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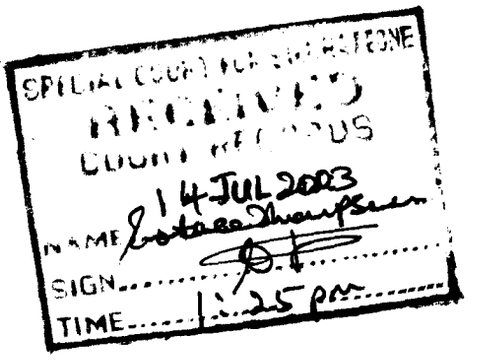
SCSL-2003-08-PT-051
(1419-1530)

THE SPECIAL COURT FOR SIERRA LEONE

IN THE TRIAL CHAMBER



Before: Judge Thompson, Presiding Judge
Judge Itoe
Judge Boutet

Registrar: Robin Vincent

Date: 14th July 2003

The Prosecutor

V.

Sam Hinga Norman

SCSL-2003-08-PT

REPLY - PRELIMINARY MOTION BASED ON LACK OF JURISDICTION: JUDICIAL INDEPENDENCE

Office of the Prosecutor:

Desmond DaSilva, Q.C.
Luc Côté
Walter Marcus-Jones
Abdul Tejan-Cole

Defence Counsel

James Blyden Jenkins-Johnston
Sulaiman Banja Tejan-Sie

I. INTRODUCTION

1. The accused replies to the "Prosecution Response to the Defence Preliminary Motion Based on Lack of Jurisdiction: Judicial Independence" (the "Response") filed on 7 July 2003 and served on counsel for the accused on 9 July 2003.

2. The Response's main argument is that those parts of the Agreement, Statute and Rules which address the qualifications of judges for the Special Court are sufficient guarantees of judicial independence. The accused replies that these guarantees address only one aspect of judicial independence. They do not address the financial aspect of this fundamental principle of justice – an aspect recognized by the authorities upon which the Prosecution relies in support of its contention that the Court's judicial independence safeguards meet international standards. Furthermore, the accused respectfully submits that the Response fails to address the practical considerations raised by the original motion. That is, the Response takes refuge in "paper" guarantees of judicial independence without regard to the reasonable implications of the funding structure insisted upon by the Security Council (and now management committee) despite the protests of the parties to the agreement creating the Court.

3. The accused also notes that the Prosecution acknowledges the potential for economic pressure or manipulation affecting judicial independence at paragraphs 8 and 9 of the Response. In essence the Prosecution admits the possibility of economic pressure or manipulation exists – hence paragraph 9's discussion of collusion by donor States. The accused submits the Prosecution either fails to analyze the implications of this admission or drastically underestimates the likelihood of such pressure being brought to bear on the Court via the opportunity it admits exists.

II. FINANCIAL INDEPENDENCE AND INTERNATIONAL STANDARDS

4. The Response submits that the Court's financial structure accords with international standards on the independence of the judiciary but fails to acknowledge the financial aspect of judicial independence contained within the standards it cites in support of its position. For instance, paragraph 15 of the Response cites Principle 11 of the UN's *Basic Principles on the Independence of the Judiciary* but fails, in the accused's submission, to acknowledge that Principle 11's requirement of "*guarantees* of adequate remuneration [emphasis added]" has been violated by the precarious nature of the Court's funding. Principle 7 of the *Basic Principles* also declares it is the "duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions" further recognizing the financial aspect of judicial independence.

5. The Prosecution also cites the International Bar Association's *Minimum Standards of Judicial Independence* Standards 2, 5, 16 and 43-45. The Response ignores Standard 10 which requires a State "provide adequate financial resources to allow for the due administration of justice" and Standard 18(b) which prohibits the Executive having the power to close down or suspend the operation of a court system. Most importantly, the Response ignores Standard 15 which reads:

a) The position of the judges, their independence, their security, and their adequate remuneration shall be secured by law.

b) Judicial salaries cannot be decreased during the judges' service except as a coherent part of an overall public economic measure.

Standard 15(b) shows that the principle discussed at length by the Canadian Supreme Court in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* is also an international standard. It also highlights the fact that remuneration of the judges of the Special Court is not secured by law. Their only guarantees are contractual, subject to adequate funding.

6. The accused therefore repeats that the principle of judicial independence, a principle which lies at the core of any court's legitimacy, has a financial aspect distinct from other aspects such as judicial qualification. The recognition of the principle's different aspects is important because their consideration is qualitatively different. Consideration of whether a Court ensures judicial qualifications necessary to to guarantee judicial independence is separate from consideration of financial independence and can usually be confined to a reading of the court's statute and other founding/regulating documents. Consideration of financial independence, on the other hand, requires an examination of the reasonably foreseeable consequences a court's financial structure – a consideration which takes account of human nature and the inevitable influence control over a qualified and impartial judge's salary affords. The Response makes a case in support of the position that the Statute, Agreement and Rules adequately provide for the qualification of the judges of the Court. This issue, of course, has not been raised by the accused. The Response fails, however, to adequately address the financial independence issue raised by the accused.

7. The accused wishes to emphasize that the issue before the Court is the degree to which funding by voluntary contribution and a few major donor's membership on a 7-member management committee which has final approval over the Court's budget compromise the judiciary's independence. As outlined immediately above, the issue requires careful consideration of the reasonable implications of the Court's financial structure. Whether or not the Court's Statute, Agreement or Rules dictate that its judges be "independent" and of "high moral character" (characterizations which the accused does not contest), the fact remains that its funding structure requires that the Court keep its donors satisfied in order to ensure

its continued funding. The accused submits these facts would lead a reasonable observer to have a legitimate fear of political influence on the decision-making process of the Chambers via economic manipulation. Funding dependent on voluntary donations requires the Court produce the results its major donors desire or risk a funding shortfall that will reduce judicial salaries. The *Barayagwiza* reconsideration outlined in the original motion proves it is reasonable to believe States have expectations of international criminal tribunals, not all of which can be accommodated by the demands of justice. *Barayagwiza* also proves that States will exert whatever pressure is available to them if those expectations are not met.

III. SPECIFIC ISSUES

8. The Response raises a number of discreet issues which the accused addresses *seriatim* below.

9. Paragraph 8 of the Response points out a "fundamental tension" exists whenever an international court is funded by "political actors such as nation states". The accused agrees with this statement but disputes the Prosecution's conclusion with respect to how that tension must be resolved in accordance with international standards. Contrary to the Prosecution's submission that "these standards focus on concerns about impartiality that are to be raised on an individual basis", the accused submits these standards address the related but distinct concepts of impartiality and independence, although only the latter principle is relevant to the motion filed. Nothing in the UN *Principles* or the IBA *Standards* restricts consideration of judicial independence in the way contemplated by the Response.

10. In paragraph 9 of the Response the Prosecution relies upon the fact that 30 States have donated to the Court. As the chart at paragraph 5 of the original motions points out, there are three major donors to the Court: the Netherlands, the United Kingdom and the United States. Were any one of these States to withhold the funds pledged to the Court it would seriously compromise its ability to do its work. The accused thus submits these main donors, all with representation on the management committee and therefore a regular venue to air their views, are individually in a position to influence the operation of the Court as a whole should they wish to.

11. The accused submits the extension of diplomatic immunity to the judges of the Special Court to which the Response refers at paragraph 13 is irrelevant to any issue raised by his motion. Diplomatic immunity will not guarantee judges adequate remuneration in the face of a major donor's displeasure.

12. Paragraph 19 of the Response asserts that the accused's motion cites the ICTY Appellate Chamber judgment in *Furundzija* "to stand for the proposition that judicial independence requires that there should be nothing whatsoever in the circumstances surrounding a judgment that might give rise to the appearance of bias". The accused submits he relied on *Furundzija* only to establish the applicability of the reasonable person test in international criminal law. The accused agrees with the Prosecution that the reasonable person test articulated by many courts, including the European Court of Human Rights, applies to the present motion. The accused, of course, also submits that a reasonable person apprised of the Court's financial structure and funding arrangements would legitimately fear for its judges' independence. In relation to paragraph 20 of the Response's elucidation of the *Furundzija* judgment, the accused points out that the allegations of personal bias raised in that case are qualitatively different from the financial issues raised in the current motion. Judges can be assumed capable of disabusing their minds of personal opinions on issues before them. Judges cannot so easily be assumed immune to financial pressure where the mechanism for such pressure exists. The same logic applies to the supposedly curative effect of oaths raised in relation to the *Kanyabashi* judgment by paragraph 21 of the Response. Were an oath sufficient guarantee of independence the international standards cited by the Prosecution would be considerably shorter.

13. With respect to the issue raised in section C of the Response, the accused submits, as he did in the original motion, that the financial structure revealed by the Statutes and Rules of the ICTY, ICTR and ICC is significantly different from that revealed by the Statute, Agreement and Rules of this Court. In the case of the ICC, Article 115 of the *Rome* Statute dictates that States Parties' contributions are to be assessed rather than voluntary. In the case of the ICTY and ICTR their funds are part of the UN budget taken, again, from assessed contributions by member States of the UN. While States may seek to have budgetary items approved or disapproved they have little ability to insist on such actions by threatening to withhold their contributions.

Dated at Freetown this 14th day of July 2003

James Blyden Jenkins-Johnston

Sulaiman Banja Tejan-Sie

ANNEX 1

Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island [1997] 3 S.C.R. 3

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Indexed as:

Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island
R. v. Campbell; R. v. Ekmecic; R. v. Wickman
Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)

IN THE MATTER of a Reference from the Lieutenant Governor in Council pursuant to Section 18 of the Supreme Court Act, R.S.P.E.I. 1988, Cap. S-10, Regarding the Remuneration of Judges of the Provincial Court of Prince Edward Island and the Jurisdiction of the Legislature in Respect Thereof
AND IN THE MATTER of a Reference from the Lieutenant Governor in Council pursuant to Section 18 of the Supreme Court Act, R.S.P.E.I. 1988, Cap. S-10, Regarding the Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island

Merlin McDonald, Omer Pineau and Robert Christie,
appellants;
v.
The Attorney General of Prince Edward Island, respondent;
and
The Attorney General of Canada, the Attorney General of Quebec, the Attorney General of Manitoba, the Attorney General for Saskatchewan, the Attorney General for Alberta, the Canadian Association of Provincial Court Judges, the Conférence des juges du Québec, the Saskatchewan Provincial Court Judges Association, the Alberta Provincial Judges' Association, the Canadian Bar Association and the Federation of Law Societies of Canada, interveners;
And between
Her Majesty The Queen, appellant;
v.
Shawn Carl Campbell, respondent;
And between
Her Majesty The Queen, appellant;
v.
Ivica Ekmecic, respondent;
And between
Her Majesty The Queen, appellant;

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v.

Percy Dwight Wickman, respondent;

and

The Attorney General of Canada, the Attorney General of Quebec, the Attorney General of Manitoba, the Attorney General of Prince Edward Island, the Attorney General for Saskatchewan, the Canadian Association of Provincial Court Judges, the Conférence des juges du Québec, the Saskatchewan Provincial Court Judges Association, the Alberta Provincial Judges' Association, the Canadian Bar Association and the Federation of Law Societies of Canada, interveners;

And between

The Judges of the Provincial Court of Manitoba as represented by the Manitoba Provincial Judges Association, Judge Marvin Garfinkel, Judge Philip Ashdown, Judge Arnold Conner, Judge Linda Giesbrecht, Judge Ronald Myers, Judge Susan Devine and Judge Wesley Swail, and the Judges of the Provincial Court of Manitoba as represented by Judge Marvin Garfinkel, Judge Philip Ashdown, Judge Arnold Conner, Judge Linda Giesbrecht, Judge Ronald Myers, Judge Susan Devine and Judge Wesley Swail, appellants

v.

Her Majesty The Queen in right of the province of Manitoba as represented by Rosemary Vodrey, the Minister of Justice and the Attorney General of Manitoba, and Darren Praznik, the Minister of Labour as the Minister responsible for The Public Sector Reduced Work Week and Compensation Management Act, respondent;

and

The Attorney General of Canada, the Attorney General of Quebec, the Attorney General of Prince Edward Island, the Attorney General for Saskatchewan, the Attorney General for Alberta, the Canadian Judges Conference, the Canadian Association of Provincial Court Judges, the Conférence des juges du Québec, the Saskatchewan Provincial Court Judges Association, the Alberta Provincial Judges' Association, the Canadian Bar Association and the Federation of Law Societies of Canada, interveners.

[1997] 3 S.C.R. 3
[1997] S.C.J. No. 75
File Nos.: 24508, 24778, 24831, 24846.

Supreme Court of Canada

1996: December 3, 4; 1997: September 18 *.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.

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ON APPEAL FROM THE PRINCE EDWARD ISLAND SUPREME COURT, APPEAL DIVISION
ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA
ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

* Reasons for judgment on rehearing reported at [1998] 1 S.C.R. 3.

Constitutional law — Judicial independence — Whether express provisions in Constitution exhaustive written code for protection of judicial independence — True source of judicial independence — Whether judicial independence extends to Provincial Court judges — Constitution Act, 1867, preamble, ss. 96 to 100 — Canadian Charter of Rights and Freedoms, s. 11(d).

Constitutional law — Judicial independence — Components of institutional financial security — Constitution Act, 1867, s. 100 — Canadian Charter of Rights and Freedoms, s. 11(d).

Courts — Judicial independence — Provincial Courts — Changes or freezes to judicial remuneration — Provincial governments and legislatures reducing salaries of Provincial Court judges as part of overall economic measure — Whether reduction constitutional — Procedure to be followed to change or freeze judicial remuneration — Canadian Charter of Rights and Freedoms, ss. 1, 11(d) — Provincial Court Act, R.S.P.E.I. 1988, c. P-25, s. 3(3) — Provincial Court Judges Act, S.A. 1981, c. P-20.1, s. 17(1) — Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94 — Public Sector Reduced Work Week and Compensation Management Act, S.M. 1993, c. 21, s. 9(1).

Constitutional law — Charter of Rights — Independent and impartial tribunal — Provincial Courts — Institutional financial security — Changes or freezes to judicial remuneration — Provincial governments and legislatures reducing salaries of Provincial Court judges as part of overall economic measure — Whether reduction infringed judicial independence — If so, whether infringement justifiable — Procedure to be followed to change or freeze judicial remuneration — Canadian Charter of Rights and Freedoms, ss. 1, 11(d) — Provincial Court Act, R.S.P.E.I. 1988, c. P-25, s. 3(3) — Provincial Court Judges Act, S.A. 1981, c. P-20.1, s. 17(1) — Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94 — Public Sector Reduced Work Week and Compensation Management Act, S.M. 1993, c. 21, s. 9(1).

Constitutional law — Charter of Rights — Independent and impartial tribunal — Provincial Courts — Individual financial security — Provincial legislation providing that Lieutenant Governor in Council "may" set judicial salaries — Whether legislation infringes judicial independence — If so, whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 11(d) — Provincial Court Judges Act, S.A. 1981, c. P-20.1, s. 17(1).

Constitutional law — Charter of Rights — Independent and impartial tribunal — Provincial Courts — Individual financial security — Discretionary benefits — Provincial legislation conferring on Lieutenant Governor in Council discretion to grant leaves of absence due to illness and sabbatical leaves — Whether legislation infringes judicial independence — Canadian Charter of Rights and Freedoms, s. 11(d) — Provincial Court Act, R.S.P.E.I. 1988, c. P-25, ss. 12(2), 13.

Constitutional law — Charter of Rights — Independent and impartial tribunal — Provincial Courts — Salary negotiations — Whether provincial government violated judicial independence of Provincial Court by attempting to engage in salary negotiations with Provincial Judges Association — Canadian Charter of Rights and Freedoms, s. 11(d).

Courts — Judicial independence — Provincial Courts — Salary negotiations — Provincial

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legislation permitting negotiations "between a public sector employer and employees" — Whether negotiation provisions applicable to Provincial Court judges — Public Sector Pay Reduction Act, S.P.E.I. 1994, c. 51, s. 12(1).

Constitutional law — Charter of Rights — Independent and impartial tribunal — Provincial Courts — Administrative independence — Closure of Provincial Court — Whether closure of Provincial Court by provincial government for several days infringed judicial independence — If so, whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 11(d) — Public Sector Reduced Work Week and Compensation Management Act, S.M. 1993, c. 21, s. 4.

Constitutional law — Charter of Rights — Independent and impartial tribunal — Provincial Courts — Administrative independence — Provincial Court located in same building as certain departments which are part of executive — Provincial Court judges not administering their own budget — Designation of place of residence of Provincial Court judges — Attorney General opposing funding for judges to intervene in court case — Lieutenant Governor in Council having power to make regulations respecting duties and powers of Chief Judge and respecting rules of courts — Whether these matters undermine administrative independence of Provincial Court — Canadian Charter of Rights and Freedoms, s. 11(d) — Provincial Court Act, R.S.P.E.I. 1988, c. P-25, ss. 4, 17.

Constitutional law — Charter of Rights — Independent and impartial tribunal — Provincial Courts — Administrative independence — Place of residence — Sittings of court — Provincial legislation authorizing Attorney General to designate judges' place of residence and court's sitting days — Whether legislation infringes upon administrative independence of Provincial Court — If so, whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 11(d) — Provincial Court Judges Act, S.A. 1981, c. P-20.1, s. 13(1)(a), (b).

Courts — Constitutionality of legislation — Notice to Attorney General — Constitutionality of provincial legislation not raised by counsel — Superior court judge proceeding on his own initiative without giving required notice to Attorney General — Whether superior court judge erred in considering constitutionality of legislation.

Criminal law — Appeals — Prohibition — Three accused challenging constitutionality of their trials before Provincial Court arguing that court not an independent and impartial tribunal — Accused seeking various remedies including prohibition in superior court — Superior court judge making declarations striking down numerous provisions found in provincial legislation and regulations — Superior court judge concluding that declarations removed source of unconstitutionality and ordering trials of accused to proceed or to continue — Court of Appeal dismissing Crown's appeals for want of jurisdiction — Whether s. 784(1) of Criminal Code limited to appeals by unsuccessful parties — Whether declarations prohibitory in nature and within scope of s. 784(1) — Criminal Code, R.S.C., 1985, c. C-46, s. 784(1).

These four appeals raise a range of issues relating to the independence of provincial courts, but are united by a single issue: whether and how the guarantee of judicial independence in s. 11(d) of the Canadian Charter of Rights and Freedoms restricts the manner by and the extent to which provincial governments and legislatures can reduce the salaries of provincial court judges. In these appeals, it is the content of the collective or institutional dimension of financial security for judges of Provincial Courts which is at issue.

In P.E.I., the province, as part of its budget deficit reduction plan, enacted the Public Sector Pay Reduction Act and reduced the salaries of Provincial Court judges and others paid from the public purse in the province. Following the pay reduction, numerous accused challenged the constitutionality of their proceedings in the Provincial Court, alleging that as a result of the salary reductions, the court had lost its status as an independent and impartial tribunal under s. 11(d) of the

Charter. The Lieutenant Governor in Council referred to the Appeal Division of the Supreme Court two constitutional questions to determine whether the Provincial Court judges still enjoyed a sufficient degree of financial security for the purposes of s. 11(d). The Appeal Division found the Provincial Court judges to be independent, concluding that the legislature has the power to reduce their salary as part of an "overall public economic measure" designed to meet a legitimate government objective. Despite this decision, accused persons continued to raise challenges based on s. 11(d) to the constitutionality of the Provincial Court. The Lieutenant Governor in Council referred a series of questions to the Appeal Division concerning all three elements of the judicial independence of the Provincial Court: financial security, security of tenure, and administrative independence. The Appeal Division answered most of the questions to the effect that the Provincial Court was independent and impartial but held that Provincial Court judges lacked a sufficient degree of security of tenure to meet the standard set by s. 11(d) of the Charter because s. 10 of the Provincial Court Act (as it read at the time) made it possible for the executive to remove a judge without probable cause and without a prior inquiry.

In Alberta, three accused in separate and unrelated criminal proceedings in Provincial Court challenged the constitutionality of their trials. They each brought a motion before the Court of Queen's Bench, arguing that, as a result of the salary reduction of the Provincial Court judges pursuant to the Payment to Provincial Judges Amendment Regulation and s. 17(1) of the Provincial Court Judges Act, the Provincial Court was not an independent and impartial tribunal for the purposes of s. 11(d). The accused also challenged the constitutionality of the Attorney General's power to designate the court's sitting days and judges' place of residence. The accused requested various remedies, including prohibition and declaratory orders. The superior court judge found that the salary reduction of the Provincial Court judges was unconstitutional because it was not part of an overall economic measure -- an exception he narrowly defined. He did not find s. 17 of the Provincial Court Judges Act, however, to be unconstitutional. On his own initiative, the superior court judge considered the constitutionality of the process for disciplining Provincial Court judges and the grounds for their removal and concluded that ss. 11(1)(b), 11(1)(c) and 11(2) of the Provincial Court Judges Act violated s. 11(d) because they failed to adequately protect security of tenure. The superior court judge also found that ss. 13(1)(a) and 13(1)(b) of that Act, which permit the Attorney General to designate the judges' place of residence and the court's sitting days, violated s. 11(d). In the end, the superior court judge declared the provincial legislation and regulations which were the source of the s. 11(d) violations to be of no force or effect, thus rendering the Provincial Court independent. As a result, although the Crown lost on the constitutional issue, it was successful in its efforts to commence or continue the trials of the accused. The Court of Appeal dismissed the Crown's appeals, holding that it did not have jurisdiction under s. 784(1) of the Criminal Code to hear them because the Crown was "successful" at trial and therefore could not rely on s. 784(1), and because declaratory relief is non-prohibitory and is therefore beyond the ambit of s. 784(1).

In Manitoba, the enactment of The Public Sector Reduced Work Week and Compensation Management Act ("Bill 22"), as part of a plan to reduce the province's deficit, led to the reduction of the salary of Provincial Court judges and of a large number of public sector employees. The Provincial Court judges through their Association launched a constitutional challenge to the salary cut, alleging that it infringed their judicial independence as protected by s. 11(d) of the Charter. They also argued that the salary reduction was unconstitutional because it effectively suspended the operation of the Judicial Compensation Committee ("JCC"), a body created by The Provincial Court Act whose task it is to issue reports on judges' salaries to the legislature. Furthermore, they alleged that the government had interfered with judicial independence by ordering the withdrawal of court staff and personnel on unpaid days of leave, which in effect shut down the Provincial Court on those days. Finally, they claimed that the government had exerted improper pressure on the Association in the course of salary discussions to desist from launching this constitutional challenge, which also allegedly infringed their judicial independence. The trial judge held that the salary reduction was unconstitutional because it was not part of an overall economic measure which affects all citizens. The reduction was part of a plan to reduce the provincial deficit solely through a reduction

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in government expenditures. He found, however, that a temporary reduction in judicial salaries is permitted under s. 11(d) in case of economic emergency and since this was such a case, he read down Bill 22 so that it only provided for a temporary suspension in compensation, with retroactive payment due after the Bill expired. The Court of Appeal rejected all the constitutional challenges.

Held (La Forest J. dissenting): The appeal from the Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island should be allowed in part.

Held (La Forest J. dissenting on the appeal): The appeal and cross-appeal from the Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island should be allowed in part.

Held: The appeal in the Alberta cases from the Court of Appeal's judgment on jurisdiction should be allowed.

Held (La Forest J. dissenting in part): The appeal in the Alberta cases on the constitutional issues should be allowed in part.

Held (La Forest J. dissenting in part): The appeal in the Manitoba case should be allowed.

Per Lamer C.J. and L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.: Sections 96 to 100 of the Constitution Act, 1867, which only protect the independence of judges of the superior, district and county courts, and s. 11(d) of the Charter, which protects the independence of a wide range of courts and tribunals, including provincial courts, but only when they exercise jurisdiction in relation to offences, are not an exhaustive and definitive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the Constitution Act, 1867 -- in particular its reference to "a Constitution similar in Principle to that of the United Kingdom" -- which is the true source of our commitment to this foundational principle. The preamble identifies the organizing principles of the Constitution Act, 1867 and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text. The same approach applies to the protection of judicial independence. Judicial independence has now grown into a principle that extends to all courts, not just the superior courts of this country.

Since these appeals were argued on the basis of s. 11(d) of the Charter, they should be resolved by reference to that provision. The independence protected by s. 11(d) is the independence of the judiciary from the other branches of government, and bodies which can exercise pressure on the judiciary through power conferred on them by the state. The three core characteristics of judicial independence are security of tenure, financial security, and administrative independence. Judicial independence has also two dimensions: the individual independence of a judge and the institutional or collective independence of the court of which that judge is a member. The institutional role demanded of the judiciary under our Constitution is a role which is now expected of provincial courts. Notwithstanding that they are statutory bodies, in light of their increased role in enforcing the provisions and in protecting the values of the Constitution, provincial courts must enjoy a certain level of institutional independence.

While s. 11(d) of the Charter does not, as a matter of principle, automatically provide the same level of protection to provincial courts as s. 100 and the other judicature provisions of the Constitution Act, 1867 do to superior court judges, the constitutional parameters of the power to change or freeze superior court judges' salaries under s. 100 are equally applicable to the guarantee of financial security provided by s. 11(d) to provincial court judges.

Financial security has both an individual and an institutional dimension. The institutional dimension of financial security has three components. First, as a general constitutional principle, the

salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, to avoid the possibility of, or the appearance of, political interference through economic manipulation, a body, such as a commission, must be interposed between the judiciary and the other branches of government. The constitutional function of this body would be to depoliticize the process of determining changes to or freezes in judicial remuneration. This objective would be achieved by setting that body the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature. Provinces are thus under a constitutional obligation to establish bodies which are independent, effective and objective. Any changes to or freezes in judicial remuneration made without prior recourse to the body are unconstitutional. Although the recommendations of the body are non-binding they should not be set aside lightly. If the executive or legislature chooses to depart from them, it has to justify its decision according to a standard of simple rationality -- if need be, in a court of law. Across-the-board measures which affect substantially every person who is paid from the public purse are prima facie rational, whereas a measure directed at judges alone may require a somewhat fuller explanation. Second, under no circumstances is it permissible for the judiciary -- not only collectively through representative organizations, but also as individuals -- to engage in negotiations over remuneration with the executive or representatives of the legislature. Any such negotiations would be fundamentally at odds with judicial independence. That does not preclude chief justices or judges, or bodies representing judges, however, from expressing concerns or making representations to governments regarding judicial remuneration. Third, any reductions to judicial remuneration cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge. Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation. In order to guard against the possibility that government inaction could be used as a means of economic manipulation, by allowing judges' real salaries to fall because of inflation, and in order to protect against the possibility that judicial salaries will fall below the adequate minimum guaranteed by judicial independence, the body must convene if a fixed period of time has elapsed since its last report, in order to consider the adequacy of judges' salaries in light of the cost of living and other relevant factors. The components of the institutional dimension of financial security need not be adhered to in cases of dire and exceptional financial emergency precipitated by unusual circumstances.

Prince Edward Island

The salary reduction imposed by s. 3(3) of the Provincial Court Act, as amended by s. 10 of the Public Sector Pay Reduction Act, was unconstitutional since it was made by the legislature without recourse to an independent, objective and effective process for determining judicial remuneration. In fact, no such body exists in P.E.I. However, if in the future, after P.E.I. establishes a salary commission, that commission were to issue a report with recommendations which the legislature declined to follow, a salary reduction such as the impugned one would probably be prima facie rational, and hence justified, because it would be part of an overall economic measure which reduces the salaries of all persons who are remunerated by public funds. Since the province has made no submissions on the absence of an independent, effective and objective process to determine judicial salaries, the violation of s. 11(d) is not justified under s. 1 of the Charter.

Section 12(1) of the Public Sector Pay Reduction Act, which permits negotiations "between a public sector employer and employees" to find alternatives to pay reductions, does not contravene the principle of judicial independence since the plain meaning of a public sector employee does not include members of the judiciary.

Sections 12(2) and 13 of the Provincial Court Act, which confer a discretion on the Lieutenant Governor in Council to grant leaves of absence due to illness and sabbatical leaves, do not affect the individual financial security of a judge. Discretionary benefits do not undermine judicial

independence.

The question concerning the lack of security of tenure created by s. 10 of the Provincial Court Act has been rendered moot by the adoption in 1995 of a new s. 10 which meets the requirements of s. 11(d) of the Charter.

The location of the Provincial Court's offices in the same building as certain departments which are part of the executive, including the Crown Attorneys' offices, does not infringe the administrative independence of the Provincial Court because, despite the physical proximity, the court's offices are separate and apart from the other offices in the building. As well, the fact that the Provincial Court judges do not administer their own budget does not violate s. 11(d). This matter does not fall within the scope of administrative independence, because it does not bear directly and immediately on the exercise of the judicial function. For the same reason, the Attorney General's decision both to decline to fund and to oppose an application to fund legal counsel for the Chief Judge and judges of the Provincial Court as interveners in a court case did not violate the administrative independence of the court. The designation of a place of residence of a particular Provincial Court judge, pursuant to s. 4 of the Provincial Court Act, does not undermine the administrative independence of the judiciary. Upon the appointment of a judge to the Provincial Court, it is necessary that he or she be assigned to a particular area. Furthermore, the stipulation that the residence of a sitting judge only be changed with that judge's consent is a sufficient protection against executive interference. Finally, s. 17 of the Provincial Court Act, which authorizes the Lieutenant Governor in Council to make regulations respecting the duties and powers of the Chief Judge (s. 17(b)) and respecting rules of court (s. 17(c)), must be read subject to s. 4(1) of that Act, which confers broad administrative powers on the Chief Judge, including the assignment of judges, sittings of the court and court lists, the allocation of courtrooms, and the direction of administrative staff carrying out these functions. Section 4(1) therefore vests with the Provincial Court, in the person of the Chief Judge, control over decisions which touch on its administrative independence. In light of the broad provisions of s. 4(1), s. 17 does not undermine the administrative independence of the court.

Alberta

The Court of Appeal had jurisdiction to hear the Crown's appeals under s. 784(1) of the Criminal Code. First, it is unclear that only unsuccessful parties can avail themselves of s. 784(1). In any event, even if this limitation applies, the Court of Appeal had jurisdiction. Although the Crown may have been successful in its efforts to commence and continue the trials against the accused, it lost on the underlying findings of unconstitutionality. Second, this is a case where the declaratory relief was essentially prohibitory in nature, and so came within the scope of s. 784(1), because the trial judgment granted relief sought in proceedings by way of prohibition. This Court can thus exercise the Court of Appeal's jurisdiction and consider the present appeal.

The salary reduction imposed by the Payment to Provincial Judges Amendment Regulation for judges of the Provincial Court is unconstitutional because there is no independent, effective and objective commission in Alberta which recommends changes to judges' salaries. However, if in the future, after Alberta establishes a salary commission, that commission were to issue a report with recommendations which the provincial legislature declined to follow, a salary reduction such as the impugned one would probably be prima facie rational because it would be part of an overall economic measure which reduces the salaries of all persons who are remunerated by public funds.

Section 17(1) of the Provincial Court Judges Act, which provides that the Lieutenant Governor in Council "may" set judicial salaries, violates s. 11(d) of the Charter. Section 17(1) does not comply with the requirements for individual financial security because it fails to lay down in mandatory terms that Provincial Court judges shall be provided with salaries.

Section 13(1)(a) of the Provincial Court Judges Act, which confers the power to "designate the

place at which a judge shall have his residence", and s. 13(1)(b), which confers the power to "designate the day or days on which the Court shall hold sittings", are unconstitutional because both provisions confer powers on the Attorney General to make decisions which infringe upon the administrative independence of the Provincial Court. Section 13(1)(a)'s constitutional defect lies in the fact that it is not limited to the initial appointment of judges. Section 13(1)(b) violates s. 11(d) because the administrative independence of the judiciary encompasses, inter alia, "sittings of the court".

The province having made no submissions on s. 1 of the Charter, the violations of s. 11(d) are not justified. The Payment to Provincial Judges Amendment Regulation is therefore of no force or effect. However, given the institutional burdens that must be met by Alberta, this declaration of invalidity is suspended for a period of one year [See Note 1 below]. Sections 13(1)(a) and (b) and 17 (1) of the Provincial Court Judges Act are also declared to be of no force or effect.

Note 1: See [1998] 1 S.C.R. 3, para. 15.

Since the accused did not raise the constitutionality of s. 11(1)(b), (c) and (2) of the Provincial Court Judges Act, it was not appropriate for the superior court judge to proceed on his own initiative, without the benefit of submissions and without giving the required notice to the Attorney General of the province, to consider their constitutionality, let alone make declarations of invalidity.

Manitoba

The salary reduction imposed by s. 9(1) of Bill 22 violated s. 11(d) of the Charter, because the government failed to respect the independent, effective and objective process -- the JCC -- for setting judicial remuneration which was already operating in Manitoba. Moreover, at least for the 1994-95 financial year, s. 9(1)(b) effectively precluded the future involvement of the JCC. Although Manitoba may have faced serious economic difficulties in the time period preceding the enactment of Bill 22, the evidence does not establish that it faced sufficiently dire and exceptional circumstances to warrant the suspension of the involvement of the JCC. Since Manitoba has offered no justification for the circumvention of the JCC before imposing the salary reduction on Provincial Court judges, the effective suspension of the operation of the JCC is not justified under s. 1 of the Charter. The phrase "as a judge of The Provincial Court or" should be severed from s. 9(1) of Bill 22 and the salary reduction imposed on the Provincial Court judges declared to be of no force or effect. Even though Bill 22 is no longer in force, that does not affect the fully retroactive nature of this declaration of invalidity. Mandamus should be issued directing the Manitoba government to perform its statutory duty, pursuant to s. 11.1(6) of The Provincial Court Act, to implement the report of the standing committee of the provincial legislature, which had been approved by the legislature. If the government persists in its decision to reduce the salaries of Provincial Court judges, it must remand the matter to the JCC. Only after the JCC has issued a report, and the statutory requirements laid down in s. 11.1 of The Provincial Court Act have been complied with, is it constitutionally permissible for the legislature to reduce the salaries of the Provincial Court judges.

The Manitoba government also violated the judicial independence of the Provincial Court by attempting to engage in salary negotiations with the Provincial Judges Association. The purpose of these negotiations was to set salaries without recourse to the JCC. Moreover, when the judges would not grant the government an assurance that they would not launch a constitutional challenge to Bill 22, the government threatened to abandon a joint recommendation. The surrounding circumstances indicate that the Association was not a willing participant and was effectively coerced into these negotiations. No matter how one-sided, however, it was improper for government and the judiciary to engage in salary negotiations. The expectations of give and take, and of threat and counter-threat, are fundamentally at odds with judicial independence. It raises the prospect that the courts will be

perceived as having altered the manner in which they adjudicate cases, and the extent to which they will protect and enforce the Constitution, as part of the process of securing the level of remuneration they consider appropriate. The attempted negotiations between the government and the judiciary were not authorized by a legal rule and thus are incapable of being justified under s. 1 of the Charter because they are not prescribed by law.

Finally, the Manitoba government infringed the administrative independence of the Provincial Court by closing it on a number of days. It was the executive, in ordering the withdrawal of court staff, pursuant to s. 4 of Bill 22, several days before the Chief Judge announced the closing of the Provincial Court, that shut down the court. Section 4 is therefore unconstitutional. Even if the trial judge had been right to conclude that the Chief Judge retained control over the decision to close the Provincial Court throughout, there would nevertheless have been a violation of s. 11(d), because the Chief Judge would have exceeded her constitutional authority when she made that decision. Control over the sittings of the court falls within the administrative independence of the judiciary. Administrative independence is a characteristic of judicial independence which generally has a collective or institutional dimension. Although certain decisions may be exercised on behalf of the judiciary by the Chief Judge, important decisions regarding administrative independence cannot be made by the Chief Judge alone. The decision to close the Provincial Court was precisely this kind of decision. Manitoba has attempted to justify the closure of the Provincial Court solely on the basis of financial considerations, and for that reason, the closure of the court cannot be justified under s. 1. Although reading down s. 4 of Bill 22 to the extent strictly necessary would be the normal solution in a case like this, this is difficult in relation to violations of s. 11(d) because, unlike other Charter provisions, s. 11(d) requires that judicial independence be secured by "objective conditions or guarantees". To read down s. 4 to its proper scope would in effect amount to reading in those objective conditions and guarantees. This would result in a fundamental rewriting of the legislation. If the Court, however, were to strike down s. 4 in its entirety, the effect would be to prevent its application to all those employees of the Government of Manitoba who were required to take leave without pay. The best solution in the circumstances is to read s. 4(1) as exempting provincial court staff from it. This is the remedy that best upholds the Charter values involved and will occasion the lesser intrusion on the role of the legislature.

Per La Forest J. (dissenting in part): There is agreement with substantial portions of the majority's reasons but not with the conclusions that s. 11(d) of the Charter prohibits salary discussions between governments and judges, and forbids governments from changing judges' salaries without first having recourse to "judicial compensation commissions". There is also disagreement with the assertion concerning the protection that provincially appointed judges, exercising functions other than criminal jurisdiction, are afforded by virtue of the preamble to the Constitution Act, 1867. Only minimal reference was made to this issue by counsel and, in such circumstances, the Court should avoid making far-reaching conclusions that are not necessary to the case before it. Nevertheless, in light of the importance that will be attached to the majority's views, the following comments are made. At the time of Confederation, there were no enforceable limits on the power of the British Parliament to interfere with the judiciary. By expressing, by way of preamble, a desire to have "a Constitution similar in Principle to that of the United Kingdom", the framers of the Constitution Act, 1867 did not give courts the power to strike down legislation violating the principle of judicial independence. The framers did, however, by virtue of ss. 99-100 of the Constitution Act, 1867, entrench the fundamental components of judicial independence set out in the Act of Settlement of 1701. Because only superior courts fell within the ambit of the Act of Settlement and under "constitutional" protection in the British sense, the protection sought to be created for inferior courts in the present appeals is in no way similar to anything found in the United Kingdom. Implying protection for judicial independence from the preambular commitment to a British-style constitution, therefore, entirely misapprehends the fundamental nature of that constitution. To the extent that courts in Canada have the power to enforce the principle of judicial independence, this power derives from the structure of Canadian, and not British, constitutionalism. Our Constitution expressly contemplates both the power of judicial review (in s. 52 of the Constitution Act, 1982) and guarantees of judicial independence (in ss. 96-100 of the Constitution

Act, 1867 and s. 11(d) of the Charter). Given that the express provisions dealing with constitutional protection for judicial independence have specifically spelled out their application, it seems strained to extend the ambit of this protection by reference to a general preambular statement. It is emphasized that these express protections for judicial independence are broad and powerful. They apply to all superior court and other judges specified in s. 96 of the Constitution Act, 1867 as well as to inferior (provincial) courts exercising criminal jurisdiction. Nothing presented in these appeals suggests that these guarantees are not sufficient to ensure the independence of the judiciary as a whole. Should the foregoing provisions be found wanting, the Charter may conceivably be brought into play.

While salary commissions and a concomitant policy to avoid discussing remuneration other than through the making of representations to commissions may be desirable as matters of legislative policy, they are not mandated by s. 11(d). To read these requirements into that section represents both an unjustified departure from established precedents and a partial usurpation of the provinces' power to set the salaries of inferior court judges pursuant to ss. 92(4) and 92(14) of the Constitution Act, 1867. The guarantee of judicial independence inhering in s. 11(d) redounds to the benefit of the judged, not the judges. Section 11(d) therefore does not grant judges a level of independence to which they feel they are entitled. Rather, it guarantees only that degree of independence necessary to ensure that tribunals exercising criminal jurisdiction act, and are perceived to act, in an impartial manner. Judicial independence must include protection against interference with the financial security of the court as an institution. However, the possibility of economic manipulation arising from changes to judges' salaries as a class does not justify the imposition of judicial compensation commissions as a constitutional imperative. By employing the reasonable perception test, judges are able to distinguish between changes to their remuneration effected for a valid public purpose and those designed to influence their decisions. Although this test applies to all changes to judicial remuneration, different types of changes warrant different levels of scrutiny. Changes to judicial salaries that apply equally to substantially all persons paid from public funds would almost inevitably be considered constitutional. Indeed, a reasonable, informed person would not view the linking of judges' salaries to those of civil servants as compromising judicial independence. Differential increases to judicial salaries would warrant a greater degree of scrutiny, and differential decreases would invite the highest level of review. In determining whether a differential change raises a perception of interference, regard must be had to both the purpose and the effect of the impugned salary change. In considering the effect of differential changes on judicial independence, the question is whether the distinction between judges and other persons paid from public funds amounts to a "substantial" difference in treatment. Trivial or insignificant differences are unlikely to threaten judicial independence. Finally, in most circumstances, a reasonable, informed person would not view direct consultations between the government and the judiciary over salaries as imperiling judicial independence. If a government uses salary discussions to attempt to influence or manipulate the judiciary, the government's actions will be reviewed according to the same reasonable perception test that applies to salary changes.

Since the governments of P.E.I. and Alberta were not required to have recourse to a salary commission, the wage reductions they imposed on Provincial Court judges as part of an overall public economic measure were consistent with s. 11(d) of the Charter. There is no evidence that the reductions were introduced in order to influence or manipulate the judiciary. A reasonable person would not perceive them, therefore, as threatening judicial independence. As well, since salary commissions are not constitutionally required, the Manitoba government's avoidance of the commission process did not violate s. 11(d). Although Bill 22 treated judges differently from most other persons paid from public funds, there is no evidence that the differences evince an intention to interfere with judicial independence. Differences in the classes of persons affected by Bill 22 necessitated differences in treatment. Moreover, the effect of the distinctions on the financial status of judges vis-à-vis others paid from public monies is essentially trivial. The Manitoba scheme was a reasonable and practical method of ensuring that judges and other appointees were treated equally in comparison to civil servants. A reasonable person would not perceive this scheme as threatening the financial security of judges in any way. However, the Manitoba government's refusal to sign a joint

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recommendation to the JCC, unless the judges agreed to forego their legal challenge of Bill 22, constituted a violation of judicial independence. The government placed economic pressure on the judges so that they would concede the constitutionality of the planned salary changes. The financial security component of judicial independence must include protection of judges' ability to challenge legislation implicating their own independence free from the reasonable perception that the government might penalize them financially for doing so.

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APPEAL and CROSS-APPEAL from a judgment of the Prince Edward Island Supreme Court, Appeal Division (1995), 130 Nfld. & P.E.I.R. 29, 405 A.P.R. 29, 124 D.L.R. (4th) 528, 39 C.P.C. (3d) 241, [1995] P.E.I.J. No. 66 (QL), in the matter of a reference concerning the independence and

impartiality of the Provincial Court judges of Prince Edward Island. Appeal allowed in part, La Forest J. dissenting. Cross-appeal allowed in part.

APPEAL from a judgment of the Alberta Court of Appeal (1995), 169 A.R. 178, 97 W.A.C. 178, 31 Alta. L.R. (3d) 190, 100 C.C.C. (3d) 167, [1995] 8 W.W.R. 747, [1995] A.J. No. 610 (QL), dismissing for want of jurisdiction the Crown's appeal from a judgment of the Court of Queen's Bench (1994), 160 A.R. 81, 25 Alta. L.R. (3d) 158, [1995] 2 W.W.R. 469, [1994] A.J. No. 866 (QL), declaring certain sections of the Provincial Court Judges Act of no force or effect. Appeal on issue of jurisdiction allowed. Appeal on constitutional issues allowed in part, La Forest J. dissenting in part.

APPEAL from a judgment of the Manitoba Court of Appeal (1995), 102 Man. R. (2d) 51, 93 W.A.C. 51, 37 C.P.C. (3d) 207, 125 D.L.R. (4th) 149, 30 C.R.R. (2d) 326, [1995] 5 W.W.R. 641, [1995] M.J. No. 170 (QL), allowing the Crown's appeal and dismissing the Provincial Court judges' cross-appeal from a judgment of the Court of Queen's Bench (1994), 98 Man. R. (2d) 67, 30 C.P.C. (3d) 31, [1994] M.J. No. 646 (QL), dismissing the Provincial Court judges' application to have The Public Sector Reduced Work Week and Compensation Management Act declared unconstitutional, but reading down the legislation. Appeal allowed, La Forest J. dissenting in part.

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Raynold Langlois, Q.C., for the intervener the Conférence des juges du Québec.
Robert McKercher, Q.C., and Michelle Ouellette, for the intervener the Saskatchewan Provincial Court Judges Association.
D.O. Sabey, Q.C., Bradley G. Nemetz and Scott H. D. Bower, for the intervener the Alberta Provincial Judges' Association.
Thomas G. Heintzman, Q.C., and Michael J. Bryant, for the intervener the Canadian Bar Association.
Ronald D. Manes and Duncan N. Embury, for the intervener the Federation of Law Societies of Canada.

Solicitor for the appellants in the P.E.I. references: Peter C. Ghiz, Charlottetown.

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Solicitors for the respondent in the P.E.I. references: Stewart McKelvey Stirling Scales, Charlottetown.
Solicitor for the appellant Her Majesty the Queen: The Department of Justice, Edmonton.
Solicitors for the respondents Campbell and Ekmecic: Legge & Muszynski, Calgary.
Solicitors for the respondent Wickman: Gunn & Prithipaul, Edmonton.
Solicitors for the appellants the Judges of the Provincial Court of Manitoba: Myers Weinberg Kussin Weinstein Bryk, Winnipeg.
Solicitors for the respondent Her Majesty the Queen in right of Manitoba: Thompson Dorfman Sweatman, Winnipeg.
Solicitor for the intervener the Attorney General of Canada: George Thomson, Ottawa.
Solicitor for the intervener the Attorney General of Quebec: The Department of Justice, Sainte-Foy.
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Solicitor for the intervener the Attorney General for Saskatchewan: The Department of Justice, Regina.
Solicitor for the intervener the Attorney General for Alberta: The Department of Justice, Edmonton.
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Solicitors for the intervener the Canadian Judges Conference: Ogilvy Renault, Montreal.
Solicitors for the intervener the Conférence des juges du Québec: Langlois Robert, Québec.
Solicitors for the intervener the Saskatchewan Provincial Court Judges Association: McKercher McKercher & Whitmore, Saskatoon.
Solicitors for the intervener the Alberta Provincial Judges' Association: Bennett Jones Verchere, Calgary.
Solicitors for the intervener the Canadian Bar Association: McCarthy Tétrault, Toronto.
Solicitors for the intervener the Federation of Law Societies of Canada: Torkin, Manes, Cohen & Arbus, Toronto.

The judgment of Lamer C.J. and L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ. was delivered by

THE CHIEF JUSTICE:—

I. Introduction

¶ 1 The four appeals handed down today -- Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island (No. 24508), Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island (No. 24778), R. v. Campbell, R. v. Ekmecic and R. v. Wickman (No. 24831), and Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice) (No. 24846) -- raise a range of issues relating to the independence of provincial courts, but are united by a single issue: whether and how the guarantee of judicial independence in s. 11(d) of the Canadian Charter of Rights and Freedoms restricts the manner by and the extent to which provincial governments and legislatures can reduce the salaries of provincial court

judges. Moreover, in my respectful opinion, they implicate the broader question of whether the constitutional home of judicial independence lies in the express provisions of the Constitution Acts, 1867 to 1982, or exterior to the sections of those documents. I am cognizant of the length of these reasons. Although it would have been possible to issue a set of separate but interrelated judgments, since many of the parties intervened in each other's cases, I find it convenient to deal with these four appeals in one set of reasons. Given the length and complexity of these reasons, I thought it would be useful and convenient to provide a summary, which is found at para. 287.

¶ 2 The question of judicial independence, not only under s. 11(d) of the Charter, but also under ss. 96-100 of the Constitution Act, 1867, has been the subject of previous decisions of this Court. However, the aspect of judicial independence which is engaged by the impugned reductions in salary -- financial security -- has only been dealt with in any depth by Valente v. The Queen, [1985] 2 S.C.R. 673, and Beauregard v. Canada, [1986] 2 S.C.R. 56. The facts of the current appeals require that we address questions which were left unanswered by those earlier decisions.

¶ 3 Valente was the first decision in which this Court gave meaning to s. 11(d)'s guarantee of judicial independence and impartiality. In that judgment, this Court held that s. 11(d) encompassed a guarantee, inter alia, of financial security for the courts and tribunals which come within the scope of that provision. This Court, however, only turned its mind to the nature of financial security which is required for individual judges to enjoy judicial independence. It held that for individual judges to be independent, their salaries must be secured by law, and not be subject to arbitrary interference by the executive. The question which arises in these appeals, by contrast, is the content of the collective or institutional dimension of financial security for judges of provincial courts, which was not at issue in Valente. In particular, I will address the institutional arrangements which are comprehended by the guarantee of collective financial security.

¶ 4 Almost a year after Valente was heard, but before it had been handed down, this Court heard the appeal in Beauregard. In that case, the Court rejected a constitutional challenge to federal legislation establishing a contributory pension scheme for superior court judges. It had been argued that the pension scheme amounted to a reduction in the salaries of those judges during their term of office, and for that reason contravened judicial independence and was beyond the powers of Parliament. Although the Court found that there had been no salary reduction on the facts of the case, the judgment has been taken to stand for the proposition that salary reductions which are "non-discriminatory" are not unconstitutional.

¶ 5 There are four questions which arise from Beauregard, and which are central to the disposition of these appeals. The first question is what kinds of salary reductions are consistent with judicial independence -- only those which apply to all citizens equally, or also those which only apply to persons paid from the public purse, or those which just apply to judges. The second question is whether the same principles which apply to salary reductions also govern salary increases and salary freezes. The third question is whether Beauregard, which was decided under s. 100 of the Constitution Act, 1867, a provision which only guarantees the independence of superior court judges, applies to the interpretation of s. 11(d), which protects a range of courts and tribunals, including provincial court judges. The fourth and final question is whether the Constitution -- through the vehicle of s. 100 or s. 11(d) -- imposes some substantive limits on the extent of permissible salary reductions for the judiciary.

¶ 6 Before I begin my legal analysis, I feel compelled to comment on the unprecedented situation which these appeals represent. The independence of provincial court judges is now a live legal issue in no fewer than four of the ten provinces in the federation. These appeals have arisen from three of those provinces -- Alberta, Manitoba, and Prince Edward Island ("P.E.I.") -- in three different ways. In Alberta, three accused persons challenged the constitutionality of their trials before judges of the Provincial Court; in Manitoba, the Provincial Judges Association proceeded by way of civil action; in P.E.I., the provincial cabinet brought two references. In British Columbia, the provincial

court judges association has brought a civil suit on a similar issue. I hasten to add that that latter case is not before this Court, and I do not wish to comment on its merits. I merely refer to it to illustrate the national scope of the question which has come before us in these appeals.

¶ 7 Although the cases from the different provinces are therefore varied in their origin, taken together, in my respectful view, they demonstrate that the proper constitutional relationship between the executive and the provincial court judges in those provinces has come under serious strain. Litigation, and especially litigation before this Court, is a last resort for parties who cannot agree about their legal rights and responsibilities. It is a very serious business. In these cases, it is even more serious because litigation has ensued between two primary organs of our constitutional system -- the executive and the judiciary -- which both serve important and interdependent roles in the administration of justice.

¶ 8 The task of the Court in these appeals is to explain the proper constitutional relationship between provincial court judges and provincial executives, and thereby assist in removing the strain on this relationship. The failure to do so would undermine "the web of institutional relationships... which continue to form the backbone of our constitutional system" (Cooper v. Canada (Human Rights Commission), [1996] 3 S.C.R. 854, at para. 3).

¶ 9 Although these cases implicate the constitutional protection afforded to the financial security of provincial court judges, the purpose of the constitutional guarantee of financial security -- found in s. 11(d) of the Charter, and also in the preamble to and s. 100 of the Constitution Act, 1867 -- is not to benefit the members of the courts which come within the scope of those provisions. The benefit that the members of those courts derive is purely secondary. Financial security must be understood as merely an aspect of judicial independence, which in turn is not an end in itself. Judicial independence is valued because it serves important societal goals -- it is a means to secure those goals.

¶ 10 One of these goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. Another social goal served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule. It is with these broader objectives in mind that these reasons, and the disposition of these appeals, must be understood.

II. Facts

A. Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island and Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island

¶ 11 These two cases, which were heard together in these proceedings, arose out of two references which were issued by the Lieutenant Governor in Council of P.E.I. to the Appeal Division of the P.E.I. Supreme Court.

¶ 12 The first reference, Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, was issued on October 11, 1994 by Order in Council No. EC646/94, pursuant to s. 18 of the Supreme Court Act, R.S.P.E.I. 1988, c. S-10, and came about as a result of reductions in the salaries of judges of the P.E.I. Provincial Court by the Public Sector Pay Reduction Act, S.P.E.I. 1994, c. 51. This statute reduced the salaries of the judges and others paid from the public purse in P.E.I. by 7.5 percent effective May 17, 1994. The Act was part of the province's plan to reduce its budget deficit. Following the pay reduction, numerous accused persons challenged the constitutionality of proceedings before them in the Provincial Court, alleging that as a result of the

salary reductions, the court had lost its status as an independent and impartial tribunal under s. 11(d) of the Charter. In response to the uncertainty created by these challenges, the provincial government issued a reference to elucidate the constitutional contours of the power of the provincial legislature to decrease, increase or otherwise adjust the remuneration of judges of the Provincial Court, and to determine whether the judges of the Provincial Court still enjoyed a sufficient degree of financial security for the purposes of s. 11(d). The Appeal Division rendered judgment on December 16, 1994: (1994), 125 Nfld. & P.E.I.R. 335, 389 A.P.R. 335, 120 D.L.R. (4th) 449, 95 C.C.C. (3d) 1, 33 C.P.C. (3d) 76, [1994] P.E.I.J. No. 123 (QL). For present purposes, it is sufficient to simply state that the court found the judges of the Provincial Court to be independent.

¶ 13 The second reference, Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island, was issued on February 13, 1995, by Order in Council No. EC132/95, and arose out of the controversy surrounding the first reference. Despite the Appeal Division's decision in the first reference, accused persons continued to raise challenges based on s. 11(d) to the constitutionality of the P.E.I. Provincial Court. In particular, Plamondon Prov. Ct. J. (formerly Chief Judge) issued a judgment in which he strongly criticized the Appeal Division's decision, and refused to follow it: R. v. Avery, [1995] P.E.I.J. No. 42 (QL).

¶ 14 The second reference was much more comprehensive in nature, and contained a series of questions concerning all three elements of the judicial independence of the P.E.I. Provincial Court: financial security (the issue in the first reference), security of tenure, and institutional (or administrative) independence. The Appeal Division rendered judgment on May 4, 1995, and answered most of the questions to the effect that the Provincial Court was independent and impartial: (1995), 130 Nfld. & P.E.I.R. 29, 405 A.P.R. 29, 124 D.L.R. (4th) 528, 39 C.P.C. (3d) 241, [1995] P.E.I.J. No. 66 (QL). The appellants (who are the same appellants as in the first reference) appeal from this holding. However, the court did hold that Provincial Court judges lacked a sufficient degree of security of tenure to meet the standard set by s. 11(d) of the Charter. The respondent Crown cross-appeals from this aspect of the judgment.

¶ 15 Because of their length and complexity, I have chosen to append the questions put in the two P.E.I. references as Appendices "A" and "B".

B. R. v. Campbell, R. v. Ekmecic and R. v. Wickman

¶ 16 This appeal arises out of three separate and unrelated criminal proceedings commenced against the respondents Shawn Carl Campbell, Ivica Ekmecic, and Percy Dwight Wickman in the province of Alberta. Campbell was charged with unlawful possession of a prohibited weapon, contrary to s. 90(1) of the Criminal Code, R.S.C., 1985, c. C-46, and subsequently, in connection with the charge of unlawful possession, with failing to attend court in contravention of s. 145(5) of the Criminal Code. Wickman was charged with two different offences -- operating a motor vehicle while his ability to operate that vehicle was impaired by alcohol, in violation of s. 253(a) of the Criminal Code, and operating a motor vehicle after having consumed alcohol in such a quantity that his blood alcohol level exceeded 80 milligrams, in contravention of s. 253(b) of the Criminal Code. Ekmecic was charged with unlawful assault contrary to s. 266 of the Criminal Code.

¶ 17 The three respondents pled not guilty, and the Crown elected to proceed summarily in all three cases. The accused appeared, in separate proceedings, before the Alberta Provincial Court. At various points in their trials, they each brought a motion before the Alberta Court of Queen's Bench, arguing that the Provincial Court was not an independent and impartial tribunal for the purposes of s. 11(d). The trials for Campbell and Ekmecic were both adjourned before they commenced. Wickman, by contrast, moved for and was granted an adjournment after the Crown had completed its case and six witnesses had testified for the defence, including the accused. Amongst the three of them, the respondents sought orders in the nature of prohibition, certiorari, declarations, and stays.

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¶ 18 The allegations of unconstitutionality, inter alia, dealt with a 5 percent reduction in the salaries of judges of the Provincial Court brought about by the Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94, and s. 17(1) of the Provincial Court Judges Act, S.A. 1981, c. P-20.1, which is the statutory basis for the aforementioned regulation. The 5 percent reduction was accomplished by a 3.1 percent direct salary reduction, and by 5 unpaid days leave of absence. The respondents also attacked the constitutionality of changes to the judges' pension plan by the Provincial Judges and Masters in Chambers Pension Plan Amendment Regulation, Alta. Reg. 29/92, and the Management Employees Pension Plan, Alta. Reg. 367/93, which respectively had the effect of reducing the base salary for calculating pension benefits, and limiting cost of living increases to 60 percent of the Consumer Price Index. In addition, the respondents challenged the constitutionality of the power of the Attorney General to designate the court's sitting days and judges' place of residence. McDonald J., on the motions, also put at issue the process for disciplining Provincial Court judges and the grounds for removal of judges of the Provincial Court.

¶ 19 Finally, and in large part, the constitutional challenges seem to have been precipitated by the remarks of Premier Ralph Klein during a radio interview. Mr. Klein stated that a judge of the provincial youth court, who had indicated that he would not sit in protest over his salary reduction, should be "very, very quickly fired".

¶ 20 All three motions were heard by McDonald J., who found that the Alberta Provincial Court was no longer independent: (1994), 160 A.R. 81, 25 Alta. L.R. (3d) 158, [1995] 2 W.W.R. 469, [1994] A.J. No. 866 (QL). However, he obviated the need for a stay by issuing a declaration that provincial legislation and regulations which were the source of the s. 11(d) violation were of no force or effect. As a result, although the Crown lost on the constitutional issue, it won on the issue of the stay. The Crown appealed to the Alberta Court of Appeal, which held that it did not have jurisdiction to hear the appeals, and therefore did not consider the merits of the arguments: (1995), 169 A.R. 178, 97 W.A.C. 178, 31 Alta. L.R. (3d) 190, 100 C.C.C. (3d) 167, [1995] 8 W.W.R. 747, [1995] A.J. No. 610 (QL). The Crown now appeals to this Court, both on the question of the Court of Appeal's jurisdiction and the merits of the constitutional issue. I stated constitutional questions on June 26, 1996. These questions can be found in Appendix "C".

C. Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)

¶ 21 This appeal deals with reductions to the salaries of judges of the Manitoba Provincial Court, by The Public Sector Reduced Work Week and Compensation Management Act, S.M. 1993, c. 21, otherwise known as "Bill 22". Bill 22 led to the reduction of the salaries of a large number of public sector employees, including employees of Crown corporations, hospitals, personal care homes, child and family services agencies, municipalities, school boards, universities and colleges. The legislation was passed as part of a plan to reduce the province's deficit. Bill 22 provided for different treatment of the several classes of employees to which it applied. It provided that public sector employers "may" require employees to take unpaid days of leave. However, judges of the Provincial Court, along with persons who received remuneration as members of a Crown agency or a board, commission or committee to which they were appointed by the government, received a mandatory reduction of 3.8 percent in the 1993-94 fiscal year. For the next fiscal year, Bill 22 provided that judges' salaries were to be reduced

> by an amount that is generally equivalent to the amount by which the wages of employees under a collective agreement with Her Majesty in right of Manitoba are reduced in the same period as a result of a requirement to take days or portions of days of leave without pay in that period.

In the second year, the pay reduction of judges of the Provincial Court could have been achieved by days of leave without pay. Similar provisions governed the salary reduction for members of the provincial legislature. By contrast, medical practitioners were dealt with by a different set of

provisions in Bill 22, which fixed the total payments for 1993-94 at 98 percent of the total payments in the 1992-93 fiscal year, and payments for the 1994-95 year by an amount obtained by multiplying the payment for the 1993-94 year by a factor laid down in regulation. Bill 22 was time-limited legislation, and is no longer in effect.

¶ 22 The Manitoba Provincial Judges Association launched a constitutional challenge to the salary cut, alleging that it infringed their judicial independence as protected by s. 11(d) of the Charter. They also argued that the salary reduction was unconstitutional because it effectively suspended the operation of the Judicial Compensation Committee, a body created by The Provincial Court Act, R.S.M. 1987, c. C275, whose task it is to issue reports on judges' salaries to the provincial legislature. Furthermore, they alleged that the government had interfered with judicial independence by ordering the withdrawal of court staff and personnel on unpaid days of leave ("Filmon Fridays"), which in effect shut down the Provincial Court on those days. Finally, they claimed that the government had exerted improper pressure on the Association in the course of salary discussions to desist from launching this constitutional challenge, which also allegedly infringed their judicial independence. The trial judge held that the salary reduction violated s. 11(d), but read down Bill 22 so that it only provided for a temporary suspension in compensation, with retroactive payment due after the Bill expired: (1994), 98 Man. R. (2d) 67, 30 C.P.C. (3d) 31, [1994] M.J. No. 646 (QL). The Court of Appeal rejected all the constitutional challenges: (1995), 102 Man. R. (2d) 51, 93 W.A.C. 51, 37 C.P.C. (3d) 207, 125 D.L.R. (4th) 149, 30 C.R.R. (2d) 326, [1995] 5 W.W.R. 641, [1995] M.J. No. 170 (QL). The Judges of the Provincial Court, as represented by the Association, now appeal to this Court. I stated constitutional questions on June 18, 1996. These questions can be found in Appendix "D".

III. Decisions Below

A. Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island and Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island

(1) Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island: Decision of the Appeal Division of the P.E.I. Supreme Court (1994), 125 Nfld. & P.E.I.R. 335

¶ 23 The Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island contains two questions; the text of the reference can be found in Appendix "A". The first question asks if the provincial legislature has the power to decrease, increase, or otherwise adjust the remuneration of judges of the P.E.I. Provincial Court either as part of an "overall public economic measure" or "in certain circumstances established by law". If the first question is answered in the affirmative, the second question must be answered. That question asks whether judges of the Provincial Court enjoy sufficient financial security for that court to be an independent and impartial tribunal for the purposes of s. 11(d) of the Charter and any other such sections as may be applicable.

¶ 24 The judgment of the court was given by Mitchell J.A., who answered both questions in the affirmative. He began his judgment by sketching the factual background to the reference -- that the salary reduction of judges of the Provincial Court occurred at a time when the provincial government "was faced with a severe deficit problem and saw an urgency to cutting its spending so as to get the Province's finances into acceptable order" (p. 337). Accordingly, he characterized the Public Sector Pay Reduction Act, the legislation whereby judges' salaries had been reduced, as a deficit reduction measure.

¶ 25 Mitchell J.A. then proceeded to canvass this Court's judgments in Valente, Beauregard, and R. v. Généreux, [1992] 1 S.C.R. 259, to draw out the proposition that the provincial legislature had

the authority to reduce the salary and benefits of Provincial Court judges if three conditions were met: the reduction was part of an "overall public economic measure", the reduction did not "remove the basic degree of financial security which is an essential condition" for judicial independence, and the reduction did not amount to "arbitrary interference with the judiciary in the sense that it [was] being enacted for an improper or colourable purpose, or that it discriminate[d] against judges vis-à-vis other citizens" (p. 340). A public economic measure, he held, could include a general pay reduction for all those who hold public office, including judges. Furthermore, the change to judges' salaries could not alter the basic requirement of financial security, that salaries be established by law and be beyond arbitrary interference by the government in a manner that could affect the independence of the individual judge.

¶ 26 Relying on this analysis, Mitchell J.A. gave the answer of a "qualified yes" to question 1. Legislatures were constitutionally competent to adjust judicial salaries, as long as they adhered to the requirements of s. 11(d).

¶ 27 Mitchell J.A. then turned to question 2, but characterized it as dealing not with the level of salary that judges receive, but rather with both the means which the provincial legislature had employed to reduce that salary and the reasons for that reduction. He concluded that judges of the P.E.I. Provincial Court were still independent for the purposes of s. 11(d), because of the circumstances surrounding the adoption of the Public Sector Pay Reduction Act. The Act had reduced their salaries as part of an overall public economic measure designed to meet a legitimate government objective. It was non-discriminatory in that it applied generally to virtually everyone paid from the public purse. Furthermore, after the salary reduction, the right of judges to their salaries remained established by law and was beyond arbitrary interference by the government. Finally, there was no evidence that the Act had been enacted for an improper or colourable purpose. Mitchell J.A. therefore answered "yes" to question 2.

(2) Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island: Decision of the Appeal Division of the P.E.I. Supreme Court (1995), 130 Nfld. & P.E.I.R. 29

(a) Introduction

¶ 28 This reference consists of eight questions, which can be found in Appendix "B". In this paragraph, I will outline the structure and content of these questions. The first question is framed in general terms, and asks the court to determine whether judges of the P.E.I. Provincial Court have sufficient security of tenure, institutional independence, and financial security to constitute an independent and impartial tribunal for the purposes of s. 11(d) of the Charter. The next three questions (questions 2, 3, and 4) ask whether specific provisions of the legislation governing Provincial Court judges (the Provincial Court Act, R.S.P.E.I. 1988, c. P-25), particular amendments thereto, and the organization and operation of the provincial court system in the province undermine the security of tenure (question 2), institutional independence (question 3), and financial security (question 4) of Provincial Court judges. Question 5 is a residual question, which asks if there is any other factor or combination of factors which undermines the independence of judges of the P.E.I. Provincial Court. Question 6 asks whether s. 11(d) of the Charter requires Provincial Court judges to have the same level of remuneration as superior court judges. Question 7 is predicated upon an affirmative answer to question 6, and asks in what particular respect or respects it would be necessary to provide the same level of remuneration to the two groups of judges. Question 8 asks whether the violations of s. 11(d), if any, can be justified under s. 1 of the Charter.

(b) Statement of Facts

¶ 29 Appended to the second reference is a lengthy statement of facts. According to the terms of

the reference, this Court is expected to have regard to this statement of facts in answering questions 1, 2, 3, 4 and 5. It is therefore necessary to give an account of what that statement of facts says.

¶ 30 The statement of facts begins by adverting to the concern about the state of judicial independence in the P.E.I. Provincial Court, following the enactment of the Public Sector Pay Reduction Act. The degree of concern is indicated by the fact that over 70 cases before the Provincial Court were adjourned to allow defendants to apply to the Supreme Court of P.E.I. for a determination of the independence of Provincial Court judges. At the time of the issuing of the reference, 20 such cases were pending before the P.E.I. Supreme Court.

¶ 31 The statement of facts then proceeds to explain how judges of the P.E.I. Provincial Court are remunerated. At the time of this reference, the three members of the Provincial Court of P.E.I. were paid an annual salary of $98,243. The statement of facts also contrasts the salaries of Provincial Court judges with the per capita income averages across Canada and in P.E.I., and provides some data on income distribution within a number of provinces, including P.E.I. These statistics convey the general impression that Provincial Court judges in P.E.I., even after the salary reductions, are paid very well relative to the population as a whole, particularly in P.E.I.

¶ 32 The statement of facts then moves on to discuss the manner in which the salaries of judges of the Provincial Court of P.E.I. are set. Until the mid-1980s, the salaries of Provincial Court judges were established by the Executive Council (i.e., the cabinet) of P.E.I., after informal consultations by the Attorney General and the Deputy Attorney General with the judges. It was customary for Provincial Court judges to receive the same salary increases as senior members of the public sector, whose salary increases were in turn generally "in line" with those increases received by other public sector employees. However, in 1986-87, the government commissioned a report by Professor Wade MacLauchlan to examine the remuneration of Provincial Court judges. The report's recommendation that Provincial Court judges' salaries should be equal to the average of provincial court judges' salaries across Canada, was implemented through an amendment to the Provincial Court Act in 1988 (An Act to Amend the Provincial Court Act, S.P.E.I. 1988, c. 54).

¶ 33 The statement of facts then goes on to discuss how the government arrived at the conclusion that it should reduce its provincial deficit. The basic thrust is that the province's annual deficit in the early 1990s had been significantly greater than expected. As a result, the province had sought to control the provincial deficit through salary reductions, culminating in the Public Sector Pay Reduction Act. The statement notes that in the years before the enactment of the Act, there had been discussions between the judges of the P.E.I. Provincial Court and the government in which the judges agreed to a pay reduction and then a salary freeze. As well, immediately before the enactment of the Act, the government had indicated a willingness to discuss alternative measures whereby the reduction in remuneration envisioned by the Act could be achieved with the judges. The statement acknowledges that Chief Judge Plamondon indicated his desire to meet with the government; however, for reasons not explained, the requested meeting did not take place.

¶ 34 The next portion of the statement of facts seeks to explain the role of the provincial government in the administration of the P.E.I. Provincial Court. The picture which emerges is that administrators make many of the important day-to-day decisions at the court, including those which directly affect the working conditions of judges (e.g., the hiring, dismissal, setting of work hours, and management of sick leaves of staff), and also ensure that the Provincial Court operates within a budget set by the province. However, Provincial Court judges have discretion with respect to the hours of their work, holidays and time off, continuing legal education, and the setting and maintaining control and operation of their own schedules and dockets. Collectively, they assign dockets, arraignment days and courtrooms for cases. As well, a government official, the Director of Legal and Judicial Services, represents the Attorney General on a committee consisting of the Chief Justices of the P.E.I. Supreme Court Appeal and Trial Divisions and the Chief Judge of the Provincial Court. This committee meets periodically to discuss general administration and

budgeting issues for the court system.

¶ 35 The last portion of the statement of facts sheds some light on the role of then Chief Judge Plamondon. It appears that Chief Judge Plamondon sought and was granted intervener status for the Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, and retained counsel. However, although his legal fees were initially paid for by the Legal Aid Plan, which assured him that it would continue to do so, he was subsequently denied legal aid, apparently according to the direct orders of the Attorney General of P.E.I. A motion for government funded counsel before the Appeal Division failed. The then Chief Judge subsequently withdrew as an intervener in that reference. He has since retired.

(c) Question 1

¶ 36 As I mentioned above, question 1 asks in general terms if judges of the P.E.I. Provincial Court enjoy sufficient security of tenure, financial security, and administrative independence for the purposes of s. 11(d) of the Charter. Mitchell J.A., speaking for the Appeal Division, answered "no", but solely on the ground that Provincial Court judges lacked sufficient security of tenure. The lack of security of tenure arose as a result of s. 10 of the Provincial Court Act, which provided for the removal of Provincial Court judges by the Lieutenant Governor in Council. According to Mitchell J.A., the effect of the provision was to allow the removal of a judge without an independent inquiry to establish cause, in circumstances where a judge was suspended because the Lieutenant Governor in Council had "reason to believe that a judge" was "guilty of misbehaviour or" was "unable to perform his duties properly", and the judge did not request an inquiry. Relying on Valente, Mitchell J.A. held that s. 10 undermined judicial independence, which requires that a judge be removable only for cause, and in all circumstances that the cause be subject to independent review.

(d) Question 2

¶ 37 Question 2 raises a series of questions about security of tenure. Mitchell J.A. grouped questions 2(a), (d), and (e) together, and answered "no" to all three questions. Question 2(a) asks whether the pension provision in s. 8(1)(c) of the Provincial Court Act infringes the judges' security of tenure; question 2(d) asks whether s. 12(2) of the Act, which confers a discretion on the Lieutenant Governor in Council to grant a leave of absence to a Provincial Court judge, infringes security of tenure; question 2(e) asks the same question, but with respect to a similar provision of the Act which governed sabbatical leaves (s. 13). In answering in the negative, Mitchell J.A. stated (at p. 51) that "[s]imilar and, in some instances, even less ideal measures were in issue in Valente" but were nevertheless upheld by this Court.

¶ 38 Mitchell J.A. also answered "no" to questions 2(b) and 2(c). Question 2(b) asks whether security of tenure had been affected by changes to the remuneration of P.E.I. Provincial Court judges; Mitchell J.A. held that this question had already been answered in the Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island. Question 2(c) queries the constitutionality of the provisions in the Provincial Court Act governing the disciplining and removal of Provincial Court judges, which Mitchell J.A. discussed under question 1. As a result, he held that this question had already been addressed.

¶ 39 Question 2(f) asks whether future alterations to the pension provisions in s. 8 of the Provincial Court Act, which increased or decreased pension benefits, changed the contributions payable by the government and judges of the P.E.I. Provincial Court, increased or decreased the years of service required to be entitled to a pension, or increased or decreased the indexing of pension benefits or provided for the use of some alternative index, would infringe upon security of tenure. Mitchell J.A. held, relying on Beauregard, that unless such alterations were enacted for an improper or colourable purpose, or were discriminatory vis-à-vis other citizens, they would be constitutional.

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¶ 40 Finally, Mitchell J.A. gave a negative answer to question 2(g), which asks whether setting the salaries of Provincial Court judges in P.E.I. at the average of the remuneration of provincial court judges in the other Atlantic provinces (Nova Scotia, New Brunswick, and Newfoundland) violates security of tenure. He simply stated that this method for calculating remuneration had no bearing on judicial independence and impartiality.

(e) Question 3

¶ 41 Question 3 poses a series of questions regarding the institutional independence of the P.E.I. Provincial Court. He grouped questions 3(a), (b), (c), (d), (f), and (g), together, and answered "no", because they addressed matters which did not bear immediately and directly on the court's adjudicative function. These questions ask whether the following matters undermine the institutional independence of the Provincial Court: the location of the Provincial Courts in relation to the offices of superior courts, legal aid offices, Crown Attorneys' offices, and the offices of the representatives of the Attorney General (question 3(a)); the fact that the judges do not administer the budget of the court (question 3(b)); the designation of a place of residence of a particular Provincial Court judge (question 3(c)); communication between a Provincial Court judge, the Director of Legal and Judicial Services in the Office of the Attorney General or the Attorney General on issues relating to the administration of justice (question 3(d)); the denial of legal aid to Chief Judge Plamondon in Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island (question 3 (f)); and a regulation enacted pursuant to the Public Sector Pay Reduction Act in order to clarify that Provincial Court judges did not fall within those provisions of the Act which allow public sector employees to negotiate alternatives to simple pay reductions (question 3(g)).

¶ 42 Mitchell J.A. also answered question 3(e) in the negative. That question asks whether the vacancy of the position of Chief Judge undermined the institutional independence of the P.E.I. Provincial Court. Mitchell J.A. held that as long as the duties of the Chief Judge which bore upon the administrative independence of the court were not exercised by persons other than judges of that court, institutional independence was not compromised.

(f) Question 4

¶ 43 Question 4 poses a series of questions regarding the financial security of judges of the Provincial Court. Mitchell J.A. answered question 4(a) in the negative, referring to his judgment in Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island. This question asks whether a general pay reduction for all persons paid from the public purse which is enacted by the provincial legislature infringes on the financial security of the members of the court.

¶ 44 Mitchell J.A. then grouped questions 4(b), (c), (d), (e), (f), (g), (i), (j) and (k) together, and answered "no" to all of them, merely stating that he was relying on the authorities cited by counsel, including Valente, and MacKeigan v. Hickman, [1989] 2 S.C.R. 796. These questions ask about the effect on the financial security of the P.E.I. Provincial Court of: a remuneration freeze for all persons paid from the public purse, including Provincial Court judges (question 4(b)); the fact that Provincial Court judges' salaries are not automatically adjusted annually to account for inflation (question 4(c)); the ability of Provincial Court judges to negotiate any aspect of their remuneration (question 4(d)); the fact that the formula for establishing the salaries of Provincial Court judges allows the legislative assemblies of other provinces to establish the salaries of P.E.I. Provincial Court judges (question 4(e)); the conferral of a discretion by s. 12(2) of the Provincial Court Act on the Lieutenant Governor in Council to grant a leave of absence for illness to Provincial Court judges (question 4(f)); a provision conferring a similar discretion to provide sabbatical leave (question 4 (g)); the amendment of the formula to determine the salaries of Provincial Court judges by the Act to Amend the Provincial Court Act, S.P.E.I. 1994, c. 49, which provides that the salary of judges of the P.E.I. Provincial Court shall be the average of the salaries of provincial court judges in Nova Scotia, New Brunswick and Newfoundland on April 1 of the preceding year (question 4(i)); the denial of

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legal aid to Chief Judge Plamondon for his intervention in Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island (question 4(j)); and a regulation enacted pursuant to the Public Sector Pay Reduction Act in order to clarify that Provincial Court judges did not fall within those provisions of the Act which allow public sector employees to negotiate alternatives to simple pay reductions (question 4(k)).

¶ 45 Finally, Mitchell J.A. held that he had already answered question 4(h), which deals with potential alterations to pension provisions identical to those raised by question 2(f).

(g) Question 5

¶ 46 Mitchell J.A. declined to answer this question, which asks if there is any other factor or combination of factors which undermines the independence of judges of the P.E.I. Provincial Court, because it was too nonspecific.

(h) Question 6

¶ 47 Question 6 asks whether s. 11(d) of the Charter requires that provincial court judges be entitled to the same level of remuneration as superior court judges. Simply stating that he was relying on Valente and Généreux, Mitchell J.A. answered "no".

(i) Question 7

¶ 48 Question 7 is predicated on an affirmative answer to question 6. Given his answer to question 6, Mitchell J.A. found it unnecessary to answer this question.

(j) Question 8

¶ 49 Question 8 asks whether the infringements of s. 11(d) of the Charter, if there are any, are justified under s. 1. Mitchell J.A. held that they could not be, because to try a person charged with an offence before a tribunal which was not independent and impartial "would be completely incompatible with the notion of a free and democratic society" (p. 55).

B. R. v. Campbell, R. v. Ekmecic and R. v. Wickman

(1) Decision of the Court of Queen's Bench of Alberta (1994), 160 A.R. 81

¶ 50 The Alberta Court of Queen's Bench, per McDonald J., addressed all three aspects of judicial independence: financial security, security of tenure, and institutional independence. McDonald J. found that each of these aspects of judicial independence was lacking in the Alberta Provincial Court. I confine my description of his judgment to those issues which were pursued on appeal.

(a) Financial Security

¶ 51 McDonald J. first considered the constitutional contours of s. 11(d), as they pertained to reductions in the salaries of judges. His analysis proceeded in three stages. First, relying on the preamble to and s. 100 of the Constitution Act, 1867 he concluded that the salaries of superior court judges, once ascertained and established, may not be reduced, either through a direct reduction or by the failure to adjust those salaries to keep pace with inflation, and that the same level of protection should apply to provincial court judges. Second, he arrived at the same conclusion by reference to the purposes of s. 11(d). Third, despite the general rule against reductions in judges' salaries, he accepted that judges' salaries could be reduced by an "overall economic measure".

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¶ 52 McDonald J. held that the salaries of superior court judges could not be reduced, either through a direct reduction or by the failure to maintain the real value of those salaries, on the basis of a number of different sources. One source was the British Constitution. In his opinion, the principle that judges' salaries could not be reduced was a constitutional rule in the United Kingdom, which had been established by the Act of Settlement of 1701, 12 & 13 Will. 3, c. 2, and the Commissions and Salaries of Judges Act of 1760, 1 Geo. 3, c. 23, and which had in turn become part of the Canadian Constitution through the operation of the preamble to the Constitution Act, 1867, which states that Canada has a constitution "similar in Principle to that of the United Kingdom".

¶ 53 Another source was s. 100 of the Constitution Act, 1867. McDonald J. made two arguments here. His first argument relied on the text of s. 100, which provides that superior court judges' salaries shall be "fixed" by Parliament. McDonald J. interpreted "fixed" to be equivalent to "cannot be reduced" (p. 122). He buttressed this argument with a second -- that Beauregard had already held that judges' salaries could not be reduced.

¶ 54 Having concluded that superior court judges' salaries could not be reduced, McDonald J. held that the same rule should apply to provincial court judges' salaries. He reasoned that if provincial court judges received a lesser degree of constitutional protection, accused persons who appeared before them might have the impression that they were receiving second-class justice. McDonald J. appreciated the difficulty with this holding -- that it contradicts language in Valente which suggests that s. 11(d) does not automatically provide the same degree of protection for the independence of provincial court judges as the judicature provisions of the Constitution Act, 1867, provide to superior court judges. McDonald J., however, confined the scope of Valente, holding that it had only considered the means whereby judges' salaries are set, not the substantive issue of what level of remuneration judges are entitled to.

¶ 55 McDonald J. also arrived at the conclusion that the salaries of provincial court judges could not be reduced by an entirely different route -- through a purposive analysis of s. 11(d). In his view, there are two purposes behind the guarantee of judicial independence in s. 11(d): to promote judicial productivity, since judges with a sense of financial security are "more likely to work above and beyond the call of duty" (p. 130), and to recruit to the bench "lawyers of great ability and first-class reputation" (p. 131). Reductions in judges' salaries were prohibited by s. 11(d), in his opinion, because they undermined those purposes.

¶ 56 Although McDonald J. articulated a general rule against the reduction of judges' salaries, he accepted that judges' salaries could be reduced as part of an overall economic measure. However, he defined that exception in very narrow terms, so that judges' salaries could be reduced only by a general income tax or "a graduated income tax which is applicable overall to all citizens who are at the same level of earnings" (p. 138). In support, he cited Beauregard, where the pension scheme at issue was similar to other pension schemes which had been established for a substantial number of other Canadians.

¶ 57 Applying these principles to the facts of the case before him, McDonald J. declared the 5 percent salary reduction for judges of the Alberta Provincial Court brought about by the Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94, to be unconstitutional. Although his reasoning is not entirely clear on this point, it seems that the reduction fell afoul of s. 11(d) because it was not an overall economic measure -- it only applied to Provincial Court judges. In addition, he found that the government's failure to increase judges' salaries in accordance with increases in the cost of living violated judges' financial security, because it amounted to a de facto reduction.

¶ 58 However, McDonald J. rejected a challenge to s. 17(1) of the Provincial Court Judges Act, which provides that the Lieutenant Governor in Council "may make regulations... fixing the salaries to be paid to judges". That provision had been challenged because it was permissive and did not require salaries to be provided, because it did not prevent the executive branch from decreasing

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salaries or benefits, because it did not prevent the executive from providing different salaries to different types of judges, and because it did not prohibit remuneration on the basis of job performance. McDonald J. rejected all of these arguments. Some he rejected by reading down s. 17 (1), so that the provision required the setting of salaries, did not authorize the reduction of salaries except as part of an overall economic measure, and did not authorize performance related remuneration. He also held that s. 11(d) did not prohibit different salaries for different judges.

¶ 59 McDonald J. then turned to two other issues relating to financial security. First, he addressed the process for determining judges' salaries. He held that judicial independence required neither an independent committee, nor a set formula to determine salaries. What the guarantee of financial security provided to judges, in his opinion, was an assurance that their salaries would not be reduced except as part of an overall economic measure, and that they would be increased to take into account changes in the cost of living. The mechanism for setting the salary is not integral to achieving this goal. Furthermore, since s. 11(d) did not mandate a particular process for setting judges' salaries, McDonald J. also held that judicial independence would not be undermined by salary negotiations between the judiciary and the executive.

¶ 60 Second, McDonald J. addressed the question of changes to judges' pensions. He held that the same restriction which applied to reductions in salaries also applied to reductions in pensions -- those reductions must be part of an overall economic measure which applies to the population as a whole. In addition, as for salaries, the failure to increase pensions to keep pace with inflation was tantamount to a reduction, and was therefore prohibited by s. 11(d) of the Charter unless the failure to index was part of an overall economic measure. However, in the absence of sufficient evidence, he declined to determine if changes to the pension plan of the judges of the Alberta Provincial Court had violated s. 11(d).

(b) Security of Tenure

¶ 61 McDonald J. found that two different sets of provisions of the Provincial Court Judges Act violated s. 11(d) of the Charter, because they provided insufficient security of tenure. The first set of provisions relates to the membership of the Judicial Council, the body charged with considering complaints made against judges of the Alberta Provincial Court. Sections 10(1)(d) and 10(1)(e) permit non-judges to be members of the Judicial Council. McDonald J. held that the presence of non-judges on the Judicial Council contravened s. 11(d), because Valente had held that security of tenure required that judges only be dismissed after a "judicial inquiry". A judicial inquiry, according to McDonald J., is an inquiry by judges only. As a result, he found ss. 11(1)(c) and 11(2) of the Act, which empower the Council to investigate complaints, make recommendations to the Minister of Justice and Attorney General, and refer complaints to the Chief Judge of the Court or a committee of the Judicial Council for inquiry and report, to be unconstitutional.

¶ 62 The second set of provisions related to the grounds for the removal of judges of the Alberta Provincial Court. Section 11(1)(b) of the Provincial Court Judges Act provides that "lack of competence" and "conduct" are grounds for removal. McDonald J. held that these provisions are overbroad, because they potentially impugn conduct which may be unrelated to the capacity of a judge to perform his or her official duties. At worst, the provisions could be used to dismiss judges for the inability to "interpret and apply the law correctly... whether in a specific case or in more than one case" (p. 161).

(c) Institutional Independence

¶ 63 Finally, McDonald J. held that the provisions of the Provincial Court Judges Act which permit the Attorney General to designate the place of residence (s. 13(1)(a)) and the sitting days (s. 13(1)(b)) of judges of the Alberta Provincial Court violated s. 11(d). He arrived at this conclusion on the basis of the view that the purpose of institutional independence is to safeguard the ability of

the court to use its judicial resources as efficiently as possible, in order to ensure a timely trial for accused persons. As well, he cited Valente's explicit statement that control over sittings of the court is an essential component of institutional independence.

(d) Disposition

¶ 64 Although he made several findings of unconstitutionality, McDonald J. denied the stays sought by Campbell and Ekmecic, on the ground that his declarations removed the source of the unconstitutionality and had rendered the Alberta Provincial Court independent. Furthermore, although Wickman's trial had already proceeded before a non-independent judge, he denied the request for orders in the nature of certiorari and prohibition, because to do otherwise would be to countenance an abuse of process, since the defence had waited to the end of the trial to raise these constitutional issues.

(e) Remarks of Premier Klein

¶ 65 McDonald J. held that the remarks of Premier Klein did not amount to a violation of judicial independence. Although the Premier's comments may have been unwise, they did not give rise to a reasonable apprehension that the executive would interfere with the independence of the Alberta Provincial Court.

(2) Decision of the Court of Appeal of Alberta (1995), 169 A.R. 178

¶ 66 The Crown appealed. The decision of the Court of Appeal dealt solely with the question of whether that court had jurisdiction to hear the case. A majority of the court (Conrad J.A. dissenting), held that it did not have jurisdiction.

¶ 67 There was a consensus on the court that the Crown's appeal required a statutory basis to proceed. The interpretive debate focussed on the meaning and scope of s. 784(1) of the Criminal Code, which provides that:

> 784. (1) An appeal lies to the court of appeal from a decision granting or refusing the relief sought in proceedings by way of mandamus, certiorari or prohibition.

Two issues were addressed by **the court**: first, whether a successful party (in this case, the Crown) could rely on s. 784(1) to appeal a decision which granted it relief, but not the relief sought; and second, whether a declaration was a form of relief sufficiently akin to mandamus, certiorari or prohibition to come within the scope of the provision.

¶ 68 Harradence J.A. answered both questions in the negative. His starting point was that a provision which allowed a successful party to appeal was sufficiently unusual that it would have to be explicitly and very clearly spelled out in the Criminal Code. Section 784(1), in his opinion, did not meet the requisite standard of clarity. O'Leary J.A. concurred with him on this point. Furthermore, speaking alone, Harradence J.A. rejected the argument that the declarations were in effect prohibitory in nature. Although the declaratory orders may have removed a flaw in the jurisdiction of the Alberta Provincial Court, he reasoned that they did not affect the proceedings taken or proposed to be taken before the Provincial Court.

¶ 69 By contrast, Conrad J.A. (dissenting) answered both questions in the affirmative. Addressing the second issue first, she held that the declarations made by McDonald J. at trial were equivalent to prohibitions, and therefore came within the scope of s. 784(1). Her argument seemed to be that the trial judge, through the declarations, effectively prohibited "the

commencement, or continuation, of the subject trials in front of a court subject to the impugned provisions" (p. 193 (emphasis in original)). With respect to the first issue, she held that s. 784(1) was not limited to appeals by unsuccessful parties, but instead permitted appeals from decisions which granted or refused the relief sought. Conceivably, this could include an appeal from a party who was successful but did not receive the relief desired, like the Crown in this case.

C. Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)

(1) Decision of the Court of Queen's Bench of Manitoba (1994), 98 Man. R. (2d) 67

¶ 70 The central issue at trial was the nature of the protection for financial security provided by s. 11(d), and whether the provisions of Bill 22 met that constitutional standard. Two questions were addressed: first, whether s. 11(d) permits reductions in judges' salaries, and if so, under what circumstances; and second, whether s. 11(d) mandates any particular process for the setting of judges' salaries.

¶ 71 On the first question, Scollin J. took the same position as McDonald J. in Campbell -- that judges' salaries may be reduced only as part of an overall economic measure which affects all citizens. As such, the reduction of judges' salaries by Bill 22 was unconstitutional, because it was part of a plan to reduce the provincial deficit solely through a reduction in government expenditures.

¶ 72 However, Scollin J. then proceeded to part company with McDonald J.'s judgment in one crucial respect -- he held that the standard set by s. 11(d) is only required for permanent reductions in judicial salaries. In economic emergencies, temporary reductions, by contrast, are allowed. Scollin J. held that the facts of this case disclosed an economic emergency, which he defined (at p. 77) as a situation

> [w]here, in the judgment of the Government, fiscal demands on the public treasury can be met only by immediate but determinate restraints on the Government's own spending....

Thus, in his disposition of the appeal, Scollin J. read down Bill 22 to provide for the temporary suspension of full compensation, and the full retroactive repayment of all compensation when Bill 22 expired.

¶ 73 The second question was addressed in the context of s. 11.1 of The Provincial Court Act, which establishes an independent commission (the Judicial Compensation Committee) that makes recommendations to the provincial legislature on salaries of judges of the Manitoba Provincial Court. It was argued that Bill 22 effectively rendered the commission inoperative, by imposing a salary reduction without the legislature first receiving the commission's report, and therefore violated s. 11(d) because the statutory provisions creating the commission had "quasi-constitutional" status which allowed those provisions to prevail over Bill 22. Scollin J. rejected this argument on two grounds: first, that Bill 22 did not purport to disband or disrupt the work of the Judicial Compensation Committee, and therefore the question of any conflict between the Bill and the provisions creating the Committee did not arise; and second, that the Committee process did not have quasi-constitutional status, and so could not prevail over Bill 22.

¶ 74 It was also argued at trial that there had been a violation of judicial independence because of the decision to close down the courts on days which the government had designated as unpaid days of leave for its employees ("Filmon Fridays"). Scollin J. rejected this argument, because the decision to close down the courts was not taken by the executive (in the person of the Attorney General), but by the Chief Judge of the Manitoba Provincial Court. A number of factors were determinative: the

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Chief Judge was consulted about the withdrawal of court staff; the Chief Judge directed that the courts be closed down on those days, and had the Chief Judge decided that the Provincial Court would remain open on those days, the government had given an assurance that sufficient staff would be made available.

¶ 75 Finally, the trial judge considered and rejected an argument that the government had exerted improper pressure on the judges of the Provincial Court. The allegation arose out of a request by the government that the judges state whether they intended to challenge Bill 22, in advance of the government agreeing to present a joint submission with the judges to the Judicial Compensation Committee. Scollin J. held that the request was "indiscreet" but "immaterial" (p. 79).

(2) Decision of the Court of Appeal of Manitoba (1995), 102 Man. R. (2d) 51

¶ 76 The Court of Appeal's views on the nature of the guarantee of financial security are not entirely clear. At one point, the court stated that s. 11(d) protects judges against "arbitrary interference" by the legislature or the executive which is "motivated by an improper or colourable purpose" (p. 63), at another that s. 11(d) prohibits the "discriminatory treatment of judges". However, despite this ambiguity, the court rejected the submission that a salary cut for judges is constitutional only if it is part of an overall economic measure, although it accepted that the fact that a reduction is part of such a measure would go to a finding that the reduction "was not enacted for an improper or colourable purpose" (p. 65).

¶ 77 The court then went on to apply the standard of discriminatory treatment, and addressed the argument that Bill 22 was unconstitutional because of the distinctions it drew among different persons who were paid from the public purse. On the facts, the court found that differences in the classes of persons affected by Bill 22 necessitated different treatment, and were therefore not discriminatory. In particular, the court pointed to the fact that other persons governed by Bill 22 were in a collective bargaining relationship with the government, a situation from which "judges would undoubtedly resile" (p. 66).

¶ 78 In addition to determining whether Bill 22 discriminated against judges of the Manitoba Provincial Court, the court asked how the reasonable person would perceive the cuts. It concluded that since the cuts were of a broadly based nature, and were motivated by budgetary concerns, they would not create the impression that judicial independence had been compromised.

¶ 79 As the trial judge had done, the Court of Appeal rejected the argument that the provisions creating the Judicial Compensation Committee somehow received constitutional protection against Bill 22, and expressly agreed with Scollin J. that Bill 22 did not conflict with those provisions. Moreover, it pointed out that s. 3 of Bill 22 provides that the Bill prevails over any conflicting legislation.

¶ 80 The Court of Appeal confined its analysis of the alleged unconstitutionality of the closing of the Manitoba Provincial Court to the decision of the Attorney General that Crown attorneys take unpaid days of leave ("Filmon Fridays") as part of the deficit reduction scheme centred around Bill 22. To the court, this particular decision did not interfere with the institutional independence of the Provincial Court, because it did not touch upon that court's adjudicative function. Rather, it concerned the prosecution of criminal offences, for which the executive has constitutional responsibility.

¶ 81 The court agreed with the trial judge's conclusion that the pressure exerted on the judges' association by the government was immaterial.

IV. Financial Security

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A. Introduction: The Unwritten Basis of Judicial Independence

¶ 82 These appeals were all argued on the basis of s. 11(d), the Charter's guarantee of judicial independence and impartiality. From its express terms, s. 11(d) is a right of limited application -- it only applies to persons accused of offences. Despite s. 11(d)'s limited scope, there is no doubt that the appeals can and should be resolved on the basis of that provision. To a large extent, the Court is the prisoner of the case which the parties and interveners have presented to us, and the arguments that have been raised, and the evidence that we have before us, have largely been directed at s. 11 (d). In particular, the two references from P.E.I. are explicitly framed in terms of s. 11(d), and if we are to answer the questions contained therein, we must direct ourselves to that section of the Constitution.

¶ 83 Nevertheless, while the thrust of the submissions was directed at s. 11(d), the respondent Wickman in Campbell et al. and the appellants in the P.E.I. references, in their written submissions, the respondent Attorney General of P.E.I., in its oral submissions, and the intervener Attorney General of Canada, in response to a question from Iacobucci J., addressed the larger question of where the constitutional home of judicial independence lies, to which I now turn. Notwithstanding the presence of s. 11(d) of the Charter, and ss. 96-100 of the Constitution Act, 1867, I am of the view that judicial independence is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the Constitution Acts. The existence of that principle, whose origins can be traced to the Act of Settlement of 1701, is recognized and affirmed by the preamble to the Constitution Act, 1867. The specific provisions of the Constitution Acts, 1867 to 1982, merely "elaborate that principle in the institutional apparatus which they create or contemplate": Switzman v. Elbling, [1957] S.C.R. 285, at p. 306, per Rand J.

¶ 84 I arrive at this conclusion, in part, by considering the tenability of the opposite position -- that the Canadian Constitution already contains explicit provisions which are directed at the protection of judicial independence, and that those provisions are exhaustive of the matter. Section 11(d) of the Charter, as I have mentioned above, protects the independence of a wide range of courts and tribunals which exercise jurisdiction over offences. Moreover, since well before the enactment of the Charter, ss. 96-100 of the Constitution Act, 1867, separately and in combination, have protected and continue to protect the independence of provincial superior courts: Cooper, supra, at para. 11; MacMillan Bloedel Ltd. v. Simpson, [1995] 4 S.C.R. 725, at para. 10. More specifically, s. 99 guarantees the security of tenure of superior court judges; s. 100 guarantees the financial security of judges of the superior, district, and county courts; and s. 96 has come to guarantee the core jurisdiction of superior, district, and county courts against legislative encroachment, which I also take to be a guarantee of judicial independence.

¶ 85 However, upon closer examination, there are serious limitations to the view that the express provisions of the Constitution comprise an exhaustive and definitive code for the protection of judicial independence. The first and most serious problem is that the range of courts whose independence is protected by the written provisions of the Constitution contains large gaps. Sections 96-100, for example, only protect the independence of judges of the superior, district, and county courts, and even then, not in a uniform or consistent manner. Thus, while ss. 96 and 100 protect the core jurisdiction and the financial security, respectively, of all three types of courts (superior, district, and county), s. 99, on its terms, only protects the security of tenure of superior court judges. Moreover, ss. 96-100 do not apply to provincially appointed inferior courts, otherwise known as provincial courts.

¶ 86 To some extent, the gaps in the scope of protection provided by ss. 96-100 are offset by the application of s. 11(d), which applies to a range of tribunals and courts, including provincial courts. However, by its express terms, s. 11(d) is limited in scope as well -- it only extends the envelope of constitutional protection to bodies which exercise jurisdiction over offences. As a result, when those courts exercise civil jurisdiction, their independence would not seem to be

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guaranteed. The independence of provincial courts adjudicating in family law matters, for example, would not be constitutionally protected. The independence of superior courts, by contrast, when hearing exactly the same cases, would be constitutionally guaranteed.

¶ 87 The second problem with reading s. 11(d) of the Charter and ss. 96-100 of the Constitution Act, 1867 as an exhaustive code of judicial independence is that some of those provisions, by their terms, do not appear to speak to this objective. Section 100, for example, provides that Parliament shall fix and provide the salaries of superior, district, and county court judges. It is therefore, in an important sense, a subtraction from provincial jurisdiction over the administration of justice under s. 92(14). Moreover, read in the light of the Act of Settlement of 1701, it is a partial guarantee of financial security, inasmuch as it vests responsibility for setting judicial remuneration with Parliament, which must act through the public means of legislative enactment, not the executive. However, on its plain language, it only places Parliament under the obligation to provide salaries to the judges covered by that provision, which would in itself not safeguard the judiciary against political interference through economic manipulation. Nevertheless, as I develop in these reasons, with reference to Beauregard, s. 100 also requires that Parliament must provide salaries that are adequate, and that changes or freezes to judicial remuneration be made only after recourse to a constitutionally mandated procedure.

¶ 88 A perusal of the language of s. 96 reveals the same difficulty:

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

Section 96 seems to do no more than confer the power to appoint judges of the superior, district, and county courts. It is a staffing provision, and is once again a subtraction from the power of the provinces under s. 92(14). However, through a process of judicial interpretation, s. 96 has come to guarantee the core jurisdiction of the courts which come within the scope of that provision. In the past, this development has often been expressed as a logical inference from the express terms of s. 96. Assuming that the goal of s. 96 was the creation of "a unitary judicial system", that goal would have been undermined "if a province could pass legislation creating a tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of the superior courts": Re Residential Tenancies Act, 1979, [1981] 1 S.C.R. 714, at p. 728. However, as I recently confirmed, s. 96 restricts not only the legislative competence of provincial legislatures, but of Parliament as well: MacMillan Bloedel, supra. The rationale for the provision has also shifted, away from the protection of national unity, to the maintenance of the rule of law through the protection of the judicial role.

¶ 89 The point which emerges from this brief discussion is that the interpretation of ss. 96 and 100 has come a long way from what those provisions actually say. This jurisprudential evolution undermines the force of the argument that the written text of the Constitution is comprehensive and definitive in its protection of judicial independence. The only way to explain the interpretation of ss. 96 and 100, in fact, is by reference to a deeper set of unwritten understandings which are not found on the face of the document itself.

¶ 90 The proposition that the Canadian Constitution embraces unwritten norms was recently confirmed by this Court in New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319. In that case, the Court found it constitutional for the Nova Scotia House of Assembly to refuse the media the right to record and broadcast legislative proceedings. The media advanced a claim based on s. 2(b) of the Charter, which protects, inter alia, "freedom of the press and other media of communication". McLachlin J., speaking for a majority of the Court, found that the refusal of the Assembly was an exercise of that Assembly's unwritten legislative privileges, that the Constitution of Canada constitutionalized those privileges, and that the

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constitutional status of those privileges therefore precluded the application of the Charter.

¶ 91 The relevant part of her judgment concerns the interpretation of s. 52(2) of the Constitution Act, 1982, which defines the "Constitution of Canada" in the following terms:

> 52. ...
>
> (2) The Constitution of Canada includes
>
> (a) the Canada Act 1982, including this Act;
>
> (b) the Acts and orders referred to in the schedule; and
>
> (c) any amendment to any Act or order referred to in paragraph (a) or (b). [Emphasis added.]

The media argued that parliamentary privileges did not enjoy constitutional status, and hence, were subject to Charter scrutiny like any other decision of a legislature, because they were not included within the list of documents found in, or referred to by, s. 52(2). McLachlin J. rejected this argument, in part on the basis of the wording of s. 52(2). She held that the use of the word "includes" indicated that the list of constitutional documents in s. 52(2) was not exhaustive.

¶ 92 Although I concurred on different grounds, and still doubt whether the privileges of provincial assemblies form part of the Constitution (Harvey v. New Brunswick (Attorney General), [1996] 2 S.C.R. 876, at para. 2), I agree with the general principle that the Constitution embraces unwritten, as well as written rules, largely on the basis of the wording of s. 52(2). Indeed, given that ours is a Constitution that has emerged from a constitutional order whose fundamental rules are not authoritatively set down in a single document, or a set of documents, it is of no surprise that our Constitution should retain some aspect of this legacy.

¶ 93 However, I do wish to add a note of caution. As I said in New Brunswick Broadcasting, supra, at p. 355, the constitutional history of Canada can be understood, in part, as a process of evolution "which [has] culminated in the supremacy of a definitive written constitution". There are many important reasons for the preference for a written constitution over an unwritten one, not the least of which is the promotion of legal certainty and through it the legitimacy of constitutional judicial review. Given these concerns, which go to the heart of the project of constitutionalism, it is of the utmost importance to articulate what the source of those unwritten norms is.

¶ 94 In my opinion, the existence of many of the unwritten rules of the Canadian Constitution can be explained by reference to the preamble of the Constitution Act, 1867. The relevant paragraph states in full:

> Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

Although the preamble has been cited by this Court on many occasions, its legal effect has never been fully explained. On the one hand, although the preamble is clearly part of the Constitution, it is equally clear that it "has no enacting force": Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753, at p. 805 (joint majority reasons). In other words, strictly speaking, it is not a source of positive law, in contrast to the provisions which follow it.

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¶ 95 But the preamble does have important legal effects. Under normal circumstances, preambles can be used to identify the purpose of a statute, and also as an aid to construing ambiguous statutory language: Driedger on the Construction of Statutes (3rd ed. 1994), by R. Sullivan, at p. 261. The preamble to the Constitution Act, 1867, certainly operates in this fashion. However, in my view, it goes even further. In the words of Rand J., the preamble articulates "the political theory which the Act embodies": Switzman, supra, at p. 306. It recognizes and affirms the basic principles which are the very source of the substantive provisions of the Constitution Act, 1867. As I have said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, the preamble is not only a key to construing the express provisions of the Constitution Act, 1867, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law.

¶ 96 What are the organizing principles of the Constitution Act, 1867, as expressed in the preamble? The preamble speaks of the desire of the founding provinces "to be federally united into One Dominion", and thus, addresses the structure of the division of powers. Moreover, by its reference to "a Constitution similar in Principle to that of the United Kingdom", the preamble indicates that the legal and institutional structure of constitutional democracy in Canada should be similar to that of the legal regime out of which the Canadian Constitution emerged. To my mind, both of these aspects of the preamble explain many of the cases in which the Court has, through the normal process of constitutional interpretation, stated some fundamental rules of Canadian constitutional law which are not found in the express terms of the Constitution Act, 1867.

¶ 97 I turn first to the jurisprudence under the division of powers, to illustrate how the process of gap-filling has occurred and how it can be understood by reference to the preamble. One example where the Court has inferred a fundamental constitutional rule which is not found in express terms in the Constitution is the doctrine of full faith and credit. Under this doctrine, the courts of one province are under a constitutional obligation to recognize the decisions of the courts of another province: Hunt v. T & N PLC, [1993] 4 S.C.R. 289. The justification for this rule has been aptly put by Professor Hogg (Constitutional Law of Canada (3rd ed. 1992 (loose-leaf)), vol. 1, at p. 13-18):

> Within a federal state, it seems obvious that, if a provincial court takes jurisdiction over a defendant who is resident in another province, and if the court observes constitutional standards..., the resulting judgment should be recognized by the courts of the defendant's province.

Speaking for the Court in Hunt, La Forest J. identified a number of sources for reading the doctrine of full faith and credit into the scheme of the Constitution: a common citizenship, interprovincial mobility of citizens, the common market created by the union, and the essentially unitary structure of our judicial system. At root, these factors combined to evince "the obvious intention of the Constitution to create a single country": Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, at p. 1099. An alternative explanation of the decision, however, is that the Court was merely giving effect to the "[d]esire" of the founding provinces "to be federally united into One Dominion", an organizing principle of the Constitution that was recognized and affirmed in the preamble, and which was given express form in the provisions identified by La Forest J.

¶ 98 Another example where the Court has inferred a basic rule of Canadian constitutional law despite the silence of the constitutional text is the doctrine of paramountcy. Simply stated, the doctrine asserts that where both the Parliament of Canada and one or more of the provincial legislatures have enacted legislation which comes into conflict, the federal law shall prevail. The doctrine of paramountcy is of fundamental importance in a legal system with more than one source of legislative authority, because it provides a guide to courts and ultimately to citizens on how to reconcile seemingly inconsistent legal obligations. However, it is nowhere to be found in the Constitution Act, 1867. The doctrinal origins of paramountcy are obscure, although it has been said

that it "is necessarily implied in our constitutional act": Huson v. Township of South Norwich (1895), 24 S.C.R. 145, at p. 149. I would venture that the doctrine of paramountcy follows from the desire of the confederating provinces "to be federally united into One Dominion". Relying on the preamble explains, for example, why federal laws are paramount over provincial laws, not the other way around.

¶ 99 The preamble, by its reference to "a Constitution similar in Principle to that of the United Kingdom", points to the nature of the legal order that envelops and sustains Canadian society. That order, as this Court held in Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721, at p. 749, is "an actual order of positive laws", an idea that is embraced by the notion of the rule of law. In that case, the Court explicitly relied on the preamble to the Constitution Act, 1867, as one basis for holding that the rule of law was a fundamental principle of the Canadian Constitution. The rule of law led the Court to confer temporary validity on the laws of Manitoba which were unconstitutional because they had been enacted only in English, in contravention of the Manitoba Act, 1870. The Court developed this remedial innovation notwithstanding the express terms of s. 52(1) of the Constitution Act, 1982, that unconstitutional laws are "of no force or effect", a provision that suggests that declarations of invalidity can only be given immediate effect. The Court did so in order to not "deprive Manitoba of its legal order and cause a transgression of the rule of law" (p. 753). Reference re Manitoba Language Rights therefore stands as another example of how the fundamental principles articulated by preamble have been given legal effect by this Court.

¶ 100 Finally, the preamble also speaks to the kind of constitutional democracy that our Constitution comprehends. One aspect of our system of governance is the importance of "parliamentary institutions, including popular assemblies elected by the people at large in both provinces and Dominion": Saumur v. City of Quebec, [1953] 2 S.C.R. 299, at p. 330, per Rand J. Again, the desire for Parliamentary government through representative institutions is not expressly found in the Constitution Act, 1867; there is no reference in that document, for example, to any requirement that members of Parliament or provincial legislatures be elected. Nevertheless, members of the Court, correctly in my opinion, have been able to infer this general principle from the preamble's reference to "a Constitution similar in Principle to that of the United Kingdom".

¶ 101 One implication of the preamble's recognition and affirmation of Parliamentary democracy is the constitutionalization of legislative privileges for provincial legislatures, and most likely, for Parliament as well. These privileges are necessary to ensure that legislatures can perform their functions, free from interference by the Crown and the courts. Given that legislatures are representative and deliberative institutions, those privileges ultimately serve to protect the democratic nature of those bodies. The Constitution, once again, is silent on this point. Nevertheless, and notwithstanding the reservations I have expressed above, the majority of this Court grounded the privileges of the Nova Scotia Legislative Assembly in the preamble's reference to "a Constitution similar in Principle to that of the United Kingdom": New Brunswick Broadcasting, supra. It argued that since those privileges inhered in the Parliament in Westminster, the preamble indicated that the intention of the Constitution Act, 1867 was that "the legislative bodies of the new Dominion would possess similar, although not necessarily identical, powers" (p. 375). Similarly, in discussing the jurisdiction of courts in relation to the exercise of privileges of the Senate or one of its committees, Iacobucci C.J. (as he then was) considered the significance of the preamble's reference to "a Constitution similar in Principle to that of the United Kingdom" in Southam Inc. v. Canada (Attorney General), [1990] 3 F.C. 465 (C.A.), at pp. 485-86:

> Strayer J. was of the opinion that courts had such a jurisdiction and found, in particular, that the adoption of the Charter fundamentally altered the nature of the Canadian Constitution such that it is no longer "similar in Principle to that of the United Kingdom" as is stated in the preamble to the Constitution Act, 1867. Accepting as we must that the adoption of the Charter transformed to a considerable extent our former system of Parliamentary supremacy into our current

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> one of constitutional supremacy, as former Chief Justice Dickson described it, the sweep of Strayer J.'s comment that our Constitution is no longer similar in principle to that of the United Kingdom is rather wide. Granted much has changed in the new constitutional world of the Charter. But just as purists of federalism have learned to live with the federalist constitution that Canada adopted in 1867 based on principles of parliamentary government in a unitary state such that the United Kingdom was and continues to be, so it seems to me that the British system of constitutional government will continue to co-exist alongside the Charter if not entirely, which it never did, but certainly in many important respects. The nature of [sic] scope of this co-existence will depend naturally on the jurisprudence that results from the questions brought before the courts.

¶ 102 Another implication of the preamble's recognition of Parliamentary democracy has been an appreciation of the interdependence between democratic governance and freedom of political speech. Thus, members of the Court have reasoned that Parliamentary democracy brought with it "all its social implications" (Switzman, supra, at p. 306, per Rand J.), including the implication that these institutions would

> wor[k] under the influence of public opinion and public discussion... [because] such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack, from the freest and fullest analysis and examination from every point of view of political proposals.

(Reference re Alberta Statutes, [1938] S.C.R. 100, at p. 133, per Duff C.J.)

Political freedoms, such as the right to freedom of expression, are not enumerated heads of jurisdiction under ss. 91 and 92 of the Constitution Act, 1867; the document is silent on their very existence. However, given the importance of political expression to national political life, combined with the intention to create one country, members of the Court have taken the position that the limitation of that expression is solely a matter for Parliament, not the provincial legislatures: Reference re Alberta Statutes, supra, at p. 134, per Duff C.J., and at p. 146, per Cannon J.; Saumur, supra, at pp. 330-31, per Rand J., and at pp. 354-56, per Kellock J.; Switzman, supra, at p. 307, per Rand J., and at p. 328, per Abbott J.

¶ 103 The logic of this argument, however, compels a much more dramatic conclusion. Denying jurisdiction over political speech to the provincial legislatures does not limit Parliament's ability to do what the provinces cannot. However, given the interdependence between national political institutions and free speech, members of the Court have suggested that Parliament itself is incompetent to "abrogate this right of discussion and debate": Switzman, supra, at p. 328, per Abbott J.; also see Rand J. at p. 307; Saumur, supra, at p. 354, per Kellock J.; OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2, at p. 57, per Beetz J. In this way, the preamble's recognition of the democratic nature of Parliamentary governance has been used by some members of the Court to fashion an implied bill of rights, in the absence of any express indication to this effect in the constitutional text. This has been done, in my opinion, out of a recognition that political institutions are fundamental to the "basic structure of our Constitution" (OPSEU, supra, at p. 57) and for that reason governments cannot undermine the mechanisms of political accountability which give those institutions definition, direction and legitimacy.

¶ 104 These examples -- the doctrines of full faith and credit and paramountcy, the remedial innovation of suspended declarations of invalidity, the recognition of the constitutional status of the privileges of provincial legislatures, the vesting of the power to regulate political speech within federal jurisdiction, and the inferral of implied limits on legislative sovereignty with respect to

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political speech -- illustrate the special legal effect of the preamble. The preamble identifies the organizing principles of the Constitution Act, 1867, and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text.

¶ 105 The same approach applies to the protection of judicial independence. In fact, this point was already decided in Beauregard, and, unless and until it is reversed, we are governed by that decision today. In that case (at p. 72), a unanimous Court held that the preamble of the Constitution Act, 1867, and in particular, its reference to "a Constitution similar in Principle to that of the United Kingdom", was "textual recognition" of the principle of judicial independence. Although in that case, it fell to us to interpret s. 100 of the Constitution Act, 1867, the comments I have just reiterated were not limited by reference to that provision, and the courts which it protects.

¶ 106 The historical origins of the protection of judicial independence in the United Kingdom, and thus in the Canadian Constitution, can be traced to the Act of Settlement of 1701. As we said in Valente, supra, at p. 693, that Act was the "historical inspiration" for the judicature provisions of the Constitution Act, 1867. Admittedly, the Act only extends protection to judges of the English superior courts. However, our Constitution has evolved over time. In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the Constitution Act, 1982, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country.

¶ 107 I also support this conclusion on the basis of the presence of s. 11(d) of the Charter, an express provision which protects the independence of provincial court judges only when those courts exercise jurisdiction in relation to offences. As I said earlier, the express provisions of the Constitution should be understood as elaborations of the underlying, unwritten, and organizing principles found in the preamble to the Constitution Act, 1867. Even though s. 11(d) is found in the newer part of our Constitution, the Charter, it can be understood in this way, since the Constitution is to be read as a unified whole: Reference re Bill 30, An Act to amend the Education Act (Ont.), [1987] 1 S.C.R. 1148, at p. 1206. An analogy can be drawn between the express reference in the preamble of the Constitution Act, 1982 to the rule of law and the implicit inclusion of that principle in the Constitution Act, 1867: Reference re Manitoba Language Rights, supra, at p. 750. Section 11 (d), far from indicating that judicial independence is constitutionally enshrined for provincial courts only when those courts exercise jurisdiction over offences, is proof of the existence of a general principle of judicial independence that applies to all courts no matter what kind of cases they hear.

¶ 108 I reinforce this conclusion by reference to the central place that courts hold within the Canadian system of government. In OPSEU, as I have mentioned above, Beetz J. linked limitations on legislative sovereignty over political speech with "the existence of certain political institutions" as part of the "basic structure of our Constitution" (p. 57). However, political institutions are only one part of the basic structure of the Canadian Constitution. As this Court has said before, there are three branches of government -- the legislature, the executive, and the judiciary: Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455, at p. 469; R. v. Power, [1994] 1 S.C.R. 601, at p. 620. Courts, in other words, are equally "definitional to the Canadian understanding of constitutionalism" (Cooper, supra, at para. 11) as are political institutions. It follows that the same constitutional imperative -- the preservation of the basic structure -- which led Beetz J. to limit the power of legislatures to affect the operation of political institutions, also extends protection to the judicial institutions of our constitutional system. By implication, the jurisdiction of the provinces over "courts", as that term is used in s. 92(14) of the Constitution Act, 1867, contains within it an implied limitation that the independence of those courts cannot be undermined.

¶ 109 In conclusion, the express provisions of the Constitution Act, 1867 and the Charter are not an exhaustive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the Constitution

Act, 1867. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located. However, since the parties and interveners have grounded their arguments in s. 11(d), I will resolve these appeals by reference to that provision.

B. Section 11(d) of the Charter

¶ 110 As I mentioned earlier, these appeals were heard together because they all raise the question of whether and how s. 11(d) of the Charter restricts the manner by and extent to which provincial governments and legislatures can reduce the salaries of provincial court judges. Before I can address this specific question, I must make some general comments about the jurisprudence under s. 11(d).

¶ 111 The starting point for my discussion is Valente, where in a unanimous judgment this Court laid down the interpretive framework for s. 11(d)'s guarantee of judicial independence and impartiality. Le Dain J., speaking for the Court, began by drawing a distinction between impartiality and independence. Later cases have referred to this distinction as "a firm line": Généreux, supra, at p. 283. Impartiality was defined as "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case" (Valente, supra, at p. 685 (emphasis added)). It was tied to the traditional concern for the "absence of bias, actual or perceived". Independence, by contrast, focussed on the status of the court or tribunal. In particular, Le Dain J. emphasized that the independence protected by s. 11(d) flowed from "the traditional constitutional value of judicial independence", which he defined in terms of the relationship of the court or tribunal "to others, particularly the executive branch of government" (p. 685). As I expanded in R. v. Lippé, [1991] 2 S.C.R. 114, the independence protected by s. 11(d) is the independence of the judiciary from the other branches of government, and bodies which can exercise pressure on the judiciary through power conferred on them by the state.

¶ 112 Le Dain J. went on in Valente to state that independence was premised on the existence of a set of "objective conditions or guarantees" (p. 685), whose absence would lead to a finding that a tribunal or court was not independent. The existence of objective guarantees, of course, follows from the fact that independence is status oriented; the objective guarantees define that status. However, he went on to supplement the requirement for objective conditions with what could be interpreted as a further requirement: that the court or tribunal be reasonably perceived as independent. The reason for this additional requirement was that the guarantee of judicial independence has the goal not only of ensuring that justice is done in individual cases, but also of ensuring public confidence in the justice system. As he said (at p. 689):

> Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.

However, it would be a mistake to conclude that Le Dain J. intended the objective guarantees and the reasonable perception of independence to be two distinct concepts. Rather, the objective guarantees must be viewed as those guarantees that are necessary to ensure a reasonable perception of independence. As Le Dain J. said himself, for a court or tribunal to be perceived as independent, that "perception must... be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence" (p. 689).

¶ 113 Another point which emerges from Valente relates to the question of whose perceptions count. The answer given is that of the reasonable and informed person. This standard was formulated by de Grandpré J. in Committee for Justice and Liberty v. National Energy Board, [1978]

1 S.C.R. 369, at p. 394, with respect to a reasonable apprehension of bias, and was cited with approval in Valente, supra, at p. 684:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude...."

That test was adapted to the determination of judicial independence by Howland C.J.O. in his judgment in the Ontario Court of Appeal in R. v. Valente (No. 2) (1983), 2 C.C.C. (3d) 417, at pp. 439-40:

> The question that now has to be determined is whether a reasonable person, who was informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically would conclude [that the tribunal or court was independent].

To my mind, the decisions of Howland C.J.O. in Valente, and de Grandpré J. in National Energy Board, correctly establish the standard for the test of reasonable perception for the purposes of s. 11 (d).

¶ 114 After establishing these core propositions, Le Dain J. in Valente went on to discuss two sets of concepts; the three core characteristics of judicial independence, and what I term the two dimensions of judicial independence.

¶ 115 The three core characteristics identified by Le Dain J. are security of tenure, financial security, and administrative independence. Valente laid down (at p. 697) two requirements for security of tenure for provincial court judges: those judges could only be removed for cause "related to the capacity to perform judicial functions", and after a "judicial inquiry at which the judge affected is given a full opportunity to be heard". Unlike the judicature provisions of the Constitution Act, 1867, which govern the removal of superior court judges, s. 11(d) of the Charter does not require an address by the legislature in order to dismiss a provincial court judge.

¶ 116 Financial security was defined in these terms (at p. 706):

> The essential point, in my opinion, is that the right to salary of a provincial court judge is established by law, and there is no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge. [Emphasis added.]

Once again, the Court drew a distinction between the requirements of s. 100 of the Constitution Act, 1867 and s. 11(d); whereas the former provision requires that the salaries of superior court judges be set by Parliament directly, the latter allows salaries of provincial court judges to be set either by statute or through an order in council.

¶ 117 Finally, the Court defined the administrative independence of the provincial court, as control by the courts "over the administrative decisions that bear directly and immediately on the exercise of the judicial function" (p. 712). These were defined (at p. 709) in narrow terms as

> assignment of judges, sittings of the court, and court lists -- as well as the related

> matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions....

Although this aspect of judicial independence was also referred to as "institutional independence" in Valente at p. 708, that term, as I explain below, has a distinct meaning altogether, and should not be confused with administrative independence.

¶ 118 The three core characteristics of judicial independence -- security of tenure, financial security, and administrative independence -- should be contrasted with what I have termed the two dimensions of judicial independence. In Valente, Le Dain J. drew a distinction between two dimensions of judicial independence, the individual independence of a judge and the institutional or collective independence of the court or tribunal of which that judge is a member. In other words, while individual independence attaches to individual judges, institutional or collective independence attaches to the court or tribunal as an institutional entity. The two different dimensions of judicial independence are related in the following way (Valente, supra, at p. 687):

> The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.

¶ 119 It is necessary to explain the relationship between the three core characteristics and the two dimensions of judicial independence, because Le Dain J. did not fully do so in Valente. For example, he stated that security of tenure was part of the individual independence of a court or tribunal, whereas administrative independence was identified with institutional or collective independence. However, the core characteristics of judicial independence, and the dimensions of judicial independence, are two very different concepts. The core characteristics of judicial independence are distinct facets of the definition of judicial independence. Security of tenure, financial security, and administrative independence come together to constitute judicial independence. By contrast, the dimensions of judicial independence indicate which entity -- the individual judge or the court or tribunal to which he or she belongs -- is protected by a particular core characteristic.

¶ 120 The conceptual distinction between the core characteristics and the dimensions of judicial independence suggests that it may be possible for a core characteristic to have both an individual and an institutional or collective dimension. To be sure, sometimes a core characteristic only attaches to a particular dimension of judicial independence; administrative independence, for example, only attaches to the court as an institution (although sometimes it may be exercised on behalf of a court by its chief judge or justice). However, this need not always be the case. The guarantee of security of tenure, for example, may have a collective or institutional dimension, such that only a body composed of judges may recommend the removal of a judge. However, I need not decide that particular point here.

¶ 121 What I do propose, however, is that financial security has both an individual and an institutional or collective dimension. Valente only talked about the individual dimension of financial security, when it stated that salaries must be established by law and not allow for executive interference in a manner which could "affect the independence of the individual judge" (p. 706). Similarly, in Généreux, speaking for a majority of this Court, I applied Valente and held that performance-related pay for the conduct of judge advocates and members of a General Court Martial during the Court Martial violated s. 11(d), because it could reasonably lead to the perception that those individuals might alter their conduct during a hearing in order to favour the military establishment.

¶ 122 However, Valente did not preclude a finding that, and did not decide whether, financial security has a collective or institutional dimension as well. That is the issue we must address today. But in order to determine whether financial security has a collective or institutional dimension, and if so, what collective or institutional financial security looks like, we must first understand what the institutional independence of the judiciary is. I emphasize this point because, as will become apparent, the conclusion I arrive at regarding the collective or institutional dimension of financial security builds upon traditional understandings of the proper constitutional relationship between the judiciary, the executive, and the legislature.

C. Institutional Independence

¶ 123 As I have mentioned, the concept of the institutional independence of the judiciary was discussed in Valente. However, other than stating that institutional independence is different from individual independence, the concept was left largely undefined. In Beauregard this Court expanded the meaning of that term, once again by contrasting it with individual independence. Individual independence was referred to as the "historical core" of judicial independence, and was defined as "the complete liberty of individual judges to hear and decide the cases that come before them" (p. 69). It is necessary for the fair and just adjudication of individual disputes. By contrast, the institutional independence of the judiciary was said to arise out of the position of the courts as organs of and protectors "of the Constitution and the fundamental values embodied in it -- rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important" (p. 70). Institutional independence enables the courts to fulfill that second and distinctly constitutional role.

¶ 124 Beauregard identified a number of sources for judicial independence which are constitutional in nature. As a result, these sources additionally ground the institutional independence of the courts. The institutional independence of the courts emerges from the logic of federalism, which requires an impartial arbiter to settle jurisdictional disputes between the federal and provincial orders of government. Institutional independence also inheres in adjudication under the Charter, because the rights protected by that document are rights against the state. As well, the Court pointed to the preamble and judicature provisions of the Constitution Act, 1867, as additional sources of judicial independence; I also consider those sources to ground the judiciary's institutional independence. Taken together, it is clear that the institutional independence of the judiciary is "definitional to the Canadian understanding of constitutionalism" (Cooper, supra, at para. 11).

¶ 125 But the institutional independence of the judiciary reflects a deeper commitment to the separation of powers between and amongst the legislative, executive, and judicial organs of government: see Cooper, supra, at para. 13. This is also clear from Beauregard, where this Court noted (at p. 73) that although judicial independence had historically developed as a bulwark against the abuse of executive power, it equally applied against "other potential intrusions, including any from the legislative branch" as a result of legislation.

¶ 126 What follows as a consequence of the link between institutional independence and the separation of powers I will turn to shortly. The point I want to make first is that the institutional role demanded of the judiciary under our Constitution is a role which we now expect of provincial court judges. I am well aware that provincial courts are creatures of statute, and that their existence is not required by the Constitution. However, there is no doubt that these statutory courts play a critical role in enforcing the provisions and protecting the values of the Constitution. Inasmuch as that role has grown over the last few years, it is clear therefore that provincial courts must be granted some institutional independence.

¶ 127 This role is most evident when we examine the remedial powers of provincial courts with respect to the enforcement of the Constitution. Notwithstanding that provincial courts are statutory bodies, this Court has held that they can enforce the supremacy clause, s. 52 of the Constitution Act,

1982. A celebrated example of the use of s. 52 by provincial courts is R. v. Big M Drug Mart Ltd. (1983), 25 Alta. L.R. (2d) 195 (Prov. Ct.) (upheld by this Court in [1985] 1 S.C.R. 295), which became one of the seminal cases in Charter jurisprudence. Provincial courts, moreover, frequently employ the remedial powers conferred by ss. 24(1) and 24(2) of the Charter, because they are courts of competent jurisdiction for the purposes of those provisions: Mills v. The Queen, [1986] 1 S.C.R. 863. Thus, provincial courts have the power to order stays of proceedings: e.g., R. v. Askov, [1990] 2 S.C.R. 1199. As well, provincial courts can exclude evidence obtained in violation of a Charter right: e.g., R. v. Collins, [1987] 1 S.C.R. 265. They use ss. 24(1) and 24(2) because of their dominant role in the adjudication of criminal cases, where the need to resort to those remedial provisions most often arises.

¶ 128 In addition to enforcing the rights in ss. 7-14 of the Charter, which predominantly operate in the criminal justice system, provincial courts also enforce the fundamental freedoms found in s. 2 of the Charter, such as freedom of religion (Big M) and freedom of expression (Ramsden v. Peterborough (City), [1993] 2 S.C.R. 1084). As well, they police the federal division of powers, by interpreting the heads of jurisdiction found in ss. 91 and 92 of the Constitution Act, 1867: e.g., Big M and R. v. Morgentaler, [1993] 3 S.C.R. 463. Finally, many decisions on the rights of Canada's aboriginal peoples, which are protected by s. 35(1) of the Constitution Act, 1982, are made by provincial courts: e.g., R. v. Sparrow, [1990] 1 S.C.R. 1075.

¶ 129 It is worth noting that the increased role of provincial courts in enforcing the provisions and protecting the values of the Constitution is in part a function of a legislative policy of granting greater jurisdiction to these courts. Often, legislation of this nature denies litigants the choice of whether they must appear before a provincial court or a superior court. As I explain below, the constitutional response to the shifting jurisdictional boundaries of the courts is to guarantee that certain fundamental aspects of judicial independence be enjoyed not only by superior courts but by provincial courts as well. In other words, not only must provincial courts be guaranteed institutional independence, they must enjoy a certain level of institutional independence.

¶ 130 Finally, although I have chosen to emphasize that judicial independence flows as a consequence of the separation of powers, because these appeals concern the proper constitutional relationship among the three branches of government in the context of judicial remuneration, I do not wish to overlook the fact that judicial independence also operates to insulate the courts from interference by parties to litigation and the public generally: Lippé, supra, at pp. 152 et seq., per Gonthier J. As Professor Shetreet has written (in "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges", in S. Shetreet and J. Deschênes, eds., Judicial Independence: The Contemporary Debate (1985), 590, at p. 599):

> Independence of the judiciary implies not only that a judge should be free from executive or legislative encroachment and from political pressures and entanglements but also that he should be removed from financial or business entanglement likely to affect or rather to seem to affect him in the exercise of his judicial functions.

D. Collective or Institutional Financial Security

(1) Introduction

(a) Summary of General Principles

¶ 131 Given the importance of the institutional or collective dimension of judicial independence generally, what is the institutional or collective dimension of financial security? To my mind, financial security for the courts as an institution has three components, which all flow from the

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constitutional imperative that, to the extent possible, the relationship between the judiciary and the other branches of government be depoliticized. As I explain below, in the context of institutional or collective financial security, this imperative demands that the courts both be free and appear to be free from political interference through economic manipulation by the other branches of government, and that they not become entangled in the politics of remuneration from the public purse.

¶ 132 I begin by stating these components in summary fashion.

¶ 133 First, as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective, and objective, for determining judicial remuneration, to avoid the possibility of, or the appearance of, political interference through economic manipulation. What judicial independence requires is an independent body, along the lines of the bodies that exist in many provinces and at the federal level to set or recommend the levels of judicial remuneration. Those bodies are often referred to as commissions, and for the sake of convenience, we will refer to the independent body required by s. 11(d) as a commission as well. Governments are constitutionally bound to go through the commission process. The recommendations of the commission would not be binding on the executive or the legislature. Nevertheless, though those recommendations are non-binding, they should not be set aside lightly, and, if the executive or the legislature chooses to depart from them, it has to justify its decision -- if need be, in a court of law. As I explain below, when governments propose to single out judges as a class for a pay reduction, the burden of justification will be heavy.

¶ 134 Second, under no circumstances is it permissible for the judiciary -- not only collectively through representative organizations, but also as individuals -- to engage in negotiations over remuneration with the executive or representatives of the legislature. Any such negotiations would be fundamentally at odds with judicial independence. As I explain below, salary negotiations are indelibly political, because remuneration from the public purse is an inherently political issue. Moreover, negotiations would undermine the appearance of judicial independence, because the Crown is almost always a party to criminal prosecutions before provincial courts, and because salary negotiations engender a set of expectations about the behaviour of parties to those negotiations which are inimical to judicial independence. When I refer to negotiations, I utilize that term as it is traditionally understood in the labour relations context. Negotiations over remuneration and benefits, in colloquial terms, are a form of "horse-trading". The prohibition on negotiations therefore does not preclude expressions of concern or representations by chief justices and chief judges, and organizations that represent judges, to governments regarding the adequacy of judicial remuneration.

¶ 135 Third, and finally, any reductions to judicial remuneration, including de facto reductions through the erosion of judicial salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge. Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation, as is witnessed in many countries.

¶ 136 I note at the outset that these appeals raise the issue of judges' salaries. However, the same principles are equally applicable to judges' pensions and other benefits.

¶ 137 I also note that the components of the collective or institutional dimension of financial security need not be adhered to in cases of dire and exceptional financial emergency precipitated by unusual circumstances, for example, such as the outbreak of war or pending bankruptcy. In those situations, governments need not have prior recourse to a salary commission before reducing or freezing judges' salaries.

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(b) The Link Between the Components of Institutional or Collective Financial Security and the Separation of Powers

¶ 138 These different components of the institutional financial security of the courts inhere, in my view, in a fundamental principle of the Canadian Constitution, the separation of powers. As I discussed above, the institutional independence of the courts is inextricably bound up with the separation of powers, because in order to guarantee that the courts can protect the Constitution, they must be protected by a set of objective guarantees against intrusions by the executive and legislative branches of government.

¶ 139 The separation of powers requires, at the very least, that some functions must be exclusively reserved to particular bodies: see Cooper, supra, at para. 13. However, there is also another aspect of the separation of powers -- the notion that the principle requires that the different branches of government only interact, as much as possible, in particular ways. In other words, the relationships between the different branches of government should have a particular character. For example, there is a hierarchical relationship between the executive and the legislature, whereby the executive must execute and implement the policies which have been enacted by the legislature in statutory form: see Cooper, supra, at paras. 23 and 24. In a system of responsible government, once legislatures have made political decisions and embodied those decisions in law, it is the constitutional duty of the executive to implement those choices.

¶ 140 What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be depoliticized. When I say that those relationships are depoliticized, I do not mean to deny that they are political in the sense that court decisions (both constitutional and non-constitutional) often have political implications, and that the statutes which courts adjudicate upon emerge from the political process. What I mean instead is the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary, and conversely, that members of the judiciary should exercise reserve in speaking out publicly on issues of general public policy that are or have the potential to come before the courts, that are the subject of political debate, and which do not relate to the proper administration of justice.

¶ 141 To be sure, the depoliticization of the relationships between the legislature and the executive on the one hand, and the judiciary on the other, is largely governed by convention. And as I said in Cooper, supra, at para. 22, the conventions of the British Constitution do not have the force of law in Canada: Reference re Resolution to Amend the Constitution, supra. However, to my mind, the depoliticization of these relationships is so fundamental to the separation of powers, and hence to the Canadian Constitution, that the provisions of the Constitution, such as s. 11(d) of the Charter, must be interpreted in such a manner as to protect this principle.

¶ 142 The depoliticized relationships I have been describing create difficult problems when it comes to judicial remuneration. On the one hand, remuneration from the public purse is an inherently political concern, in the sense that it implicates general public policy. Even the most casual observer of current affairs can attest to this. For example, the salary reductions for the judges in these appeals were usually part of a general salary reduction for all persons paid from the public purse designed to implement a goal of government policy, deficit reduction. The decision to reduce a government deficit, of course, is an inherently political decision. In turn, these salary cuts were often opposed by public sector unions who questioned the underlying goal of deficit reduction itself. The political nature of the salary reductions at issue here is underlined by the fact that they were achieved through legislation, not collective bargaining and contract negotiations.

¶ 143 On the other hand, the fact remains that judges, although they must ultimately be paid from public monies, are not civil servants. Civil servants are part of the executive; judges, by definition, are independent of the executive. The three core characteristics of judicial independence -- security

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of tenure, financial security, and administrative independence -- are a reflection of that fundamental distinction, because they provide a range of protections to members of the judiciary to which civil servants are not constitutionally entitled.

¶ 144 The political nature of remuneration from the public purse has been recognized by this Court before, in the area of public sector labour relations. In Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211, we held that the Charter applied to collective agreements to which the government was a party. In arriving at this conclusion, the Court considered the argument that the Charter ought not to apply because public sector employment relationships were private and non-public in nature. This argument was rejected. La Forest J., speaking for the majority on this point, said at p. 314:

> ... government activities which are in form "commercial" or "private" transactions are in reality expressions of government policy....

¶ 145 With respect to the judiciary, the determination of the level of remuneration from the public purse is political in another sense, because it raises the spectre of political interference through economic manipulation. An unscrupulous government could utilize its authority to set judges' salaries as a vehicle to influence the course and outcome of adjudication. Admittedly, this would be very different from the kind of political interference with the judiciary by the Stuart Monarchs in England which is the historical source of the constitutional concern for judicial independence in the Anglo-American tradition. However, the threat to judicial independence would be as significant. We were alive to this danger in Beauregard, supra, when we held (at p. 77) that salary changes which were enacted for an "improper or colourable purpose" were unconstitutional. Moreover, as I develop below, changes to judicial remuneration might create the reasonable perception of political interference, a danger which s. 11(d) must prevent in light of Valente.

¶ 146 The challenge which faces the Court in these appeals is to ensure that the setting of judicial remuneration remains consistent -- to the extent possible given that judicial salaries must ultimately be fixed by one of the political organs of the Constitution, the executive or the legislature, and that the setting of remuneration from the public purse is, as a result, inherently political -- with the depoliticized relationship between the judiciary and the other branches of government. Our task, in other words, is to ensure compliance with one of the "structural requirements of the Canadian Constitution": Hunt, supra, at p. 323. The three components of the institutional or collective dimension of financial security, to my mind, fulfill this goal.

(2) The Components of Institutional or Collective Financial Security

(a) Judicial Salaries Can Be Reduced, Increased, or Frozen, but not Without Recourse to an Independent, Effective and Objective Commission

¶ 147 As a general principle, s. 11(d) allows that the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, the imperative of protecting the courts from political interference through economic manipulation requires that an independent body -- a judicial compensation commission -- be interposed between the judiciary and the other branches of government. The constitutional function of this body would be to depoliticize the process of determining changes to or freezes in judicial remuneration. This objective would be achieved by setting that body the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature, responding to the particular proposals made by the government. As well, in order to guard against the possibility that government inaction could be used as a means of economic manipulation by allowing judges' real salaries to fall because of inflation, and also to

protect against the possibility that judges' salaries will drop below the adequate minimum required by judicial independence, the commission must convene if a fixed period of time (e.g., three to five years) has elapsed since its last report, in order to consider the adequacy of judges' salaries in light of the cost of living and other relevant factors.

(I) Reductions and Increases to, and Freezes in the Salaries of Judges Raise Concerns Regarding Judicial Independence

¶ 148 I arrive at these propositions through an argument that begins with the question of whether superior court judges, whose independence is protected by s. 100 of the Constitution Act, 1867, may be reduced at all. That question faced us in Beauregard. That case involved a constitutional challenge to s. 29.1 of the Judges Act, R.S.C. 1970, c. J-1, which makes it mandatory for superior court judges to contribute a percentage of their salary to a pension plan. Prior to the enactment of s. 29.1, the pension plan had been non-contributory. Justice Beauregard challenged the constitutionality of s. 29.1, alleging that it reduced judicial remuneration, and for that reason undermined the independence of the judiciary.

¶ 149 The Court dismissed the constitutional challenge. However, there was considerable debate among the parties to this litigation as to the basis of that decision. Some of the parties suggested that Beauregard stands for the view that the salaries of superior court judges may not be reduced at all. They argued that the Court upheld s. 29.1 only because, on the facts, there was no net reduction of judicial remuneration, and that the basic submission made by Justice Beauregard -- that salaries may not be reduced -- was not disagreed with. In support they pointed to the Court's statement that the contributory scheme "did not diminish, reduce or impair the financial position of federally-appointed judges" (p. 78), because it was implemented as part of a package of substantial salary increases.

¶ 150 However, this is an erroneous interpretation of Beauregard. In fact, that decision stands for exactly the opposite position -- that Parliament can reduce the salaries of superior court judges. This conclusion is implicit in the analogy drawn and relied upon by the Court between the contributory scheme and income tax, another measure which imposed financial burdens on judges. The Court pointed out that the imposition of income tax on judges had withstood constitutional challenge (Judges v. Attorney-General of Saskatchewan, [1937] 2 D.L.R. 209 (P.C.)), and then stated that the pension scheme was not relevantly different. Although both schemes could reduce the take-home pay of judges, neither of them impaired judicial independence. As Dickson C.J. said at p. 77:

> It is very difficult for me to see any connection between... judicial independence and Parliament's decision to establish a pension scheme for judges and to expect judges to make contributions toward the benefits established by the scheme.

¶ 151 It is therefore clear from Beauregard that s. 100 permits reductions to the salaries of superior court judges. However, as I outlined in my introductory remarks, the decision raises four questions which we must answer in order to resolve these appeals. I deal with three of these questions here, and return to the fourth later on in these reasons.

¶ 152 The first question addresses the issue of what kinds of salary reductions are consistent with the principle of judicial independence, as protected by s. 100. Beauregard held that reductions which were enacted for an improper or colourable purpose are prohibited by s. 100. Some of the parties to this litigation pointed to passages in Beauregard which suggest, in addition, that s. 100 prohibits reductions in judicial remuneration except through measures which apply to the population as a whole, such as income tax or sales tax. They noted that Dickson C.J. placed a great deal of weight on the fact that contributory pension schemes for judges treated judges "in accordance with standard, widely used and generally accepted pension schemes in Canada", that there were "similar

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pension schemes for a substantial number of other Canadians" (p. 77), and that "pension schemes are now widespread in Canada" (p. 78). More importantly, they emphasized that Dickson C.J. stated that reductions in judges' salaries would be unconstitutional if they amounted to the "discriminatory treatment of judges vis-à-vis other citizens" (p. 77 (emphasis added)).

¶ 153 However, Beauregard should not be read so literally. It is important to recall that the contributory pension scheme for superior court judges at issue there was not part of a scheme for the public at large, and in this sense discriminated against the judiciary vis-à-vis other citizens. Moreover, not only was the Court very much aware of this fact, it did not regard this fact to be constitutionally significant. This is clear from the Court's comparison of income tax and mandatory contributions to the Canada Pension Plan, on the one hand, and the impugned pension scheme, on the other, which the Court conceded were factually different in the following terms, at p. 77:

> These two liabilities [i.e., income tax and mandatory contributions to the Canada Pension Plan] are, of course, general in the sense that all citizens are subject to them whereas the contributions demanded by s. 29.1 of the Judges Act are directed at judges only. [Emphasis added.]

This factual difference, however, did not translate "into any legal consequence" (p. 77).

¶ 154 I take Beauregard's reference to the principle of non-discrimination to mean that judges' salaries may be reduced even if that reduction is part of a measure which only applies to substantially every person who is paid directly from the public purse. This interpretation is consistent with the views of numerous commentators on the constitutionality of reductions to judicial salaries under s. 100. Professor Hogg, supra, at p. 7-6, for example, dismisses the argument that s. 100 prohibits a reduction in judicial remuneration which is non-discriminatory in the sense that it applies "to the entire federal civil service as well". Similarly, Professor Lederman suggests (in "The Independence of the Judiciary" (1956), 34 Can. Bar Rev. 1139, at p. 1164) that a "general income tax of ten per cent on all public salaries... including the judicial salaries" would be constitutionally valid.

¶ 155 What I have just said, however, does not mean that Parliament is constitutionally prohibited, in all circumstances, from reducing judicial remuneration in a manner which does not extend to all persons paid from the public purse. As I now discuss, although identical treatment may be preferable, it is not required in all circumstances.

¶ 156 To explain how I arrive at this conclusion, I return to one of the goals of financial security -- to ensure that the courts be free and appear to be free from political interference through economic manipulation. To be sure, a salary cut for superior court judges which is part of a measure affecting the salaries of all persons paid from the public purse helps to sustain the perception of judicial independence precisely because judges are not being singled out for differential treatment. As Professor Renke has explained (in Invoking Independence: Judicial Independence as a No-cut Wage Guarantee (1994), at p. 30):

> Financial security is an essential condition of judicial independence. It must not, however, be considered abstractly. It must be considered in relation to its purpose, which is, ultimately, to protect the judiciary from economic manipulation by the legislature or executive. Where economic measures apply equally to clerks, secretaries, managers, public sector workers of all grades and departments, as well as judges, how could judges be manipulated?

Conversely, if superior court judges alone had their salaries reduced, one could conclude that Parliament was somehow meting out punishment against the judiciary for adjudicating cases in a

particular way.

¶ 157 However, many parties to these appeals presented a plausible counter-argument by turning this position on its head -- that far from securing a perception of independence, salary reductions which treat superior court judges in the same manner as civil servants undermine judicial independence precisely because they create the impression that judges are merely public employees and are not independent of the government. This submission has a kernel of truth to it. For example, as I have stated above, if judges' salaries were set by the same process as the salaries of public sector employees, there might well be reason to be concerned about judicial independence.

¶ 158 What this debate illustrates is that judicial independence can be threatened by measures which treat judges either differently from, or identically to, other persons paid from the public purse. Since s. 100 clearly permits identical treatment (Beauregard), I am driven to the conclusion that it is illogical for it to prohibit differential treatment as well. That is not to say, however, that the distinction between differential and identical treatment is a distinction without a difference. In my opinion, the risk of political interference through economic manipulation is clearly greater when judges are treated differently from other persons paid from the public purse. This is why we focussed on discriminatory measures in Beauregard. As Professor Renke, supra, has stated in the context of current appeals (at p. 19):

> ... if judges were spared compensation decreases affecting other public sector groups, a reasonable person might well conclude that the judges had engaged in some behind-the-scenes lobbying. The judges' exemption could be thought to be the result of secret deals, or secret commitments to favour the government. An exemption of judges from across-the-board pay cuts is as likely to generate suspicions concerning judicial independence as the reduction of judicial compensation in the context of general public sector reductions.

¶ 159 The second question which emerges from Beauregard arises from the first -- whether the danger of political interference through economic manipulation can arise not only from reductions in the salaries of superior court judges, but also from increases and freezes in judicial remuneration. To my mind, it can. Manipulation and interference most clearly arise from reductions in remuneration; those reductions provide an economic lever for governments to wield against the courts. But salary increases can be powerful economic levers as well. For this reason, salary increases also have the potential to undermine judicial independence, and engage the guarantees of s. 100. Salary freezes for superior court judges raise questions of judicial independence as well, because salary freezes, when the cost of living is rising because of inflation, amount to de facto reductions in judicial salaries, and can therefore be used as means of political interference through economic manipulation.

¶ 160 The third question which arises from Beauregard is the applicability of the jurisprudence under s. 100 of the Constitution Act, 1867, to the interpretation of s. 11(d) of the Charter. Section 100, along with the rest of the judicature provisions, guarantees the independence of superior court judges. Section 11(d), by contrast, guarantees the independence of a wide range of tribunals and courts, including provincial courts, and for the reasons explained above, is the central constitutional provision in these appeals. Since Beauregard defines the scope of Parliament's powers with respect to the remuneration of superior court judges, it was argued before this Court that it had no application to the cases at bar.

¶ 161 To some extent, this question was dealt with in Valente, where the Court held that s. 11(d) did not entitle provincial court judges to a number of protections which were constitutionally guaranteed to superior court judges. For example, while superior court judges may only be dismissed by a resolution of both Houses of Parliament, this Court expressly rejected the need for the dismissal of provincial court judges by provincial legislatures. As well, whereas the salaries of

superior court judges must ultimately be fixed by Parliament, the Court held that the salaries of provincial court judges may be set either by legislation or by order in council.

¶ 162 However, Valente should not be read as having decided that the jurisprudence under s. 100 is of no assistance in shaping the contours of judicial independence as it is protected by s. 11 (d). Rather, all that Valente held is that s. 11(d) does not, as a matter of principle, automatically provide the same level of protection to provincial courts as s. 100 and the other judicature provisions do to superior court judges. In the particular circumstances, though, s. 11(d) may in fact provide the same level of protection to provincial court judges as the judicature provisions do to superior court judges.

¶ 163 The relevance of the judicature provisions, and s. 100 in particular, to the interpretation of s. 11(d) emerges from their shared commitment to judicial independence. The link between these two sets of provisions can be found in Beauregard itself, where the Court developed the distinction between individual independence and institutional independence by reference to Valente. I also alluded to the link between these two sets of provisions in my separate reasons in Cooper. As I have suggested, this link arises in part as a function of the fact that both ss. 11(d) and 100 are expressions of the unwritten principle of judicial independence which is recognized and affirmed by the preamble to the Constitution Act, 1867.

¶ 164 What the link between s. 11(d) and the judicature provisions means is that certain fundamental aspects of judicial independence are enjoyed not only by superior courts, but by provincial courts as well. In my opinion, the constitutional parameters of the power to change or freeze judges' salaries under s. 100, as defined by Beauregard and developed in these reasons, fall into this category.

¶ 165 In conclusion, the requirements laid down in Beauregard and developed in these reasons with respect to s. 100 and superior court judges, are equally applicable to the guarantee of financial security provided by s. 11(d) to provincial court judges. Just as Parliament can change or freeze the salaries of superior court judges, legislatures and executives of the provinces can do the same to the salaries of provincial court judges.

(ii) Independent, Effective and Objective Commissions

¶ 166 Although provincial executives and legislatures, as the case may be, are constitutionally permitted to change or freeze judicial remuneration, those decisions have the potential to jeopardize judicial independence. The imperative of protecting the courts from political interference through economic manipulation is served by interposing an independent body -- a judicial compensation commission -- between the judiciary and the other branches of government. The constitutional function of this body is to depoliticize the process of determining changes or freezes to judicial remuneration. This objective would be achieved by setting that body the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature, responding to the particular proposals made by the government to increase, reduce, or freeze judges' salaries.

¶ 167 I do not wish to dictate the exact shape and powers of the independent commission here. These questions of detailed institutional design are better left to the executive and the legislature, although it would be helpful if they consulted the provincial judiciary prior to creating these bodies. Moreover, different provinces should be free to choose procedures and arrangements which are suitable to their needs and particular circumstances. Within the parameters of s. 11(d), there must be scope for local choice, because jurisdiction over provincial courts has been assigned to the provinces by the Constitution Act, 1867. This is one reason why we held in Valente, supra, at p. 694, that "[t]he standard of judicial independence for purposes of s. 11(d) cannot be a standard of uniform provisions".

¶ 168 Before proceeding to lay down the general guidelines for these independent commissions, I must briefly comment on Valente. There is language in that decision which suggests that s. 11(d) does not require the existence of independent commissions to deal with the issue of judicial remuneration. In particular, Le Dain J. stated that he did "not consider the existence of such a committee to be essential to security of salary for purposes of s. 11(d)" (p. 706). However, that question was not before the Court, since Ontario, the province where Valente arose, had an independent commission in operation at the time of the decision. As a result, the remarks of Le Dain J. were strictly obiter dicta, and do not bind the courts below and need not today be overruled by this Court.

¶ 169 The commissions charged with the responsibility of dealing with the issue of judicial remuneration must meet three general criteria. They must be independent, objective, and effective. I will address these criteria in turn, by reference, where possible, to commissions which already exist in many Canadian provinces to set or recommend the levels of judicial remuneration.

¶ 170 First and foremost, these commissions must be independent. The rationale for independence flows from the constitutional function performed by these commissions -- they serve as an institutional sieve, to prevent the setting or freezing of judicial remuneration from being used as a means to exert political pressure through the economic manipulation of the judiciary. It would undermine that goal if the independent commissions were under the control of the executive or the legislature.

¶ 171 There are several different aspects to the independence required of salary commissions. First, the members of these bodies must have some kind of security of tenure. In this context, security of tenure means that the members of commissions should serve for a fixed term, which may vary in length. Thus, in Manitoba, the term of office for the Judicial Compensation Committee is two years (Provincial Court Act, s. 11.1(1)), whereas the term of office for British Columbia's Judicial Compensation Committee and Ontario's Provincial Judges Remuneration Commission is three years (Provincial Court Act, R.S.B.C. 1979, c. 341, s. 7.1(1); Courts of Justice Act, R.S.O. 1990, c. C.43, Schedule (Appendix A of Framework Agreement), para. 7), and in Newfoundland, the term of its salary tribunal is four years (Provincial Court Act, 1991, S.N. 1991, c. 15, s. 28(3)). In my opinion, s. 11(d) does not impose any restrictions on the membership of these commissions. Although the independence of these commissions would be better served by ensuring that their membership stood apart from the three branches of government, as is the case in Ontario (Courts of Justice Act, Schedule, para. 11), this is not required by the Constitution.

¶ 172 Under ideal circumstances, it would be desirable if appointments to the salary commission were not made by any of the three branches of government, in order to guarantee the independence of its members. However, the members of that body would then have to be appointed by a body which must in turn be independent, and so on. This is clearly not a practical solution, and thus is not required by s. 11(d). As we said in Valente, supra, at p. 692:

> It would not be feasible... to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s. 11(d) of the Charter....

What s. 11(d) requires instead is that the appointments not be entirely controlled by any one of the branches of government. The commission should have members appointed by the judiciary, on the one hand, and the legislature and the executive, on the other. The judiciary's nominees may, for example, be chosen either by the provincial judges' association, as is the case in Ontario (Courts of Justice Act, Schedule, para. 6), or by the Chief Judge of the Provincial Court in consultation with the provincial judges' association, as in British Columbia (Provincial Court Act, s. 7.1(2)). The exact mechanism is for provincial governments to determine. Likewise, the nominees of the executive and the legislature may be chosen by the Lieutenant Governor in Council, although appointments by the

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Attorney General as in British Columbia (Provincial Court Act, s. 7.1(2)), or conceivably by the legislature itself, are entirely permissible.

¶ 173 In addition to being independent, the salary commissions must be objective. They must make recommendations on judges' remuneration by reference to objective criteria, not political expediencies. The goal is to present "an objective and fair set of recommendations dictated by the public interest" (Canada, Department of Justice, Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits (1996), at p. 7). Although s. 11(d) does not require it, the commission's objectivity can be promoted by ensuring that it is fully informed before deliberating and making its recommendations. This can be best achieved by requiring that the commission receive and consider submissions from the judiciary, the executive, and the legislature. In Ontario, for example, the Provincial Judges' Remuneration Commission is bound to consider submissions from the provincial judges' association and the government (Courts of Justice Act, Schedule, para. 20). Moreover, I recommend (but do not require) that the objectivity of the commission be ensured by including in the enabling legislation or regulations a list of relevant factors to guide the commission's deliberations. These factors need not be exhaustive. A list of relevant factors might include, for example, increases in the cost of living, the need to ensure that judges' salaries remain adequate, as well as the need to attract excellent candidates to the judiciary.

¶ 174 Finally, and most importantly, the commission must also be effective. The effectiveness of these bodies must be guaranteed in a number of ways. First, there is a constitutional obligation for governments not to change (either by reducing or increasing) or freeze judicial remuneration until they have received the report of the salary commission. Changes or freezes of this nature secured without going through the commission process are unconstitutional. The commission must convene to consider and report on the proposed change or freeze. Second, in order to guard against the possibility that government inaction might lead to a reduction in judges' real salaries because of inflation, and that inaction could therefore be used as a means of economic manipulation, the commission must convene if a fixed period of time has elapsed since its last report, in order to consider the adequacy of judges' salaries in light of the cost of living and other relevant factors, and issue a recommendation in its report. Although the exact length of the period is for provincial governments to determine, I would suggest a period of three to five years.

¶ 175 Third, the reports of the commission must have a meaningful effect on the determination of judicial salaries. Provinces which have created salary commissions have adopted three different ways of giving such effect to these reports. One is to make a report of the commission binding, so that the government is bound by the commission's decision. Ontario, for example, requires that a report be implemented by the Lieutenant Governor in Council within 60 days, and gives a report of the Provincial Judges' Remuneration Commission statutory force (Courts of Justice Act, Schedule, para. 27). Another way of dealing with a report is the negative resolution procedure, whereby the report is laid before the legislature and its recommendations are implemented unless the legislature votes to reject or amend them. This is the model which has been adopted in British Columbia (Provincial Court Act, s. 7.1(10)) and Newfoundland (Provincial Court Act, 1991, s. 28(7)). The final way of giving effect to a report is the affirmative resolution procedure, whereby a report is laid before but need not be adopted by the legislature. As I shall explain below, until the adoption of Bill 22, this was very similar to the procedure followed in Manitoba (Provincial Court Act, s. 11.1(6)).

¶ 176 The model mandated as a constitutional minimum by s. 11(d) is somewhat different from the ones I have just described. My starting point is that s. 11(d) does not require that the reports of the commission be binding, because decisions about the allocation of public resources are generally within the realm of the legislature, and through it, the executive. The expenditure of public funds, as I said above, is an inherently political matter. Of course, it is possible to exceed the constitutional minimum mandated by s. 11(d) and adopt a binding procedure, as has been done in some provinces.

¶ 177 For the same reasons, s. 11(d) does not require a negative resolution procedure, although it

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does not preclude it. Although the negative resolution procedure still leaves the ultimate decision to set judicial salaries in the hands of the legislature, it creates the possibility that in cases of legislative inaction, the report of the commission will determine judicial salaries in a binding manner. In my opinion, s. 11(d) does not require that this possibility exist.

¶ 178 However, whereas the binding decision and negative resolution models exceed the standard set by s. 11(d), the positive resolution model on its own does not meet that standard, because it requires no response to the commission's report at all. The fact that the report need not be binding does not mean that the executive and the legislature should be free to ignore it. On the contrary, for collective or institutional financial security to have any meaning at all, and to be taken seriously, the commission process must have a meaningful impact on the decision to set judges' salaries.

¶ 179 What judicial independence requires is that the executive or the legislature, whichever is vested with the authority to set judicial remuneration under provincial legislation, must formally respond to the contents of the commission's report within a specified amount of time. Before it can set judges' salaries, the executive must issue a report in which it outlines its response to the commission's recommendations. If the legislature is involved in the process, the report of the commission must be laid before the legislature, when it is in session, with due diligence. If the legislature is not in session, the government may wait until a new sitting commences. The legislature should deal with the report directly, with due diligence and reasonable dispatch.

¶ 180 Furthermore, if after turning its mind to the report of the commission, the executive or the legislature, as applicable, chooses not to accept one or more of the recommendations in that report, it must be prepared to justify this decision, if necessary in a court of law. The reasons for this decision would be found either in the report of the executive responding to the contents of the commission's report, or in the recitals to the resolution of the legislature on the matter. An unjustified decision could potentially lead to a finding of unconstitutionality. The need for public justification, to my mind, emerges from one of the purposes of s. 11(d)'s guarantee of judicial independence -- to ensure public confidence in the justice system. A decision by the executive or the legislature, to change or freeze judges' salaries, and then to disagree with a recommendation not to act on that decision made by a constitutionally mandated body whose existence is premised on the need to preserve the independence of the judiciary, will only be legitimate and not be viewed as being indifferent or hostile to judicial independence, if it is supported by reasons.

¶ 181 The importance of reasons as the basis for the legitimate exercise of public power has been recognized by a number of commentators. For example, in "Developments in Administrative Law: The 1992-93 Term" (1994), 5 S.C.L.R. (2d) 189, at p. 243, David Dyzenhaus has written that

> what justifies all public power is the ability of its incumbents to offer adequate reasons for their decisions which affect those subject to them. The difference between mere legal subjects and citizens is the democratic right of the latter to require an accounting for acts of public power.

Frederick Schauer has made a similar point ("Giving Reasons" (1995), 47 Stan. L. Rev. 633, at p. 658):

> ... when decisionmakers... expect respect for decisions because the decisions are right rather than because they emanate from an authoritative source, then giving reasons... is still a way of showing respect for the subject....

¶ 182 I hasten to add that these comments should not be construed as endorsing or establishing a general duty to give reasons, either in the constitutional or in the administrative law context. Moreover, I wish to clarify that the standard of justification required under s. 11(d) is not

the same as that required under s. 1 of the Charter. Section 1 imposes a very rigorous standard of justification. Not only does it require an important government objective, but it requires a proportionality between this objective and the means employed to pursue it. The party seeking to uphold the impugned state action must demonstrate a rational connection between the objective and the means chosen, that the means chosen are the least restrictive means or violate the right as little as reasonably possible, and that there is a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgment of the right.

¶ 183 The standard of justification here, by contrast, is one of simple rationality. It requires that the government articulate a legitimate reason for why it has chosen to depart from the recommendation of the commission, and if applicable, why it has chosen to treat judges differently from other persons paid from the public purse. A reviewing court does not engage in a searching analysis of the relationship between ends and means, which is the hallmark of a s. 1 analysis. However, the absence of this analysis does not mean that the standard of justification is ineffectual. On the contrary, it has two aspects. First, it screens out decisions with respect to judicial remuneration which are based on purely political considerations, or which are enacted for discriminatory reasons. Changes to or freezes in remuneration can only be justified for reasons which relate to the public interest, broadly understood. Second, if judicial review is sought, a reviewing court must inquire into the reasonableness of the factual foundation of the claim made by the government, similar to the way that we have evaluated whether there was an economic emergency in Canada in our jurisprudence under the division of powers (Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373).

¶ 184 Although the test of justification -- one of simple rationality -- must be met by all measures which affect judicial remuneration and which depart from the recommendation of the salary commission, some will satisfy that test more easily than others, because they pose less of a danger of being used as a means of economic manipulation, and hence of political interference. Across-the-board measures which affect substantially every person who is paid from the public purse, in my opinion, are prima facie rational. For example, an across-the-board reduction in salaries that includes judges will typically be designed to effectuate the government's overall fiscal priorities, and hence will usually be aimed at furthering some sort of larger public interest. By contrast, a measure directed at judges alone may require a somewhat fuller explanation, precisely because it is directed at judges alone.

¶ 185 By laying down a set of guidelines to assist provincial legislatures in designing judicial compensation commissions, I do not intend to lay down a particular institutional framework in constitutional stone. What s. 11(d) requires is an institutional sieve between the judiciary and the other branches of government. Commissions are merely a means to that end. In the future, governments may create new institutional arrangements which can serve the same end, but in a different way. As long as those institutions meet the three cardinal requirements of independence, effectiveness, and objectivity, s. 11(d) will be complied with.

(b) No Negotiations on Judicial Remuneration Between the Judiciary and the Executive and Legislature

¶ 186 Negotiations over remuneration are a central feature of the landscape of public sector labour relations. The evidence before this Court (anecdotal and otherwise) suggests that salary negotiations have been occurring between provincial court judges and provincial governments in a number of provinces. However, from a constitutional standpoint, this is inappropriate, for two related reasons. First, as I have argued above, negotiations for remuneration from the public purse are indelibly political. For the judiciary to engage in salary negotiations would undermine public confidence in the impartiality and independence of the judiciary, and thereby frustrate a major purpose of s. 11(d). As the Manitoba Law Reform Commission has noted (in the Report on the

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Independence of Provincial Judges (1989), at p. 41):

> ... it forces them [i.e. judges] into the political arena and tarnishes the public perception that the courts can be relied upon to interpret and apply our laws without concern for the effect of their decisions on their personal careers or well-being (in this case, earnings).

¶ 187 Second, negotiations are deeply problematic because the Crown is almost always a party to criminal prosecutions in provincial courts. Negotiations by the judges who try those cases put them in a conflict of interest, because they would be negotiating with a litigant. The appearance of independence would be lost, because salary negotiations bring with them a whole set of expectations about the behaviour of the parties to those negotiations which are inimical to judicial independence. The major expectation is of give and take between the parties. By analogy with Généreux, the reasonable person might conclude that judges would alter the manner in which they adjudicate cases in order to curry favour with the executive. As Professor Friedland has written in A Place Apart: Judicial Independence and Accountability in Canada (1995), at p. 57, "head-to-head bargaining between the government and the judiciary [creates]... the danger of subtle accommodations being made". This perception would be heightened if the salary negotiations, as is usually the case, were conducted behind closed doors, beyond the gaze of public scrutiny, and through it, public accountability. Conversely, there is the expectation that parties to a salary negotiation often engage in pressure tactics. As such, the reasonable person might expect that judges would adjudicate in such a manner so as to exert pressure on the Crown.

¶ 188 When I refer to negotiations, I use that term as it is understood in the labour relations context. Negotiation over remuneration and benefits involves a certain degree of "horse-trading" between the parties. Indeed, to negotiate is "to bargain with another respecting a transaction" (Black's Law Dictionary (6th ed. 1990), at p. 1036). That kind of activity, however, must be contrasted with expressions of concern and representations by chief justices and chief judges of courts, or by representative organizations such as the Canadian Judicial Council, the Canadian Judges Conference, and the Canadian Association of Provincial Court Judges, on the adequacy of current levels of remuneration. Those representations merely provide information and cannot, as a result, be said to pose a danger to judicial independence.

¶ 189 I recognize that the constitutional prohibition against salary negotiations places the judiciary at an inherent disadvantage compared to other persons paid from the public purse, because they cannot lobby the executive and the legislature with respect to their level of remuneration. The point is put very well by Douglas A. Schmeiser and W. Howard McConnell in The Independence of Provincial Court Judges: A Public Trust (1996), at p. 13:

> Because of the constitutional convention that judges should not speak out on political matters, judges are at a disadvantage vis-à-vis other groups when making a case to governments for increments in salaries.

I have no doubt that this is the case, although to some extent, the inability of judges to engage in negotiations is offset by the guarantees provided by s. 11(d). In particular, the mandatory involvement of an independent commission serves as a substitute for negotiations, because it provides a forum in which members of the judiciary can raise concerns about the level of their remuneration that might have otherwise been advanced at the bargaining table. Moreover, a commission serves as an institutional sieve which protects the courts from political interference through economic manipulation, a danger which inheres in salary negotiations.

¶ 190 At the end of the day, however, any disadvantage which may flow from the prohibition of negotiations is a concern which the Constitution cannot accommodate. The purpose of the collective

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or institutional dimension of financial security is not to guarantee a mechanism for the setting of judicial salaries which is fair to the economic interests of judges. Its purpose is to protect an organ of the Constitution which in turn is charged with the responsibility of protecting that document and the fundamental values contained therein. If judges do not receive the level of remuneration that they would otherwise receive under a regime of salary negotiations, then this is a price that must be paid.

¶ 191 Finally, it should be noted that since these cases are only concerned with remuneration, the above prohibition addresses only negotiations which directly concern that issue. I leave to another day the question of other types of negotiations. For example, the judiciary and government can negotiate the form that the commission is to take, as was done in Ontario, where the Courts of Justice Act, Schedule, embodies an agreement between the government and the provincial court judges designed "to establish a framework for the regulation of certain aspects of the relationship between the executive branch of the government and the Judges, including a binding process for the determination of Judges' compensation" (para. 2). Agreements of this sort promote, rather than diminish, judicial independence.

(c) Judicial Salaries May Not Fall Below a Minimum Level

¶ 192 Finally, I turn to the question of whether the Constitution -- through the vehicle of either s. 100 or s. 11(d) -- imposes some substantive limits on the extent of salary reductions for the judiciary. This point was left unanswered by Beauregard. I note at the outset that neither the parties nor the interveners submitted that judicial salaries were close to those minimum limits here. However, since I have decided to lay down the parameters of the guarantee of collective or institutional financial security in these reasons, I will address this issue briefly.

¶ 193 I have no doubt that the Constitution protects judicial salaries from falling below an acceptable minimum level. The reason it does is for financial security to protect the judiciary from political interference through economic manipulation, and to thereby ensure public confidence in the administration of justice. If salaries are too low, there is always the danger, however speculative, that members of the judiciary could be tempted to adjudicate cases in a particular way in order to secure a higher salary from the executive or the legislature or to receive benefits from one of the litigants. Perhaps more importantly, in the context of s. 11(d), there is the perception that this could happen. As Professor Friedland has written, supra, at p. 53:

> We do not want judges put in a position of temptation, hoping to get some possible financial advantage if they favour one side or the other. Nor do we want the public to contemplate this as a possibility.

I want to make it very clear that the guarantee of a minimum salary is not meant for the benefit of the judiciary. Rather, financial security is a means to the end of judicial independence, and is therefore for the benefit of the public. As Professor Friedland has put it, speaking as a concerned citizen, it is "for our sake, not for theirs" (p. 56).

¶ 194 The idea of a minimum salary has been recognized in a number of international instruments. Article 11 of the Basic Principles on the Independence of the Judiciary, which was adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, states that:

> 11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law. [Emphasis added.]

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The U.N. Basic Principles were endorsed by the United Nations General Assembly on November 29, 1985 (A/RES/40/32), which later invited governments "to respect them and to take them into account within the framework of their national legislation and practice" (A/RES/40/146) on December 13, 1985. A more recent document is the Draft Universal Declaration on the Independence of Justice, which the United Nations Commission on Human Rights invited governments to take into account when implementing the U.N. Basic Principles (resolution 1989/32). Article 18(b) provides that:

> The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office, and shall be periodically reviewed to overcome or minimize the effect of inflation.

¶ 195 I offer three final observations. First, I do not address the question of what the minimum acceptable level of judicial remuneration is. We shall answer that question if and when the need arises. However, I note that this Court has in the past accepted its expertise to adjudicate upon rights with a financial component, such as s. 23 of the Charter (see Mahe v. Alberta, [1990] 1 S.C.R. 342). Second, although the basic minimum salary provides financial security against reductions in remuneration by the executive or the legislature, it is also a protection against the erosion of judicial salaries by inflation.

¶ 196 Finally, I want to emphasize that the guarantee of a minimum acceptable level of judicial remuneration is not a device to shield the courts from the effects of deficit reduction. Nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times. Rather, as I said above, financial security is one of the means whereby the independence of an organ of the Constitution is ensured. Judges are officers of the Constitution, and hence their remuneration must have some constitutional status.

E. Application of Legal Principles

¶ 197 I shall now measure the salary reductions in P.E.I., Alberta, and Manitoba according to the procedural and substantive aspects of the collective or institutional financial security of the judiciary. As we shall see shortly, the reductions in each of these provinces fall short of the standard set down by s. 11(d). What remedial consequences follow from these findings of unconstitutionality, however, are another matter entirely, to which I shall turn at the conclusion of this judgment.

(1) Prince Edward Island

(a) Salary Reduction

¶ 198 The salaries of Provincial Court judges in P.E.I. were and continue to be set by s. 3(3) of the Provincial Court Act. Until May 1994, s. 3(3) of the Provincial Court Act provided that:

> 3. ...
>
> (3) The remuneration of judges for any year shall be determined by calculating the average of the remuneration of provincial court judges in the other provinces of Canada as of April 1 in that year.

What this provision did was to fix the salaries of judges of the P.E.I. Provincial Court judges at a level equal to the average of the salaries of provincial court judges across the country.

¶ 199 However, s. 3(3) was amended in two ways on May 19, 1994. First, for judges appointed

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on or after April 1, 1994, the formula for calculating salaries was changed from the national average to the average of the three other Atlantic provinces in the preceding year, by s. 1 of An Act to Amend the Provincial Court Act, S.P.E.I. 1994, c. 49. Second, and more importantly, s. 3(3) was amended by the addition of the words "less 7.5%" at the end of the salary formula, by s. 10 of the Public Sector Pay Reduction Act. As amended, s. 3(3) now reads in full:

> 3. ...
>
> (3) The remuneration of judges for any year shall be determined
>
> (a) in respect of judges appointed before April 1, 1994, by calculating the average of the remuneration of provincial court judges in the other provinces of Canada as of April 1 in that year, less 7.5%;
>
> (b) in respect of judges appointed on or after April 1, 1994, by calculating the average of the remuneration of provincial court judges in the provinces of Nova Scotia, New Brunswick and Newfoundland on April 1 of the immediately preceding year, less 7.5%.

The evidence we have before us demonstrates that the net effect of these changes was to reduce judges' salaries by approximately 7.5 percent from $106,123.14 in 1993, to $98,243 as of May 17, 1994.

¶ 200 These changes were made by the legislature without recourse having first been made to an independent, objective, and effective process for determining judicial remuneration. In fact, no such body exists in P.E.I. Salaries cannot be reduced without first considering the report of a salary commission; if they are, then the reduction is unconstitutional. It is evident that the 7.5 percent reduction was therefore unconstitutional.

¶ 201 However, if in the future, after P.E.I. establishes a salary commission, that commission were to issue a report with recommendations which the provincial legislature declined to follow, a salary reduction such as the impugned one would probably be prima facie rational, and hence justified, because it would be part of an overall economic measure which reduces the salaries of all persons who are remunerated by public funds. I arrive at this view on the basis of an analysis of the Public Sector Pay Reduction Act. As the statement of facts which is appended to the Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island indicates, the Act was an overall measure which was directed at everyone who is paid from the public purse. The Act draws a distinction between "Public Sector Employees" and "Persons Paid From Public Funds"; Provincial Court judges fall into the latter group. Public sector employees are governed by Part II of the Act. The definition of public sector employees is very inclusive, and can be gleaned from s. 1(d), which defines the public sector employers who are covered by the Act. Included in this list are the provincial government, school boards, Crown agencies and corporations, health and community services councils and regional authorities, universities, and colleges. Section 6(1) provides that public sector employees who are paid more than $28,000 per year had their salaries reduced by 7.5 percent (to a minimum of $26,950 -- see s. 6(2)); and the salaries of those who made less than $28,000 annually were reduced by 3.75 percent. I do not consider the smaller salary reduction of those paid considerably less than Provincial Court judges to be of any significance for the disposition of these appeals.

¶ 202 There is no comparable definition of persons paid from public funds, who are governed by Part III of the Act, to the definition of those persons governed by Part II. The approach of Part III is

to deal with different categories of persons separately, partly because these persons are paid in different ways. However, notwithstanding these differences, a 7.5 percent reduction is applied in one way or another to all of these persons. For example, the annual, daily, or periodical allowances of members of provincial tribunals, commissions, and agencies are reduced by 7.5 percent (s. 9). Salary reductions for physicians are achieved by a 7.5 percent reduction of the envelope of funding set aside for the P.E.I. Medical Society (s. 11). Finally, a 7.5 percent reduction is achieved for judges of the P.E.I. Provincial Court by s. 10, which I have described above.

¶ 203 In sum, the Public Sector Pay Reduction Act imposed an across-the-board cut which reduced the salaries of substantially every person remunerated from public funds, including members of the P.E.I. Provincial Court. On its face, it is therefore prima facie rational. The facts surrounding the enactment of the Act support this initial conclusion. The Act was enacted as part of a government policy to reduce the provincial deficit, and was therefore designed to further the public interest. Although it is hard to assess the reasonableness of the factual foundation for this claim in the absence of a trial record, the statement of facts appended to the Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island suffices for the purposes of this illustrative discussion.

(b) Other Issues Regarding Financial Security

¶ 204 The appellants raised a number of objections to the treatment of Provincial Court judges by the Public Sector Pay Reduction Act and the Provincial Court Act. I have dealt with most of them in the course of my general analysis on collective or institutional financial security. Moreover, a number of the reference questions address specific aspects of financial security which I have also dealt with in my general analysis. However, there are two that I would like to address here, if only briefly.

(I) Negotiations

¶ 205 First, the appellants object that the Public Sector Pay Reduction Act is unconstitutional because it provides for the possibility of salary negotiations between judges of the P.E.I. Provincial Court and the executive. The appellants centre their submissions on s. 12(1), which is found in Part IV, entitled "Saving for Future Negotiations". According to the appellants, s. 12(1) permits negotiations between any persons whose salaries are reduced by the Act and the government to find alternatives to pay reductions. If s. 12(1) had this effect, I would agree with the appellants that it contravened the principle of judicial independence. I note that this view of the Act has been taken by MacDonald C.J. of the P.E.I. Supreme Court, Trial Division in Lowther v. Prince Edward Island (1994), 118 D.L.R. (4th) 665. Moreover, as the court below pointed out in Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, the Lieutenant Governor in Council of P.E.I. enacted a regulation subsequent to the decision in Lowther to clarify that the negotiation provisions did not cover Provincial Court judges (Regulation EC631/94).

¶ 206 However, I doubt whether the enactment of that regulation was necessary. I arrive at this conclusion on the basis of both the plain wording of s. 12(1) and the structure of the Act. Section 12 (1) is limited to negotiations "between a public sector employer and employees". The plain meaning of a public sector employee does not include members of the judiciary. This interpretation of s. 12 (1) is reinforced by the organization of the Act. Public sector employees are governed by Part II of the Act; by contrast, judges of the P.E.I. Provincial Court are governed by Part III, which is entitled "Persons Paid from Public Funds". Given the attempt of the Act to draw a distinction between persons like judges on the one hand, and public sector employees on the other, I have little doubt that the negotiation provisions, which expressly refer to public sector employees, do not apply to judges.

(ii) Miscellaneous Provisions

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¶ 207 The appellants also object to ss. 12(2) and 13 of the Provincial Court Act, which confer a discretion on the Lieutenant Governor in Council to grant leaves of absence due to illness and sabbatical leaves, respectively. It is unclear what the precise objection is to s. 13, other than making sabbatical leaves a matter for executive discretion. The objection to s. 12(2) is directed at the ability of the Lieutenant Governor in Council to grant leave "on such terms as he [sic] may consider appropriate". Both the objections to ss. 12(2) and 13 implicate individual financial security. However, they are without merit. To understand why, I return to Valente, where the question of discretionary benefits for judges was considered. A number of discretionary benefits were at issue: unpaid leave, permission to take on extra-judicial employment, special leave, and paid leave. The Court dismissed the concern that discretionary benefits undermined judicial independence, at p. 714:

> While it may well be desirable that such discretionary benefits or advantages, to the extent that they should exist at all, should be under the control of the judiciary rather than the Executive... I do not think that their control by the Executive touches what must be considered to be one of the essential conditions of judicial independence for purposes of s. 11(d) of the Charter.... [I]t would not be reasonable to apprehend that a provincial court judge would be influenced by possible desire for one of these benefits or advantages to be less than independent in his or her adjudication.

To my mind, the same reasoning applies here.

(2) Alberta

(a) Jurisdiction of the Alberta Court of Appeal

¶ 208 Next, I turn to the salary reduction in Alberta. As a preliminary point, I will consider whether the Alberta Court of Appeal was correct in declaring that it was without jurisdiction to hear the Crown's appeals under s. 784(1) of the Criminal Code. I conclude that s. 784(1) was applicable in this instance, and that the court below should have considered the merits of these appeals. Notwithstanding this error, we can assume the jurisdiction that the Court of Appeal had, and pronounce upon the merits ourselves, rather than send the matter back to be dealt with by the Alberta Court of Appeal. This Court would only be without jurisdiction to do so if the parties had appealed directly from the decision of the Alberta Court of Queen's Bench, which, through the operation of s. 784(1), was not the court of final resort in Alberta: Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835; R. v. Laba, [1994] 3 S.C.R. 965.

¶ 209 In order to understand why s. 784(1) is at issue, I must recapitulate some aspects of the proceedings below. The three respondents had been charged with offences under the Criminal Code, and all pled not guilty. The Crown elected to proceed summarily in all three cases. The three accused appeared, in separate proceedings, before the Alberta Provincial Court. They then sought recourse to the Alberta Court of Queen's Bench to advance their constitutional arguments, but at different stages in the proceedings before them.

¶ 210 Ekmecic and Campbell challenged the constitutionality of their trials in the Alberta Provincial Court before those trials had started. In their notices of motion, filed in the Alberta Court of Queen's Bench on May 5, 1994, the respondents Campbell and Ekmecic requested stays pursuant to s. 24(1) of the Charter, on the basis of an alleged violation of s. 11(d). These notices of motion were subsequently amended on May 11, 1994, during the proceedings before the Alberta Court of Queen's Bench, to include a request for an order in the nature of a prohibition as an alternative to the stay. The prohibition was sought to prevent Ekmecic and Campbell from being tried before the Alberta Provincial Court.

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¶ 211 By contrast, Wickman brought his motion before the superior court after the Crown had completed its case and six witnesses had testified for the defence, including Wickman. On May 8, 1994, Wickman filed a notice of motion in the Alberta Court of Queen's Bench for an order in the nature of certiorari quashing the information and proceedings at trial, an order in the nature of a prohibition to prevent the Alberta Provincial Court from proceeding further with his trial, and a series of declarations for alleged violations of s. 11(d). On May 9, 1994, he filed an amended notice of motion, asking for such further and other relief that the court deemed fit.

¶ 212 The difficulty which we now face arises from the mixed results of the trial judgment of the Alberta Court of Queen's Bench. On the one hand, the Crown lost, and the respondents won, because McDonald J. found that the Alberta Provincial Court was not an independent and impartial tribunal for the purposes of s. 11(d), and made a series of declarations of invalidity against the provincial legislation and regulations which were the source of the alleged violation of s. 11(d). But on the other hand, the Crown won, and the respondents lost, because McDonald J. held that the declarations had the effect of removing the source of the s. 11(d) violations, and therefore rendered the Alberta Provincial Court independent. There was no need to prevent the trials against Campbell and Ekmecic from commencing, or to prevent the trial of Wickman from continuing.

¶ 213 The Crown appealed the trial judgment on the basis of s. 784(1) of the Criminal Code, which provides that:

> 784. (1) An appeal lies to the court of appeal from a decision granting or refusing the relief sought in proceedings by way of mandamus, certiorari or prohibition.

A majority of the Alberta Court of Appeal held that it did not have jurisdiction to hear the appeals because the Crown was "successful" at trial and therefore could not rely on s. 784(1) (per Harradence and O'Leary J.A.) and because declaratory relief is non-prohibitory, and is therefore beyond the ambit of s. 784(1) (per Harradence J.A.). Conrad J.A., dissenting, disagreed on both points, and held that s. 784(1) could be relied on by successful parties, and that the declaratory relief granted by McDonald J. was prohibitory in nature.

¶ 214 I find the arguments advanced in support of the view that s. 784(1) was unavailable to the Crown to be unconvincing. First, it is not clear to me that only unsuccessful parties can avail themselves of s. 784(1). But even if this limitation applies, the Court of Appeal had jurisdiction. Although the Crown may have been successful in its efforts to commence and continue the trials against the respondents, it lost on the underlying finding of unconstitutionality. A series of declarations was made which had the effect of striking down numerous provisions found in legislation and regulations. It was, at most, a Pyrrhic victory for the Crown.

¶ 215 Second, I agree with Conrad J.A. that this is a case where the declaratory relief was essentially prohibitory in nature, and so came within the scope of s. 784(1), because the trial judgment granted relief sought in proceedings by way of prohibition. As the Crown stated in its factum, the declaratory judgments "did, in substance, prohibit the commencement or continuation of the trials before a court subject to the impugned legislation". The prohibitory nature of declaratory relief has been recognized before: e.g., R. v. Paquette (1987), 38 C.C.C. (3d) 333 (Alta. C.A.); R. v. Yes Holdings Ltd. (1987), 40 C.C.C. (3d) 30 (Alta. C.A.). Indeed, Paquette is analogous to these appeals, because the accused sought a prohibition and declaration at trial, but was only granted a declaration. The Crown appealed. The Court of Appeal held that it had jurisdiction under s. 719(1) (now s. 784(1)) of the Criminal Code, because the declaration was "in effect and intent prohibitory" (pp. 337-38).

¶ 216 I therefore conclude that the Court of Appeal had jurisdiction to hear the appeals under s.

784(1). This Court can exercise the jurisdiction that the Court of Appeal had, and consider these appeals.

(b) The Salary Reduction

¶ 217 The salary reduction for judges of the Alberta Provincial Court is unconstitutional for the same reason as the impugned reduction in P.E.I. That is because there is no independent, effective, and objective commission in Alberta which recommends changes to judges' salaries.

¶ 218 The salaries and pensions of Provincial Court judges in Alberta are set down by regulations made by the Lieutenant Governor in Council. The source of this regulation-making power is s. 17(1) of the Provincial Court Judges Act, which provides in part:

> 17(1) The Lieutenant Governor in Council may make regulations
>
> (a) fixing the salaries to be paid to judges;
>
> . . .
>
> (d) providing for the benefits to which judges are entitled, including,...
>
> (v) pension benefits for judges and their spouses or survivors;

According to the evidence before us, judges' remuneration was reduced by 5 percent from $113,964 in 1993 to $108,266 in 1994. This reduction was achieved through two different means. First, judges' salaries were directly reduced by 3.1 percent, by the Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94. This regulation set the salary of the Chief Judge at $124,245, the Assistant Chief Judge at $117,338, and other members of the Provincial Court at $110,431. These salaries had previously been set at $128,220, $121,092, and $113,964 by Payment to Provincial Judges Amendment Regulation, Alta. Reg. 171/91. Second, an additional 1.9 percent reduction was achieved through five unpaid days of leave (two unpaid statutory holidays and three unpaid work days). Unfortunately, we have not been pointed to the legal instrument through which those days of leave were imposed on members of the Provincial Court. I can only assume that these days of leave were achieved pursuant to s. 17(1)(d)(iii) of the Provincial Court Judges Act, which authorizes the Lieutenant Governor in Council to provide for leaves of absence.

¶ 219 The absence of an independent, effective, and objective procedure for reviewing a government proposal to reduce judicial salaries in Alberta, which is what s. 11(d)'s guarantee of judicial independence requires, means that the salary reduction in Alberta is unconstitutional. However, if in the future, after Alberta establishes a salary commission, that commission were to issue a report with recommendations which the provincial legislature declined to follow, a salary reduction such as the impugned one would probably be prima facie rational because it would be part of an overall economic measure which reduces the salaries of all persons who are remunerated by public funds.

¶ 220 The parties to this appeal engaged in a debate over how widespread and how uniform the salary reductions in the Alberta public sector were. To buttress their respective arguments, they attempted to adduce extrinsic evidence which had not been adduced in the courts below. We denied the motions to introduce this evidence, because the establishment of a factual record is a matter for trial courts, not courts of appeal. Moreover, nothing turns on this question, because we are not issuing judgment on the rationality of the salary reduction. For present purposes, it is sufficient to note that the trial judge proceeded on the basis that the salary reductions did apply across the public

sector. Accordingly, the salary reduction in Alberta would likely have been prima facie rational. However, in the absence of a complete factual record, for the purposes of this illustration, I would be unable to reach the ultimate conclusion that there was a reasonable factual foundation for the government's claim, and hence that the pay reduction was in fact rational.

(c) Miscellaneous Provisions

¶ 221 The respondents and interveners raised a number of objections to the scheme governing the remuneration of judges of the Alberta Provincial Court, which I shall now consider. Several of them centred on the permissive language in s. 17(1) of the Provincial Court Judges Act, which provides that the Lieutenant Governor in Council "may" set judicial salaries. The respondents submit that s. 17(1) violates s. 11(d) of the Charter because, on its plain language, it does not require the government to fix salaries and pensions. Applying the standard of the reasonable and informed person, the respondents argue that the permissive language of s. 17(1) creates a perception of a lack of judicial independence, because the independence of Provincial Court judges is not guaranteed by "objective conditions or guarantees" (Valente, supra, at p. 685).

¶ 222 What these arguments implicate are the requirements for individual financial security. As I stated above, Valente laid down two requirements: that salaries be established by law, and that they not be subject to arbitrary or discretionary interference by the executive. The appellant argues that both of these conditions are met by s. 1 of the Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94, which provides that judges "shall" be paid specified salaries. I agree that the regulation complies with the requirements for individual financial security. However, s. 17(1) of the Act does not. Its principal defect is the failure to lay down in mandatory terms that Provincial Court judges shall be provided with salaries.

¶ 223 The intervener Alberta Provincial Judges' Association raises a different issue -- the pension scheme for Alberta Provincial Court judges. Its submissions are somewhat unclear, but in the end, appear to assert that numerous changes to the operation of the pension plan demonstrate the "financial vulnerability of the judiciary". However, this analysis relies entirely on extrinsic evidence which was not accepted by this Court. As a result, I can do no more than agree with the trial judge, who found that there was insufficient evidence before him to properly consider whether the pension scheme complied with s. 11(d) of the Charter.

(3) Manitoba

(a) Bill 22 and the Salary Reduction

¶ 224 Finally, I turn to the salary reduction in Manitoba. I find that this salary reduction violates s. 11(d), because the salaries were reduced without the use of an independent, effective, and objective commission process for determining judicial salaries. Unlike in Alberta and P.E.I., where no such process existed, Manitoba had created a salary commission, the Judicial Compensation Committee ("JCC"). The unconstitutionality of the salary reduction in that province arises from the fact that the government ignored the JCC process.

¶ 225 The remuneration of the judges of the Manitoba Provincial Court was reduced by Bill 22. Section 9(1) of Bill 22 provided that:

> 9(1) The amount that would otherwise be paid to every person who receives remuneration as a judge of The Provincial Court... shall be reduced
>
> (a) for the period commencing on April 1, 1993 and ending on March 31, 1994, by 3.8%; and

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(b) for the period commencing on April 1, 1994 and ending on March 31, 1995, by an amount that is generally equivalent to the amount by which the wages of employees under a collective agreement with Her Majesty in right of Manitoba are reduced in the same period as a result of a requirement to take days or portions of days of leave without pay in that period. [Emphasis added.]

On a plain reading of s. 9(1), it is clear that the pay reduction for Provincial Court judges was mandatory for the 1993-94 fiscal year, and perhaps for the 1994-95 year, depending on the outcome of public sector collective bargaining.

¶ 226 Bill 22 imposed a salary reduction on members of the Manitoba Provincial Court. It was therefore necessary for the government to have prior recourse to an independent salary commission, which would have reported on the proposed reduction, before that legislation was enacted. Such a body already existed in Manitoba -- the JCC. The JCC is a statutory body, created by s. 11.1 of The Provincial Court Act. As the trial judge noted, s. 11.1 was enacted in partial response to the recommendation of the Manitoba Law Reform Commission, supra, chapter 4. The Commission expressed its concern with the setting of judicial remuneration by order in council, because it created the perception of a dependent relationship between the executive and the judiciary. It recommended the creation of an independent committee for determining judicial remuneration, operating according to the negative resolution procedure I described earlier. The Manitoba legislation, however, only empowers the independent committee to make non-binding recommendations to the legislature.

¶ 227 Section 11.1 lays down the membership and powers of the JCC. There are three members, all appointed by the Lieutenant Governor in Council. Two members are designated by the responsible Minister, and the remaining member is designated by the judges of the Manitoba Provincial Court (s. 11.1(2)). The Lieutenant Governor in Council appoints one of these three to be the chair (s. 11.1(2)). The term of office is two years (s. 11.1(1)). Once appointed, the JCC is charged with the mandate of reviewing and issuing a report to the Minister on the salaries and benefits payable to judges, including pensions, vacations, sick leave, travel expenses and allowances (s. 11.1(1)). Once this report is submitted, it must be tabled by the Minister before the provincial legislature within 30 days if the legislature is in session, or within 30 days of the legislature commencing a new session (s. 11.1(4)). Within 30 days of being tabled, the report must be referred to a standing committee of the legislature, which in turn must report back on the recommendations of the JCC within 60 days (s. 11.1(5)). It is then left to the legislature to determine whether it will accept the report of the standing committee (s. 11.1(6)). If the legislature adopts that report, all acts, regulations, and administrative practices are deemed to be amended as necessary to implement the report (s. 11.1(6)).

¶ 228 The evidence presented by the parties indicates that there have been two JCC's since s. 11.1 was added to The Provincial Court Act in 1990. In the same year, the first JCC was appointed by order in council (895/90). It held public hearings in January 1991, and issued its report in June 1991. That report was eventually laid before the legislature, which in turn referred it to a standing committee. The standing committee's report was adopted by the legislature on June 24, 1992. The report incorporated the recommendations of the JCC with respect to changes in judicial remuneration. It provided for a 3 percent increase for Manitoba Provincial Court judges effective April 3, 1993.

¶ 229 The first JCC seems to have operated in the manner envisioned by The Provincial Court Act -- changes were made to judicial remuneration after the JCC had issued its report, which was duly considered by a committee of the legislature. However, the problem in this appeal is that Bill 22 displaced the operation of the second JCC. As required by s. 11.1(1), a new JCC was appointed in October 1992, pursuant to an order in council (865/92). The second JCC received submissions

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from both the Provincial Court judges and the government in May 1993. However, before the JCC had convened or issued its report, the legislature enacted Bill 22 on July 27, 1993. The salaries of Manitoba Provincial Court judges were altered by s. 9 of the Bill, which I have cited above.

¶ 230 There was considerable debate among the parties over the interaction between s. 9 of Bill 22 and the JCC. The appellants argued that the JCC had constitutional status, and that Bill 22 violated s. 11(d) because it suspended the operation of the JCC and had therefore "effective[ly] repeal[ed] s. 11.1". In particular, they drew attention to the fact that Bill 22 changed salaries for a period of time (April 1, 1993 to March 31, 1994) which had been the object of a JCC report that had already been accepted by the legislature.

¶ 231 The respondent, in addition to rejecting the submission that the JCC had any constitutional status, placed a great deal of weight on the argument that there was in fact no conflict between Bill 22 and the continued operation of the JCC. Not only did Bill 22 not preclude the operation of the JCC; it in fact allowed for that process to continue. The respondent draws support for its submission from the wording of s. 9(1) of Bill 22, which provides that the 3.8 percent reduction is to apply to "[t]he amount that would otherwise be paid" (emphasis added). This language, it is said, was apparently intended to permit the continued operation of the JCC, which could have recommended increases to judges' salaries; these recommendations in turn, could have been accepted by the legislature.

¶ 232 I reject the submission of the respondent on this point. Bill 22 is constitutionally defective in two respects. First, s. 9(1)(a) reduced the salary for the 1993-94 financial year which had been set by the legislature on the basis of the previous JCC's recommendation without further recourse to that body. Second, s. 9(1)(b) effectively precluded the future involvement of the JCC, at least for the 1994-95 financial year.

¶ 233 I first consider s. 9(1)(a). That provision reduced the salaries that the judges would have otherwise received commencing April 1, 1993 by 3.8 percent, for the 1993-94 year. The base salary to which the 3.8 percent reduction applied was the salary arrived at as a result of the report of the first JCC; this is the significance of the words "would otherwise be paid" in s. 9(1). What is important is that this reduction was imposed without the benefit of a report from the second JCC, which had been constituted at the time. In fact, the second JCC was left out of the process entirely. Section 11(d) of the Charter requires that that change only be made after the report of an independent salary commission. The circumvention of the JCC by the province therefore violated an essential procedural requirement of the collective or institutional guarantee of financial security.

¶ 234 Moreover, I do not accept that s. 9(1)(b) of Bill 22 accommodated the possibility of a report from another JCC for a further salary increase, which the legislature could then accept, for 1994-95. The respondent's argument has theoretical appeal. However, that appeal is just that -- theoretical. It ignores the simple political reality that s. 11.1 of The Provincial Court Act leaves the ultimate decision on judicial remuneration with the provincial legislature, the same body that enacted Bill 22. It is exceedingly unlikely that the same legislature which sought to reduce judges' salaries in 1994-95 by enacting s. 9(1)(b) would then turn around and approve a JCC report which would potentially recommend increases to judges' salaries.

¶ 235 Finally, I consider whether the economic circumstances facing Manitoba were sufficiently serious to warrant the reduction of judges' salaries without recourse to the JCC. Scollin J. held, at trial, that there was an economic emergency in Manitoba. However, he defined (at p. 77) an economic emergency in much broader terms than I have above, as a situation

> [w]here, in the judgment of the Government, fiscal demands on the public treasury can be met only by immediate but determinate restraints on the Government's own

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spending....

By contrast, I have defined an economic emergency as a dire and exceptional situation precipitated by unusual circumstances, for example, such as the outbreak of war or pending bankruptcy. Although Manitoba may have faced serious economic difficulties in the time period preceding the enactment of Bill 22, the evidence tendered by the government does not establish that Manitoba faced sufficiently dire and exceptional circumstances to warrant the suspension of the involvement of the JCC.

¶ 236 In conclusion, the salary reduction imposed by s. 9(1) of Bill 22 violated s. 11(d) of the Charter, because the government failed to respect the independent, effective, and objective process for setting judicial remuneration which was already operating in Manitoba. The appellants also submitted that Bill 22 was unconstitutional because it discriminated against members of the judiciary. The provisions governing salary reductions for the judiciary, they note, are mandatory; s. 9 provides that judges' salaries "shall" be reduced. By contrast, s. 4, which governs persons employed in the broader public sector, is framed in permissive terms. It provides that public sector employers "may" require their employers to take up to 15 days of unpaid leave.

¶ 237 I decline to consider these submissions, because they go to the question of whether the government would have been justified in enacting legislation with terms identical to Bill 22 in rejection of the report of the JCC. Unlike cuts such as those in P.E.I. and Alberta, whose prima facie rationality is evident on their face because they apply across-the-board, the differential treatment of judges under Bill 22 is a matter better left, in its entirety, for future litigation, because the factual issues involved are by definition more complex. I note in passing, though, that s. 11(d) allows for differential treatment of judges, and hence does not require that mandatory salary reductions for judges be accompanied by salary reductions for absolutely every person who is paid from the public purse. It may be necessary to adopt different arrangements for different groups of persons, depending on the nature of the employment relationship they have with the government.

(b) The Conduct of the Executive in Manitoba

¶ 238 I now turn to the highly inappropriate conduct of the Manitoba provincial government, in the time period following the implementation of the salary reductions in that province. This conduct represents either an ignorance of, or a complete disrespect for judicial independence.

¶ 239 Earlier on in these reasons, I stated why it was improper for governments and the judiciary to engage in salary negotiations. The separation of powers demands that the relationship between the judiciary and the other branches be depoliticized. Moreover, remuneration from the public purse is an inherently political issue. It follows that judges should not negotiate changes in remuneration with executives and legislatures, because they would be engaging in political activity if they were to do so. Moreover, salary negotiations would undermine the appearance of independence, because those negotiations would bring with them a whole set of expectations about the behaviour of the parties to those negotiations which are inimical to judicial independence.

¶ 240 Salary negotiations between judges and the executive and legislature are clearly unacceptable. However, the record before this Court indicates that the Government of Manitoba initiated negotiations with the Manitoba Provincial Judges Association, and furthermore that those negotiations had the express purpose of setting salaries without recourse to the JCC. The first piece of documentary evidence is a letter from Chief Judge Webster to judges of the Manitoba Provincial Court, dated March 11, 1994. That letter describes an offer from the Minister of Justice for a salary increase of 2.3 percent. The letter also quotes the Minister as having made the offer "[o]n the condition that the Judicial Compensation Committee hearings do not proceed".

¶ 241 The President of the Manitoba Provincial Judges Association instructed counsel to accept the offer on March 31, 1994. This letter confirms that negotiations were to replace the JCC as the means whereby salaries were set. There seems to have been the expectation that the JCC would merely rubber-stamp the salary increase negotiated by the parties:

> The judges agree that this acceptance of this offer requires a joint recommendation to the Judicial Compensation Committee which ought to proceed forthwith and really without any hearing. It is also expected that the Compensation Committee will recommend to the Legislature adoption of the joint recommendation without further comment.

Alternatively, the Association also seems to have thought that the JCC would not convene at all. In a letter dated March 31, 1994, counsel for the Association informed counsel for the government that the judges accepted the offer "[subject to] the condition that the Judicial Compensation Committee hearings do not proceed". A few days later, on April 6, 1994, counsel for the Association sent a draft of a joint recommendation to be submitted to the JCC to counsel for the government. It is clear that both parties intended a negotiated salary increase to be an alternative to proceeding through the JCC.

¶ 242 I must confess that I am somewhat disturbed by this course of events, because it creates the impression that the Manitoba Provincial Judges Association was a willing participant in these negotiations, and thus compromised its own independence. If the Association had acted in this manner, its conduct would have been highly problematic. However, the surrounding circumstances have led me to conclude that the Association was effectively coerced into these negotiations. The offer of March 11, 1994 must be viewed against the background of Bill 22. As I mentioned earlier, Bill 22 violated s. 11(d) because it changed judicial remuneration without first proceeding through the JCC, and because it effectively precluded the future operation of the JCC for the 1994-95 financial year. Faced with the prospect of a JCC which was destined to be completely ineffectual, if not inoperative, the Association had little choice but to enter into salary discussions. An indication of the Association's relatively weak position is the fact that they accepted the government's offer without requesting any modifications.

¶ 243 That negotiations occurred between the provincial government and the Association, no matter how one-sided, was bad enough. What happened next was even worse, and illustrates why the Constitution must be read to prohibit negotiations between the judiciary and the other branches of government. The government seems to have learned that the Association was considering a constitutional challenge to Bill 22. It then refused to agree to making a joint submission with the Association to the JCC until the Association clarified its intentions regarding potential litigation.

¶ 244 Thus, on May 3, 1994, counsel for the government wrote that in light of the Association's failure to give an assurance that it would not be challenging Bill 22, the government "had to reconsider the draft recommendation" in order to clarify that the 2.3 percent increase would be subject to Bill 22. The government then proposed that the Association accept one of two alternative changes to the proposed draft recommendation to address its concerns. The Association accepted one of these changes on May 4, 1994, but made it clear that it wished to treat the joint recommendation and a possible challenge to Bill 22 as separate issues. Counsel for the government then replied, on May 5, 1994, that the government would not sign the joint recommendation unless it received "a clear and unequivocal statement" of the Association's intentions with regard to Bill 22. The clear implication of this letter, as of a letter sent by counsel for the government on May 19, 1994, was that the government would not proceed with the joint recommendation unless the Association agreed to forego litigation on Bill 22. No such assurance was given, and the joint recommendation was never made.

¶ 245 The overall picture which emerges is that the Government of Manitoba initiated negotiations with the Manitoba Provincial Judges Association, the purpose of which was to set

salaries without recourse to the independent, effective, and objective process centred on the JCC. Moreover, when the judges would not grant the government an assurance that they would not launch a constitutional challenge to Bill 22, the government threatened to abandon the joint recommendation.

¶ 246 The facts of this appeal vividly illustrate why salary negotiations between the judiciary and the other branches of government are unconstitutional. Negotiations force the organs of government to engage in conduct which is inconsistent with the character of the relationship between them. For example, the Manitoba government relied on pressure tactics of the sort which are characteristic of salary negotiations. Those tactics created an atmosphere of acrimony and discord, and were intended to induce a concession from the judiciary. Alternatively, the judiciary may have responded with a pressure tactic of its own. The expectations of give and take, and of threat and counter-threat, are fundamentally at odds with judicial independence. They raise the prospect that the courts will be perceived as having altered the manner in which they adjudicate cases, and the extent to which they will protect and enforce the Constitution, as part of the process of securing the level of remuneration they consider appropriate. In this light, the conduct of the Manitoba government was unacceptable.

V. Other Issues Raised in These Appeals

¶ 247 As I mentioned earlier, the issue which unites these appeals is whether and how s. 11(d)'s guarantee of judicial independence restricts and manner and extent by and to which provincial governments and legislatures can reduce the salaries of provincial court judges. This is a question of financial security. However, each of these appeals also implicates the other two aspects of judicial independence, security of tenure and administrative independence, to which I will now turn.

A. Prince Edward Island

(1) Security of Tenure

¶ 248 The appellants direct their submissions at the alleged lack of security of tenure created by s. 10 of the Provincial Court Act, as it stood at the time of the reference to the court below. They argue that the provision is constitutionally deficient in two respects: first, it permits the executive to suspend a judge if it has reason to believe that a judge is guilty of misbehaviour, or is unable to perform his or her duties properly, without requiring probable cause, and second, it is possible to remove judges without a prior inquiry. For these reasons, they submit that questions 1 and 2(c) of the Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island should be answered in the negative.

¶ 249 These arguments have been rendered moot by repeal and replacement of s. 10 by the Provincial Affairs and Attorney General (Miscellaneous Amendments) Act, S.P.E.I. 1995, c. 32. The amended legislation now requires that there be an inquiry in every case by a judge of the P.E.I. Supreme Court (s. 10(1)), that the judge whose conduct is being investigated be given notice of the hearing and a full opportunity to be heard (s. 10(3)), and that a finding of misbehaviour or inability to perform one's duties be a precondition to any recommendation for disciplinary measures. Because there will now always be a judicial inquiry before the removal of a judge, and because that removal must be based on actual cause, the new legislation meets the standard set down by Valente. It is unnecessary to consider the constitutionality of the former provisions.

¶ 250 Finally, I turn to question 2 of Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island, which purports to raise a series of questions about security of tenure. Aside from question 2(c), which addresses the provisions I have just described, the rest of these questions raise issues which fall outside the ambit of security of tenure. Since the sole focus of question 2 is security of tenure, whatever other aspects of judicial independence those questions

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might touch on is irrelevant for the purpose of answering that question. However, to some extent, questions 2(a) and (f) (pensions), questions 2(b) and (g) (the remuneration of Provincial Court judges), and questions 2(d) and (e) (discretionary benefits), which all touch on financial security, are dealt with by the various parts of question 4.

(2) Administrative Independence

¶ 251 The administrative independence of the P.E.I. Provincial Court was the subject of question 3 of the Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island. The appellants also raised in question 5, the residual question, a concern about administrative independence which was not addressed by the specific parts of question 3. To frame the analysis which follows, I will begin by recalling the meaning given to administrative independence in Valente. The Court defined administrative independence in rather narrow terms, at p. 712, as "[t]he essentials of institutional independence which may be reasonably perceived as sufficient for purposes of s. 11(d)". That essential minimum was defined (at p. 709) as control by the judiciary over

> assignment of judges, sittings of the court, and court lists -- as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions....

These matters "bear directly and immediately on the exercise of the judicial function" (p. 712). Le Dain J. took pains to contrast the scope of s. 11(d) with claims for an increased measure of autonomy for the courts over financial and personnel aspects of administration. Although Le Dain J. may have been sympathetic to judicial control over these aspects of administration, he clearly held that they were not within the ambit of s. 11(d), because they were not essential for judicial independence, at pp. 711-12:

> Although the increased measure of administrative autonomy or independence that is being recommended for the courts, or some degree of it, may well be highly desirable, it cannot in my opinion be regarded as essential for purposes of s. 11(d) of the Charter.

It is against this background that I analyse these questions.

¶ 252 I first address question 3. Question 3(a) asks whether the location of the P.E.I. Provincial Court with respect to the offices, inter alia, of Legal Aid, Crown Attorneys and representatives of the Attorney General undermines the administrative independence of the Provincial Court. These entities and departments are part of the executive, from which the judiciary must remain independent, but are located in the same building as the Provincial Court. The concern underlying this question is that this physical proximity may somehow undermine judicial independence. The statement of facts appended to the Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island, however, shows that these fears are unfounded, because the Provincial Court's offices are "separate and apart" from the other offices in the building. I therefore find that the location of the P.E.I. Provincial Court does not violate s. 11(d).

¶ 253 Question 3(b) asks whether it is a violation of s. 11(d) for P.E.I. Provincial Court judges not to administer their own budget. It is clear from Valente that while it may be desirable for the judiciary to have control over the various aspects of financial administration, such as "budgetary preparation and presentation and allocation of expenditure" (pp. 709-10), these matters do not fall within the scope of administrative independence, because they do not bear directly and immediately on the exercise of the judicial function. I therefore conclude that it does not violate s. 11(d) for judges of the P.E.I. Provincial Court not to administer their own budget.

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¶ 254 Question 3(c) asks whether "the designation of a place of residence of a particular Provincial Court Judge" undermines the administrative independence of the judiciary. Although the question does not refer to specific provisions of the Provincial Court Act, it seems that the relevant section is s. 4. Section 4(1)(b) authorizes the Chief Judge to "designate a particular geographical area in respect of which a particular judge shall act". Furthermore, under s. 4(2), "[w]here the residence of a judge has been established for the purpose of servicing a particular geographical area pursuant to clause (1)(b), that residence shall not be changed except with the consent of the judge".

¶ 255 Section 4 is constitutionally sound. Upon the appointment of a judge to the Provincial Court, it is necessary that he or she be assigned to a particular area. Furthermore, the stipulation that the residence of a sitting judge only be changed with that judge's consent is a sufficient protection against executive interference.

¶ 256 Question 3(d) asks if communications between a judge of the P.E.I. Provincial Court and the executive on issues relating to the administration of justice undermine the administrative independence of the judiciary. I decline to answer this question, because it is too vague -- it does not offer sufficient detail on the subject-matter of the communication. However, I do wish to note that the separation of powers, which s. 11(d) protects, does not prevent the different branches of government from communicating with each other. This was acknowledged in the Court of Appeal's judgment in Valente, supra, at p. 433, in a passage which was cited with approval by Le Dain J. at p. 709:

> The heads of the judiciary have to work closely with the representatives of the Executive unless the judiciary is given full responsibility for judicial administration.

¶ 257 Question 3(e) asks whether the vacancy in the position of the Chief Judge undermines the administrative independence of the P.E.I. Provincial Court. The statement of facts does not refer to a vacancy in this position, although it appears that Chief Judge Plamondon resigned on November 2, 1994, in connection with the dispute which led to this litigation. Nor does the statement of facts provide any detail on who was exercising the functions of the Chief Judge after he had resigned. The appellants contend that the Attorney General assumed the duties of the Chief Judge, whereas the respondent states that the duties of the Chief Judge were carried out by Provincial Court judges. In the absence of sufficient information, I decline to answer this question.

¶ 258 Question 3(f) asks whether the decision of the Attorney General both to decline to fund and to oppose an application to fund legal counsel for the Chief Judge and judges of the P.E.I. Provincial Court as interveners in the Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island violated the administrative independence of the court. It did not. As I stated above, the administrative independence of the judiciary encompasses control over those matters which "bear directly and immediately on the exercise of the judicial function". I do not see how the receipt of legal aid funding for judges to intervene in a court case furthers this purpose.

¶ 259 In contrast to the specific issues raised in question 3, the argument advanced under question 5 is much more substantive. The appellants allege that s. 17 of the Provincial Court Act authorizes serious intrusions into the administrative independence of the P.E.I. Provincial Court. I set out that provision in full:

> 17. The Lieutenant Governor in Council may make regulations for the better carrying out of the intent and purpose of this Act, and without limiting the generality thereof, may make regulations
>
> (a) respecting inquiries and the form and content of reports under section

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10;

(b) respecting the duties and powers of the Chief Judge;

(c) respecting rules of court governing the operation and conduct of a court presided over by a judge or by a justice of the peace; and

(d) respecting the qualifications, duties, responsibilities and jurisdiction of justices of the peace.

The appellants attack s. 17(b), (c), and (d). The first thing to note is that s. 17(d) is irrelevant to this appeal, because the Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island is confined to the independence of judges of the P.E.I. Provincial Court, and does not touch on justices of the peace. However, that aside, parss. 17(b) and (c) of s. 17 do appear to give broad regulatory power to the executive with respect to matters that might fall within the ambit of administrative independence.

¶ 260 However, s. 17 has to be read subject to s. 4(1), which confers broad administrative powers on the Chief Judge:

4. (1) The Chief Judge has the power and duty to administer the provincial court, including the power and duty to

(a) designate a particular case or other matter or class of cases or matters in respect of which a particular judge shall act;

(b) designate a particular geographical area in respect of which a particular judge shall act;

(c) designate which court facilities shall be used by particular judges;

(d) assign duties to judges.

The matters over which the Chief Judge is given power by s. 4(1) are almost identical to the list of matters which Le Dain J. held, in Valente, to constitute administrative independence: the assignment of judges, sittings of the court and court lists, the allocation of courtrooms, and the direction of administrative staff carrying out these functions. Section 4(1) therefore vests with the P.E.I. Provincial Court, in the person of the Chief Judge, control over decisions which touch on its administrative independence. In light of the broad provisions of s. 4(1), I see no problem with s. 17.

¶ 261 I hasten to add that by regarding the powers of the Chief Judge under s. 4(1) as a guarantee of the collective or institutional administrative independence of the P.E.I. Provincial Court as a whole, I do not suggest that the Chief Judge can in all circumstances make administrative decisions for the entire court. For reasons that I develop below, there are limits to the Chief Judge's ability to make such decisions on behalf of his or her colleagues.

B. Alberta

(1) Security of Tenure

¶ 262 The trial judge found two sets of provisions of the Provincial Court Judges Act to violate s. 11(d) for failing to adequately protect security of tenure. He held that the presence of non-judges on the Judicial Council, the body with the power to receive and investigate complaints against members

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of the Alberta Provincial Court, violated s. 11(d) because Valente had held that judges could only be removed after a "judicial inquiry". As a result, he declared ss. 11(1)(c) and 11(2) of the Act, which empower the Council to investigate complaints, make recommendations to the Minister of Justice and Attorney General, and refer complaints to the Chief Judge of the Court or a committee of the Judicial Council for inquiry and report, to be of no force or effect. As well, he held that use of "lack of competence" and "conduct" as grounds of removal in s. 11(1)(b) of the Act also violated s. 11(d) of the Charter, because those grounds were unconstitutionally broad, and declared that provision to be of no force or effect.

¶ 263 The parties made submissions on both of these sets of provisions before this Court. However, we need not consider the merits of their arguments, because the constitutionality of those provisions was not properly before the trial judge. The respondents did not raise the constitutionality of these provisions at trial. Rather, as the trial judge conceded, they only sought remedies against provisions in the Provincial Court Judges Act governing the removal of supernumerary judges. Nevertheless, without the benefit of submissions, and without giving the required notice to the Attorney General for Alberta under s. 25 of the Judicature Act, R.S.A. 1980, c. J-1, the trial judge held (at p. 160) that he was

> at liberty to decide generally (and not limited to supernumerary judges) whether the statutory removal procedure fails to satisfy the security of tenure condition which is guaranteed by s. 11(d).

¶ 264 With respect, I cannot agree. It was not appropriate for the trial judge to proceed on his own motion to consider the constitutionality of these provisions, let alone make declarations of invalidity. As I will indicate at the conclusion of this judgment, this part of his reasons cannot stand.

(2) Administrative Independence

¶ 265 However, I do agree with the trial judge's holdings that ss. 13(1)(a) and 13(1)(b) of the Provincial Court Judges Act are unconstitutional. Both of these provisions confer powers on the Attorney General and Minister of Justice (or a person authorized by him or her) to make decisions which infringe upon the administrative independence of the Alberta Provincial Court.

¶ 266 Section 13(1)(a) confers the power to "designate the place at which a judge shall have his residence". Counsel for the appellant rightly points out that it is reasonable (although not necessary) to vest responsibility for designating the residence of judges with the executive, because that decision concerns the proper allocation of court resources. However, my concern is that, as it is presently worded, s. 13(1)(a) creates the reasonable apprehension that it could be used to punish judges whose decisions do not favour the government, or alternatively, to favour judges whose decisions benefit the government. Section 13(1)(a)'s constitutional defect lies in the fact that it is not limited to the initial appointment of judges. The appellant tried to demonstrate that s. 13(1)(a), when properly interpreted, was so confined. However, the words of the provision are not qualified in the manner in which the appellant suggests. Section 13(1)(a) authorizes the Minister of Justice and the Attorney General to designate a judge's place of residence at any time, including his initial appointment or afterward. It therefore violates s. 11(d) of the Charter.

¶ 267 Section 13(1)(b) is also unconstitutional. It confers the power to "designate the day or days on which the Court shall hold sittings". This provision violates s. 11(d) because it flies in the face of explicit language in Valente, supra, at p. 709, which held that the administrative independence of the judiciary, encompasses, inter alia, "sittings of the court".

¶ 268 I do, however, wish to make one further comment in respect of this issue. The strongest argument made by the appellant in favour of the constitutionality of s. 13(1)(b) is that giving the

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executive control over sitting days enables the executive to give specific dates to defendants for their first appearance in criminal proceedings. The implication of this argument is that judicial control of the dates of court sittings would preclude the establishment of a system to inform defendants when they must first appear. This argument, however, is incorrect, because it ignores the fact that the courts can and should coordinate their sitting days with the relevant government authorities.

C. Manitoba: The Closing of the Provincial Court

¶ 269 One of the issues raised at trial in the Manitoba case, and pursued on appeal, is whether the Government of Manitoba infringed the administrative independence of the Manitoba Provincial Court by effectively shutting down those courts on a number of days known as "Filmon Fridays". The trial judge made a specific finding of fact that control over sitting days had remained with the judiciary, largely because the Chief Judge had been consulted on the withdrawal of court staff, and because the government had assured the Chief Judge that had she decided that the Provincial Court would remain open on those days, adequate staff would have been provided.

¶ 270 However, a careful perusal of the record has led me to conclude that Scollin J. made an overriding and palpable error in making this factual finding. The record shows that the government effectively shut down the Manitoba Provincial Court by ordering the withdrawal of court staff several days before the Chief Judge announced the closing of the Manitoba Provincial Court. As well, the government also shut down the courts by rescheduling trials involving accused persons who had already been remanded by the court. These acts constituted a violation of the administrative independence of the Manitoba Provincial Court. Moreover, even if Scollin J. were correct in finding that the Chief Judge had retained control throughout, I would nevertheless find that there had been a violation of s. 11(d), because it was not within her constitutional authority unilaterally to shut down the Manitoba Provincial Court.

¶ 271 The chronology of events illustrates how it was the executive, not the judiciary, that shut down the Manitoba Provincial Court. Bill 22 was enacted on July 27, 1993. Section 4 of the Bill conferred the power on public sector employers, including the province of Manitoba, to require employees to take days of leave without pay. It appears that the government used s. 4 to order its employees to take 10 unpaid days of leave in 1993, and on these days, the Provincial Court of Manitoba, with the exception of one adult custody docket court and one youth custody docket court, was closed down.

¶ 272 However, the events which concern me here transpired in the spring of 1994. On March 1, 1994, letters were sent from the Manitoba Civil Service Commission to the Crown Attorneys of Manitoba Association, the Legal Aid Lawyers' Association, and the Manitoba Government Employees' Union. These letters gave these groups notice that they would be required to take 10 unpaid days of leave, pursuant to Bill 22. The dates for the unpaid days of leave were announced by the Assistant Deputy Minister, Marvin Bruce, on March 24, 1994:

> 2. Office closures will be on 7 Fridays in the summer months commencing July 8, 1994 to and including August 19, 1994 and 3 days during Christmas time, that is, December 28, 29 and 30th, 1994.

Almost two weeks passed before a memorandum was sent from Chief Judge Webster to all members of the Manitoba Provincial Court on April 6, 1994. Her memorandum states in full:

> Further to my memo of March 24th, the following 10 days have been designated as reduced work week days:
>
> July 8, 15, 22, 29; August 5, 12, 19; December 28, 29, 30.

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During the 10 days on which the government offices are closed ALL PROVINCIAL COURTS will be closed with the exception of the two custody courts:

-One at 408 York
-One at the Manitoba Youth Centre.

(Signature)

The days on which the Provincial Court were closed was identical to the days on which the Manitoba government required its employees to take unpaid days of leave.

¶ 273 These facts clearly demonstrate that the decision to withdraw court staff was taken almost two weeks before the Chief Judge ordered the closure of the Manitoba Provincial Court. As well, the court was closed on the same days as the unpaid days of leave for court staff. Moreover, it is the uncontroverted evidence of Judge Linda Giesbrecht, which was presented at trial, that the Manitoba Provincial Court could not function "without the assistance and presence of Courts' staff including Court clerks, Crown Attorneys, Legal Aid lawyers and Sheriff's officers and other administrative personnel". The only conclusion I can draw is that the government, through its decision of March 24, 1994, effectively forced Chief Judge Webster to close the Manitoba Provincial Court by her decision of April 6, 1994.

¶ 274 I reject the argument that the government would have provided the necessary staff to keep the Manitoba Provincial Court open if the Chief Judge had so requested. Although it had apparently made this offer in conversations with the Chief Judge before the closure was announced, the letter from Marvin Bruce announcing the dates of closure makes no reference to the possibility of staff being required on days designated as unpaid days of leave. Moreover, this conclusion is strengthened by the fact that Crown attorneys rescheduled trials that were set to be held on "Filmon Fridays" before Chief Judge Webster announced the closure of the Manitoba Provincial Court. In particular, the record indicates that on March 22, 1994, a trial scheduled for Friday, July 8, 1994, was moved to September 28, 1994, on the motion of a Crown attorney.

¶ 275 Even if the trial judge had been right to conclude that the Chief Judge retained control over the decision to close the Manitoba Provincial Court throughout, there would nevertheless have been a violation of s. 11(d), because the Chief Judge would have exceeded her constitutional authority when she made that decision. As this Court held in Valente, control over the sittings of the court falls within the administrative independence of the judiciary. And as I indicated above, administrative independence is a characteristic of judicial independence which normally has a collective or institutional dimension. It attaches to the court as a whole. Although certain decisions may be exercised on behalf of the judiciary by the Chief Judge, it is important to remember that the Chief Judge is no more than "primus inter pares": Ruffo v. Conseil de la magistrature, [1995] 4 S.C.R. 267, at para. 59. Important decisions regarding administrative independence cannot be made by the Chief Judge alone. In my opinion, the decision to close the Manitoba Provincial Court is precisely this kind of decision.

¶ 276 In conclusion, the closure of the Manitoba Provincial Court on "Filmon Fridays" violated s. 11(d) of the Charter. Since s. 4 of Bill 22 authorized the withdrawal of court staff on "Filmon Fridays", and hence enabled the government to close the Manitoba Provincial Court on those days, that provision is therefore unconstitutional. It is worth emphasizing that s. 4 cannot be read down in such a precise way so as not to authorize conduct which violates the Charter. Although reading down the impugned legislation to the extent strictly necessary would be the normal solution in a case like this (Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038), this is very difficult in relation to violations of s. 11(d) because, unlike other Charter provisions, it requires that judicial

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independence be secured by "objective conditions or guarantees" (Valente, supra, at p. 685). Objective guarantees are the means by which the reasonable perception of independence is secured and, hence, any legislative provision which does not contain those objective guarantees is unconstitutional. In effect, then, to read down the legislation to its proper scope would amount to reading in those objective conditions and guarantees. This would result in a fundamental rewriting of the legislation. On the other hand, if the Court were to strike down the legislation in its entirety, the effect would be to prevent its application to all those employees of the Government of Manitoba who were required to take leave without pay. In the circumstances, the best solution would be to read down the legislation so that it would simply not apply to government workers employed in the Manitoba Provincial Court. In other words, the provision should be read as exempting provincial court staff from it. This is the remedy that best upholds the Charter values involved and will occasion the lesser intrusion on the role of the legislature. See Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69, at p. 105. Accordingly, s. 4 should be read as follows:

> 4(1) Notwithstanding any Act, regulation, collective agreement, employment contract or arrangement, arbitral or other award or decision or any other agreement or arrangement of any kind, an employer may, subject to subsection (2) and the other provisions of this Part, require employees of the employer, except employees of the Provincial Court, to take days or portions of days as leave without pay at any point within a 12-month period authorized in subsection (2), provided that the combined total of days and portions of days required to be taken does not exceed 15 days in the 12-month period for any one employee.

VI. Section 1

¶ 277 I must now consider whether any of the violations of s. 11(d) can be justified under s. 1 of the Charter.

A. Prince Edward Island

¶ 278 The respondent, the Attorney General of P.E.I., has offered no submissions on the absence of an independent, effective, and objective process to determine judicial salaries. For this reason, I conclude that there are inadequate submissions upon which to base a s. 1 analysis. Since the onus is on the Crown to justify the infringement of Charter rights, the violation of s. 11(d) is not justified under s. 1.

B. Alberta

¶ 279 The appellant Attorney General for Alberta has made no submissions on s. 1. Since the onus rests with the Crown under s. 1, I must conclude that the violations of s. 11(d) are not justified.

C. Manitoba

¶ 280 The respondent Attorney General of Manitoba has offered brief submissions attempting to justify the infringements of s. 11(d) by Bill 22 under s. 1. However, the respondent has offered no justification whatsoever either for the circumvention of the independent, effective, and objective process for recommending judicial salaries that centres on the JCC before imposing the salary reduction on members of the Manitoba Provincial Court, or for the attempt to engage in salary negotiations with the Provincial Judges Association. Instead, its submissions focussed on the closure of the courts. I therefore have no choice but to conclude that the effective suspension of the operation of the JCC, and the attempted salary negotiations, are not justified under s. 1. Moreover, since the attempted negotiations were not authorized by a legal rule, be it a statute, a regulation, or a

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rule of the common law (R. v. Thomsen, [1988] 1 S.C.R. 640, at pp. 650-51), they are incapable of being justified under s. 1 because they are not prescribed by law.

¶ 281 The respondent attempted to justify the closure of the Manitoba Provincial Court as a measure designed to reduce the provincial deficit. Thus, it has chosen to characterize this decision as a financial measure. However, this begs the prior question of whether measures whose sole purpose is budgetary can justifiably infringe Charter rights. This Court has already answered this question in the negative, because it has held on previous occasions that budgetary considerations do not count as a pressing and substantial objective for s. 1. In Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177, at p. 218, Wilson J. speaking for the three members of the Court who addressed the Charter (including myself), doubted that "utilitarian consideration[s]... [could] constitute a justification for a limitation on the rights set out in the Charter" (emphasis added). The reason behind Wilson J.'s scepticism was that "the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so". I agree.

¶ 282 I expressed the same view in Schachter v. Canada, [1992] 2 S.C.R. 679, where I spoke for the Court on this point. In Schachter, I clarified that while financial considerations could not be used to justify the infringement of Charter rights, they could and should play a role in fashioning an appropriate remedy under s. 52 of the Constitution Act, 1982. As I said at p. 709:

> This Court has held, and rightly so, that budgetary considerations cannot be used to justify a violation under s. 1. However, such considerations are clearly relevant once a violation which does not survive s. 1 has been established, s. 52 is determined to have been engaged and the Court turns its attention to what action should be taken thereunder. [Emphasis added.]

¶ 283 While purely financial considerations are not sufficient to justify the infringement of Charter rights, they are relevant to determining the standard of deference for the test of minimal impairment when reviewing legislation which is enacted for a purpose which is not financial. Thus, in Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, at p. 994, the Court stated that "the distribution of scarce government resources" was a reason to relax the strict approach to minimal impairment taken in R. v. Oakes, [1986] 1 S.C.R. 103; the impugned legislation was aimed at the protection of children. In McKinney v. University of Guelph, [1990] 3 S.C.R. 229, where the issue was the constitutionality of a provision in provincial human rights legislation, La Forest J. stated at p. 288 that "the proper distribution of scarce resources must be weighed in a s. 1 analysis". Finally, in Egan v. Canada, [1995] 2 S.C.R. 513, where a scheme for pension benefits was under attack, Sopinka J. stated at para. 104 that

> government must be accorded some flexibility in extending social benefits.... It is not realistic for the Court to assume that there are unlimited funds to address the needs of all.

¶ 284 Three main principles emerge from this discussion. First, a measure whose sole purpose is financial, and which infringes Charter rights, can never be justified under s. 1 (Singh and Schachter). Second, financial considerations are relevant to tailoring the standard of review under minimal impairment (Irwin Toy, McKinney and Egan). Third, financial considerations are relevant to the exercise of the court's remedial discretion, when s. 52 is engaged (Schachter).

¶ 285 In this appeal, the Manitoba government has attempted to justify the closure of the Manitoba Provincial Court solely on the basis of financial considerations, and for that reason, the closure of the Provincial Court cannot be justified under s. 1. Given this conclusion, it is not necessary for me to consider the parties' submissions on rational connection, minimal impairment, and proportionate effect. Were I to do so, however, I would hold that the closure of the courts did

not minimally impair the right to be tried by an impartial and independent tribunal, because it had the effect of absolutely denying access to the courts for the days on which they were closed.

VII. The Remarks of Premier Klein

¶ 286 On a final note, I have decided not to comment on the remarks made by Premier Klein in the time period following the implementation of the salary reduction in Alberta, except to say that they were unfortunate and reflect a misunderstanding of the theory and practice of judicial independence in Canada. If the Premier had concerns regarding the conduct of a Provincial Court judge, the proper course of action would have been for him to lodge a complaint with the Judicial Council, not to take up the matter himself during a radio interview. I note, and am comforted by the fact, that Premier Klein effectively distanced himself from those remarks later on in a letter he sent to Chief Judge Wachowich of the Alberta Provincial Court, in which he stated that he was "well aware" of the process established to deal with judicial conduct, and that he had "no intention or desire to interfere with that process".

VIII. Summary

¶ 287 Given the length and complexity of these reasons, I summarize the major principles governing the collective or institutional dimension of financial security:

1. It is obvious to us that governments are free to reduce, increase, or freeze the salaries of provincial court judges, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class.

2. Provinces are under a constitutional obligation to establish bodies which are independent, effective, and objective, according to the criteria that I have laid down in these reasons. Any changes to or freezes in judicial remuneration require prior recourse to the independent body, which will review the proposed reduction or increase to, or freeze in, judicial remuneration. Any changes to or freezes in judicial remuneration made without prior recourse to the independent body are unconstitutional.

3. As well, in order to guard against the possibility that government inaction could be used as a means of economic manipulation, by allowing judges' real wages to fall because of inflation, and in order to protect against the possibility that judicial salaries will fall below the adequate minimum guaranteed by judicial independence, the commission must convene if a fixed period of time (e.g. three to five years) has elapsed since its last report, in order to consider the adequacy of judges' salaries in light of the cost of living and other relevant factors.

4. The recommendations of the independent body are non-binding. However, if the executive or legislature chooses to depart from those recommendations, it has to justify its decision according to a standard of simple rationality -- if need be, in a court of law.

5. Under no circumstances is it permissible for the judiciary to engage in negotiations over remuneration with the executive or representatives of the legislature. However, that does not preclude chief justices or judges, or bodies representing judges, from expressing concerns or making representations to governments regarding judicial remuneration.

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IX. Conclusion and Disposition

A. Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island and Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island

(1) Answers to Reference Questions (Appendices "A" and "B")

¶ 288 The answers to the reference questions are as follows:

(a) Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island

Question 1

(a): No. Without prior recourse to an independent, effective, and objective salary commission, the Legislature of P.E.I. cannot, even as part of an overall public economic measure, decrease, increase, or otherwise adjust the remuneration of Judges of the P.E.I. Provincial Court.

(b): Yes.

Question 2: No.

(b) Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island

Question 1

(a): Yes.
(b): Yes.
(c): No.

Question 2

(a): No.
(b): No.
(c): Since this question has been rendered moot by the amendment of s. 10 of the Provincial Court Act, I decline to answer this question.

(d): No.
(e): No.
(f)
(I): No.
(ii): No.
(iii): No.
(iv): No.
(g): No.

Question 3

(a): No.
(b): No.

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(c): No.
(d): This question is too vague to answer.
(e): There is insufficient information to answer this question.
(f): No.
(g): No.

Question 4

(a): Yes. The explanation for this answer is the same as for the answer to question 1(a) of the Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island.

(b): Yes. The explanation for this answer is the same as for the answer to question 1(a) of the Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island.

(c): No.
(d): No. Although salary negotiations are prohibited by s. 11(d), on the facts, no such negotiations took place, and so the independence of the judges of the P.E.I. Provincial Court was not undermined.

(e): Yes. The explanation for this answer is the same as for the answer to question 1(a) of the Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island.

(f): No.
(g): No.
(h)
(I): No.
(ii): No.
(iii): No.
(iv): No.
(I): Yes.
(j): No.
(k): No.

Question 5: No.
Question 6: No.
Question 7: Because I have answered question 6 in the negative, it is not necessary to answer this question.

Question 8: No.

(2) Disposition

¶ 289 I would allow the appeals in Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, with respect to questions 1(a) and 2, and in Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island, with respect to questions 1 (c), 4(a), (b), (e) and (i), and 8. I would also allow the cross-appeal on question 1(a) of the Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island. I award costs to the appellants throughout.

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B. R. v. Campbell, R. v. Ekmecic and R. v. Wickman

(1) Answers to Constitutional Questions (Appendix "C")

¶ 290 The answers to the constitutional questions are as follows:

Question 1:	Yes.
Question 2:	Yes.
Question 3:	The constitutionality of these provisions was not properly before the Court.
Question 4:	The constitutionality of these provisions was not properly before the Court.
Question 5:	Yes.
Question 6:	Yes.
Question 7:	No.

(2) Disposition

¶ 291 I would allow the appeal by the Crown from the decision of the Alberta Court of Appeal that it was without jurisdiction to hear these appeals under s. 784(1) of the Criminal Code. I would also allow the appeal by the Crown from McDonald J.'s holding that ss. 11(1)(c), 11(2) and 11(1)(b) of the Provincial Court Judges Act were unconstitutional. However, I would dismiss the Crown's appeal from McDonald J.'s holdings that the 5 percent pay reduction imposed on members of the Alberta Provincial Court by the Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94, and ss. 13(1)(a) and 13(1)(b) of the Provincial Court Judges Act, were unconstitutional. Finally, I would declare s. 17(1) of the Provincial Court Judges Act to be unconstitutional.

¶ 292 The Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94, is therefore of no force or effect. However, given the institutional burdens that must be met by Alberta, I suspend this declaration of invalidity for a period of one year [See Note 2 below]. I also declare ss. 13(1)(a), 13(1)(b) and 17(1) of the Alberta Provincial Court Judges Act to be of no force or effect. As there were no submissions as to costs, none shall be awarded.

Note 2: See [1998] 1 S.C.R. 3, para. 15.

C. Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)

(1) Answers to Constitutional Questions (Appendix "D")

¶ 293 The answers to the constitutional questions are as follows:

Question 1
(a): Yes.
(b): No.
Question 2

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(a): Yes.
(b): No.
Question 3
(a): Yes.
(b): No.

(2) Disposition

¶ 294 I would sever the phrase "as a judge of The Provincial Court or" from s. 9 of Bill 22, and would accordingly declare the salary reduction imposed on judges of the Manitoba Provincial Court to be of no force or effect. Even though Bill 22 is no longer in force, that does not affect the fully retroactive nature of this declaration of invalidity. I would also issue mandamus, directing the government to perform its statutory duty, pursuant to s. 11.1(6) of The Provincial Court Act, to implement the report of the standing committee of the provincial legislature which recommended a 3 percent increase to judges' salaries effective April 3, 1993, and which was approved by the provincial legislature on June 24, 1992. If the government wishes to persist in its decision to reduce the salaries of Manitoba Provincial Court judges for the 1993-94 year by 3.8 percent, and for the 1994-95 year by an amount generally equivalent to the amount by which the salaries of employees under a collective agreement with the Crown in right of Manitoba were reduced, it must remand the matter to the JCC. Only after the JCC has issued a report, and the statutory requirements laid down in s. 11.1 of The Provincial Court Act have been complied with, is it constitutionally permissible for the provincial legislature to reduce the salaries of Provincial Court judges as it sought to do through Bill 22. I also issue a declaration that the requirement that the staff of the Provincial Court take unpaid leave and the resulting closure of the Provincial Court during the summer of 1994 on "Filmon Fridays" violated the judicial independence of that court, and direct that s. 4(1) of Bill 22 be read in the way I have described above. Finally, I issue a declaration that the Manitoba government violated the judicial independence of the Provincial Court by attempting to engage in salary negotiations with the Manitoba Provincial Judges Association.

¶ 295 I would allow therefore the appeal in Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice), with respect to the salary reduction imposed on members of the Manitoba Provincial Court, the closure of the Manitoba Provincial Court, and the attempt by the provincial executive to engage in salary negotiations with the judges of the Provincial Court. Costs are awarded to the appellants throughout.

The following are the reasons delivered by

LA FOREST J. (dissenting in part):—

I. Introduction

¶ 296 The primary issue raised in these appeals is a narrow one: has the reduction of the salaries of provincial court judges, in the circumstances of each of these cases, so affected the independence of these judges that persons "charged with an offence" before them are deprived of their right to "an independent and impartial tribunal" within the meaning of s. 11(d) of the Canadian Charter of Rights and Freedoms? I have had the advantage of reading the reasons of the Chief Justice who sets forth the facts and history of the litigation. Although I agree with substantial portions of his reasons, I cannot concur with his conclusion that s. 11(d) forbids governments from changing judges' salaries without first having recourse to the "judicial compensation commissions" he describes. Furthermore, I do not believe that s. 11(d) prohibits salary discussions between governments and judges. In my view, reading these requirements into s. 11(d) represents both an unjustified departure from established precedents and a partial usurpation of the provinces' power to set the salaries of inferior court judges pursuant to ss. 92(4) and 92(14) of the Constitution Act, 1867. In addition to these

issues, the Chief Justice deals with a number of other questions respecting the independence of provincial court judges that were raised by the parties to these appeals. I agree with his disposition of these issues.

¶ 297 But if the Chief Justice and I share a considerable measure of agreement on many of the issues raised by the parties, that cannot be said of his broad assertion concerning the protection provincially appointed judges exercising functions other than criminal jurisdiction are afforded by virtue of the preamble to the Constitution Act, 1867. Indeed I have grave reservations about the Court entering into a discussion of the matter in the present appeals. Only minimal reference was made to it by counsel who essentially argued the issues on the basis of s. 11(d) of the Charter which guarantees that anyone charged with an offence is entitled to a fair hearing by "an independent and impartial tribunal". I observe that this protection afforded in relation to criminal proceedings is expressly provided by the Charter.

¶ 298 I add that, in relation to prosecutions for an offence, there are compelling reasons for including this guarantee to supplement the specific constitutional protection for the federally appointed courts set out in ss. 96-100 of the Constitution Act, 1867. Being accused of a crime is one of the most momentous encounters an individual can have with the power of the state. Such persons are the sole beneficiaries of the rights set out in s. 11(d). No explanation is required as to why it is essential that the fate of accused persons be in the hands of independent and impartial adjudicators.

¶ 299 Whether, and to what extent, other persons appearing before inferior courts are entitled to such protection is a difficult and open question; one which may have significant implications for the administration of justice throughout the land. Before addressing such an important constitutional issue, it is, in my view, critical to have the benefit of full submissions from counsel.

¶ 300 My concern arises out of the nature of judicial power. As I see it, the judiciary derives its public acceptance and its strength from the fact that judges do not initiate recourse to the law. Rather, they respond to grievances raised by those who come before them seeking to have the law applied, listening fairly to the representations of all parties, always subject to the discipline provided by the facts of the case. This sustains their impartiality and limits their powers. Unlike the other branches of the government, the judicial branch does not initiate matters and has no agenda of its own. Its sole duty is to hear and decide cases on the issues presented to it in accordance with the law and the Constitution. And so it was that Alexander Hamilton referred to the courts as "the least dangerous" branch of government: The Federalist, No. 78.

¶ 301 Indeed courts are generally reluctant to comment on matters that are not necessary to decide in order to dispose of the case at hand. This policy is especially apposite in constitutional cases, where the implications of abstract legal conclusions are often unpredictable and can, in retrospect, turn out to be undesirable. After adverting to a number of decisions of this Court endorsing this principle, Sopinka J. stated the following for the majority in Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy), [1995] 2 S.C.R. 97, at para. 9:

> The policy which dictates restraint in constitutional cases is sound. It is based on the realization that unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen. Early in this century, Viscount Haldane in John Deere Plow Co. v. Wharton, [1915] A.C. 330, at p. 339, stated that the abstract logical definition of the scope of constitutional provisions is not only "impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases".

See also Attorney General of Quebec v. Cumming, [1978] 2 S.C.R. 605; The Queen in Right of Manitoba v. Air Canada, [1980] 2 S.C.R. 303; Winner v. S.M.T. (Eastern) Ltd., [1951] S.C.R. 887;

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Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357. Notably, Sopinka J. uttered this admonition in a case in which the relevant legal issue was fully argued in both this Court and in the court below. The policy of forbearance with respect to extraneous legal issues applies, a fortiori, in a case where only the briefest of allusion to the issue was made by counsel.

¶ 302 I am, therefore, deeply concerned that the Court is entering into a debate on this issue without the benefit of substantial argument. I am all the more troubled since the question involves the proper relationship between the political branches of government and the judicial branch, an issue on which judges can hardly be seen to be indifferent, especially as it concerns their own remuneration. In such circumstances, it is absolutely critical for the Court to tread carefully and avoid making far-reaching conclusions that are not necessary to decide the case before it. If the Chief Justice's discussion was of a merely marginal character -- a side-wind so to speak -- I would abstain from commenting on it. After all, it is technically only obiter dicta. Nevertheless, in light of the importance that will necessarily be attached to his lengthy and sustained exegesis, I feel compelled to express my view.

II. The Effect of the Preamble to the Constitution Act, 1867

¶ 303 I emphasize at the outset that it is not my position that s. 11(d) of the Charter and ss. 96-100 of the Constitution Act, 1867 comprise an exhaustive code of judicial independence. As I discuss briefly later, additional protection for judicial independence may inhere in other provisions of the Constitution. Nor do I deny that the Constitution embraces unwritten rules, including rules that find expression in the preamble of the Constitution Act, 1867; see New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319. I hasten to add that these rules really find their origin in specific provisions of the Constitution viewed in light of our constitutional heritage. In other words, what we are concerned with is the meaning to be attached to an expression used in a constitutional provision.

¶ 304 I take issue, however, with the Chief Justice's view that the preamble to the Constitution Act, 1867 is a source of constitutional limitations on the power of legislatures to interfere with judicial independence. In New Brunswick Broadcasting, supra, this Court held that the privileges of the Nova Scotia legislature had constitutional status by virtue of the statement in the preamble expressing the desire to have "a Constitution similar in Principle to that of the United Kingdom". In reaching this conclusion, the Court examined the historical basis for the privileges of the British Parliament. That analysis established that the power of Parliament to exclude strangers was absolute, constitutional and immune from regulation by the courts. The effect of the preamble, the Court held, is to recognize and confirm that this long-standing principle of British constitutional law was continued or established in post-Confederation Canada.

¶ 305 There is no similar historical basis, in contrast, for the idea that Parliament cannot interfere with judicial independence. At the time of Confederation (and indeed to this day), the British Constitution did not contemplate the notion that Parliament was limited in its ability to deal with judges. The principle of judicial independence developed very gradually in Great Britain; see generally W. R. Lederman, "The Independence of the Judiciary" (1956), 34 Can. Bar Rev. 769 and 1139. In the Norman era, judicial power was concentrated in the hands of the King and his immediate entourage (the Curia Regis). Subsequent centuries saw the emergence of specialized courts and a professional judiciary, and the king's participation in the judicial function had by the end of the fifteenth century effectively withered. Thus Blackstone in his Commentaries was able to state:

> ... at present, by the long and uniform usage of many ages, our kings have delegated their whole judicial power to the judges of their several courts; which are the grand depository of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain established rules, which the crown itself cannot now alter but by act of parliament.

(Sir William Blackstone, Commentaries on the Laws of England (4th ed. 1770), Book 1, at p. 267.)

¶ 306 Despite these advances, kings retained power to apply pressure on the judiciary to conform to their wishes through the exercise of the royal power of dismissal. Generally speaking, up to the seventeenth century, judges held office during the king's good pleasure (durante bene placito). This power to dismiss judges for political ends was wielded most liberally by the Stuart kings in the early seventeenth century as part of their effort to assert the royal prerogative powers over the authority of Parliament and the common law. It was thus natural that protection against this kind of arbitrary, executive interference became a priority in the post-revolution settlement. Efforts to secure such protection in legislation were scuttled in the two decades following 1688, but at the turn of the century William III gave his assent to the Act of Settlement, 12 & 13 Will. 3, c. 2, which took effect with the accession of George I in 1714. Section 3, para. 7 of that statute mandated that "Judges Commissions be made Quandiu se bene gesserint [during good behaviour], and their Salaries ascertained and established; but upon the Address of both Houses of Parliament it may be lawful to remove them". Further protection was provided by an Act of 1760 (Commissions and Salaries of Judges Act, 1 Geo. 3, c. 23), which ensured that the commissions of judges continued notwithstanding the demise of the king. Prior to this enactment, the governing rule provided that all royal appointees, including judges, vacated their offices upon the death of the king.

¶ 307 Various jurists have asserted that these statutes and their successors have come to be viewed as "constitutional" guarantees of an independent judiciary. Professor Lederman writes, for example, that it would be "unconstitutional" for the British Parliament to cut the salary of an individual superior court judge during his or her commission or to reduce the salaries of judges as a class to the extent that it threatened their independence (supra, at p. 795). It has thus been suggested that the preamble to the Constitution Act, 1867, which expresses a desire to have a Constitution "similar in Principle to that of the United Kingdom" is a source of judicial independence in Canada: Beauregard v. Canada, [1986] 2 S.C.R. 56, at p. 72.

¶ 308 Even if it is accepted that judicial independence had become a "constitutional" principle in Britain by 1867, it is important to understand the precise meaning of that term in British law. Unlike Canada, Great Britain does not have a written constitution. Under accepted British legal theory, Parliament is supreme. By this I mean that there are no limitations upon its legislative competence. As Dicey explains, Parliament has "under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament" (A. V. Dicey, Introduction to the Study of the Law of the Constitution (10th ed. 1959), at pp. 39-40). This principle has been modified somewhat in recent decades to take into account the effect of Great Britain's membership in the European Community, but ultimately, the British Parliament remains supreme; see E. C. S. Wade and A. W. Bradley, Constitutional and Administrative Law (11th ed. 1993), by A. W. Bradley and K. D. Ewing, at pp. 68-87; Colin Turpin, British Government and the Constitution (3rd ed. 1995), at pp. 298-99.

¶ 309 The consequence of parliamentary supremacy is that judicial review of legislation is not possible. The courts have no power to hold an Act of Parliament invalid or unconstitutional. When it is said that a certain principle or convention is "constitutional", this does not mean that a statute violating that principle can be found to be ultra vires Parliament. As Lord Reid stated in Madzimbamuto v. Lardner-Burke, [1969] 1 A.C. 645 (P.C.), at p. 723:

> It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political or other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid.

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See also: Manuel v. Attorney-General, [1983] Ch. 77 (C.A.).

¶ 310 This fundamental principle is illustrated by the debate that occurred when members of the English judiciary complained to the Prime Minister in the early 1930s about legislation which reduced the salaries of judges, along with those of civil servants, by 20 percent as an emergency response to a financial crisis. Viscount Buckmaster, who vigorously resisted the notion that judges' salaries could be diminished during their term of office, admitted that Parliament was supreme and could repeal the Act of Settlement if it chose to do so. He only objected that it was not permissible to effectively repeal the Act by order in council; see U.K., H.L. Parliamentary Debates, vol. 90, cols. 67-68 (November 23, 1933). It seems that the judges themselves also conceded this point; see R. F. V. Heuston, Lives of the Lord Chancellors 1885-1940 (1964), at p. 514.

¶ 311 The idea that there were enforceable limits on the power of the British Parliament to interfere with the judiciary at the time of Confederation, then, is an historical fallacy. By expressing a desire to have a Constitution "similar in Principle to that of the United Kingdom", the framers of the Constitution Act, 1867 did not give courts the power to strike down legislation violating the principle of judicial independence. The framers did, however, entrench the fundamental components of judicial independence set out in the Act of Settlement such that violations could be struck down by the courts. This was accomplished, however, by ss. 99-100 of the Constitution Act, 1867, not the preamble.

¶ 312 It might be asserted that the argument presented above is merely a technical quibble. After all, in Canada the Constitution is supreme, not the legislatures. Courts have had the power to invalidate unconstitutional legislation in this country since 1867. If judicial independence was a "constitutional" principle in the broad sense in nineteenth-century Britain, and that principle was continued or established in Canada as a result of the preamble to the Constitution Act, 1867, why should Canadian courts resile from enforcing this principle by striking down incompatible legislation?

¶ 313 One answer to this question is the ambit of the Act of Settlement. The protection it accorded was limited to superior courts, specifically the central courts of common law; see Lederman, supra, at p. 782. It did not apply to inferior courts. While subsequent legislation did provide limited protection for the independence of the judges of certain statutory courts, such as the county courts, the courts there were not regarded as within the ambit of the "constitutional" protection in the British sense. Generally the independence and impartiality of these courts were ensured to litigants through the superintendence exercised over them by the superior courts by way of prerogative writs and other extraordinary remedies. The overall task of protection sought to be created for inferior courts in the present appeals seems to me to be made of insubstantial cloth, and certainly in no way similar to anything to be found in the United Kingdom.

¶ 314 A more general answer to the question lies in the nature of the power of judicial review. The ability to nullify the laws of democratically elected representatives derives its legitimacy from a super-legislative source: the text of the Constitution. This foundational document (in Canada, a series of documents) expresses the desire of the people to limit the power of legislatures in certain specified ways. Because our Constitution is entrenched, those limitations cannot be changed by recourse to the usual democratic process. They are not cast in stone, however, and can be modified in accordance with a further expression of democratic will: constitutional amendment.

¶ 315 Judicial review, therefore, is politically legitimate only insofar as it involves the interpretation of an authoritative constitutional instrument. In this sense, it is akin to statutory interpretation. In each case, the court's role is to divine the intent or purpose of the text as it has been expressed by the people through the mechanism of the democratic process. Of course, many (but not

all) constitutional provisions are cast in broad and abstract language. Courts have the often arduous task of explicating the effect of this language in a myriad of factual circumstances, many of which may not have been contemplated by the framers of the Constitution. While there are inevitable disputes about the manner in which courts should perform this duty, for example by according more or less deference to legislative decisions, there is general agreement that the task itself is legitimate.

¶ 316 This legitimacy is imperiled, however, when courts attempt to limit the power of legislatures without recourse to express textual authority. From time to time, members of this Court have suggested that our Constitution comprehends implied rights that circumscribe legislative competence. On the theory that the efficacy of parliamentary democracy requires free political expression, it has been asserted that the curtailment of such expression is ultra vires both provincial legislatures and the federal Parliament: Switzman v. Elbling, [1957] S.C.R. 285, at p. 328 (per Abbott J.); OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2, at p. 57 (per Beetz J.); see also: Reference re Alberta Statutes, [1938] S.C.R. 100, at pp. 132-35 (per Duff C.J.), and at pp. 145-46 (per Cannon J.); Switzman, supra, at pp. 306-7 (per Rand J.); OPSEU, supra, at p. 25 (per Dickson C.J.); Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455, at pp. 462-63 (per Dickson C.J.); RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, at p. 584 (per McIntyre J.).

¶ 317 This theory, which is not so much an "implied bill of rights", as it has so often been called, but rather a more limited guarantee of those communicative freedoms necessary for the existence of parliamentary democracy, is not without appeal. An argument can be made that, even under a constitutional structure that deems Parliament to be supreme, certain rights, including freedom of political speech, should be enforced by the courts in order to safeguard the democratic accountability of Parliament. Without this limitation of its powers, the argument runs, Parliament could subvert the very process by which it acquired its legitimacy as a representative, democratic institution; see F. R. Scott, Civil Liberties and Canadian Federalism (1959), at pp. 18-21; Dale Gibson, "Constitutional Amendment and the Implied Bill of Rights" (1966-67), 12 McGill L.J. 497. It should be noted, however, that the idea that the Constitution contemplates implied protection for democratic rights has been rejected by a number of eminent jurists as being incompatible with the structure and history of the Constitution; see Attorney General for Canada and Dupond v. Montreal, [1978] 2 S.C.R. 770, at p. 796 (per Beetz J.); Bora Laskin, "An Inquiry into the Diefenbaker Bill of Rights" (1959), 37 Can. Bar Rev. 77, at pp. 100-103; Paul C. Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973), 23 U.T.L.J. 307, at p. 344; Peter W. Hogg, Constitutional Law of Canada (3rd ed. 1992 (loose-leaf)), vol. 2, at pp. 31-12 and 31-13.

¶ 318 Whatever attraction this theory may hold, and I do not wish to be understood as either endorsing or rejecting it, it is clear in my view that it may not be used to justify the notion that the preamble to the Constitution Act, 1867 contains implicit protection for judicial independence. Although it has been suggested that guarantees of political freedom flow from the preamble, as I have discussed in relation to judicial independence, this position is untenable. The better view is that if these guarantees exist, they are implicit in s. 17 of the Constitution Act, 1867, which provides for the establishment of Parliament; see Gibson, supra, at p. 498. More important, the justification for implied political freedoms is that they are supportive, and not subversive, of legislative supremacy. That doctrine holds that democratically constituted legislatures, and not the courts, are the ultimate guarantors of civil liberties, including the right to an independent judiciary. Implying protection for judicial independence from the preambular commitment to a British-style constitution, therefore, entirely misapprehends the fundamental nature of that constitution.

¶ 319 This brings us back to the central point: to the extent that courts in Canada have the power to enforce the principle of judicial independence, this power derives from the structure of Canadian, and not British, constitutionalism. Our Constitution expressly contemplates both the power of judicial review (in s. 52 of the Constitution Act, 1982) and guarantees of judicial independence (in ss. 96-100 of the Constitution Act, 1867 and s. 11(d) of the Charter). While these provisions have

been interpreted to provide guarantees of independence that are not immediately manifest in their language, this has been accomplished through the usual mechanisms of constitutional interpretation, not through recourse to the preamble. The legitimacy of this interpretive exercise stems from its grounding in an expression of democratic will, not from a dubious theory of an implicit constitutional structure. The express provisions of the Constitution are not, as the Chief Justice contends, "elaborations of the underlying, unwritten, and organizing principles found in the preamble to the Constitution Act, 1867" (para. 107). On the contrary, they are the Constitution. To assert otherwise is to subvert the democratic foundation of judicial review.

¶ 320 In other words, the approach adopted by the Chief Justice, in my view, misapprehends the nature of the Constitution Act, 1867. The Act was not intended as an abstract document on the nature of government. The philosophical underpinnings of government in a British colony were a given, and find expression in the preamble. The Act was intended to create governmental and judicial structures for the maintenance of a British system of government in a federation of former British colonies. Insofar as there were limits to legislative power in Canada, they flowed from the terms of the Act (it being a British statute) that created them and vis-à-vis Great Britain the condition of dependency that prevailed in 1867. In considering the nature of the structures created, it was relevant to look at the principles underlying their British counterparts as the preamble invites the courts to do.

¶ 321 In considering the nature of the Canadian judicial system in light of its British counterpart, one should observe that only the superior courts' independence and impartiality were regarded as "constitutional". The independence and impartiality of inferior courts were, in turn, protected through the superintending functions of the superior courts. They were not protected directly under the relevant British "constitutional" principles.

¶ 322 This was the judicial organization that was adopted for this country, with adaptations suitable to Canadian conditions, in the judicature provisions of the Constitution Act, 1867. In reviewing these provisions, it is worth observing that the courts given constitutional protection are expressly named. The existing provincial inferior courts are not mentioned, and, indeed, the Probate Courts of some provinces were expressly excluded. Given that the express provisions dealing with constitutional protection for judicial independence have specifically spelled out their application, it seems strained to extend the ambit of this protection by reference to a general preambular statement. As the majority stated in McVey (Re), [1992] 3 S.C.R. 475, at p. 525, "it would seem odd if general words in a preamble were to be given more weight than the specific provisions that deal with the matter".

¶ 323 This is a matter of no little significance for other reasons. If one is to give constitutional protection to courts generally, one must be able to determine with some precision what the term "court" encompasses. It is clear both under the Constitution Act, 1867 as well as under s. 11(d) of the Charter what courts are covered, those under the Constitution Act, 1867 arising under historic events in British constitutional history, those in s. 11(d) for the compelling reasons already given, namely protection for persons accused of an offence. But what are we to make of a general protection for courts such as that proposed by the Chief Justice? The word "court" is a broad term and can encompass a wide variety of tribunals. In the province of Quebec, for example, the term is legislatively used in respect of any number of administrative tribunals. Are we to include only those inferior courts applying ordinary jurisdiction in civil matters, or should we include all sorts of administrative tribunals, some of which are of far greater importance than ordinary civil courts? And if we do, is a distinction to be drawn between different tribunals and on the basis of what principles is this to be done?

¶ 324 These are some of the issues that have persuaded me that this Court should not precipitously, and without the benefit of argument of any real relevance to the case before us, venture forth on this uncharted sea. It is not as if the law as it stands is devoid of devices to ensure

independent and impartial courts and tribunals. Quite the contrary, I would emphasize that the express protections for judicial independence set out in the Constitution are broad and powerful. They apply to all superior court and other judges specified in s. 96 of the Constitution Act, 1867 as well as to inferior (provincial) courts exercising criminal jurisdiction. Nothing presented in these appeals suggests that these guarantees are not sufficient to ensure the independence of the judiciary as a whole. The superior courts have significant appellate and supervisory jurisdiction over inferior courts. If the impartiality of decisions from inferior courts is threatened by a lack of independence, any ensuing injustice may be rectified by the superior courts.

¶ 325 Should the foregoing provisions be found wanting, the Charter may conceivably be brought into play. Thus it is possible that protection for the independence for courts charged with determining the constitutionality of government action inheres in s. 24(1) of the Charter and s. 52 of the Constitution Act, 1982. It could be argued that the efficacy of those provisions, which empower courts to grant remedies for Charter violations and strike down unconstitutional laws, respectively, depends upon the existence of an independent and impartial adjudicator. The same may possibly be said in certain cases involving the applicability of the guarantees of liberty and security of the person arising in a non-penal setting. I add that these various possibilities may be seen to be abetted by the commitment to the rule of law expressed in the preamble to the Charter. These, however, are issues I would prefer to explore when they are brought before us for decision.

III. Financial Security

¶ 326 I turn now to the main issue in these appeals: whether the governments of Prince Edward Island, Alberta and Manitoba violated s. 11(d) of the Charter by compromising the financial security of provincial court judges. In Valente v. The Queen, [1985] 2 S.C.R. 673, this Court held that the guarantee of an independent judiciary set out in s. 11(d) requires that tribunals exercising criminal jurisdiction exhibit three "essential conditions" of independence: security of tenure, financial security and institutional independence. The Court also found that judicial independence involves both individual and institutional relationships. It requires, in other words, both the individual independence of a particular judge and the institutional or collective independence of the tribunal of which that judge is a member.

¶ 327 Building on Valente, the Chief Justice concludes in the present appeals that the financial security component of judicial independence has both individual and institutional dimensions. The institutional dimension, in his view, has three components. One of these -- the principle that reductions to judicial remuneration cannot diminish salaries to a point below a basic minimum level required for the office of a judge -- is unobjectionable. As there has been no suggestion in these appeals that the salaries of provincial court judges have been reduced to such a level, I need not comment further on this issue.

¶ 328 The Chief Justice also finds, as a general principle, that s. 11(d) of the Charter permits governments to reduce, increase or freeze the salaries of provincial court judges, either as part of an overall economic measure which affects the salaries of all persons paid from the public purse, or as part of a measure directed at judges as a class. I agree. He goes on to hold, however, that before such changes can be made, governments must consider and respond to the recommendations of an independent "judicial compensation commission". He further concludes that s. 11(d) forbids, under any circumstances, discussions about remuneration between the judiciary and the government.

¶ 329 I am unable to agree with these conclusions. While both salary commissions and a concomitant policy to avoid discussing remuneration other than through the making of representations to commissions may be desirable as matters of legislative policy, they are not mandated by s. 11(d) of the Charter. I begin with an examination of the text of the Constitution. Section 11(d) of the Charter provides as follows:

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11. Any person charged with an offence has the right

. . .

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

By its express terms, s. 11(d) grants the right to an independent tribunal to persons "charged with an offence". The guarantee of judicial independence inhering in s. 11(d) redounds to the benefit of the judged, not the judges; see Gratton v. Canadian Judicial Council, [1994] 2 F.C. 769 (T.D.), at p. 782; Philip B. Kurland, "The Constitution and the Tenure of Federal Judges: Some Notes from History" (1968-69), 36 U. Chi. L. Rev. 665, at p. 698. Section 11(d), therefore, does not grant judges a level of independence to which they feel they are entitled. Rather, it guarantees only that degree of independence necessary to ensure that accused persons receive fair trials.

¶ 330 This Court has confirmed that s. 11(d) does not guarantee an "ideal" level of judicial independence. After referring to a number of reports and studies on judicial independence calling for increased safeguards, Le Dain J. had this to say in Valente, supra, at pp. 692-93:

> These efforts, particularly by the legal profession and the judiciary, to strengthen the conditions of judicial independence in Canada may be expected to continue as a movement towards the ideal. It would not be feasible, however, to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s. 11(d) of the Charter, which may have to be applied to a variety of tribunals. The legislative and constitutional provisions in Canada governing matters which bear on the judicial independence of tribunals trying persons charged with an offence exhibit a great range and variety. The essential conditions of judicial independence for purposes of s. 11(d) must bear some reasonable relationship to that variety. Moreover, it is the essence of the security afforded by the essential conditions of judicial independence that is appropriate for application under s. 11(d) and not any particular legislative or constitutional formula by which it may be provided or guaranteed. [Emphasis added].

Similarly, in R. v. Lippé, [1991] 2 S.C.R. 114, at p. 142, Lamer C.J. concluded that while the Quebec municipal court system, which allowed judges to continue to practice as lawyers was not "ideal", it was sufficient for the purposes of s. 11(d). He remarked:

> I admit that a system which allows for part-time judges is not the ideal system. However, the Constitution does not always guarantee the "ideal". Perhaps the ideal system would be to have a panel of three or five judges hearing every case; that may be the ideal, but it certainly cannot be said to be constitutionally guaranteed. [Emphasis in original.]

As Lamer C.J. stated in R. v. Kuldip, [1990] 3 S.C.R. 618, at p. 638, "[t]he Charter aims to guarantee that individuals benefit from a minimum standard of fundamental rights. If Parliament chooses to grant protection over and above that which is enshrined in our Charter, it is always at liberty to do so."

¶ 331 I also note that s. 11(d) expressly provides that accused persons have a right to a hearing

that is both "independent" and "impartial". As the Court explained in Valente, supra, independence and impartiality are discrete concepts; see also R. v. Généreux, [1992] 1 S.C.R. 259, at p. 283. "Impartiality", Le Dain J. stated for the Court in Valente, at p. 685, "refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case". Impartial adjudicators, in other words, base their decisions on the merits of the case, not the identity of the litigants. Independence, in contrast, "connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees" (p. 685).

¶ 332 That being said, it is important to remember that judicial independence is not an end in itself. Independence is required only insofar as it serves to ensure that cases are decided in an impartial manner. As Lamer C.J. wrote in Lippé, supra, at p. 139:

> The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a "means" to this "end". If judges could be perceived as "impartial" without judicial "independence", the requirement of "independence" would be unnecessary. However, judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality.

¶ 333 From the foregoing, it can be stated that the "essential objective conditions" of judicial independence for the purposes of s. 11(d) consist of those minimum guarantees that are necessary to ensure that tribunals exercising criminal jurisdiction act, and are perceived to act, in an impartial manner. Section 11(d) does not empower this or any other court to compel governments to enact "model" legislation affording the utmost protection for judicial independence. This is a task for the legislatures, not the courts.

¶ 334 With this general principle in mind, I turn to the first question at hand: does s. 11(d) require governments to establish judicial compensation commissions and consider and respond to their recommendations before changing the salaries of provincial court judges? As noted by the Chief Justice in his reasons, this Court held unanimously in Valente, supra, that such commissions were not required for the purposes of s. 11(d). This holding should be followed, in my opinion, not simply because it is authoritative, but because it is grounded in reason and common sense. As I have discussed, the Chief Justice asserts that the financial security component of judicial independence has both an individual and an institutional or collective dimension. In Valente, the Court focused solely on the individual dimension, holding at p. 706 that "the essential point" of financial security "is that the right to salary of a provincial court judge is established by law, and there is no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge".

¶ 335 I agree that financial security has a collective dimension. Judicial independence must include protection against interference with the financial security of the court as an institution. It is not enough that the right to a salary is established by law and that individual judges are protected against arbitrary changes to their remuneration. The possibility of economic manipulation also arises from changes to the salaries of judges as a class.

¶ 336 The fact that the potential for such manipulation exists, however, does not justify the imposition of judicial compensation commissions as a constitutional imperative. As noted above, s. 11(d) does not mandate "any particular legislative or constitutional formula": Valente, supra, at p. 693; see also Généreux, supra, at pp. 284-85. This Court has repeatedly held that s. 11(d) requires only that courts exercising criminal jurisdiction be reasonably perceived as independent. In Valente, supra, Le Dain J. wrote the following for the Court at p. 689:

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> Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, it is sound, I think, that the test for independence for the purposes of s. 11(d) of the Charter should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.

See also: Lippé, supra, at p. 139; Généreux, supra, at p. 286.

¶ 337 In my view, it is abundantly clear that a reasonable, informed person would not perceive that, in the absence of a commission process, all changes to the remuneration of provincial court judges threaten their independence. I reach this conclusion by considering the type of change to judicial salaries that is at issue in the present appeals. It is simply not reasonable to think that a decrease to judicial salaries that is part of an overall economic measure which affects the salaries of substantially all persons paid from public funds imperils the independence of the judiciary. To hold otherwise is to assume that judges could be influenced or manipulated by such a reduction. A reasonable person, I submit, would believe judges are made of sturdier stuff than this.

¶ 338 Indeed, as support for his conclusion that s. 11(d) does not prohibit non-discriminatory reductions, the Chief Justice cites a number of commentators who argue that such reductions are constitutional; see Hogg, supra, vol. 1, at p. 7-6; Lederman, supra, at pp. 795, 1164; Wayne Renke, Invoking Independence: Judicial Independence as a No-cut Wage Guarantee (1994), at p. 30. As stated by Professor Renke, "[w]here economic measures apply equally to clerks, secretaries, managers, public sector workers of all grades and departments, as well as judges, how could judges be manipulated?" If this is the case, why is it necessary to require the intervention of an independent commission before the government imposes such reductions?

¶ 339 The Chief Justice addresses this question by expressing sympathy for the view that salary reductions that treat judges in the same manner as civil servants undermine judicial independence "precisely because they create the impression that judges are merely public employees and are not independent of the government" (para. 157 (emphasis in original)). Judicial independence, he concludes, "can be threatened by measures which treat judges either differently from, or identically to, other persons paid from the public purse" (para. 158). In order to guard against this threat, the argument goes, governments are required to have recourse to the commission process before any changes to remuneration are made.

¶ 340 With respect, I fail to see the logic in this position. In Valente, supra, this Court rejected the argument that the institutional independence of provincial court judges was compromised by the fact that they were treated as civil servants for the purposes of pension and other financial benefits and the executive exercised control over the conferring of such discretionary benefits as post-retirement reappointment, leaves of absence and the right to engage in extra-judicial appointments. The contention was that the government's control over these matters was calculated to make the court appear as a branch of the executive and the judges as civil servants. This impression, it was argued, was reinforced by the manner in which the court and its judges were associated with the Ministry of the Attorney General in printed material intended for public information.

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¶ 341 In Valente, the Court held that none of these factors could reasonably be perceived to compromise the institutional independence of the judiciary. All that is required, Le Dain J. stated for the Court at p. 712, is that the judiciary retain control over "the administrative decisions that bear directly and immediately on the exercise of the judicial function". Similarly, the fact that changes to judicial salaries are linked, along with other persons paid from the public purse, to changes made to the remuneration of civil servants does not create the impression that judges are public employees who are not independent from government. It must be remembered that the test for judicial independence incorporates the perception of the reasonable, informed person. As noted by the Chief Justice in his reasons, the question is "whether a reasonable person, who was informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically would conclude (that the tribunal or court was independent)" (para. 113). In my view, such a person would not view the linking of judges' salaries to those of civil servants as compromising judicial independence.

¶ 342 The threat to judicial independence that arises from the government's power to set salaries consists in the prospect that judges will be influenced by the possibility that the government will punish or reward them financially for their decisions. Protection against this potentiality is the raison d'être of the financial security component of judicial independence. There is virtually no possibility that such economic manipulation will arise where the government makes equivalent changes to the remuneration of all persons paid from public funds. The fact that such a procedure might leave some members of the public with the impression that provincial court judges are public servants is thus irrelevant. A reasonable, informed person would not perceive any infringement of the judges' financial security.

¶ 343 In his reasons, the Chief Justice asserts that, where the government chooses to depart from the recommendations of the judicial compensation commission, it must justify its decision according to a standard of rationality. He goes on to state, however, that across-the-board measures affecting substantially every person who is paid from the public purse are prima facie rational because they are typically designed to further a larger public interest. If this is true, and I have no doubt that it is, little is gained by going through the commission process in these circumstances. Under the Chief Justice's approach, governments are free to reduce the salaries of judges, in concert with all other persons paid from public funds, so long as they set up a commission whose recommendations they are for all practical purposes free to ignore. In my view, this result represents a triumph of form over substance.

¶ 344 Although I have framed my argument in terms of reductions to judicial salaries that are part of across-the-board measures applying throughout the public sector, the same logic applies, a fortiori, to salary freezes and increases. In my view, furthermore, governments may make changes to judicial salaries that are not parallelled by equivalent changes to the salaries of other persons paid from public funds. As I will develop later, changes, and especially decreases, to judicial salaries that are not part of an overall public measure should be subject to greater scrutiny than those that are. Under the reasonable perception test, however, commissions are not a necessary condition of independence. Of course, the existence of such a process may go a long way toward showing that a given change to judges' salaries does not threaten their independence. Requiring commissions a priori, however, is tantamount to enacting a new constitutional provision to extend the protection provided by s. 11(d). Section 11(d) requires only that tribunals exercising criminal jurisdiction be independent and impartial. To that end, it prohibits governments from acting in ways that threaten that independence and impartiality. It does not require legislatures, however, to establish what in some respects is a virtual fourth branch of government to police the interaction between the political branches and the judiciary. Judges, in my opinion, are capable of ensuring their own independence by an appropriate application of the Constitution. By employing the reasonable perception test, judges are able to distinguish between changes to their remuneration effected for a valid public purpose and those designed to influence their decisions.

¶ 345 As I have noted, although the reasonable perception test applies to all changes to judicial remuneration, different types of changes warrant different levels of scrutiny. Although each case must be judged on its own facts, some general guiding principles can be articulated. Changes to judicial salaries that apply equally to substantially all persons paid from public funds, for example, would almost inevitably be considered constitutional. Differential increases to judicial salaries warrant a greater degree of scrutiny, although in most cases it would be relatively easy to link the increase to a legitimate governmental purpose such as a desire to attract, or continue to attract, highly qualified lawyers to the bench. Differential decreases to judicial remuneration would invite the highest level of review. This approach receives support from the fact that the constitutions of many states and a number of international instruments contain provisions prohibiting reductions of judicial salaries.

¶ 346 Determining whether a differential change raises a perception of interference is, in my view, analogous to determining whether government action is discriminatory under s. 15 of the Charter. In its equality jurisprudence, this Court has emphasized that discrimination means more than simply different treatment; see Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143. To constitute discrimination, the impugned difference in treatment must implicate the purpose of the constitutional protection in question. It is not enough to say, in other words, that judges and non-judges are treated differently. What is important is that this disparate treatment has the potential to influence the adjudicative process.

¶ 347 In determining this question, regard must be had to both the purpose and the effect of the impugned salary change. The reasonable perception test contemplates the possibility that a court may be found to lack independence despite the fact that the government did not act with an improper motive; see Généreux, supra, at p. 307. Purpose is nevertheless relevant. As Dickson C.J. noted in Beauregard, supra, at p. 77, legislation dealing with judges' salaries will be suspect if there is "any hint that... [it] was enacted for an improper or colourable purpose". Conversely, he stated, legislation will be constitutional where it represents an attempt "to try to deal fairly with judges and with judicial salaries and pensions" (p. 78).

¶ 348 In considering the effect of differential changes on judicial independence, the question that must be asked is whether the distinction between judges and other persons paid from public funds amounts to a "substantial" difference in treatment. Trivial or insignificant differences are unlikely to threaten judicial independence. If the effect of the change on the financial position of judges and others is essentially similar, a reasonable person would not perceive it as potentially influencing judges to favour or disfavour the government's interests in litigation.

¶ 349 I now turn to the question of discussions between the judiciary and the government over salaries. In the absence of a commission process, the only manner in which judges may have a say in the setting of their salaries is through direct dialogue with the executive. The Chief Justice terms these discussions "negotiations" and would prohibit them, in all circumstances, as violations of the financial security component of judicial independence. According to him, negotiations threaten independence because a "reasonable person might conclude that judges would alter the manner in which they adjudicate cases in order to curry favour with the executive" (para. 187).

¶ 350 In my view, this position seriously mischaracterizes the manner in which judicial salaries are set. Valente establishes that the fixing of provincial court judges' remuneration is entirely within the discretion of the government, subject, of course, to the conditions that the right to a salary be established by law and that the government not change salaries in a manner that raises a reasonable apprehension of interference. There is no constitutional requirement that the executive discuss, consult or "negotiate" with provincial court judges. As stated by McDonald J. in the Alberta cases, the government "might exercise [this] discretion quite properly (i.e., without reliance upon constitutionally irrelevant considerations such as the performance of the judges) without ever soliciting or receiving the view of the Provincial Court judges" ((1994), 160 A.R. 81, at p.

144). Provincial judges associations are not unions, and the government and the judges are not involved in a statutorily compelled collective bargaining relationship. While judges are free to make recommendations regarding their salaries, and governments would be wise to seriously consider them, as a group they have no economic "bargaining power" vis-à-vis the government. The atmosphere of negotiation the Chief Justice describes, which fosters expectations of "give and take" and encourages "subtle accommodations", does not therefore apply to salary discussions between government and the judiciary. The danger that is alleged to arise from such discussions -- that judges will barter their independence for financial gain -- is thus illusory.

¶ 351 Of course, some persons may view direct consultations between the government and the judiciary over salaries to be unseemly or inappropriate. It may be that making representations to an independent commission better reflects the position of judges as independent from the political branches of government. A general prohibition against such consultations, however, is not required by s. 11(d) of the Charter. In most circumstances, a reasonable, informed person would not view them as imperiling judicial independence. As stated by McDonald J. (at p. 145):

> ... a reasonable, well-informed, right-minded person would not regard such a process as one that would impair the independence of the court. In the absence of evidence that the judges had improperly applied the law, no reasonable, right-minded person would have even a suspicion that the judges' independence had been bartered. It must be remembered that there is an appellate process in which either judges of the Court of Queen's Bench or of the Court of Appeal would soon become aware of any colourable use of judicial power, and correct it. Any reasonable, right-minded person would add that safeguard to his or her presumption that the integrity of the Provincial Court judges would prevail.

¶ 352 Although there is no general constitutional prohibition against salary discussions between the judiciary and the government, the possibility remains that governments may use such discussions to attempt to influence or manipulate the judiciary. In such cases, the actions of the government will be reviewed according to the same reasonable perception test that applies to salary changes.

IV. Application to the Present Appeals

1. Prince Edward Island

¶ 353 The Chief Justice finds that the wage reduction in Prince Edward Island was unconstitutional on the basis that it was made without recourse having first been made to an independent salary commission. He states, however, that if such a commission had been established, and the legislature had decided to depart from its recommendations and enact the reduction that it did, the reduction would probably be prima facie rational, and hence justified, because it would be part of a broadly based deficit reduction measure reducing the salaries of all persons who are remunerated by public funds.

¶ 354 I agree with the Chief Justice's conclusion that the reduction to the salaries of Provincial Court judges in Prince Edward Island was part of an overall public economic measure. Because I would not require governments to have recourse to salary commissions, I find the reduction was consistent with s. 11(d) of the Charter. Based on the statement of facts appended to the Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island, there is no evidence that the reduction was introduced in order to influence or manipulate the judiciary. A reasonable person would not perceive it, therefore, as threatening judicial independence.

2. Alberta

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¶ 355 The Chief Justice concludes that the wage reduction imposed on Provincial Court judges in Alberta violated s. 11(d) for the same reason that he finds the reduction in Prince Edward Island unconstitutional: it was effected without recourse to a salary commission process. Again, however, he opines that had such a process been followed, the reduction would likely be prima facie rational because it would be part of an overall economic measure that reduces the salaries of all persons remunerated by public funds. For the reasons already given, I do not think a reasonable person would perceive this reduction as compromising judicial independence. As a result, I find the reduction did not violate s. 11(d).

¶ 356 One of the interveners in these appeals, the Alberta Provincial Court Judges' Association, alleges that the wage reductions in Alberta were not as widespread and uniform as assumed in the Agreed Statement of Facts that forms the factual foundation of the litigation. Before this Court, the intervener sought to introduce extrinsic evidence to support this allegation. In response, the Attorney General for Alberta attempted to adduce evidence in rebuttal. As noted by the Chief Justice, the Court denied both these motions.

¶ 357 In my view, it is not necessary to consider this factual dispute. The conclusion I have reached is based entirely on the Agreed Statement of Facts reproduced in the reasons of McDonald J. In any future litigation involving this issue, the parties will be free to adduce whatever evidence they feel is appropriate and a factual record will be developed accordingly.

3. Manitoba

¶ 358 The situation in Manitoba is more complicated. As noted by the Chief Justice, there the legislature had established a judicial compensation commission process, which had been in effect since 1990. In 1993, the government passed legislation reducing the salaries of Provincial Court judges in a manner I shall describe later. The government instituted this reduction before the commission had convened or issued its report. For this reason, the Chief Justice finds that the reduction violated s. 11(d) of the Charter.

¶ 359 Because I do not believe that commissions are constitutionally required, I find that the Manitoba government's avoidance of the commission process did not violate s. 11(d). Unlike the situations in Prince Edward Island and Alberta, however, the legislation in Manitoba treated judges differently from most other persons paid from public funds. The Public Sector Reduced Work Week and Compensation Management Act, S.M. 1993, c. 21 ("Bill 22"), permitted, but did not require, public sector employers to impose up to 15 days leave without pay upon their employees during the fiscal years 1993-94 and 1994-95. The definition of public sector "employer" was very broad, encompassing the government itself as well as Crown corporations, hospitals, personal care homes, child and family services agencies, municipalities, school boards, universities and colleges. In contrast, the remuneration of Provincial Court judges, along with members of Crown agencies, boards, commissions and committees appointed by the Lieutenant Governor in Council, was reduced by 3.8 percent for the fiscal year 1993-94, and for the next fiscal year, by an amount equivalent to the number of leave days imposed on unionized government employees. A provision of Bill 22 allowed this reduction to be effected by the taking of specific approved days of leave without pay. Members of the Legislative Assembly were treated in essentially the same manner as judges and other appointees.

¶ 360 Two aspects of the legislation are potentially problematic. First, the legislation permitted, but did not compel, government employers to mandate unpaid leaves for their employees. The salary reduction imposed on judges and other appointees, in contrast, was mandatory. In practice, the reduced work week was imposed on all civil servants and most other public sector employees. Some employers, including certain school divisions and health care facilities, dealt with funding reductions in other ways. Second, Bill 22 specified that reductions imposed by public employers were to be effected in the form of unpaid leave. In the case of judges and other

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appointees, salaries were reduced directly.

¶ 361 There is no evidence, however, that these differences evince an intention to interfere with judicial independence. As Philp J.A. stated for the Manitoba Court of Appeal, "differences in the classes of persons affected by Bill 22 necessitated differences in treatment" ((1995), 102 Man. R. (2d) 51, at p. 66). In the case of the permissive-mandatory distinction, the evidence establishes that it served a rational and legitimate purpose. Though all those affected by Bill 22 were in one form or another "paid" from public funds, their relationship to government differed markedly. A number of the "employers" under Bill 22, such as school boards, Crown corporations, municipalities, universities and health care facilities, though ultimately dependent on government funding, have traditionally enjoyed a significant amount of financial autonomy. Generally speaking, the provincial government does not set the salaries of employees of these institutions. The legislation respects the autonomy of those bodies by permitting them to cope with reduced funding in alternative ways. Judges, though obviously required to be independent from government in specific, constitutionally guaranteed ways, are paid directly by the government. In this limited sense, they are analogous to civil servants and not to employees of other public institutions such as school boards, universities or hospitals. Notably, the provincial government, as an "employer" under Bill 22, required its civil servants to take unpaid leaves. Moreover, unlike many public employees, judges are not in a collective bargaining relationship with the government. The government may have felt that permitting judges to "negotiate" the manner in which they would absorb reductions to their remuneration would have been inappropriate.

¶ 362 The purpose of the unpaid leave-salary reduction distinction is also benign. The government may have considered the imposition of mandatory leave without pay to violate judicial independence. There are certainly weighty reasons for doing so. At all events, it is certainly less intrusive to simply reduce judges' salary than to require them to take specific days off without pay. Section 9(2) of Bill 22 permits, but does not require, judges to substitute unpaid leave on "specific approved days" for the salary reduction. Presumably, "specific approved days" refers to those days designated by the government for unpaid leave in the civil service (including employees of the courts and Crown prosecutors' offices). In my view, to the extent that this provision evinces any intention at all, it is to defer to judges' preferences on this matter and not, as the appellants suggest, to subject them to the discretion of the executive.

¶ 363 The effect of these distinctions on the financial status of judges vis-à-vis others paid from public monies, moreover, is essentially trivial. It is true that the salaries of some categories of public employees were not reduced or were reduced by a lesser amount than those of judges. However, as mentioned earlier, there are sufficient reasons to justify this distinction. What is important is that judges received the same reduction as civil servants. As conceded by the appellants, the 3.8 percent reduction in the first year parallelled the number of leave days the government had decided to impose on civil servants in anticipation of the Bill being passed. In the second year, the judges salaries were to be reduced by an amount equivalent to the reduction applied to employees under a collective agreement. This scheme, in my view, was a reasonable and practical method of ensuring that judges and other appointees were treated equally in comparison to civil servants. As the Manitoba Court of Appeal unanimously held, a reasonable person would not perceive this scheme as threatening the financial security of judges in any way.

¶ 364 In addition to the claim based on the reduction of their salaries, the Provincial Court judges in Manitoba also contended that their independence was violated by the conduct of the executive in refusing to sign a joint recommendation to the Judicial Compensation Committee unless the judges agreed to forego their legal challenge of Bill 22. As already noted, the fact that the government and judges discuss remuneration issues is not necessarily unconstitutional. Nevertheless, in my view, the government's actions in this particular case constituted a violation of judicial independence.

¶ 365 The economic pressure placed on the judges was not intended to induce judges to favour

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the government's interests in litigation. Rather, it was designed to pressure them into conceding the constitutionality of the planned salary reduction. The judges, however, had bona fide concerns about the constitutionality of Bill 22. They had a right, if not a duty, to defend the principle of independence in the superior courts. The financial security component of judicial independence must include protection of judges' ability to challenge legislation implicating their own independence free from the reasonable perception that the government might penalize them financially for doing so. In my view, the executive's decision not to sign the joint recommendation was made for an improper purpose and constituted arbitrary interference with the process by which judges' salaries were established: Valente, supra, at p. 704.

V. Conclusion and Disposition

1. Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island and Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island

(a) Answers to Reference Questions

¶ 366 The answers to the relevant reference questions, which are appended to the reasons of the Chief Justice as Appendices "A" and "B" respectively, are as follows:

(i) Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island

Question 1

(a) and (b): Yes. Subject to the principles outlined in my reasons, the legislature of Prince Edward Island may increase, decrease or otherwise adjust the remuneration of Provincial Court Judges, whether or not such adjustment is part of an overall public economic measure.

Question 2: Yes.

(ii) Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island

Question 1(c): Yes.

...

Question 4:

(a) and (b): No. The explanation for these answers is the same as for the answer to question 1 of the Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island.

...

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(d): No.

(e): No. The explanation for this answer is the same as for the answer to question 1 of the Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island.

...

(I): No.

...

Question 8: Given my answers to the foregoing questions, it is not necessary to answer this question.

¶ 367 For all other questions, my answers are the same as those set out by the Chief Justice.

(b) Disposition

¶ 368 I would dismiss the appeals in Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island and in Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island. I would allow the cross-appeal on question 1(a) of the Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island.

2. R. v. Campbell, R. v. Ekmecic and R. v. Wickman

(a) Answers to Constitutional Questions

¶ 369 The answers to the relevant questions, which are appended to the reasons of the Chief Justice as Appendix "C," are as follows:

Question 1: No.

Question 2: No.

¶ 370 For all other questions, my answers are the same as those set out by the Chief Justice.

(b) Disposition

¶ 371 For the reasons given by the Chief Justice, I would allow the appeal by the Crown from the decision of the Alberta Court of Appeal that it was without jurisdiction to hear these appeals under s. 784(1) of the Criminal Code, R.S.C., 1985, c. C-46. I would also allow the appeal by the Crown from McDonald J.'s holding that ss. 11(1)(c), 11(2) and 11(1)(b) of the Provincial Court Judges Act were unconstitutional. I would also dismiss the Crown's appeal from McDonald J.'s holding that ss. 13(1)(a) and 13(1)(b) of the Provincial Court Judges Act were unconstitutional and declare these provisions to be of no force or effect. Unlike the Chief Justice, however, I would allow the Crown's appeal from McDonald J.'s holding that the 5 percent pay reduction imposed on members of the Alberta Provincial Court by the Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94, was unconstitutional and declare s. 17(1) of the Provincial Court Judges Act to be constitutional.

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3. Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)

(a) Answers to Constitutional Questions

¶ 372 The answers to the relevant questions, which are appended to the reasons of the Chief Justice as Appendix "D" are as follows:

Question 1:

(a): No.

(b): Given my response to Question 1(a), it is not necessary to answer this question.

Question 2:

(a): No.

(b): Given my response to Question 2(a), it is not necessary to answer this question.

¶ 373 For all other questions, my answers are the same as those set out by the Chief Justice.

(b) Disposition

¶ 374 For the reasons of the Chief Justice, I would issue a declaration that the closure of the Provincial Court during the summer of 1994 on "Filmon Fridays" violated the independence of the court. I would also issue a declaration that the Manitoba government violated the independence of the Provincial Court by refusing to sign a joint recommendation to the Judicial Compensation Committee unless the judges agreed to forego their legal challenge of Bill 22.

¶ 375 I would therefore allow the appeal in respect of the closure of the Manitoba Provincial Court and the attempt of the government to induce the judges to abstain from legal action. I would dismiss the appeal with respect to the wage reduction.

* * * * *

Appendix "A"

Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, October 11, 1994

1. Can the Legislature of the Province of Prince Edward Island make laws such that the remuneration of Judges of the Provincial Court may be decreased, increased, or otherwise adjusted, either:

   (a) as part of an overall public economic measure, or

   (b) in certain circumstances established by law?

2. If the answer to 1(a) or (b) is yes, then do the Judges of the Provincial Court of

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Prince Edward Island currently enjoy a basic or sufficient degree of financial security or remuneration such that they constitute an independent and impartial tribunal within the meaning of section 11(d) of the Canadian Charter of Rights and Freedoms and such other sections as may be applicable?

* * * * *

Appendix "B"

Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island, February 13, 1995

1. Having regard to the Statement of Facts, the original of which is on file with the Supreme Court of Prince Edward Island, can a Judge of the Provincial Court of Prince Edward Island (as appointed pursuant to the Provincial Court Act, R.S.P.E.I. 1988, Cap. P-25, as amended) be perceived as having a sufficient or basic degree of:

   (a) security of tenure, or

   (b) institutional independence with respect to matters of administration bearing on the exercise of the Judge's judicial function, or

   (c) financial security,

   such that the Judge is an independent and impartial tribunal within the meaning of section 11(d) of the Canadian Charter of Rights and Freedoms?

2. Having regard to the said Statement of Facts, with respect to "security of tenure", is the independence and impartiality of a Judge of the Provincial Court of Prince Edward Island affected to the extent that he is no longer an independent and impartial tribunal within the meaning of section 11(d) of the Canadian Charter of Rights and Freedoms by:

   (a) the pension provision in section 8(1)(c) of the Provincial Court Act, supra?

   (b) the fact that the Legislative Assembly of the Province of Prince Edward Island has increased, decreased or otherwise adjusted the remuneration of Provincial Court Judges in the Province of Prince Edward Island?

   (c) the provision for possible suspension or removal of a Provincial Court Judge from office by the Lieutenant Governor in Council pursuant to section 10 of the Provincial Court Act, supra?

   (d) section 12(2) of the Provincial Court Act, supra, which provides for a leave of absence to a Provincial Court Judge, due to illness, at the discretion of the Lieutenant Governor in Council?

   (e) section 13 of the Provincial Court Act, supra, which provides for sabbatical leave to a Provincial Court Judge at the discretion of the Lieutenant Governor in Council?

   (f) alteration(s) to the pension provisions provided in section 8 of the Provincial Court Act, supra, which could result in:

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(i) an increase or decrease in the pension benefits payable?

(ii) making the plan subject to no more than equal contributions by Provincial Court Judges and the Government of Prince Edward Island?

(iii) an increase or decrease in the years of service required for entitlement to the pension benefits?

(iv) an increase or decrease in the level of indexing of pension benefits, or the use of some alternative index?

(g) remuneration of Provincial Court Judges appointed on or after April 1, 1994, being determined for any year by calculating the average of the remuneration of Provincial Court Judges in the Provinces of Nova Scotia, New Brunswick and Newfoundland on April 1 of the immediately preceding year?

and, if so affected, specifically in what way?

3. Having regard to the said Statement of Facts, with respect to "institutional independence", is the independence and impartiality of a Judge of the Provincial Court of Prince Edward Island affected to the extent that he is no longer an independent and impartial tribunal within the meaning of section 11(d) of the Canadian Charter of Rights and Freedoms by:

(a) the location of the Provincial Courts, the offices of the Judges of the Provincial Court, the staff and court clerks associated with the Provincial Court, in relation to the offices of other Judges of Superior Courts, Legal Aid offices, Crown Attorneys' offices, or the offices of representatives of the Attorney General?

(b) the fact that the Provincial Court Judges do not administer their own budget as provided to the Judicial Services Section of the Office of the Attorney General for the Province of Prince Edward Island?

(c) the designation of a place of residence of a particular Provincial Court Judge?

(d) communication between a Provincial Court Judge and the Director of Legal and Judicial Services in the Office of the Attorney General or the Attorney General for the Province of Prince Edward Island on issues relating to the administration of justice in the Province?

(e) the position of the Chief Judge being vacant?

(f) the fact that the Attorney General, via the Director of Legal and Judicial Services, declined to fund, and opposed an application to fund, legal counsel for the Chief Judge of the Provincial Court or Provincial Court Judges, as intervenor(s) in Reference re Remuneration of Provincial Court Judges and the Jurisdiction of the Legislature and Related Matters dated October 11, 1994?

(g) Regulation No. EC631/94 enacted pursuant to the Public Sector Pay Reduction Act, S.P.E.I. 1994, Cap. 51?

and, if so affected, specifically in what way?

4. Having regard to the said Statement of Facts, with respect to "financial security", is the independence and impartiality of a Judge of the Provincial Court of Prince Edward Island affected to the extent that he is no longer an independent and impartial tribunal within the meaning of section 11(d) of the Canadian Charter of Rights and Freedoms by:

   (a) a general pay reduction for all public sector employees, and for all who hold public office, including Judges, which is enacted by the Legislative Assembly of Prince Edward Island?

   (b) a remuneration freeze for all public sector employees, and for all who hold public office, including Judges, which is implemented by the Government of Prince Edward Island or is enacted by the Legislative Assembly of Prince Edward Island?

   (c) the fact that Judges' salaries are not automatically adjusted annually to account for inflation?

   (d) Provincial Court Judges having the ability to negotiate any aspect of their remuneration package?

   (e) Provincial Court Judges' salaries being established directly by the Legislative Assembly for the Province of Prince Edward Island and per the Provincial Court Act, supra, indirectly by other legislative assemblies in Canada?

   (f) section 12(2) of the Provincial Court Act, supra, which provides for a leave of absence to a Provincial Court Judge, due to illness, at the discretion of the Lieutenant Governor in Council?

   (g) section 13 of the Provincial Court Act, supra, which provides for sabbatical leave to a Provincial Court Judge at the discretion of the Lieutenant Governor in Council?

   (h) alteration(s) to the pension provisions provided in section 8 of the Provincial Court Act, supra, which could result in:

      (i) an increase or decrease in the pension benefits payable?

      (ii) making the plan subject to no more than equal contributions by Provincial Court Judges and the Government of Prince Edward Island?

      (iii) an increase or decrease in the years of service required for entitlement to the pension benefits?

      (iv) an increase or decrease in the level of indexing of pension benefits, or the use of some alternative index?

   (i) An Act to Amend the Provincial Court Act, assented to May 19, 1994, which provides, inter alia, that the remuneration of Provincial Court Judges appointed on or after April 1, 1994, shall be determined for any year by calculating the average of the remuneration of Provincial Court Judges in the Provinces of Nova Scotia, New Brunswick and Newfoundland on April 1 of the immediately preceding year?

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(j) the fact that the Attorney General, via the Director of Legal and Judicial Services, declined to fund, and opposed an application to fund, legal counsel for the Chief Judge of the Provincial Court or Provincial Court Judges, as intervenor(s) in Reference re Remuneration of Provincial Court Judges and the Jurisdiction of the Legislature and Related Matters dated October 11, 1994?

(k) Regulation No. EC631/94 enacted pursuant to the Public Sector Pay Reduction Act, supra?

and, if so affected, specifically in what way?

5. Notwithstanding the individual answers to the foregoing questions, is there any other factor or combination of factors arising from the said Statement of Facts that affects the independence and impartiality of a Judge of the Provincial Court of Prince Edward Island to the extent that he is no longer an independent and impartial tribunal within the meaning of section 11(d) of the Canadian Charter of Rights and Freedoms? If so affected, specifically in what way?

6. Is it necessary for a Judge of the Provincial Court of Prince Edward Island appointed pursuant to the Provincial Court Act, supra, to have the same level of remuneration as a Judge of the Supreme Court of Prince Edward Island appointed pursuant to the Judges Act, R.S.C. 1985, c. J-1, in order to be an independent and impartial tribunal within the meaning of section 11(d) of the Canadian Charter of Rights and Freedoms?

7. If the answer to question 6 is yes, in what particular respect or respects is it so necessary?

8. If any of the foregoing questions are answered "yes", are any possible infringements or denials of any person's rights and freedoms as guaranteed by section 11(d) of the Canadian Charter of Rights and Freedoms within reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society within the meaning of section 1 of the Canadian Charter of Rights and Freedoms?

* * * * *

Appendix "C"

Constitutional questions in R. v. Campbell, R. v. Ekmecic, and R. v. Wickman, June 26, 1996

1. Does the provision made in s. 17(1) of the Provincial Court Judges Act, S.A. 1981, c. P-20.1, for the remuneration of judges of the Provincial Court of Alberta, when read on its own or in conjunction with the regulations enacted thereunder (with the exception of the regulation referred to in question 2), fail to provide a sufficient degree of financial security to constitute that court an independent and impartial tribunal within the meaning of s. 11(d) of the Canadian Charter of Rights and Freedoms?

2. Does the 5% salary reduction imposed by the Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94, infringe the right to be tried by an independent and impartial tribunal guaranteed by s. 11(d) of the Canadian Charter of Rights and Freedoms?

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3. Do s. 11(1)(c) and s. 11(2) of the Provincial Court Judges Act, S.A. 1981, c. P-20.1, relating to the handling by the Judicial Council of complaints against judges of the Provincial Court of Alberta, when read in light of s. 10(1)(e) and s. 10(2) of the Act, infringe the right to be tried by an independent and impartial tribunal guaranteed by s. 11(d) of the Canadian Charter of Rights and Freedoms?

4. Does the inclusion of "lack of competence" and "conduct" in s. 11(1)(b) of the Provincial Court Judges Act, S.A. 1981, c. P-20.1, infringe the right to be tried by an independent and impartial tribunal guaranteed by s. 11(d) of the Canadian Charter of Rights and Freedoms?

5. Does s. 13(1)(a) of the Provincial Court Judges Act, S.A. 1981, c. P-20.1, authorizing the Minister of Justice to designate the place at which a judge shall have his residence, infringe the right to be tried by an independent and impartial tribunal guaranteed by s. 11(d) of the Canadian Charter of Rights and Freedoms?

6. Does s. 13(1)(b) of the Provincial Court Judges Act, S.A. 1981, c. P-20.1, authorizing the Minister of Justice to designate the Court's sitting days, infringe the right to be tried by an independent and impartial tribunal guaranteed by s. 11(d) of the Canadian Charter of Rights and Freedoms?

7. If any of the foregoing questions are answered "yes", are any of the provisions justified under s. 1 of the Canadian Charter of Rights and Freedoms?

* * * * *

Appendix "D"

Constitutional questions in Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice), June 18, 1996

1. (a) Does s. 9 of The Public Sector Reduced Work Week and Compensation Management Act, S.M. 1993, c. 21 ("Bill 22"), relating to the remuneration of the judges of the Provincial Court of Manitoba, violate in whole or in part the rule of law and/or the requirement of an independent and impartial tribunal imposed by s. 11(d) of the Canadian Charter of Rights and Freedoms?

   (b) If so, can the provision be justified as a reasonable limit under s. 1 of the Canadian Charter of Rights and Freedoms?

2. (a) To the extent that s. 9 of Bill 22 repeals or suspends the operation of s. 11.1 of The Provincial Court Act, R.S.M. 1987, c. C275, does it violate in whole or in part the rule of law and/or the requirement of an independent and impartial tribunal imposed by s. 11(d) of the Canadian Charter of Rights and Freedoms?

   (b) If so, can the provision be justified as a reasonable limit under s. 1 of the Canadian Charter of Rights and Freedoms?

3. (a) To the extent that s. 4 of Bill 22 authorizes the withdrawal of court staff and personnel on days of leave, does that provision violate in whole or in part the

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rule of law and/or requirement of an independent and impartial tribunal imposed by s. 11(d) of the Canadian Charter of Rights and Freedoms?

(b) If so, can the provision be justified as a reasonable limit under s. 1 of the Canadian Charter of Rights and Freedoms?

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Γ Trial Attorney in charge of case: _____, received by _____
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Γ Accused: _____
Γ Lead Counsel: __Jenkins-Johnson_____(name)
Γ In Freetown _____ (signature) Γ Fax Number:
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Defence Reply to Prosecution Response to the Third Preliminary Motion: Judicial Independence

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- ☐ Article 7 : Format of Motions and other processes
- ☐ Article 8 : Lenghts and sizes of briefs and others
- ☐ Article 10 : After-hours filing
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