

**IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of Alberta)**

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

**APPELLANT/
RESPONDENT ON CROSS-APPEAL
(Respondent)**

- and -

**DEVON GARY ELL, JOHN MICHAEL MAGUIRE
and ROSELYNNE MARGARET SPENCER**

**RESPONDENTS/
APPELLANTS ON CROSS-APPEAL
(Applicants)**

- and -

ASSOCIATION OF JUSTICES OF THE PEACE OF ONTARIO

INTERVENER

FACTUM OF THE APPELLANT ALBERTA

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ABBREVIATIONS

The following abbreviations will be used in this Factum:

- AR Appellant's Record
- *Amendment Act, 1998* *Justice Statutes Amendment Act, 1998*, c. 18, S.A. 1998
- *JP Act* *Justice of the Peace Act*, c. J-3, R.S.A. 1980 as amended by *Amendment Act*
- Transitional Provision *Amendment Act, 1998*, s. 3(3) [s. 2.4(8) *Justice of the Peace Act*]:
 - (8) A person appointed as a justice of the peace before the coming into force of this section who is not appointed under section 2.1(1) or 2.2 may not exercise any authority or receive any remuneration as a justice of the peace after this section comes into force.

PART I - STATEMENT OF FACTS

1. **Overview** - This appeal deals with a challenge to Alberta's 1999 reform of its system of justices of the peace (jps). Part of the reform involved replacement of the office of non-sitting jp with two new offices: presiding and non-presiding. An independent Judicial Council established qualifications for the new and expanding office of presiding jp. The three respondent non-sitting jps failed to qualify for the new office of presiding jp, so were offered staff positions with appointments as non-presiding jps with no reduction to salary and benefits. They challenged the
10 transitional provision of the reform, which prevented them from continuing to function as non-sitting jps, on the basis that it violated their constitutionally protected independence and tenure.

2. The general constitutional issue raised is how to apply the principles of judicial independence in the context of legislative reform of the office or commission of inferior judicial officers. Alberta argues that a contextual approach is appropriate, consistent with decisions of the Quebec courts. In the context of reform of office of inferior judicial officers, the jurisdiction or tenure of incumbents may be affected without necessarily violating independence principles. In contrast, the Alberta Court of Appeal in this appeal held that an essential element of security of tenure for judges, jps and members of administrative tribunals is "removal only for cause" so
20 that any legislation, which has the effect of removing a judicial officer during tenure, is unconstitutional regardless of context.

3. Alberta asserts that a proper contextual approach in this case requires an examination of a number of factors including the express constitutional power of a province to reform the office of jp and the historical exercise of that power, the history and traditions of office of jp, the necessity and timeliness of the reforms, whether the reforms are consistent with and respond to recommendations of independent commissions, the extent to which the reforms improve the independence and impartiality of decision-makers and thus promote the purposes of the guarantee of judicial independence, whether the reforms are a disguised attempt to remove
30 judicial officers, the impact of the reforms on incumbents, and the detrimental impact that an obligation to grandfather incumbent non-sitting jps would have on the public confidence in the justice system, the rule of law, and the impartiality of decision makers.

4. **Recommendations for reform** - Prior to Alberta's reforms to its jp system, many reports and studies described the problems with the office of jp and made recommendations for change. Those reports and studies arose in several jurisdictions, including Ontario, Manitoba and Alberta. Many of the reports dealt expressly with the issue of transitional provisions and the impact of reforms on incumbent office holders. Although the reports emphasize the need for a relatively high level of protection for independence, including security of tenure and protection against arbitrary removal from office by government, the reports did not recommend the protection of the jurisdiction and tenure of all incumbent office holders through an obligation to grandfather all incumbents when implementing reforms. [see paragraphs 68-71 below]

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5. **Alberta's jp system prior to reform** - The Alberta system of jps as it evolved from 1973 to 1999 is described comprehensively in the affidavit of K. Hawrelechko. The most relevant features may be summarized as follows. A jp is a "judicial officer" - a person who adjudicates. Jps were divided into two main categories: sitting and non-sitting. Sitting jps were judicial officials whose powers included the power to preside over trials of minor regulatory matters. Non-sitting jps were subordinate judicial officials with jurisdiction over matters relating primarily to the initiation of legal process, or intake procedures. The category of non-sitting was divided into four sub-categories, based on whether full-time or part-time and on the type of payment: hearing officers (full-time, salaried), ad hocs (part-time, per diem), fee (paid per transaction) or staff (employed by Department of Justice with no additional payment for jp duties during business hours).

20

6. Neither sitting nor non-sitting jps were members of a court. They exercised their functions pursuant to statutory authority. Sitting jps had authority to sit in Provincial Court, but were not members of the Provincial Court. Non-sitting Jps had no authority to sit in Provincial Court. Hearing officers carried out their duties in the hearing office or at the counter of the Traffic Court. Fee jps typically carried out their duties at police stations, and staff jps typically carried out their duties during the day at a courthouse, or after hours at the police station. [*Provincial Court Judges Act*, S.A. 1981, c. P-20.1, s. 1(a), 6.1; *JP Act*, ss. 4(1)(1.1)(1.2), 6.1; *Re Joe Fong*, [1923] 53 O.L.R. 493 at 496 (i.e.- a jp does not exercise functions as a judicial officer

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of the court); Dr. I. Greene, AR 996-997 (definition of 'judicial officer'); Charter Committee Report AR 702-3 (location of hearings)]

7. The appointments of all categories of non-sitting jps were identical, except for the different term of office for ad hocs. At the time of the reform in February 1999, there were 3 hearing officers, 190 fee jps and 242 staff jps who had been appointed until retirement, and 15 ad hocs who had been appointed for fixed terms of 5 or 10 years. [See Chart of Categories of JP by Working Titles; Supplementary Affidavit of K. Hawrelechko, AR 912-928]

10 8. **The three respondent hearing officers** – The 3 Respondents were hired to staff positions, receiving their jp appointments in conjunction with their employment (staff jps). The Respondent Spencer was initially employed as a judicial clerk in July 1976 and received her jp appointment in July 1977. She was hired to the position of hearing officer in the early 1980s, and merely retained her original jp appointment. In 1987 Respondent Ell was hired as a hearing officer and received his jp appointment. Respondent Maguire was hired as a hearing officer in February 1992 and received his appointment as jp in March 1992. Requirements for the position of hearing officer included a grade 12 education and extensive court or law enforcement experience. None of the applicants have a law degree, nor are they members in good standing of the Law Society of Alberta. Respondents Spencer and Ell were hired before the introduction of
 20 statutory protection of tenure for jps in 1991, and respondent Maguire was hired after its introduction. [R.M. Spencer at AR 877-878, 881, 883-884; D.G. Ell at AR 857, 860-861, 864; R.M. Maguire at AR 896, 898-899; Qualifications for hearing officer at AR 875]

9. The three respondents were hired to the position of hearing officer, described as having two roles:

Principal Role - counter duties - accepting first appearance pleas respecting traffic-related provincial and by-law offences and all fish and wildlife charges, and disposing of guilty pleas by imposing specified penalties and scheduling trials.

30 Secondary Role - hearing office duties - perform duties as Bail Justice by hearing applications for judicial interim release. [Hawrelechko Affidavit, para. 7, AR 163-164]

10. The scope of duties of hearing officers was further defined in “letters of appointment” from the Department of the Attorney General at the time of appointment. After 1991, when responsibility for supervision of jps and assignment of jp duties was transferred from the Department to the Chief Judge of the Provincial Court or his designate (Co-ordinator of jps, Judge S. Friedman), there were replacement letters named “letters of assignment of duties”, issued by the Co-ordinator to all staff jps, fee jps and hearing officers. [K. Hawrelechko, para. 8 at AR 164, para. 23 at AR 171; Exhibits G, H, I, BB, CC at AR 334-338, 824-825]

11. The duties of hearing officers assigned by the Coordinator in the letter of assignment of duties that was in place at the time of the *Amendment Act* in 1999, were described as follows:

- dealing with first appearances as they relate to Provincial Statute and Bylaw offences (excluding guilty pleas on mandatory appearance matters)
- receiving informations and affidavits
- confirming police process
- attending to judicial interim release
- issuing process and subpoenas

[Letter of April 11th, 1996, from Coordinator of jps, Judge S. Friedman, AR 825]

12. The Co-ordinator assigned duties to staff jps and fee jps that were similar, or identical to hearing officers’. They conduct functions including hearings for judicial interim release, and search warrants. [Hawrelechko, para. 17, Exhibits U, T, CC, DD at AR 170, 803-4, 825-6; Hawrelechko Affidavit dated Nov. 16, 1998, para. 34, AR 178]

13. **Qualifications under reform** - On June 24, 1998, pursuant to the impending legislative reforms, an independent Judicial Council determined that to be qualified all appointees to the new offices of sitting or presiding jp must be members in good standing of the Law Society of Alberta with five years related experience. Appointees to the new office of non-presiding jp did not require such qualification. The members of the Judicial Council present were Justice Coté (designate of the Chief Justice of the Court of Appeal), Associate Chief Justice A. Wachowich (designate of the Chief Justice of the Court of Queen’s Bench), Chief Judge E. Wachowich of the Provincial Court (responsible for supervising all jps), and Gordon W. Flynn, President of the

Law Society of Alberta. After all attendees at the meeting had discussed the possibility of adopting a minimum requirement, they were unanimous in the view that the office should be filled only by persons who are members in good standing of the Law Society of Alberta with a minimum of 5 years related experience at the bar. Mr. Flynn considered the nature of the office of presiding jp to be quasi-judicial. He noted that Provincial Court Judge Friedman, who had been responsible for supervision, training and assignment of duties to all justices of the peace since 1991, had recommended that such a requirement be adopted. [Hawrelechko, AR 177-178; Flynn Affidavit, AR 143-146]

10 14. The three respondent hearing officers did not qualify for appointment as presiding jp under the reformed system, as they had no law degree or requisite legal experience, but had backgrounds as paralegals or police officers, respectively. [Hawrelechko, AR 177-178, 848-850]

15. **Offer of employment to non-qualifying hearing officers** - As the three hearing officers failed to qualify for the office of presiding jp, they were offered employment with the Department of Justice in the position of Counter Services Officer (Judicial Clerk IV), in either the Traffic, Criminal, or Family and Youth Division Courts. The position includes appointment as non-presiding jp. Under the offer, their salary and benefits would remain unchanged [“If you elect to be employed with Alberta Justice as a Counter Services Officer (Judicial Clerk IV), your
20 current compensation level will be maintained while you occupy this position.”]. Their duties as Counter Services Officer and appointment as non-presiding jp, would include those duties set out in the amended acts and the regulations and would include all of the counter duties for which they had been responsible throughout much of their employment. At the time of the effective date of reform on February 1, 1999 the duties of non-presiding jps included the following:

- Dealing with first appearances including disposing of charges on guilty pleas, and applications for extension of time to pay (except taking guilty pleas on mandatory court appearances, or issuing summonses of warrants for arrest)
- Receive informations (except under s., 810 *Criminal Code*)
- Schedule trials and hearing dates; adjourn cases
- 30 • Taking affidavits
- Administering oaths or affirmations or taking declarations
- Confirm or cancel police process
- Processing judicial interim release orders previously made
- Confirming or cancelling an appearance notice, promise to appear or recognizance under s. 508(1) *Criminal Code*

- Issuing subpoenas
- Ordering the disposition of seized items
- Issuing summonses under s. 27(2) of the *Domestic Relations Act*

[Exhibit G to Affidavit of D. Ell, AR 131; *JP Act*, s. 2.2(2); JP Regulation 6/99, s. 4(1)]

16. The three respondent hearing officers did not accept or reject the offer of employment. Prior to the effective date of reform, February 1, 1999, they filed an Originating Notice seeking, *inter alia*, a declaration of invalidity of a transitional provision of the reforms, s. 2.4(8) of the *JP Act*, and a declaration that they enjoy security of tenure until the age of 70 years, except for resignation or the process of removal for cause.

17. The hearing officers did not challenge by way of judicial review or otherwise, the decision of the Judicial Council to impose the qualification of 5 years at the bar for presiding jps. Nor did their counsel cross-examine the president of the Alberta Law Society, Gordon Flynn, on his affidavit respecting the meeting, discussions and decision of the Judicial Council. However, the hearing officers were successful before the Chambers Judge and were effectively “grandfathered”, remaining non-sitting jps pursuant to his order. Alberta amended its regulations to provide for their continued payment as non-sitting jps. They have not been appointed as presiding jps or non-presiding jps under the reformed system.

18. **Alberta’s reforms** - Alberta’s legislative response to the need for reform of the office of jp as described in the various reports, took place in two stages. In 1991 the primary changes to the *Justice of the Peace Act*, c. J-3, RSA 1980 as amended, were:

- creation of position of sitting jps to hear and try complaints or informations (ss. 4(1) & 6.1);
- extension of immunity to jps against actions for damages (s. 6.2);
- vesting of a power in the Chief Judge of the Provincial Court or designate to supervise and assign duties to all jps (s. 6.3);
- establishment of a JP Review Council to deal with competence-based or conduct-based complaints against jps and to make recommendations to the Lt. Governor in Council (s. 5.1);
- granting of express authority to the Lt. Governor in Council to terminate the appointment of a jp on recommendation of the JP Review Council (s. 5.2) [*Miscellaneous Statutes Amendment Act*, c. 21, S.A. 1991, s. 16].

19. In relation to the latter two provisions, ss. 5.1 & 5.2, an internal government report had reasoned that “As Valente requires security of tenure free from arbitrary or discretionary interference by the executive, the Committee is of the view that there must be a mechanism established which would remove this potential of interference”. [Klinck Report, AR 763]

20. The second stage of reform was under the *Amendment Act, 1998*, and was more far reaching. The *Amendment Act* retained the category of sitting jps, but replaced the category of non-sitting jp, and its sub-categories of ad hocs, staff jps, fee jps and hearing officers, with two categories of jp: presiding and non-presiding.

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21. The *Amendment Act* also changed many other aspects of Alberta’s jp system. The reforms as implemented responded to many problems identified in, and are consistent with many recommendations found in, several law reform commission reports and internal government studies and include:

- qualifications for office are set independently, resulting in higher education and experiential requirements, which should improve quality of decisions and enhance independence;
- fee jps are no longer used, avoiding the many criticisms associated with their use;
- categories of persons defined as ineligible for jp appointment are broadened, addressing conflict of interest concerns (i.e. staff jps);
- 20 ▪ the appointment process is changed, addressing patronage concerns;
- introduction of legislated categories and powers of jps, clarifies their roles for the public and reduces the perception that jps may be too dependent on the discretion of the chief judge;
- establishment of an independent complaints process, addresses concerns that jps may be too dependent on the discretion of a chief judge; and
- use of the Transitional Provision which allows effective implementation of the reforms within a reasonable time, by not automatically grandfathering all incumbent jps, or appointing them into positions with equivalent or greater jurisdiction in the reformed system.

30 [see paras. 68-82 below, and Chart of “Factors Relevant to Independence: a comparison of non-sitting and presiding jps”]

22. The jurisdiction of presiding jps has been expanded beyond the jurisdiction previously exercised by non-sitting jps. For example, presiding jps were granted authority to issue emergency protection orders by telecommunication pursuant to the *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2. They have received authority to issue entry orders authorizing apprehension of children for the purpose of enforcing access orders under the *Domestic Relations Act*, R.S.A. 2000, c. D-14, s. 74. Statutory authority was extended in relation to apprehension orders under the *Protection of Children Involved in Prostitution Act*, R.S.A. 2000, c. P-28, s. 2. Most recently, statutory amendments were passed to authorize presiding jps to receive applications by telephone or telecommunications for apprehension orders under the *Child Welfare Act* [s. 3, *Child Welfare Amendment Act, 2000*, c. 9, S.A. 2002]

23. The jurisdiction of non-presiding jps does not include the authority to conduct hearings for judicial interim release or to issue search warrants. [para. 15 above; Hawrelechko, AR 178-179]

24. The 15 non-sitting ad hocs (part-time lawyers), all of whom qualified for appointment, were appointed as presiding jps under the reformed system. Of the 190 fee jps and the 242 staff jps who did not qualify for the new office of presiding jp, all those who were active were appointed and designated non-presiding jps by ministerial order. The 3 respondent hearing officers did not qualify to be appointed as presiding jps and did not consent to their appointment as non-presiding jps, so were not appointed to either category. [O.C. 333 /98 - appoints 15 ad hocs as presiding jps; Hawrelechko Affidavit of Nov. 16, 1998, para. 34, AR 178-179; Ministerial Orders 4/99 and 15/99, appointing and designating non-presiding jps]

25. An additional 20 qualified candidates (part-time lawyers) have been appointed in addition to the 15 ad hocs, so a total of 35 presiding jps have now been appointed to operate the system. The three respondent hearing officers have continued to work as non-sitting jps, pursuant to the order of the Chambers Judge. [O.C. 3 /99; O.C. 179 /99]

26. **Decisions of courts below** - The Chambers judge ruled that the Transitional Provision, s. 2.4(8) of the *JP Act*, offends the principles of judicial independence and is of no force and effect

insofar as it relates to the three hearing officers. Further, he declared that the hearing officers enjoy security of tenure in accordance with sections 5, 5.1 and 5.2 of the *JP Act*. He denied the hearing officers' application for solicitor/client costs, but awarded them trial costs for the chambers application, on a generous party/party basis. The Chamber's Judge reasoned that "s. 2.4(8) constitutes the arbitrary retroactive imposition of an educational qualification" (AR 1150, para. 43).

27. The Court of Appeal dismissed Alberta's appeal on the merits, awarded appellate costs on a full indemnity (solicitor-client) basis to the respondent hearing officers, but dismissed their cross-appeal on trial costs. The Court of Appeal reasoned:

- 10 ▪ The Supreme Court of Canada in binding decisions (*Valenté; Généreux; Matsqui Indian Band*) has ruled that the essential element of security of tenure for judges and members of administrative tribunals is "removal only for cause". The same minimum standard applies to jps. [Reasons, paras. 39-46, 55, AR 1178-1180, 1182-1183]
- 20 • Any attempt by a Legislature to pass legislation, which has the effect of removing a judicial officer during tenure, is unconstitutional. Such removal is deemed to be an arbitrary interference with the constitutionally protected security of tenure of a judicial officer, even in the context of reforms enacted in the public interest and for the purpose of enhancing judicial independence. [Reasons, paras. 37-43, 48, 55, AR 1177-1179, 1180, 1182-1183]
- 30 ▪ While the usual common law rule for awarding solicitor-client costs is restricted to cases of misconduct by the payor in the conduct of legislation, judicial independence cases are an exception to the rule because of the obligation on judges imposed by Codes of Conduct and Ethical Principles to defend the independence of their courts. [paras. 68, 7-6 AR 1185]

28. **Leave to Appeal** - The Appellants sought leave to appeal the decision of the Alberta Court of Appeal on the merits, and leave to appeal the order of appellate costs on a solicitor/client basis. This Court granted leave to the Appellants with costs in any event of the cause. The Respondents were granted leave to appeal the order awarding trial costs on an enhanced party/party basis.

29. **Related action by fee jps** - Subsequent to the decision of the Alberta Court of Appeal, eight fee jps filed and served a statement of claim dated January 31, 2001, challenging Alberta's reform and particularly the reduction of jurisdiction suffered by fee jps as a result of the transitional provisions in the *Amendment Act*. By agreement of counsel this action is on hold, pending a decision in this *Ell* appeal. [Statement of Claim, *Allan J. Brown et al v. The Queen*]

PART II - POINTS IN ISSUE

10 **Constitutional questions:**

1. Does section 2.4(8) of the *Justice of the Peace Act*, R.S.A. 1980, c. J-3, as amended, interfere with the tenure of non-sitting justices of the peace and thereby violate the principle of judicial independence guaranteed by:

- (a) the preamble of the *Constitution Act, 1867*, or
- (b) section 11(d) of the *Canadian Charter of Rights and Freedoms*?

20 2. If the answer to question 1(b) is yes, is the Act demonstrably justified as a reasonable limit prescribed by law under s. 1 of the Charter?

Other Legal points in issue:

3. Whether the Alberta Court of Appeal erred, in finding that the essential element of security of tenure for judges, jps and members of administrative tribunals is "removal only for cause", so that regardless of context, any legislation which has the effect of removing a judicial officer during tenure is unconstitutional?

30 4. Whether the Alberta Court of Appeal erred in awarding appellate costs on a solicitor-client basis, and ruling that while the usual common law rule for awarding solicitor-client costs is restricted to cases of misconduct by the payor in the conduct of litigation, judicial independence cases are an exception to the usual rule because of an obligation on judges to defend the independence of their courts?

PART III - ARGUMENT

30. The general constitutional issue in this appeal is how to properly apply the principles of judicial independence in the context of a legislative reform of the office or commission of an inferior judicial officer. To what extent should the implied principles of judicial independence restrict the express plenary power of the province to engage in meaningful, necessary and timely reforms of the office of an inferior judicial officer?

A. Provincial Power to Reform Judicial Office

31. Provinces enjoy a broad, plenary power pursuant to s. 92(14) *Constitution Act, 1867*, over “The Administration of Justice in the Province”. This authority includes the power to provide for the appointment and qualifications of justices of the peace, and to regulate and define their duties and powers. [*Di Iorio v. Warden of the Montreal Jail* [1978] 1 SCR 152 at 199-200; *Wilson v. McGuire*, [1883] O.R. 118 at 123-4 (QB); *R. v. Bush* (1888), 15 O.R. 398 at 406 (QB)]

32. The general language of s. 92(14) is supported by specific constitutional provisions, which expressly contemplate reform of office. The power to reform, reorganize, alter or even repeal or abolish the office of jp for Ontario, Quebec, New Brunswick and Nova Scotia is expressly conferred by the language of s. 129 of the *Constitution Act, 1867* and for Alberta is found in the language of s. 16 of the *Alberta Act, 1905*. As justices of the peace existed in Upper and Lower Canada immediately prior to Confederation, and as jps existed in the N.W.T. immediately prior to the establishment of Alberta, the wording of ss. 129 *Constitution Act, 1867* and s. 16 *Alberta Act, 1905* apply to the office of jp. [Report of R.C. Macleod, AR 1083-1086]:

16(1) All laws and all orders and regulations made thereunder... and all courts of civil and criminal jurisdiction, and all commissions, powers, authorities and functions, and all officers and functionaries, judicial, administrative and ministerial, existing immediately before the coming into force of this act and the territory hereby established as the province of Alberta, shall continue ...subject nevertheless... to be repealed, abolished or altered by the Parliament of Canada, or of the said Legislature: ... [*Alberta Act, 1905*]

B. Proper Approach to Principles of Judicial Independence

33. **Contextual approach preferred** - Canadian courts have generally adopted a contextual approach to the interpretation of the principles of judicial independence resulting in a flexible application of those principles, as demonstrated by the discussion below. [*C.P. Ltd. v. Matsqui* [1995] 1 S.C.R. 3 at 68-69]

34. **Incorrect approach of Alberta courts: an inflexible, universal rule** - The approach of the Chambers Judge and the Alberta Court of Appeal in this case fails to adequately take context into consideration. They adopted an inflexible and universal rule: the essential element of security of tenure for judges, jps and administrative tribunals is “removal only for cause”, and any attempt by a Legislature to pass legislation which has the effect of removing a judicial officer from office during his tenure is arbitrary and unconstitutional. In relation to Alberta’s current reform of jp system, this principle as stated by the Alberta Court of Appeal would result in an obligation on Alberta to grandfather not only the 3 hearing officers, but also the 190 fee jps and 242 staff jps, delaying implementation of necessary reforms for decades. In the broader context, adoption of such an inflexible rule would surely result in “negating or ossifying the exercise by the provinces of their legislative jurisdiction under s. 92(14) of the *Constitution Act, 1867*.” [*Mackin v. N. B. (Minster of Finance)*; *Rice v. N.B.*, [2002] S.C.C. 13, at para. 70]

35. **Proper approach of Quebec courts: context essential** - Quebec courts have adopted a proper contextual approach to the application of independence principles to legislated reform of office of inferior judicial officers (municipal court judges). They recognize that a rule, “no removal except for cause”, which was developed to protect the tenure and individual independence of judges from arbitrary actions of the Executive, may have no direct application in the context of legislative reforms to an office of inferior judicial officers and its institutional independence. A number of factors must be considered when considering whether a legislative reform of a lower level court which affects the tenure of incumbent judges, unconstitutionally offends the principles of judicial independence. The perspective of the reasonable, well-informed person should be the test. [*Lavoie v. Quebec*, [1994] A.Q. No. 1133, (Que. Sup. Ct.),

affirmed [1995] A.Q. No. 187 (Que. C.A.), leave to appeal to S.C.C. dismissed with costs [1995] C.S.C.R. No. 174; *Baie D'Urfe (Ville) v. Quebec* [2001] J.Q. No. 2954 (Que S.Ct.), aff'd [2001] J.Q. No 4821 (Que. C.A.) (QL); leave to appeal to S.C.C. denied [2001] J.Q. No 4821 (QL)]

36. **The reasonable person test** - The test adopted for both institutional independence and impartiality is a flexible one based on a reasonable perception or apprehension of independence or bias, as stated by Lamer C.J. in the *Provincial Court Judges Remuneration* case, at 79-80:

10 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].

[*Reference re Remuneration of Judges of the Provincial Court of P.E.I.* [1997] 3 S.C.R. 3 at 79-80 (“*Provincial Court Judges Remuneration case*”); see also *R. v. Lippé*, [1991] 2 S.C.R. 114 at 143; *Mackin, supra* at paras. 39-40]

37. **Objective guarantees for independence** - The objective guarantees necessary to ensure a reasonable perception of independence are described in terms of two dimensions (individual independence of a judge and institutional independence of a tribunal or members) and three core characteristics (security of tenure, financial security, administrative independence). [*Valenté, supra*, at pp. 694, 704; *Provincial Court Judges Remuneration case, supra*, at para. 115; *Re Therrien*, [2001] S.C.C. 35 at para. 65; *Mackin, supra* at paras. 39-40]

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38. **Individual and institutional independence** – Individual independence relates to the purely adjudicative functions of judges, whereas the institutional independence relates more to the status of the judiciary as an institution. “Nevertheless, in each of its dimensions, independence is designed to prevent any undue interference in the judicial decision-making process, which must be based solely on the requirements of law and justice. [*Mackin, supra* at para. 39]

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39. **Construe flexibly: no uniform standard** - As affirmed recently in *Re Therrien*:

[66] Le Dain next said that although it may be desirable, it is not reasonable to apply the most elaborate and rigorous conditions of judicial independence as constitutional

requirements, since s. 11(d) of the *Canadian Charter* may have to be applied to a variety of tribunals. These essential conditions should instead respect that diversity and be construed flexibly. Accordingly, there should be no uniform standard imposed or specific legislative formula dictated as supposedly prevailing. It will be sufficient if the essence of these conditions is respected: *Valente, supra*, at pp. 692-93 (see also *Lippé, supra*, at p. 142; *Généreux, supra*, at pp. 284-86 and 304; and *Provincial Court Judges Remuneration case, supra*, at para. 167).

For example, “the higher degree of constitutional guarantee” appropriate to superior courts, and the standard of protection of tenure for superior court judges which requires an address to Parliament as a pre-condition to removal, is not applicable to provincial court judges. [*Re Therrien, supra*, at paras. 63-68]

40. **Essence of conditions for protection of tenure** – Justice Le Dain in *Valente* described the essence of security of tenure for provincial court judges, to protect their individual independence from actions of the Executive. As summarized in *Therrien* at para 66:

In his view, the essence of security of tenure for purposes of s. 11(d) of the *Canadian Charter* is that the appointment be made until an age of retirement, for a fixed term, or for a specific adjudicative task, and that the tenure be secure against interference by the Executive or other appointing authority in a discretionary [or arbitrary] manner: *Valenté, supra*, at pp. 698 and 693 (see also *Généreux, supra*, at p. 285). More specifically, as regards removal of provincial court judges, it will be sufficient if the following two criteria are met: (1) the judge may be removed only for cause related to his or her capacity to perform judicial functions and (2) there must be a judicial inquiry to establish that such cause exists, at which the judge must be given an opportunity to be heard: *Valenté, supra*, at pp. 697-98 (see also *Provincial Court Judges Remuneration case, supra*, at para. 115). (emphasis added).

30 41. Justice Le Dain, who was considering the independence of a provincial court judge hearing criminal trials, did not purport to establish a universal minimum standard for the ‘essential condition’ which would apply in all contexts and for all purposes, including the protection of institutional independence required when legislating reform of office of an inferior judicial officer. The Alberta Court of Appeal was in error in adopting “removal for cause after a hearing” as a minimum standard for judges, jps and members of administrative tribunals in relation to legislative reform of office.

42. The analysis of this Court in its recent *Mackin* decision provides helpful direction, at least insofar as provincial court judges and the institution of the provincial court is concerned. After noting that “[I]n *Valente*,...it was found that in its individual dimension, the security of tenure provided for provincial court judges generally required that they not be dismissed by the executive before the age of retirement except for misconduct or disability, following a judicial inquiry” this Court noted that s. 6 of the N.B. Act seemed to create adequate protection by indicating that “a judge holds office during good behaviour and may be removed from office only for misconduct, neglect of duty or inability to perform his duties.” Then this Court decided it would be necessary to determine whether the elimination of the office of supernumerary judge constituted an arbitrary removal of the respondent judges from office.”[emphasis added, *Mackin*, *supra* at paras. 42-44]

43. **Legislative reform – Is there an arbitrary or discretionary removal from office? –**
The proper test for determining whether a legislative reform of office violates constitutionally protected tenure, is whether the legislation results in an arbitrary or discretionary removal from office. To answer this question, a contextual approach is required, and consideration of a number of factors is necessary. The reasoning of the Alberta Court of Appeal that legislation must always be “deemed to be arbitrary” in the absence of removal for cause after a hearing, should be rejected.

44. **Quebec courts’ proper application of independence principles in context of reform -**
The Quebec courts have properly applied the “arbitrariness” test to legislative reforms to a lower court. In the *Lavoie* case, there was a challenge to the 1988 amendment to the *Cities and Towns Act* which introduced a provision that a municipal judge ceases to hold office “when the municipal court to which he is appointed is abolished.” [s. 609.2] When there were proposals in 1993 to amalgamate certain municipalities in the Quebec City region and to abolish some of the associated municipal courts, municipal court judges whose tenure was to be terminated challenged the provision as a violation of their independence and security of tenure. Justice Phillippon acknowledged that municipal court judges whose functions triggered the application of s. 11(d) Charter enjoyed “protection against arbitrary revocation” [para 29], that protection of their tenure is necessary to safeguard the independence necessary to ensure the rule of law, and

that “Arbitrariness in this area is not acceptable, whether it be theoretically possible or only reasonably perceivable.” [para. 30] After reviewing a number of factors including the need for and purpose of the amalgamation of municipalities and concomitant abolishment of municipal courts, the role and function of municipal judges, the level of independence appropriate to the office, and the lack of any evidence or suggestion of a hidden motive for removing municipal judges (including consideration of the likely perceptions of a well-informed reasonable man) Justice Phillipon of the Superior Court dismissed the challenge. [*Lavoie v. Quebec, supra* (Que. Sup. Ct.) at paragraphs 18-30]

10 45. The Quebec Court of Appeal affirmed, noting that the constitution “does not guarantee the ideal”. It is of interest that the same 1988 amending legislation which introduced cessation of
 20 46. tenure of municipal court judges upon abolishment of their court, also extended to them the right to hold office during good behaviour and provided that the the rules respecting removal of Provincial Court judges were to apply to them (no removal except for cause and after an inquiry). Clearly, the Quebec National Assembly did not see any inconsistency between extending a right of “no removal except for cause”, in conjunction with a provision that a judge’s tenure would cease if the court was abolished. The Quebec courts agreed. Leave to the Supreme Court of Canada was denied. [*Lavoie v. Quebec, supra*; *An Act respecting certain aspects of the status of municipal court judges*, S.Q. 1988, c. 74, ss. 2 & 3 inserting ss. 606.1 & 609.1 of the
 30 *Cities and Towns Act*, R.S.Q. c. C – 19, and incorporating ss. 127 & 85 of *Courts of Justice Act*, R.S.Q. 1977, c. T – 16]

46. The *Lavoie* decisions and their reasoning were recently followed in Quebec in a case dealing with a challenge to amalgamations proposed in the region of the City of Montreal. In *Baie D’Urfe (Ville) v. Quebec*, Justice Lagace heard a challenge based on the argument, presented by the City of Westmount, that judges of municipal courts who were to lose their tenure upon amalgamation of their municipalities and abolishment of their courts, would be exercising their judicial functions with no security of tenure. Justice Lagace ruled that “...the constitutional power to abolish municipal courts cannot, under the pretext of the judicial
 30 independence provided for in the Canadian and Quebec charters, be conditioned by an obligation to keep all the judges sitting in these courts in a similar judicial position (regardless of

availability) or to guarantee their present remuneration until they retire (regardless of the exercise of a judicial function)” (para 292). He also adopted the remarks of Justice Phillipon in *Lavoie*, that the abolishment of the court and cessation of tenure of the municipal court judge did not create a perception of lack of impartiality or independence in the context of the restructuring, as he did “not believe that a reasonable man, accurately informed of the facts as a person interested in the question might be, could under the circumstances, entertain a valid suspicion of disguised dismissal” (para. 296) [*Baie D’Urfe (Ville) v. Quebec, supra* (Que S.Ct.)]

47. The Quebec Court of Appeal affirmed. The Conference des juges municipaux du Quebec
 10 intervened, making independence and impartiality arguments, and the appeal court treated their position as an appeal of Justice Legace’s decision on the arguments of the City of Westmount. The Conference challenged the provisions which set up a committee to select the municipal judges of the former courts who would be appointed to the new courts. Criteria for selection was defined in statute and included experience on the bench, conditions of exercise of office, and ability to integrate into the new court. The committee’s recommendations were not binding, and the Executive retained discretion to decide which judges to appoint. The Court of Appeal pursued a contextual approach to the application of independence principles, and did not find any violation of the independence of the judges who would lose their tenure, resulting from the abolishment of their courts and the recommendations of the committee:

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[240] Here, instead of relying solely on the government's discretionary power of appointment, as it might have done, the legislature enhanced the transparency of the selection process by giving the job of preselection to this committee on which the chief judge sits. It cannot be reproached for that. Significantly, it will be noted that this committee does not in any way deal with the judge's ability to perform his duties. This system simply offers an additional tool for guaranteeing an objective selection, although it must be acknowledged that the criteria to be taken into account by the committee (experience on the bench, conditions of exercise of the office, ability to integrate, judge's intentions regarding his future) remain fairly vague.

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[241] Certainly, when new judges are being selected, public confidence in judicial independence and impartiality must be maintained. Municipal court judges have an important role to play, which is not, as some people might think, limited just to parking violations. Some municipal court judges perform an important adjudicative function in criminal cases, pursuant to Part XXVII of the Criminal Code, and are often the citizen's only contact with the criminal justice system. Indeed, besides being competent to hear all

issues arising out of a municipality's laws, charters, by-laws, resolutions or ordinances, they also hear criminal proceedings initiated under the *Highway Safety Code*, the *Code of Penal Procedure* and a number of cases involving provincial and federal statutes and, lastly, have jurisdiction over several types of proceedings under the *Criminal Code*.

.....

[244] In the present case, it is our view that the sole fact that part-time judges of a court that will be abolished may, in some cases, not be called upon to sit as acting or deputy judges or not be appointed to the new court cannot be considered an impediment to judicial independence. In addition, a well-informed citizen who, in 2002, had to appear before one of the judges whose application was successful, would understand very well, it seems to us, that the selection process that led to the judge's appointment poses no threat to the independence he is required to demonstrate.

[*Bai d'Urfé (Ville) c. Québec, supra*, (Que C.A.); leave to S.C.C. denied]

C. Application of Independence Principles to Alberta's Reforms

(i) Degree of Protection of Independence Appropriate to Office of Non-sitting JP

48. The degree of protection of independence appropriate to an office, is a contextual factor which may affect the manner in which the arbitrariness test is applied. Principles of judicial independence should be applied in a manner which provides provinces with significant flexibility to exercise their plenary power to reform judicial offices in the public interest, particularly when the reforms promote the impartiality and independence of that office.

49. As principles of judicial independence may be applied to a variety of tribunals, the essential conditions of independence should respect that diversity and be construed flexibly. Standards for superior court judges are higher than for provincial court judges. [*Valente, supra*; *Therrien, supra*] Standards for provincial court judges, should be higher than for non-judges such as non-sitting jps who are not members of a court. For similar reasons, standards for provincial court judges will be higher than for members of administrative tribunals. To determine the degree of protection appropriate to non-sitting jps, a number of factors may be considered including their functions, and the history and traditions of their office and reforms to their office. [*Ocean Port Hotel Ltd. v. British Columbia*, [2001] S.C.C. 52]

50. No functions triggering Section 11(d) Charter – Non-sitting jps do not carry out functions triggering the application of s. 11(d) of the *Charter*. They do not conduct trials, nor determine the “guilt” of an accused. Judicial interim release hearings, the issuance of search warrants, or receipt of informations and issuance of process do not give rise to s. 11(d) *Charter* rights. [*R. v. Pearson* [1992] 3 S.C.R. 665 at para. 40; *Gatien v. Quebec*, [1996] J.Q. No. 4666 paras. 5-9 (Que. S. Ct.); *R. v. Baylis* (1986), 28 C.C.C. (3d) 40 at 42-3 (Sask. Q.B.), reversed on other grounds (1988), 43 C.C.C. (3d) 514 (Sask. C.A.); *R. v. Isaac* (1989), 47 C.C.C. (3d) 353 at 357 (B.C. S.C.); **R. v. Young [1999] B.C.J. No. 818 at para. 2 (B.C.Prov. Ct.)- add cite!!]**

10 51. Protection of independence through Preamble not applicable to non-sitting jps - Chief Justice Lamer in the *Provincial Court Judges Remuneration* case, had suggested in *obiter* that the proper home of judicial independence of courts is the Preamble. Analyzing this case, Professor Hogg described the state of the law on whether the Preamble protects the independence of more than superior or provincial courts, to be uncertain: “we are now in an ‘uncharted sea’, and only after more decisions of the Supreme Court of Canada can we hope to prepare the required maps”. Later in *Re Therrien*, a majority of this Court confirmed that provincial court judges hearing non-criminal matters have their independence protected by the Preamble to the *Constitution Act, 1867*. More recently, this Court stated in *Ocean Port* that protection of independence through the Preamble extends only to provincial and superior courts, and not to
 20 other tribunals or officials: “These comments circumscribe the requirement of independence, as a constitutional imperative emanating from the preamble, to the provincial and superior courts.” The *Ocean Port* Court acknowledged the possibility of Charter-based independence for non-courts: “While tribunals may sometimes attract Charter requirements of independence, as a general rule they do not.” [*Provincial Court Judges Remuneration* case, *supra* at paras. 92 and 106; Hogg, *Constitutional Law of Canada*, p. 7-14.4; *Ocean Port*, *supra* at paras. 24, 31]

52. In *Ocean Port* the reasons given for the conclusion that the Preamble does not extend judicial independence to administrative tribunals such as a liquor appeal board, is that the board is not a court and its role does not approach the constitutional role of the courts. (*Ocean Port*,
 30 *supra*, para 33) Chief Justice Lamer in the *Provincial Court Judge Remuneration* case engaged in similar analysis, when deciding whether to extend a high level of constitutional protection of

financial security to provincial court judges. Chief Justice Lamer concludes that the institutional role demanded of the “judiciary” under the *Constitution* is now a role now expected of provincial court judges including:

- (a) enforcement of the supremacy clause of the *Constitution*, s. 52 of the *Constitution Act, 1982*, (i.e. *R. v. Big M Drug Mart Ltd.* (1983), 25 Alta. L.R. (2d) 195 (Prov. Ct.));
- (b) enforcement of fundamental freedoms in s. 2 of the *Charter* (i.e. freedom of expression - *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084);
- 10 (c) employment of ss. 24(1) & (2) of the *Charter* in their capacity as “courts of competent jurisdiction”, as they may order stays of proceedings (i.e. *R. v. Askov*, [1990] 2 S.C.R. 1199) or exclude evidence (i.e. *R. v. Collins*, [1987] 15 C.R. 265), pursuant to “Their dominant role in the adjudication of criminal cases.”;
- (d) their role in policing the federal division of powers by interpreting ss. 91 & 92 *Constitution Act, 1867* (i.e. *R. v. Morgentaler*, [1993] 3 S.C.R. 463);
- (e) making decisions on the rights of aboriginal peoples protected by s. 35 *Constitution Act, 1982* (i.e. *R. v. Sparrow*, [1990] 1 S.C.R. 1075).
- 20 (f) provincial courts have played an increased role as a result of “a legislative policy of granting greater jurisdiction to those courts”. [*Provincial Court Judges Remuneration case, supra* at 634 - 636]

53. Chief Justice Lamer’s reasons do not apply to non-sitting jps:

- (a) Non-sitting jps are not judges and are not members of the provincial court;
- 30 (b) Non-sitting jps do not preside over trials;
- (c) Non-sitting jps have not been expected to assume the institutional role of the “judiciary” under the *Constitution*, and in particular there is no evidence that non-sitting jps have issued decisions enforcing the supremacy clause of the *Constitution*, enforced fundamental freedoms in s. 2 of the *Charter*, issued stays of proceedings or excluded evidence, interpreted heads of power under ss. 91 & 92 *Constitution Act*, or determined rights of aboriginal peoples;
- 40 (d) Non-sitting jps have not had their jurisdiction increased as part of a legislative policy. [The Irving Report cited by the Learned Chambers Judge, AR 1140, lines 38-39, suggesting that the powers of non-sitting jps were “enlarged greatly” was clearly in error – see Macleod, Supplementary Report , AR 1095-1096]

54. Search warrant function supports lower level of protection – Non-sitting jps have jurisdiction to issue search warrants, affecting privacy rights protected by s. 8 of the Charter. That function justifies a lower level of judicial independence, than is required under the express guarantee of an “independent and impartial tribunal” in s. 11(d) *Charter*. As stated by Chief Justice Dickson in *Hunter v. Southam Inc.*:

10 “While it may be wise, in view of the sensitivity of the task, to assign the decision whether an authorization should be issued to a judicial officer, I agree with Prowse J.A. that this is not a pre-condition for the safeguarding the right enshrined in s. 8. The person performing this function need not be a judge, but he must at a minimum be capable of acting judicially.” ([1984] 2 S.C.R. 145 at 162)

55. Non-sitting jps have been found to be sufficiently independent to issue search warrants despite lack of statutory protection of tenure and the absence of a judicial compensation commission. [*R. v. Jardine* (1990), 111 A.R. 29 (C.A.); *R. v. Young*, [1999] B.C.J. No. 818 (B.C. Prov. Ct.); *R. v. Daniele Bernardi and Henry Kryst Keiszkowski*, No. C30578-01-D, Vanc. Reg., July 23, 1999 (B.C. Prov. Ct.); *Gatien v. Quebec, supra* (Que. S. Ct.), that ground of appeal abandoned and conviction affirmed [1999] J.Q. No. 404 (Que. C.A.); *cf. R. v. Do*, [2001] B.C.J. No. 1777 (B.C.S.C.), relying on B.C.C.A. decision in *Ocean Port*, subsequently reversed]

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56. If functions affecting liberty interests justify protection of independence, principles must be applied flexibly - Some functions of a non-sitting jp affect liberty interests, such as applications for judicial interim release or issuing process. A wide variety of tribunals may affect liberty interests to varying degrees, so independence principles, if applied, must be applied flexibly. Mental Health review panels, parole boards, prison disciplinary panels, labour boards, and even provincially created boards and commissions with subpoena powers affect liberty interests. [*R v. Beare* [1998] 2 S.C.R. 387 at 402; *Thompson Newspapers v. Canada* [1990] 1 S.C.R. 425 at 536; List of Alberta statutes extending inquiry powers to boards/tribunals/officials]

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57. Curiously, this Court, when stating the constitutional questions in this appeal, removed from the draft questions suggested by counsel, a reference to s. 7 Charter as a possible source of a guarantee of judicial independence of non-sitting jps. If liberty interests and s. 7 are still

relevant to this appeal, and if some tribunals or officials that affect liberty interests enjoy Charter-based independence as suggested in *Ocean Port*, it is submitted that the *extent* of the interference with liberty interests should be a major factor to consider when deciding the appropriate level of protection of independence:

- an adjudicator in immigration proceedings who has the security of tenure generally available to public servants, which provides only a right of appeal against a recommendation for dismissal, and a 3 stage grievance procedure, was found to have sufficient protection of tenure to satisfy independence requirements. [*Mohammad v. Canada* (1988), 55 D.L.R. (4th) 321 at 347-349 (Fed. C.A.)]
- 10 • The Quebec Administrative Tribunal exercises numerous judicial powers and exercises an exclusively jurisdictional function, which require procedures that are similar to those of judicial courts. However, both the trial judge and Court of Appeal agreed that the members of the tribunal benefited from a level of guarantee that was less than the judicial courts, but higher than the level of guarantee generally required for administrative tribunals under s. 23 Quebec Charter. A term of 5 years with discretion in government to renew for 5 years, satisfied the independence guarantee. [*Barreau du Montreal v. Quebec*, [2001] J.Q. No. 3882 (Que. C.A.)]
- 20 • Although routine duties of non-sitting jps such as issuing process are part of the criminal procedure and have some impact on liberty interests, they “do not impact on the rights of interested parties in the same manner as the adjudication process does at trial”. [*Re Valois* (1986), 33 C.C.C. (3d) 535 at 542 (Que. C.A.)]

58. A non-sitting jp may refuse judicial interim release and affect the liberty interests of an accused, but any detention resulting from the decision is likely to be relatively brief when compared to sentences on conviction, which could be imposed by provincial courts. An accused refused bail by a jp may immediately apply for review before a Queen’s Bench justice under s. 520(1) C.C., or apply for review before a provincial court judge with the consent of the Crown.

30 Any interference with liberty interests by non-sitting jps, then, is closely supervised by superior courts, reducing the need for an independent, high level of protection of judicial independence for jps exercising this function.

59. History and practice of reforms to office of jp – The traditions or conventions associated with reforms to the office of jp may have significance when determining the manner in which independence principles should be applied. Is there a convention requiring the grandfathering of all incumbents when reforms to the office of jp are implemented? Is there a convention on

which to build a constitutional obligation to grandfather? From the following review of the history and practice of reforms to the office of jps or lower level courts, it is clear that there is no convention of grandfathering all incumbent jps or lower level judges, or of preserving their jurisdiction, when reforms are undertaken. This history and practice may be contrasted with that of higher level courts, in which such grandfathering has been common. When superior courts are merged, such as district or superior courts in Alberta, there appears to be a convention to grandfather all incumbent judges, or appoint them into the newly formed office. This convention is consistent with the observation that superior courts “are the foundation of the rule of law”, while statutory courts are not “as crucial to the rule of law”. [see *Lavoie, supra* (Que. S. Ct.) para. 40, footnote 13 for list of legislation which has provided grandfathering for judges; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 at para. 37]

60. Much of the history and traditions of the office of jp as it evolved in England and Canada, and particularly in Western Canada, is described with some particularity in the expert report of Dr. R. Macleod. That history confirms that:

- The powers of jps have been altered or reformed continually by provinces, and those powers have waxed and waned enormously over time. They have included judicial, police and administrative powers, including administering local government such as licensing and setting of local tax rates;
- The office and role of jp is unlike that of judges;
- Provinces have chosen to bestow dramatically different roles on jps. The history of jps and magistrates in the (old) North West Territories and later in the prairie provinces is unique, because of the prominent role of police jps;
- There was no tradition of protection for security of tenure or finances;
- Patronage in appointments was common;
- In the (old) North West Territories in the late 19th century and later in Alberta, governments engaged in sweeping cancellations of appointments of jps;
- In Alberta from 1971 onwards, governments dramatically increased the jurisdiction and powers of stipendiary magistrates (now provincial court judges), but did not increase the jurisdiction or powers of jps.

- Provinces have continued to reform or change the office of jps - “The diversity of the office of jp across the various provincial and territorial jurisdictions in Canada in the late 20th century is an indication that it is still being adapted to changing circumstances.” [Report and Supplemental Report of Dr. R. Macleod at AR 1072-1101, Testimony of R. Macleod at AR 932-963, 967, 969; Exhibit 2 at AR 1072-1093; See also “Responsible Governance: The Implications of Judicial Independence for Policy and Practice in the Provincial Courts of Canada” (1997) *The Provincial Judges Journal*, 20 at 20-1, 23]

61. The history of the office of jp is replete with examples of how provinces have changed or eliminated the roles of jps through the appointment process or by reducing jurisdiction. The resulting roles of jps in various provinces are disparate. In New Brunswick, jps are not used as all “jp functions” are conducted by provincial court judges. Some provinces do not appoint sitting jps with the authority to preside over trials (Nfld., P.E.I. & N.B.). Provinces using sitting jps provide varying degrees of jurisdiction: Ontario the most generous, Alberta the least.

62. Police jps have been eliminated. In the late 19th century in the (old) North West Territories, many jps were police and they had broad powers including the right to preside over many types of criminal cases. About a hundred years later, in 1989, over 500 jp appointments were held by police officers in Alberta, and several of those officers held unrestricted appointments until retirement. The Klinck Committee in 1986, whose mandate it was to analyze problems with the jp system and recommend solutions, had stated that “The Committee is of the view that there is a conflict arising from the appointment of a police officer as a Justice of the Peace which cannot be resolved, and therefore believes that police officers should not hold Justice of the Peace appointments”. In 1989, Alberta cancelled all police appointments. [Klinck Report, para. 4.9, AR 766; O.C. 1974/74; Macleod Report, AR 1088]

63. In relation to major reforms of the jp system in Ontario (1989, 1994-5) and Saskatchewan (1988), the provinces found it necessary to affect the jurisdiction or tenure of incumbent jps, in order to achieve the objectives of the reform within a reasonable time. In Ontario, when the province moved to a new two-tiered system, not all jps retained the jurisdiction they enjoyed under the old system. Imposition of a mandatory retirement age of 70 years was adopted without

grandfathering of incumbents. Fee jps who had not been on a duty roster 365 days a year, did not receive new appointments. [Dr. I. Greene: Report AR 1127-1128, Testimony AR 1001-1003]

64. In Saskatchewan, a number of pre-1988 jps had their appointments cancelled because of the new retirement age of 65 years, because they were inactive, or because there was an apparent conflict of interest with their regular employment (i.e. police). Incumbent staff jps became “court official justices of the peace”, with substantially restricted authority. Some incumbent jps were not re-appointed as presiding jps under the new system, but were assigned by the 1988 legislation to the “non-presiding” category. [Dr. I. Greene: Report AR 1131-1133, Testimony AR 1020-1022]

65. As discussed above, the reform of municipalities and their municipal courts in Quebec included a provision for the abolishment of the courts for the purpose of financial savings, greater efficiency for police forces attending court, greater accessibility to the public and greater administrative efficiency. There was no provision for the grandfathering of municipal judges, although they retained their status as judges and were given priority in the event additional judges were required in the future. [*Lavoie v. Quebec, supra; Baie D’Urfe, supra*]

66. In New South Wales, Australia, the NSW Law Reform Commission recommended that incumbent stipendiary magistrates not be automatically appointed as Magistrates under the new *Local Courts Act*. Five stipendiary magistrates of 100 incumbents were not recommended by the Appointments Committee and were not appointed as Magistrates. [see para. 71 below]

(ii) No Arbitrary or Discretionary Removal From Office

67. To determine whether Alberta’s reforms have resulted in an arbitrary or discretionary removal of non-sitting jps from office, a number of factors should be considered, including:

- the necessity and timeliness of the reforms;
- whether the reforms are consistent with, and respond to recommendations of independent commissions;

- whether the reforms improve the independence and impartiality of decision-makers and thus promote the purposes of the guarantee of judicial independence;
- whether the reforms are a disguised attempt to remove officers;
- the impact of the reforms on incumbent office holders, and whether the reform effectively removes hearing officers from office, or merely reduces their jurisdiction;
- the impact that a restriction imposing a requirement to grandfather incumbent office holders would have on the public confidence in the justice system, the rule of law, and the impartiality of decision makers.

10 68. **Necessity and timeliness of reforms** - Prior to Alberta's reforms to its jp system, many reports and studies described the significant problems with the office of jp and made recommendations for change. Those reports and studies arose in several jurisdictions, including Ontario, Manitoba and Alberta. They recommended, *inter alia*:

- (a) Abolition of the use of non-sitting "fee jps" (paid on a per transaction basis) who conduct judicial functions including bail hearings and the issuance of search warrants;
- (b) Abolition of the use of non-sitting "staff jps" (employees of government) to carry out similar functions, as well as exclusion of other categories of persons because of concerns over conflicts of interest (i.e. police, municipal councillors, government employees);
- 20 (c) Revision of the appointment process to eliminate patronage, by creating an independent nominating committee to recommend candidates for appointment based on merit;
- (d) Higher qualifications including better education to improve the quality of decision making and to enhance independence by reducing reliance on others for advice;
- (e) Avoidance of potential for arbitrary interference with tenure by the Executive through unwarranted dismissal, by providing for protection of tenure in statute;
- (f) Transitional provisions allowing implementation of reforms to affect the jurisdiction or tenure of incumbent office holders in order to achieve benefits of reforms on a timely basis.

30 - McCruer, Hon. James C., *Royal Commission Inquiry into Civil Rights* (Toronto: Queen's Printer, 1968), particularly Report No. 1, Vol. 2, pp. 519, 523, 524-525 ["McCruer Report"]

- Ontario Law Reform Commission, *Report on the Administration of Ontario Courts* (Toronto: Queen's Printer, 1973), particularly Part II, p. 19 [Ontario LRC Report"]
- Alan W. Mewett, *Report to the Attorney General of Ontario on the Office and Function of Justices of the Peace in Ontario* (Toronto: Ministry of the Attorney General, 1981)
- *Kirby Report* (Alberta, 1975), AR 195, 210, 229, 259-260, 264
- *Charter Committee Report* (Alberta, 1983), AR 695, 699
- *Patton Report* (Alberta, 1985), AR 722, 735, 739, 746
- *Klinck Report* (Alberta, 1986), AR 747, 754-755, 762-763, 766, 771, 776-777 ["Klinck Report"]
- 10 - Anthony N. Doob, Patricia M. Baranek, and Susan M. Addario, *Understanding Justices: A Study of Canadian Justices of the Peace* (Toronto: Centre of Criminology, University of Toronto, 1991) ["Doob Report"]
- Manitoba Law Reform Commission, *The Independence of Justices of the Peace and Magistrates*, August 1991, Report# 75 at pp. 53-59, 63-67, 69-77 ["Manitoba LRC Report"]

[For a summary and discussion of several of the reports, see Report of Dr. I. Greene, A.R. 1126-1135 and Affidavit of K. Hawrelechko, AR 163, 165-168]

20 69. The reports, regardless of whether they preceded or followed the passing of the *Charter*, generally recognized the importance of independence to the office of jp. Some reports appeared to be animated by the increasing importance given the principle of judicial independence in court decisions. [i.e. Re 1968 McCruer Report, see Dr. I. Greene AR 984-986 and Mewett Report p. 5; Re 1991 Manitoba LRC Report see p. 21-25 of report and Dr. I. Greene AR 1008-1010]

70. Many of the reports dealt expressly with the issue of transitional provisions and the impact of reforms on incumbent office holders. Although the reports emphasize the need for a relatively high level of protection for independence, including security of tenure and protection against
 30 arbitrary removal from office by government, the reports do *not* require the protection of the jurisdiction and tenure of all incumbent office holders, through an obligation to grandfather all incumbents when implementing reforms.

- The McCruer Report recommended that appointments of all justices of the peace in Ontario be cancelled and that only those qualified for office be re-appointed. [pp.519, 524]
- The Ontario LRC Report recommended a legislative change that would result in some existing jps retaining their titles but stripping them of their powers. [p.19]
- The Manitoba LRC Report recommended that during transition to the new system, the nominating committee consider whether jps were qualified and those not qualified as presiding jps be re-appointed as non-presiding jps:

10 Because justices of the peace and magistrates may hold office for many years, a solution which did not affect those presently appointed would have no appreciable impact for a very long time. However, we have seen that the concerns expressed by the courts suggest a more immediate need for significant changes to the laws affecting the independence of justices of the peace and magistrates in Manitoba.

For those reasons, we are agreed that transitional provisions should be implemented to achieve the desired reforms as soon as practicable, with the least possible disruption to the administration of justice and to the individual judicial officers themselves.

20 [Manitoba LRC Report at 74-5; Dr. I. Greene: Report AR 1115-1122, 1131, Testimony AR 986, 1006-1013, 1025]

71. The issue of transitional provisions was the sole subject of a report in an earlier reform in Australia. In the 1983 report of the New South Wales Law Reform Commission, on the issue of whether all incumbent stipendiary magistrates ought to be automatically re-appointed as Magistrates under the new *Local Courts Act*, the Commission rejected automatic re-appointment, reasoning that the public importance of securing a high quality bench outweighed the potential hardship to individual stipendiary magistrates who fail to meet the criteria. The Commission recommended that any stipendiary magistrate not appointed under the new act be given employment within the public service at no reduction in salary. [N.S.W. Law Reform
30 Commission, *First Appointments as Magistrates Under the Local Courts Act, 1982*, at 43, 60]

72. **Alberta's implementation of reforms consistent with recommendations** - The 1986 Klinck Report identified a number of problems with Alberta's jp system, in light of the 1985 Irving Report and two recent cases on judicial independence, the 1985 *Re Currie* case (Ont. C.A.), and the 1986 *Valente* case (S.C.C.). The 1991 amendments addressed to varying degrees,

a number of the recommendations in the 1986 Klinck Report but left a number of recommendations unfulfilled (i.e. screening and examination of jp candidates by the Chief Judge of Provincial Court; appointment only on recommendation of the JP Review Council; provision for removal on recommendation of JP Council if competency exams required by Coordinator not passed; creation of 2 legislated categories of jp with legislation expressly authorizing the prescription of duties and certain categories of duties to jps; cessation of use of staff jps; replacement of fee jps by part-time salaried jps).

73. Alberta's 1999 reforms dealt with a number of the 1986 Klinck recommendations, but largely followed the structure of reforms and implementation as recommended in the 1991 Manitoba LRC Report – the most comprehensive and recent study then available. The Manitoba LRC Report included consideration of cases not available to the Klinck Committee, including *Lippé* (S.C.C.), *Wigglesworth* (S.C.C.), *Magee* (Alta. Q.B.); *Baylis* (Sask. C.A.); *Lefebvre v. Gauthier* (Que. C.A.); *Dorion* (Man. Prov. Ct.), as well as the draft *Doob* Report. The *Provincial Court Judges Remuneration* case in 1997, which emphasized institutional independence in the context of financial security of provincial court judges, was a motivating factor for Alberta's reforms. [Alberta Hansard, March 16, 1998, pp. 905-906]

74. The major reports on jp systems identified and discussed in some detail the major problems with, and criticisms of, elements common to many of Canada's jp systems. The Chart entitled "Factors Relevant to Independence: A Comparison of Non-sitting and Presiding JPs", describes in summary form a number of the specific problems, cites the relevant reports, and identifies the provision of Alberta's 1999 reform responding to the problem. A few of the major problems, recommendations, and responses may be summarized as follows:

75. Assignment of Work – Need to Restrict Duties by Statute - The Manitoba LRC Report states:

"...a number of Canadian jurisdictions have chosen to tailor the scope of an individual justice's powers to their ability, skills and preparation... This has been accomplished ... by administrative directive... [such as in B.C. where those directives take] the form of an annual 'assignment letter' from the Chief Judge... In order to ensure that justices of the

peace are adequately prepared and possess the requisite level of independence for the task at hand, we are agreed that it should be possible to vary the scope of judicial powers granted with an appointment. However, we are of the view that the jurisdiction of judicial officers should be ascertainable from their title or appointment, since limitation by oral or written directive leads to confusion and does not inform the public...[and] we are concerned that limitation by administrative directive may be perceived as a fettering of judicial discretion which could jeopardize the judicial independence required by section 11(d) of the Charter...For those reasons we prefer the use of statutorily sanctioned classifications to limit the powers of individual justices of the peace...such a scheme should allow more effective allocation of resources by linking levels of education, training, remuneration and even terms of tenure to the work that justices of the peace are expected to do. We are agreed that three levels of jurisdiction should be sufficient and suggest...Non-presiding justices of the peace...Presiding justices of the peace...Senior presiding justices of the peace ... it would be our preference to see the various jurisdictions set out in the statute, although we do acknowledge that regulations would more easily facilitate subsequent fine-tuning, should that be required.” (p. 51)

76. In 1999 Alberta created the statutorily defined categories of non-presiding, presiding, and sitting jps, specifying the jurisdiction of each in statute and regulation, consistent with this recommendation. The previous system which relied largely upon letters of assignment of duties, not only had given rise to the concerns identified by the Manitoba Commission, but Alberta’s hearing officers had refused to recognize the authority of the Coordinator of jps to restrict their authority. They refused to comply with the letters of assignment of duties and conducted functions exceeding the Coordinator’s directions. Their actions were inconsistent with the ability to “tailor the scope of an individual justice’s powers to their ability, skills and preparation” and to “ensure that justices of the peace are adequately prepared... for the task at hand”. [Cross-examination of R.M. Spencer at AR 888-890; Cross-examination of J.M. Maguire at AR 903-905; Cross-examination of D.G. Ell at AR 869]

77. Qualifications - The Manitoba Commission recommended that a Nominating Committee, which would include the Chief Judge and an additional provincial court judge, “itself should

determine the level of educational preparation to be required. This is especially appropriate, given that those charged with the training and supervision of justices of the peace are represented on the Committee.” (at p. 58).

78. Alberta’s 1999 reform was consistent with this recommendation. A Judicial Council was established which includes the Chief Judge of the Provincial Court, who has responsibility for the supervision of jps. The Council was given authority to establish qualifications for appointments to the offices of presiding jp or sitting jp. The need for the establishment of effective qualifications for each statutorily created category of jp with jurisdiction prescribed by statute or regulation, becomes critical if there is to be less reliance on, or control through, the system of “letters of assignment of duties”. [*Jp Act*, s. 2.1(1); *Judicature Act*, s. 32.2(1), 32.21(a); Dr. I. Greene, AR 1031; Manitoba Report at 51-52]

79. Tenure and Discipline - The Manitoba Commission first noted that the S.C.C. in *Valente* had identified security of tenure as the first of the essential conditions of judicial independence, and that “At minimum, security of tenure requires that removal from office will only be for cause related to capacity to perform judicial functions...” [at 53] The Commission then observed that Ontario, Saskatchewan, B.C. and the Yukon had systems “to review complaints against jps and to recommend discipline or removal”, but that Manitoba had “no process of review to allow for or challenge their discipline or removal from office.”[at 53-54] The Commission recommended that presiding jps hold office during good behaviour, with removal from office only upon recommendation of the Judicial Council. [at 54] This recommendation and its justification was similar to Alberta’s 1986 Klinck Report, where the committee reasoned that “As *Valente* requires security of tenure free from arbitrary or discretionary interference by the executive, the Committee is of the view that there must be a mechanism established which would remove this potential of interference”.

80. Alberta had effectively implemented this recommendation in 1991. Neither report suggests that this amendment, which creates an independent council for hearing complaints, and which protects officers against removal except for cause and upon recommendation of the independent council, was intended to apply in the context of a legislative reform of office.

Neither did the reasoning of the *Valente* case, which dealt with protection of individual independence against arbitrary actions of the Executive, on which the Manitoba Commission's recommendations were based. [See also Dr. I. Greene, AR 985-986, 1014-1016]

81. Transition - The Manitoba Commission noted that because jps hold office for many years, a solution which did not affect those presently appointed would have no appreciable impact for a very long time, but that the concerns expressed by the courts suggested a more immediate need for significant changes to the laws affecting the independence of justices of the peace. The Commission noted that reforms in Ontario and Saskatchewan had affected incumbents, and the pending NWT reform did as well. (The NWT reform was proclaimed in force in 1992, revoking all existing appointments and providing the Commissioner in Executive Council with the power to appoint jps in the new system. [*An Act to Amend the Justices of the Peace Act*, c. 39, R.S.N.W.T. 1988, c. 39, s. 8 (Supp.); Dr. I. Greene: Report at AR 1131, Testimony at AR 1010-1013]

82. The Manitoba Commission recommended the immediate establishment of a Nominating Committee, suggested that government should advise of the number and designation of jps required, and that the nominating Committee would then present a list of candidates for each position. Incumbents could apply, but although the nominating committee should give serious consideration to incumbents, it should not be restricted to them. Jps who did not receive appointments as senior presiding or presiding jps would be deemed to be non-presiding jps. Alberta's reform was substantially consistent with this recommendation, but left less discretion in the Executive because s. 2.4(5) of the *JP Act* mandated that all qualified incumbent non-sitting jps in the old system be appointed as presiding jps in the reformed system.

83. **Alberta's reforms promote the purposes of independence** – Principles of independence should be interpreted and applied in a manner consistent with their purpose. As recently stated by this Court in *Dunmore*, in relation to the use of purpose to interpret and apply a constitutional right: "... an enduring source of insight into the content of s. 2(d) is the purpose of the provision." [*Dunmore v. Ontario (A.G.)*, [2001] S.C.C. 94 at para 15] The purposes of protecting judicial independence in the constitution include enhancing public confidence in the

justice system, and upholding the rule of law. As first stated in *Lippé*, the most important, overriding purpose of independence is to achieve a perception of impartiality:

The over-all 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.

10 [R. v. *Lippé* [1991], *supra* at 139; 2747-3174 *Quebec Inc. v. Quebec* [1996] 3 S.C.R. 919 at para. 61 (per majority) and at paras. 106-107 (per L’Heureux-Dube); *Provincial Court Judges Remuneration* case, *supra*, at paras. 9-10, 112-113]

84. The Alberta reform of office of non-sitting jp promotes and enhances the impartiality of decision makers. The office of jp has been studied by independent bodies which have recommended the elimination of patronage in the appointment process, the setting of qualifications by an independent body, the appointment of only those determined to be competent by the independent body, and the proscription of persons who may create the appearance of bias (i.e. staff jps). The timely implementation of such reforms *enhance* the public confidence in the impartiality of the office, and they have removed any cloud on the perception
20 of impartiality which may exist for the reasons set out in the reports. The reform will also enhance public confidence in the independence and competence of jps. [Chart of “Factors Relevant to Independence: A comparison of Non-Sitting and Presiding JPs”; Dr. I. Greene: Report at AR 1133-1135, Testimony at AR 984, 986, 988, 991, 999, 1006, 1016; Manitoba LRC Report at p. 75-77; McCruer Report at p. 579]

85. **Reforms are not a disguised attempt to remove officers** – The Quebec courts in the *Lavoie* and *Baie d’Urfe* cases, examined the question of whether the legislative reforms were a disguised attempt to remove judicial officers. There is no evidence even suggesting that Alberta’s reforms included, or was motivated by, a disguised attempt to remove judicial officers.
30 Alberta’s reform followed the recommendations of independent commissions. The reform was designed in part to ensure that appointees to the new and expanding office of presiding jp are qualified to carry out their duties, according to the judgment of an independent judicial council, which is in the best position to make that decision. That decision of the Judicial Council to require a law degree and 5 years experience at the bar, was not challenged by the Respondents or

their counsel. Under the transitional provisions, the Executive has not even the discretion to refuse to appoint an incumbent non-sitting jp as a presiding jp, if the incumbent is found to be qualified by the independent Judicial Council. There was simply no opportunity for the Executive to interfere with the tenure of incumbent jps in a discretionary manner, or to engage in a disguised attempt to remove judicial officers.

10 86. **Impact of reforms on incumbent office holders** – Query whether Alberta’s reform, taken in conjunction with the offer of employment to the 3 hearing officers, has the effect of removing hearing officers from office, or whether the government’s actions could be better characterized as reducing the hearing officers’ jurisdiction. Under the impugned transitional provision, non-sitting jps not appointed as a presiding or non-presiding jp under the new system, retain their jp appointment but may not exercise any authority or receive any remuneration as a justice of the peace after February 1, 1999. [*JP Act*, s. 2.4(8)] As a result of the failure of the 3 hearing officers to qualify for the office of presiding jp under the reforms, they were each offered a staff position [Counter Services Officer (Judicial Clerk IV)] at no reduction in salary and benefits, with an associated appointment as non-presiding jp. In effect, they were asked to accept a reduction in jurisdiction from the job into which they were hired. They were originally hired to the position of hearing officer (which included a related appointment as non-sitting jp), their job description being: Principal Role - Counter Duties; Secondary Role - Hearing Office
20 Duties. They were offered the position of Counter Services Officer with related appointment as non-presiding jp, and the duties in their newly offered job could generally be described as: Role - Counter Duties.

30 87. If the hearing officers to accept the position of Counter Services Officer, with the associated appointment as non-presiding jp, they suffer only a reduction in jurisdiction by removal of the ‘secondary role’ into which they had originally been hired. This is somewhat comparable to the situation of the supernumerary judges in *Mackin*, where the status of supernumerary judge (with the right to work 40% of usual duties for full pay), was eliminated and replaced with three options: retirement; work full-time for full pay; work part time on a per diem basis. A judge in that case, merely “decided to exercise his or her duties as a judge of the Provincial Court under different terms, until he or she retired.”(*Mackin*, supra, at para. 47) The

“elimination of the duties of supernumerary judges” was seen to primarily affect “the definition of duties of Provincial Court judges”, which raised a question of protection of financial security rather than security of tenure.”(para. 49) The same arguments apply to the hearing officers who could to exercise their duties as a jp [Counter Services Officer and non-presiding jp] under different conditions (including no statutory protection of tenure), until he or she retires.

88. This characterization of the impact of the reforms on the hearing officers, is consistent with the arguments of the non-sitting fee jps who have also challenged Alberta’s reform. They were appointed as non-presiding jps under the new system, and in their statement of claim they
10 make the claim that the reform’s effect on them was to reduce their jurisdiction, not to remove them from office. [Statement of Claim, *Allan J. Brown v. The Queen*, at paras. 10-12, 14]

89. **Adverse impact of a requirement to grandfather incumbents, on public confidence in the justice system, the rule of law, and the impartiality of decision makers** - If in the context of legislative reform of office, persons appointed as non-sitting jps in Alberta have a constitutionally protected tenure to age 70, subject to removal from office only for cause related to the ability to perform their duties and then only after a hearing, then there will be an unacceptable curtailing of the province’s plenary power over the administration of justice and a highly detrimental effect on the public interest. The impartiality of decision makers, or
20 perception of same, will be hindered rather than helped. Such an unwarranted extension of the principles of judicial independence would benefit the personal interests of incumbent judicial officers at the expense of both the public interest and the public’s confidence in the justice system. The application of a constitutional principle of “no removal except for cause” as adopted and applied by the Alberta Court of Appeal in this case, would delay necessary reforms to the jp system for years or even decades:

- The disqualification of the category of staff jps in s. 5.01 of the *JP Act* was adopted because staff jps are recognized to operate with an inherent conflict of interest, or perception of same, which undermines public confidence in the justice system. Application of the “no removal except for cause” principle would result in the 242 incumbent staff jps being grandfathered as
30 non-sitting jps, as their appointments are identical to those of the hearing officers’.

- The preservation of the office of non-sitting fee jps and the continuation of 190 incumbent fee jps would be constitutionally mandated, notwithstanding that they do not satisfy the educational and experiential qualifications thought to be necessary by an independent Judicial Council (which is best suited to set such qualifications). This would not promote public confidence in the justice system. Further, several of the reports cited are critical of the use of fee jps and suggest their office undermines confidence in the justice system, and is inconsistent with promotion of the principles of independence and impartiality.
- In principle, even Alberta's revocation of the appointments of over 500 police jps in 1989 would be constitutionally invalid, notwithstanding that the Klinck committee reasoned that
10 appointments of police officers resulted in a conflict that "cannot be resolved".
- The new system of presiding jps using the 35 presiding jps (part-time) with enhanced independence and impartiality, which is operated from Calgary and Edmonton by way of telecommunications, could not continue to operate. For example, telewarrants are available under the Criminal Code only if it is not practicable to obtain one otherwise. The presence of a local (non-sitting) fee jp, would make a telewarrant unavailable in many circumstances.

90. The grandfathering of jps with inherent conflicts of interest, such as staff or police jps, or the continued use of fee jps would not serve the purpose of judicial independence - to ensure a reasonable perception of impartiality by the parties. As stated in the uncontroverted opinion of
20 Dr. I. Greene:

I don't think its in the public interest to grandfather all non-sitting justices of the peace... it would just delay I think much needed reforms to the JP system for an unacceptably long period of time... from the perspective of the public. The purpose of the court system in general and the jp system in particular is to provide service to the public, to provide an... impartial and effective method of handling disputes, and if reforms that have been identified as necessary for so many years by so many different reports are allowed to languish yet again for another 10 or 15 years, I think that could do enormous harm to the perception of the fair administration of justice. [AR 1032-1033].
30

91. Governments must be able to respond to current societal needs and demands, by effectively addressing on a timely basis, the existence, nature and jurisdiction of tribunals. A universal obligation to grandfather all incumbent office holders, would unduly inhibit a province

from adequately responding to its express constitutional mandate. [*Public School Boards Association of Alberta v. Alberta (Attorney General)*, [2000] 2 S.C.R. 409 at paras. 31-42]

92. **Application of ‘reasonable person’ test to Alberta’s reforms** - The ‘reasonable person’ test is stated by Chief Justice Lamer in the *Provincial Court Judges Remuneration* case:

10 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].

93. A consideration of the factors discussed above in paragraphs 67 to 90, compels the conclusion that a reasonable person, adequately informed of the amendments including the transitional provision, their historical background and the traditions surrounding them, would conclude that the hearing officers just prior to February 1, 1999, or presiding jps after February 1, 1999, were independent and were perceived to be independent. The reforms were necessary and timely, were consistent with and responded to recommendations of independent commissions, improved the independence and impartiality and competence of decision-makers and thus promoted the purposes of the guarantee of judicial independence, and were not a
20 disguised attempt to remove judicial officers.

94. There is little merit in the Respondents’ suggestion in the courts below that the ability of the province to reform the office of jp without an automatic obligation to grandfather all incumbent office holders, would place a ‘chill’ on the hearing officers prior to February 1, 1999, or on presiding jps subsequent to February 1, 1999, preventing them from being sufficiently independent to hear applications for judicial interim release or search warrants. The contrary reasoning and conclusions of the Quebec courts in the *Lavoie* and *Baie d’Urfe* cases are compelling.

30 95. Justice Phillipon in *Lavoie* concluded that municipal courts require the necessary tenure for the essential independence described by Le Dain in *Valente* - protection against all discretionary or arbitrary intervention. However, the legislative context favoured a reform of

municipal affairs and establishment of a common municipal court arising from serious considerations, after studies, and satisfied the principles prohibiting discretionary or arbitrary actions. [*Lavoie, supra* at paras. 43-44, (Que. S.Ct.)] In the more recent decision in *Baie d'Urfe*, the Quebec Court of Appeal considered whether the possibility that a municipal judge may not be appointed to the newly amalgamated court violates independence principles, or whether a judge successfully appointed to the new court (having been recommended by an independent committee who considered certain criteria) would not have sufficient independence:

10 [243] The now well-known test for judicial independence consists in asking oneself whether, with regard to the process established, a reasonably well-informed person [sic] could reasonably fear a potential lack of impartiality on the basis of these three criteria [security of tenure, financial security and institutional independence].

20 [244] In the present case, it is our view that the sole fact that part-time judges of a court that will be abolished may, in some cases, not be called upon to sit as acting or deputy judges or not be appointed to the new court cannot be considered an impediment to judicial independence. In addition, a well-informed citizen who, in 2002, had to appear before one of the judges whose application was successful, would understand very well, it seems to us, that the selection process that led to the judge's appointment poses no threat to the independence he is required to demonstrate. [*Baie d'Urfe, supra*, (Que C.A.)]

96. Phrased in another way, did the legislative reform result in an arbitrary or discretionary removal of jps from their office of non-sitting jp? In the case of the hearing officers, who received an offer of employment with associated appointment of non-presiding jp, there is some question whether a removal from office has occurred, or whether there has been in effect a reduction in their jurisdiction. Assuming that s. 2.4(8) of the *Act* abolished the office of non-sitting jp and effectively removes the non-qualifying, non-sitting jps from office, the issue becomes whether the removal was arbitrary or discretionary.

30

97. For the reasons stated above, there was no arbitrariness in the actions of the Legislature. The reforms were necessary and timely, were consistent with and responded to recommendations of independent commissions, improved the independence and impartiality of decision-makers and thus promoted the purposes of the guarantee of judicial independence, and were not a disguised attempt to remove judicial officers. The impugned transitional provision, s. 2.4(8),

was specifically recommended by independent commissions, and responded to a need to enhance judicial independence of the expanding office of presiding jp within a reasonable time.

98. The removal of the hearing officers from their office was not the result of a discretionary action of the Legislature or the Executive. The removal was a direct result of the decision of the Judicial Council to require a qualification of formal legal training and 5 years at the bar, together with the hearing officers' failure to satisfy the qualification. There has been no suggestion or allegation that the decision of the independent Judicial Council was arbitrary, and there was no challenge by the Respondents to the Council's decision. The need to ensure that judicial officers are adequately qualified to carry out duties in a judicial office of expanding jurisdiction, provides obvious justification for the Judicial Council's decision. In any event, the Judicial Council is well aware of issues related to judicial independence, and should be afforded a high degree of deference when making such decisions. [*Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] S.C.C. 11 at para. 53]

D. Section 1 of the Charter

99. The second constitutional question asks, that if s. 2.4(8) of the *Act* violates the principle of judicial independence guaranteed by s. 11(d) of the Charter, then is the Act demonstrably justified as a reasonable limit under s. 1 of the Charter? The s. 1 question is not relevant to this appeal. Non-sitting jps do not conduct functions which trigger the application of s. 11(d) of the Charter, so there can be no violation of judicial independence guaranteed by s. 11(d). The constitutional questions jointly submitted by counsel included the issue of whether s. 7 Charter may guarantee independence, which could perhaps have given rise to a s. 1 issue. However, the reference to s. 7 Charter in counsels' draft constitutional question was rejected by this Court.

E. Costs

100. All argument by the Appellant on the issues dealing with the trial costs and appellate costs, will be included in Alberta's factum as Respondent on the Cross-Appeal.

101. The Appellant respectfully requests this Honourable Court to:

- a) answer the first constitutional question in the negative and find it unnecessary to decide the second question;
- b) allow the appeal;
- c) dismiss the cross-appeal;
- d) grant costs to the Appellant throughout;
- e) order such other relief as this Court may consider appropriate and just.

10

ALL OF WHICH IS RESPECTFULLY SUBMITTED by counsel for the Appellant (Respondent on Cross-appeal) this 30th day of May, 2002.

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ROBERT C. MAYBANK

CHRISTINE ENNS

Counsel for the Appellant /
Respondent on Cross Appeal
Her Majesty the Queen in Right of Alberta

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