

IN THE COURT OF APPEAL OF ALBERTA

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THE COURT:

THE HONOURABLE MR. JUSTICE BRACCO  
THE HONOURABLE MADAM JUSTICE McFADYEN  
THE HONOURABLE MADAM JUSTICE PICARD

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BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

Appellant  
(Respondent on Cross-Appeal)

- and -

DEVON GARY ELL, JOHN MICHAEL MAGUIRE  
and ROSELYNNE MARGARET SPENCER

Respondents  
(Cross-Appellants)

APPEAL FROM ORDERS OF  
THE HONOURABLE MR. JUSTICE McMAHON  
Dated 21<sup>st</sup> of January 1999  
and 17<sup>th</sup> of March 1999

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REASONS FOR JUDGMENT RESERVED

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For the Respondents

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**REASONS FOR JUDGMENT OF THE HONOURABLE  
MADAM JUSTICE McFADYEN**

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[1] The appellant appeals the order of McMahon J., declaring unconstitutional and of no force and effect, certain amendments to the *Justice of the Peace Act*, R.S.A. 1980, c. J-3, which had the effect of terminating the tenure of the three respondents, and resulting in their removal from office. The respondents cross-appeal his order on costs.

[2] In this appeal, we are asked to consider whether the Legislature, by setting new eligibility criteria for judicial office, or by establishing a scheme whereby such criteria would be established, can affect the position of a judicial officer who previously enjoyed security of tenure to retirement, except for cause?

**FACTS**

[3] A brief note about the general structure in existence prior to February 1, 1999, when the amendments came into force, is necessary. The *Justice of the Peace Act* provided for two categories of justice of the peace, sitting and non-sitting. Sitting Justices of the Peace exercised judicial functions, which included presiding at trials of less serious offences. Non-sitting Justices of the Peace performed judicial functions which did not include presiding at trials, but included a vast number of functions such as granting of search warrants and process initiating criminal proceedings, the swearing of informations and the issuance of warrants of arrest and summons.

[4] The Regulations and Orders-in-Council appointing Justices of the Peace provided for subcategories. Sitting Justices of the Peace could be appointed on a full-time salaried basis or could act part-time on a per diem fee basis. The Non-sitting Justices of the Peace could be appointed as full-time salaried Non-sitting Justices with a designation, “hearing officer”; Fee Justices of the Peace who were paid on a per diem basis; or Staff Justices of the Peace who were employed full time in other government positions and functioned as Justices of the Peace within that government position, and without additional salary or fee for any duties performed as Justices of the Peace. There was also a category described as ‘Ad Hoc’.

[5] The action was commenced by the respondents, Devon Gary Ell, John Michael Maguire and Roselynn Margaret Spencer, who, at the time the amendments came into force, held positions as full time salaried hearing officers. They were not reappointed under the new *Act* as they did not meet the qualifications in the proposed new regime for appointments as sitting or presiding justices of the peace. Ell was first appointed in 1987, Maguire in 1982, and Spencer in 1977 under the *Justice of the Peace Act*.

[6] Issues involving the jurisdiction and independence of justices of the peace have troubled the legal community for some time, resulting in numerous reports, studies and articles.

Following the adoption of the *Charter of Rights and Freedoms* in 1982, challenges questioning the independence of justices commenced. In Alberta, two reports, the Irving report in 1984, and the Klinck report in 1986, resulted in early reforms. The Irving report recognized the ever increasing importance of the judicial role of justices of the peace and recommended that supervision be transferred from the Attorney General's Department to the Office of the Chief Judge of the Provincial Court. This recommendation was implemented. In 1986, a report authored by J. E. Klinck, then Associate Deputy Attorney General, was issued. Relying on concerns expressed in the Irving report and the Supreme Court of Canada decision in *Valente v. The Queen*, [1985] 2 S.C.R. 673, 24 D.L.R. (4<sup>th</sup>) 161, Klinck recommended important changes to the *Justice of the Peace Act* to ensure the independence of justices of the peace in the performance of their judicial functions. These recommendations included:

- (1) that Clerks of the Court not be appointed as justices of the peace,
- (2) that a review committee be established to consider appointments and deal with discipline of justices of the peace,
- (3) that appointments be to age 70 and subject to removal only for cause on the recommendation of the review committee, and
- (4) that justices of the peace be protected from civil liability for acts or omissions in the execution of their duties, in the absence of malice.

[7] The recommendations follow closely the pronouncements of the Supreme Court of Canada in *Valente* regarding security of tenure, a necessary characteristic of independence of judicial office.

[8] In his report, Klinck acknowledged that all justices of the peace held their positions at pleasure, and that the appointments could be revoked at any time at the discretion of the Executive, contrary to the requirements specified by the Supreme Court in *Valente*. The *Justices of the Peace Act* was amended in 1991. The amendments established the Justices of the Peace Review Council, and recognized the tenure of a justice of the peace to the age of 70, subject only to dismissal for cause on the recommendation of the Justices of the Peace Review Council. Subsequent to 1991, the three respondents enjoyed security of tenure as defined by the Supreme Court of Canada.

[9] In 1998, the Minister of Justice indicated that the purpose for the *Justice Statutes Amendment Act, 1998*, S.A. 1998, c. 18, which resulted in the amendments in question, was:

...to provide for the independence of Provincial Court Judges, Masters and Justices of the Peace in compliance with the common law and the recent *Wickman* decision of the Supreme Court of Canada.

[10] What follows is a brief overview of the amendments as they apply to justices of the peace. Section 2.1(1) provides that the Lieutenant Governor in Council may appoint a justice of the peace designated as a sitting justice of the peace or a presiding justice of the peace, “if the Judicial Council has determined that the person is qualified”. The appointment may be designated as full-time or part-time and, pursuant to s. 2.4(1), is for a term of ten years subject to removal for cause in accordance with the procedure set out in the *Judicature Act*, R.S.A. 1980, c. J-1. Section 2.2(1) provides that the Minister may appoint a person as a non-presiding justice of the peace for the purpose of exercising the limited jurisdiction set out in (2) as well as performing other functions and duties prescribed by the Regulations. A non-presiding justice of the peace holds office at the pleasure of the minister (s. 2.4(3)). Provisions relating to removal from office applicable to Provincial Court Judges and sitting and presiding justices of the peace are not applicable to non-presiding justices of the peace (s. 2.4(1)).

[11] Sitting justices of the peace have jurisdiction to conduct certain hearings or trials. Presiding justices of the peace exercise much of the jurisdiction formerly exercised by non-sitting justices of the peace including the issuance of search warrants and process initiating proceedings. Persons holding the office of sitting justices of the peace when the new scheme comes into force, who meet the qualifications set out by the Judicial Council under the new *Act*, are to be appointed as sitting justices of the peace under the new *Act*. Other persons holding the office of justice of the peace who meet the qualifications established for presiding justices of the peace, shall be appointed as presiding justices of the peace.

[12] Section 2.4(8) provides that any person who held the appointment of justice of the peace when the amendments came into force who is not appointed under the new *Act* may not exercise any authority or receive any remuneration as a justice of the peace after the amendments come into force. S. 3(5) of the amending statute repealed the provisions of the 1991 *Act* which had granted justices of the peace security of tenure to retirement.

[13] Following the enactment of the amendments, the Judicial Council (which had been granted the power to establish the qualifications for sitting and presiding justices of the peace) decided that candidates for that office must be members in good standing of the Law Society of Alberta, with five years experience at the bar.

[14] The three respondents were not lawyers or members of the Law Society. On the coming into force of the relevant provisions, the three individuals, who had been functioning as full-time salaried judicial officers with security of tenure to the date of retirement, were effectively removed from office without cause.

[15] Neither the legislation nor the Judicial Council made any provision for the three individuals in question. By letters dated September 28, 1998, the Honourable Judge S. A. Friedman, Coordinator of the Justice of the Peace Program, advised the respondents of the proposed changes. Because the respondents were not members of the Law Society of Alberta, they would only be eligible to become non-presiding Justices of the Peace. They would no longer exercise the powers and authority as justices of the peace that they had been exercising, and would receive no salary or benefits. The Coordinator proposed a severance package or, alternatively, offered employment with the Attorney General's Department as a Counter Clerk at the current compensation level for that position. The offer of employment was not a firm one, but specified only that "Alberta Justice will consider you for employment" and indicated that the positions offered were subject to competition and future reclassification.

[16] The Judicial Council decided that the qualifications for future sitting and presiding justices of the peace required membership in the Law Society and five years at the Bar. There is evidence that the Judicial Council had been given a list of justices of the peace who were qualified under that definition and approved their appointments. I have been unable to determine from the material before us whether the situation of the three respondents, all full-time salaried non-sitting justices of the peace who did not meet the specified qualifications, was ever drawn to the attention of the Judicial Council or whether Council was asked to consider the qualifications, experience and situation of the three respondents or to recommend any alternative solution which would avoid the removal from office of three judicial officers without cause.

[17] Prior to the coming into force of the amendments in question, the three respondents performed judicial functions which were not minor or inconsequential. The respondents were designated as "hearing officers". They were paid a full-time salary and their duties included conducting judicial interim release show cause hearings; issuing search warrants, summons, subpoenas and arrest warrants; receiving informations and determining their validity; reviewing affidavits; swearing informations and affidavits; confirming or cancelling police process; accepting first appearance pleas; imposing specified penalties, granting time to pay or incarcerations upon guilty pleas, scheduling trials and hearing dates; ordering detention or release of accused persons; hearing applications to revoke surety; accepting applications and issuing peace bonds; hearing applications for publication bans; determining the validity of traffic infractions; hearing and considering arrest warrants; hearing and reviewing officer-in-charge form 11.1 condition release conditions; hearing and considering warrant to arrest witness applications and hearing and considering peace officer returns in connection with post search warrant executions. These duties included important *Charter* protection both of the person and privacy of the individual. The coming into force of the legislation resulted in their removal from office without cause.

[18] The respondents took the position that this loss of tenure breaches a core characteristic of judicial independence. They brought an Originating Notice, dated October 9, 1998, seeking, among other things, a declaration that the not yet proclaimed s. 2.4(8) contravened the constitutional guarantee of judicial independence, enjoining the implementation of that subsection, and declaring that the respondents had tenure.

### **DECISION BELOW**

[19] The Chambers Judge held that the retroactive effect of the s. 2.4(8) and the repeal of the security of tenure provisions of the 1991 amendments had the effect of removing the respondents from office without cause and without benefit of process. He concluded that this rendered the impugned section of the *Justice of the Peace Act* invalid because it offended the constitutional principle of judicial independence. He further held that the sections of the *Justice Statutes Amendment Act* repealing tenure were of no force and effect insofar as it relates to the respondents and that they continue to enjoy security of tenure in their office as justices of the peace.

[20] He came to his conclusion after applying the test set out in *Valente*: whether a reasonable and informed person viewing the matter realistically and practically would conclude that the respondents were independent in the circumstances. He held that while there may be levels of independence, security of tenure was at the core and dismissal by retroactive imposition of qualifications results in the perception that there was no security of tenure and no judicial independence either on an individual or an institutional basis.

[21] In a separate decision on costs, the Chambers Judge denied solicitor-client costs on the basis that he was constrained by two decisions from this Court, *Reform Party of Canada v. Canada (Attorney General)*, [1995] 10 W.W.R. 764, and *Vriend v. Alberta* (1996), 40 Alta. L.R. (3d) 352. He held because the public interest involved in the action exceeded the private interests, costs would be awarded and because the matter was more in the nature of a trial with *viva voce* evidence, for costs purposes, trial items could be included and taxed on Column 5 multiplied by 1.5.

### **APPELLANT'S POSITION**

[22] The appellant submits that the Chambers Judge erred in declaring s. 2.4(8) of the *Justice of the Peace Act*, and the repeal of the provisions granting security of tenure to retirement, unconstitutional and of no force and effect because the amendment interfered with the judicial independence of justices of the peace. In essence, Alberta argues that the legislation which is intended to reform and bring about improvements to the system is constitutionally valid, although it terminated the statutory tenure of justices of the peace and removed some of them from office. Alberta says that the Chambers Judge erred in four respects.

[23] The Chambers Judge interpreted and applied the principles of judicial independence and security of tenure in a matter inconsistent with current judicial definitions by holding that any action by the state which affects the tenure of a judicial officer violates the guarantee of tenure. The appellant argues that the essence of security of tenure is that tenure be secured against interference by the executive or legislature in a discretionary or arbitrary manner, which the appellant defines as the presence of improper motives or intentions.

[24] The Chambers Judge erred in concluding that the impugned provisions constituted an arbitrary action. The appellant argues that the reforms to the office of Justice of the Peace are not arbitrary or discretionary but were made to improve the judicial system by ensuring that the appointees to the judicial offices are qualified, and that all such reforms are permissible.

[25] The Chambers Judge erred in failing to determine the appropriate level of constitutional protection for the independence of non-sitting justices of the peace who are described as “minor judicial officers”. Judicial independence and security of tenure, the appellant argues, does not require that the jurisdiction and tenure of a justice of the peace remain unchanged until retirement. For justices of the peace, a lower level of protection is appropriate.

[26] The Chambers Judge erred in failing to recognize that allowing the respondents to continue in their positions until they reach the age of 70 years would also require that fee, staff and ad hoc officers, who are non-sitting justices of the peace, would also have to be “grandfathered”. As a result, the reforms would be delayed for an unreasonable length of time and defeat major aspects of the reforms.

[27] To summarize, the appellant takes the position that the Legislature may alter qualifications for judicial office, within the established period of tenure, or may enact legislation permitting the alteration of those qualifications, resulting in the removal of those holding judicial office without establishing cause, provided that it does so for no improper purpose.

## **RESPONDENTS’ POSITION**

[28] The respondents argue that they are judicial officers and enjoy security of tenure as an essential condition of judicial independence. The amendment to the *Justice of the Peace Act*, which would remove them from office, is inconsistent with their security of tenure to age 70 years and contravenes the constitutional guarantee of judicial independence.

[29] They say that the constitutional protection for judges extends to all judicial officers including themselves as their duties are judicial. Moreover, their duties daily include the protection of constitutional rights set out in s. 11(d) of the *Charter*, for example, when dealing

with judicial interim release hearings, issuance of arrest or search warrants and the confirmation or cancellation of police process.

[30] While conceding that the requirement that justices of the peace be members of the Law Society may be a step towards improving the quality of decision making and authority of justices of the peace, the respondents argue that the retrospective application of the qualification to their office is arbitrary in that it results in their dismissal without cause or without any determination that they lack the competence to do their jobs. Cause was not alleged and there was no evidence that the respondents were incapable of performing the duties of a presiding justice of the peace other than retrospectively imposed qualifications, not linked to capacity. The effect of the amendment abolishes the offices held by the respondents and is inconsistent with and in contravention of the judicial independence of their offices.

[31] Further, they submit that a declaration that the amendments do not apply to them does not also mean that the amendments cannot be applied to other justices of the peace. The respondents are the only full time, salaried, non-sitting justices of the peace in the province. The issue of fee justices of the peace, or other justices of the peace, is not before this Court and was not before the court below.

## **COSTS**

[32] The respondents cross-appeal the costs order arguing that the Chambers Judge erred in failing to award costs on an indemnity basis where judicial officers have successfully defended the constitutionally mandated independence of their office.

[33] They argued that the determination of constitutional issues related to security of tenure and judicial independence was of benefit to the public and it was in the public interest that these issues be determined by the courts. Although the respondents brought the matter forward, they submit that they should not have to do so at their personal expense. Moreover, they argue their code of conduct, which requires that a justice of the peace shall uphold and defend the independence of the judiciary in the best interest of justice and society, gave them no choice but to bring this matter forward. They cite in support other decisions where applicants who were judicial officers were indemnified for their costs of defending constitutional values.

[34] Further, they argue that to have to pay the costs of defending their judicial office in effect threatens another aspect of judicial independence, namely, financial security.

[35] The appellant argues that this Court should only interfere with a chamber's judge's discretion to award costs when there is a clear, palpable and overriding error. The appellant says there was no such error in this case because full indemnity costs orders are appropriate only in rare and exceptional circumstances. Such circumstances are not present in this case. The

appellant cites other cases involving constitutional issues, including judicial independence, where the courts declined to award costs on an indemnity basis. The cases cited by the respondents, the appellant says, are distinguishable. Alternatively, even if those cases constitute proper exercises of discretion, they do not demonstrate that the discretion exercised by the Chambers Judge in this case was in error.

## **DISCUSSION**

### **The Concept of Security of Tenure**

[36] Judicial independence and security of tenure was first considered by the Supreme Court of Canada in *Valente*. In support of his position, counsel for the appellant quotes and relies on the following statement from the judgment of LeDain J., at p. 180 (D.L.R.):

The essence of security of tenure for purposes of section 11(d) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner.

[37] He asks us to decide that because the Legislature intended to improve the administration of justice by increasing the qualifications for appointment of justices of the peace, it did not act in a “discretionary or arbitrary manner”. In other words, if the motives of the government are good, such as the improvement of the judicial system, legislation should not be impugned although it results in the dismissal without cause or hearing of judicial officers who previously enjoyed security of tenure.

[38] I do not agree with this interpretation. The absence of arbitrariness or discretion has been defined by the Supreme Court of Canada as legal or legislative structure which permits the removal of a judicial officer from office only for cause, which is determined following a hearing by an independent tribunal at which the judicial officer has an opportunity to be heard.

[39] In *Valente*, LeDain J. clearly defined what he meant by the absence of discretion or arbitrariness in the paragraphs preceding the sentence relied on by the appellant. At p. 179, he stated:

It is sufficient if a judge may be removed only for cause related to the capacity to perform judicial functions.....but the requirement of cause, as defined by statute, together with a provision for judicial inquiry at which the judge affected is given a full opportunity to be heard, is in my opinion a sufficient restraint upon the power of removal for purposes of s. 11(d).

[40] In the passage preceding the sentence relied on by the appellant, LeDain J. repeats this requirement:

In sum, I am of the opinion that while the provision concerning security of tenure up to the age of retirement which applied to provincial court judges when Judge Sharpe declined jurisdiction falls short of the ideal or highest degree of security, it reflects what may be reasonably perceived as the essentials of security of tenure for the purposes of s. 11(d) of the Charter: that the judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure for purposes of s. 11(d) is a tenure,....., that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner.

[41] I do not understand the last sentence to introduce some new test of public interest or absence of improper motives. LeDain J. equated discretionary or arbitrary interference with provisions permitting removal from office for reasons other than cause related to the capacity to perform the duties of office or the lack of a process which affords independent judicial review and an opportunity to be heard.

[42] In *R. v. Genereux* (1992), 88 D.L.R. (4<sup>th</sup>) 110 (S.C.C.) the Supreme Court of Canada considered issues relating to the independence of a General Court Martial. After discussing and acknowledging the need for flexible application of judicial independence criteria, depending on the nature of the tribunal, and the fact that security of tenure can be satisfied in any number of ways, Lamer C.J. concluded at p. 129:

The first essential condition of judicial independence, as defined in *Valente*, is security of tenure. This condition, like the other two, can be satisfied in a number of ways. What is essential is that the decision-maker be removable only for cause. In other words, at p. 212 C.C.C., p. 180 D.L.R.,

The essence of security of tenure for purposes of s. 11(d) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner.

[43] If any doubt existed as to what the LeDain J. meant when he used the words “in a discretionary or arbitrary manner”, cited by the appellant, that doubt is dispelled by the Chief Justice in the above quote passage.

[44] Lamer C.J. again discussed security of tenure in the context of administrative tribunals in *Canadian Pacific Ltd. v. Matsqui Indian Band et al*, [1995] 1 S.C.R. 3, 122 D.L.R. (4<sup>th</sup>) 129. One of the issues raised involved the institutional independence of a Board appointed by the Bands which had jurisdiction to review tax assessments made by the Bands. After finding that the tribunal did not meet the requisite standards of independence, Lamer C.J. discussed what would have to be done to ensure institutional independence at pp. 164-5 (D.L.R.), para. [101]:

Thus, to conform to the requirements of institutional independence, the appellant bands' bylaws will have to guarantee remuneration and stipulate periods of tenure for tribunal members. The bylaws will also have to ensure that members may only be dismissed during their tenure "with cause".

[45] Although only minimal standards of independence are required in the case of administrative tribunals, security of tenure was again an essential element and was defined as removal only for cause.

[46] The standard which applies to justices of the peace, who make important decisions in the criminal law context, many of which impact on security of the person and the right to privacy, cannot be any less. It may be, as suggested by the Appellant, that tenure to retirement is not essential in the case of justices of the peace. It may be that in 1991, the legislature could have established tenure of a fixed number of years. We are not asked to decide whether theoretically something less would have sufficed in 1991. We are faced with the case of judicial officers who enjoyed security of tenure to retirement, and who face removal from office in the absence of any allegation of cause related to their capacity to perform the functions of that office. Once tenure to retirement has been granted (as is the case here), then interference by government which results in the removal of the judicial officer from office without establishing cause, is an interference with security of tenure and therefore with the judicial independence of the judicial officer.

[47] In *Ref. Re: Public Sector Pay Reduction Act (P.E.I.), s. 10* (1997), 150 D.L.R. (4<sup>th</sup>) 577 (S.C.C.) (the "Provincial Court Judges Reference"), Chief Justice Lamer conducted a detailed and searching analysis of the constitutional aspects of judicial independence. He confirmed that the constitutional foundation for judicial independence is not limited to the provisions of s. 11(d) of the *Charter* and the express provisions of the *Constitution Act*. Judicial independence also has its foundation in the unwritten constitution, dating back to the *Act of Settlement* of 1701, and is affirmed by the preamble to the *Constitution Act*, 1867. This constitutional protection extended not only to judges appointed under s. 96 of the *Constitution Act*, 1867, but also to judges and judicial officers appointed by the province who exercise both criminal and civil jurisdiction. This decision removed any doubt which may have existed about the constitutional protection afforded to judicial independence of judicial officers.

[48] Security of tenure is a necessary characteristic of judicial independence. There can be no security of tenure if the Legislature, or its delegate, can alter qualifications of the judicial office in question, resulting in the removal from office of judicial officers who had security of tenure pursuant to legislation prior to the amendment. The mere fact that government motives may not be improper and that it intended to improve the judicial system by the appointing of more qualified individuals does not alter the fact that the removal or dismissal of a judicial officer from the judicial office without cause, and without the opportunity to be heard, constitutes an arbitrary or discretionary interference with the security of tenure of a judicial officer; a clear breach of the principle of judicial independence. The concept of independence of the judiciary and the aspect of security of tenure prevents the retrospective application of the new criteria to remove from office judicial officers who had previously enjoyed security of tenure.

[49] The appellant says that government should be able to enact reforms which are in the public interest despite the fact that those reforms terminate tenure of a judicial officer, at least, a judicial officer of limited jurisdiction. The appellant cites no authority for that proposition which is clearly contrary to the principles established by the Supreme Court of Canada in the cases cited above.

[50] Of course, nothing prevents the executive and the legislature from reforming the judicial system by changing qualifications for future appointees to the judicial office. However, by doing so, the legislature cannot affect the tenure of those who held judicial office prior to the enactment. The principle of judicial independence and security of tenure requires that a decision-maker, during the period of his or her tenure, may only be removed for cause related to his or her capacity to perform the duties of the office. Cause is not alleged or proven in this case.

[51] The appellant further says that the full constitutionally protected security of tenure should not be extended to justices of the peace, who are “minor judicial officers”. I do not accept this characterization. As non-sitting justices of the peace, the respondents played an important and essential function in the criminal law system. They dealt with a large number of applications. Their decisions seriously affected rights of individuals. These decisions related to the issuance of search warrants affecting the right to privacy, and arrest warrants affecting security of the person. While it is clear that as non-sitting justices of the peace, the respondents had no authority to hear trials at which guilt or innocence would be determined, the importance of what they did is not minimal.

[52] In a recent decision, *Ontario Federation of Justices of the Peace Associations et al. v. Ontario* (1999), 171 D.L.R. (4<sup>th</sup>) 337, the Ontario Court of Appeal discussed the importance of the judicial office of justice of the peace. Although I recognize that the jurisdiction of some of the Ontario justices of the peace may well exceed that of Alberta justices of the peace, I find the reasoning persuasive. Haley J.A., writing for the Court, stated at pp. 359-360:

The protection of the liberty of the person is of utmost importance in our society, whether that liberty is subject to be taken away at the high court level or at the level of the justice of the peace. It merits the unbiased deliberation of a person who is and who is perceived to be independent of any possible coercion, through economic manipulation or otherwise, on the part of the executive branch or the legislative branch of government.

It is not necessary for the justice of the peace to have the same constitutional guarantees as those accorded to superior court judges. In that sense there is a spectrum in the extent of the guarantee of judicial independence required for different levels of judges. But one must consider how the functions allocated to different levels of judges affect the ordinary person in our society. Where that function involves an adjudication affecting the liberty of the person or other rights safeguarded by the Constitution, such as protection against unlawful search and seizure, there must be assurance that the person exercising that function is impartial, independent and unbiased.

[53] I am not disregarding the decisions from various levels of courts where legislative structures guaranteeing lesser standards of independence have been found to be sufficient. These include *R. v. Airth*, [1999] A.J. No. 890 (Alta. Q.B.), *R. v. Baylis* (1986), 28 C.C.C. (3d) 40 (Sask. Q.B.), *Re Heagle and The Queen* (1983), 2 D.L.R. (4<sup>th</sup>) 693 (Sask. Q.B.), *R. v. Yellowhorse*, (1990), 111 A.R. 20 (Prov. Ct.), *Lavoie v. Quebec*, [1994] A.Q. No. 1133 (Sup. Ct.), aff'd. [1995] A.Q. No. 187 (C.A.), *R. v. Magee* (1988), 85 A.R. 118 (Q.B.), *Reference re Justice of the Peace Act*, (1984), 48 O.R. (2d) 609 (C.A.); *R. v. St Cyr*, (Alta. Q.B. March 22, 1988, unreported); *R. v. Valois* (1986), 33 C.C.C. (3d) 535. I do not intend to review these cases individually. Most of these cases involved attacks on search warrants or other process issued by justices of the peace. Most were decided prior to the Supreme Court of Canada decision in *Re Provincial Court Judges Reference*. None involved the issue raised here: whether security of tenure may be revoked or altered once it has been established.

[54] The appellant argues that the purpose of judicial independence is to enhance public respect and confidence in the system, and that such confidence will only be augmented by the proposed reforms. Relying on the purposive approach, the appellant says that the reasonable and informed person, viewing the matter realistically and practically, would not view the legislation as an attack on independence of justices of the peace. I agree with the contrary finding of the trial judge.

[55] It is important to once again return to and emphasize the order appealed from. That order merely provides that s. 2.4(8) and the repeal of the existing tenure provisions which result in the removal of the three respondents from office is unconstitutional insofar as it applies to the three respondents. No other amendment or reform has been affected by the Chambers Judge's order.

All reforms remain in place. When this is recognized, the appellant's argument appears to be limited to the fact that the enhancement of public respect which arises from these reforms will be diminished because three non-lawyers appointed as full time salaried justices of the peace under the old system will continue to function as justices of the peace. Whether public respect for justices of the peace will be enhanced because all justices of the peace will have law degrees is entirely a matter of speculation, as is the suggestion that it will somehow be diminished because three individuals do not have the qualifications now required. In any event, this argument ignores the binding decisions of the Supreme Court of Canada which decides that security of tenure is an essential characteristic of judicial independence. Security of tenure is defined by the Supreme Court of Canada as a fixed term appointment subject to removal from office only for cause, as determined by an independent

tribunal which gives an opportunity to be heard. That definition has been applied not only to federally and provincially appointed judges who have jurisdiction to determine questions of guilt or innocence, but also to other decision-makers, including members of the General Court Martial and administrative tribunals. Any attempt to remove a judicial officer from office during his or her tenure without establishing cause related to capacity to perform the functions of the office constitutes an interference with that judicial officer's independence and is unconstitutional.

[56] If the interpretation urged by the appellant were accepted by this Court, nothing would prevent Parliament or the Legislature from altering qualifications for a myriad of judicial positions or administrative tribunal positions and removing those who held office whenever these were thought to be in the public interest. If existing tenure can be interfered with, a five year qualification can become a seven year qualification, or a ten year qualification. Justices of the peace who, under the new legislation, hold appointments for ten years could see that term reduced at any time. The reasonable and informed member of the public could not have confidence that the independence of the office was protected by the legal structure in place if that structure could be changed at any time, resulting in the removal from office of those who did not qualify under the new regime.

[57] The appellant asks us to take into account the fact that a large number of staff and fee justices of the peace were also affected by the legislation, and any decision would apply to these individuals. He submits that this would result in unacceptable delay in the implementation of the suggested reforms. The Chambers Judge correctly dealt with the constitutional validity of s. 2.4(8) and repeal of the security of tenure provisions only as it applied to the three respondents, all full time salaried non-sitting justices of the peace. I have dealt with the constitutional validity of s. 2.4(8) only as it applies to the respondents. It is clear that prior to the amendments, each of these individuals performed judicial functions of more than minimal or technical importance; each received a fixed salary for the services performed and not some other function; each had been granted security of tenure at least by the 1991 amendments to the *Act*. As earlier indicated, that security of tenure was not merely a statutory tenure which could be revoked or altered at any time by the Legislature, but had a constitutional basis arising out of the judicial function. Each of the justices of the peace were judicial officers, exercising judicial powers, with security of tenure, and were generally regarded as independent.

[58] Whether the same principles will be found to be applicable to fee or staff justices of the peace, whether there are other impediments to the finding that they are also independent judicial officers whose security of tenure cannot be interfered with, will have to be determined in the other litigation currently before the Courts.

[59] The appeal by the appellant is dismissed.

## **COSTS**

[60] A costs award is discretionary. Unless the Chambers Judge is shown to have erred in principle or law, this Court will only interfere if persuaded that the Chambers Judge made a clear, palpable and overriding error. *Westersund v. Westersund* (1994), 157 A.R. 276, 77 W.A.C. 276 (CA).

[61] The respondents say that, in the circumstances of this case, the Chambers Judge erred in principle, or committed a clear and palpable error in failing to indemnify the respondents, whose independence was interfered with and who faced the loss of judicial office as a result of the appellant's acts.

[62] The respondents ask us to establish the principle that judicial officers who are confronted by a governmental threat to their independence are entitled to client and their own solicitor costs or to indemnification for costs, on two basis: (1) Judicial independence is a constitutional right protecting the interest of the public in general, and not that of the individual judge. While in an individual case (as here) the application of the principle of judicial independence benefits the judge, that is not its main purpose or objective. (2) Most Codes of Conduct and Ethical Principles governing the conduct of judges oblige judges to defend judicial independence, when it is perceived that such independence is threatened. (3) Failure to provide indemnity for costs to the judge, who takes legal action to defend judicial independence, will result in loss of financial security.

[63] The respondents argued before the Chambers Judge that they were entitled to solicitor and own client costs or indemnity costs because of the importance of the public interest question raised in this litigation. The argument before him is set out in para [8] of his reasons: public interest litigation; testing the constitutionality of a statute which threatened judicial independence. Having regard to the argument before him, the Chambers Judge considered himself bound by the decisions of this Court in *Reform Party of Canada v. Canada (Attorney General)*, [1995] 10 W.W.R. 764, and *Vriend v. Alberta* (1996), 40 Alta. L.R. (3d) 352, not to award costs on a solicitor client basis. In both decisions, this Court rejected the argument that full indemnity costs should be awarded on the sole ground that the litigation is in the public interest.

[64] McMahon J. stated at p. 442:

Nevertheless, the recovery of solicitor client costs is foreclosed in this jurisdiction when the basis for them is as argued here, I am constrained by the principles set out in two decisions of the Alberta Court of Appeal, namely, *Reform Party of Canada v. Canada (Attorney General)* [1995] 10 W.W.R. 764 and *Vriend v. Alberta* (1996) 40 Alta L.R. (3d) 352.

[65] While those decisions did not involve judicial independence issues, we cannot say that the Chambers Judge erred in principle in considering himself bound by those cases, having

regard to the argument before him, and having regard to the discretionary nature of a costs order and the limited power of review, I dismiss the respondent's cross appeal.

[66] The respondents have been successful in this appeal and are entitled to costs. The only other issue is scale of costs on the appeal before this Court.

[67] Judicial independence was in issue before this Court in *Alberta Provincial Judges Association v. Alberta* (1999), 177 D.L.R. (4<sup>th</sup>) 418. That decision involved the Government's rejection of recommendations of a Salary and Benefits Commission without giving adequate reasons for the rejection. After considering tariffs, estimates of solicitor client costs and reasonable amount of time for preparation of the appeal, this Court awarded costs at 2 times column 5 – with an award for second and third counsel. In the *Alberta Provincial Judges* case, this Court did not reject solicitor client costs on the basis of principle, but made an alternate award to account for the complexity of the issues raised.

[68] Generally in ordinary litigation, indemnity costs are awarded only in cases of misconduct by the payor in the conduct of the litigation, and not on the basis of fairness to the recipient of costs. (See *Sidorsky v. CFCN Communications Ltd.* (1997), 206 A.R. 382.)

[69] In a number of cases where a successful constitutional challenge has been undertaken, indemnity costs have been rejected; however, costs have been awarded on an increased scale, having regard to the public interest in such litigation and the complexity of the issues involved. (See *Reform Party, Vriend*, and *Alberta Provincial Judges* cases.)

[70] Judges, who are subjected to process arising out of complaints made, have been awarded indemnity costs. In *Ruffo v. Minister of Justice (Quebec)*, [1977] A.Q. No. 3658 (Que. S.C.) the Government of Quebec was required to pay the costs of Ruffo in defending herself on grounds that the failure to do so would impair the independence of the judiciary by impairing financial security.

[71] In a recent decision, *Reilly, P.C.J. v. Wachowich, C.J.P.C.* (1999), 234 A.R. 1, Mason J., relying on the principles established in *Ruffo* and *Hamann c. Quebec (Ministre de la justice)*, [1999] J.Q. no. 559 (Que. S.C.) that the government is required to indemnify a judge for costs incurred in defending himself in disciplinary proceedings, ordered the payment of solicitor client costs. The indemnity award has been upheld by this Court, [2000] A.J. No. 1029 (Q.L.). Hunt, J.A. indicated that Mason, J. committed no error in awarding costs on that basis.

[72] In *Reference re: Territorial Court Act (N.W.T.) s. 6(2)*, (1997), 152 D.L.R. (4<sup>th</sup>) 132 (N.W.T. Sup. Ct.), the Chief Judge of the Territorial Court challenged the constitutional validity of legislation which provided for the appointment of deputy territorial judges for 2 year periods and permitted the revocation of the appointment of a deputy territorial judge on the

recommendation of the Chief Judge. Vertes J. found that the legislation threatened judicial independence. Vertes J. refused to apply rules applicable to ordinary litigation in determining entitlement to costs on a solicitor and own client basis. He awarded costs indemnity costs largely on the ground that the Chief Judge was obliged to bring the action in the public interest. He stated at pp. 177-8:

The issues on this reference touch directly the fundamentally important considerations of the independence and impartiality of the Territorial Court. As submitted by his counsel, the Chief Judge had an obligation to intervene in the interests of the judiciary and in the public interest for the orderly administration of justice. No one else did so.

[73] In *Mackin v. New Brunswick (Minister of Finance)* (1998), 21 C.P.C. (4<sup>th</sup>) 29, a majority of the New Brunswick Court of Appeal allowed costs on a solicitor client basis on the ground that the “improper and unnecessary actions” of the government “have been onerous to the judge.” No such allegation of impropriety is made here, although, the necessity of government action is certainly in doubt.

[74] Another category of cases, in which judges who have engaged in litigation with the government to protect judicial independence, has been those cases (cited above) which involved the complaints or discipline process.

[75] There is no binding authority in Alberta that solicitor client costs are not be awarded to a judge who seeks a court ruling on the basis that legislation or government action constitutes a perceived threat to judicial independence. Judicial independence cases can be distinguished from other constitutional cases because of the obligation imposed on judges by Codes of Conduct and the Ethical Principles for Judges to defend the independence of the courts, and because of the threat to financial security, an aspect of judicial independence. I do not suggest that solicitor client costs must be awarded, but that solicitor client costs may be awarded in the appropriate case, even in the absence of evidence of misconduct in the litigation process on the part of the government.

[76] Here, the legislation resulted in serious infringement of the right to security of tenure of three judicial officers. No impropriety or improper motive is alleged as against the government, nor is it suggested that there was any misconduct in the course of the litigation. Nevertheless, having regard to the serious nature of the threat which resulted in the termination of three judicial officers, without any foundation based on competence or capacity to perform duties or misconduct in office or recourse to process, I am of the view that the appropriate scale of costs on the appeal is full indemnity of the respondents’ reasonable costs in defending the appeal.

APPEAL HEARD on February 28 & 29, 2000

REASONS FILED at Calgary, Alberta,  
this 18th day of September, 2000

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McFADYEN, J.A.

I concur: \_\_\_\_\_  
BRACCO, J.A.

I concur: \_\_\_\_\_  
PICARD, J.A.