

IN THE COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

DEVON GARY ELL, JOHN MICHAEL MAGUIRE  
and ROSELYNNE MARGARET SPENCER

Applicants

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

Respondent

[Note: Decision as to Cost was filed on March 18, 1999; the text is appended to this judgment.]

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REASONS FOR DECISION  
of the  
HONOURABLE Mr. JUSTICE T.F. McMAHON

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**INTRODUCTION**

[1] This application raises the question of the constitutionality of proposed amendments to the *Justice of the Peace Act*, R.S.A. 1980 c. J-3.

[2] The *Justice Statutes Amendment Act*, 1998, provides for significant reforms to the appointment and organization of the system of Justices of the Peace in Alberta. The purpose, as expressed by the Minister of Justice, is:

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.

[3] In short, the applicants are three Justices of the Peace with statutory security of tenure to age 70 whose educational qualifications would not permit them to be appointed as “sitting or presiding” Justices under the new regime. The problem arises because the changes in qualifications (now requiring candidates to be members in good standing of the Law Society of Alberta with at least five years related experience at the Bar) are effectively made retroactive by the operation of the proposed Section 2.4(8) of the *Justice of the Peace Act*:

A person appointed as a Justice of the Peace before the coming into force of this section who was 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.

[4] It is this subsection which is challenged as being an unconstitutional infringement upon judicial independence. Section 2.1(1) therein referred to will, under the new regime, permit the appointment of sitting or presiding Justices only if the Judicial Council has determined that the proposed appointee is qualified. Section 2.2 permits the Minister to appoint persons as non-presiding Justices whose authority is restricted largely to administrative matters. Commonly, those persons are employees of the Department and receive no payment in addition to their salary for holding that position.

## THE AMENDMENTS

[5] Some explanation of the current (that is pre-reform) and the new regime is necessary. Before the changes, the *Justice of the Peace Act* provided that:

1. Only Canadian citizens were eligible. There were no other statutory qualifications. A substantial number of Justices now and historically and including these three did not and do not have law degrees.
2. Some Justices of the Peace could be designated by the Lieutenant Governor in Council as “sitting” Justices. Presumably then the others were “non-sitting”. Sitting Justices hear trials, are appointed for 10 year terms and are required to have law degrees with at least 5 years related experience at the Bar.
3. The appointment of a Justice would terminate at age 70 by Section 5 of the *Act*.
4. Since 1991, earlier involuntary termination could only occur for cause and by an established process involving a Review Council, pursuant to section 5.2 and 5.1.
5. The Lieutenant Governor in Council could, by regulation, fix hours and fees to be paid to Justices. Alberta Regulation 116/95 and 154/98 listed the three applicants as “salaried non-sitting Justices” and described each

member of that group as “a Justice, other than a sitting Justice, who is paid a salary for working on a full time basis”.

[6] The changes are as follows. Some of them have already been proclaimed. Others have not. Section 2.4(8) is scheduled for proclamation on February 1, 1999:

1. Appointees will be designated as sitting Justices, presiding Justices or non-presiding Justices.
2. Sitting and presiding Justices are appointed only after the Judicial Council on the Provincial Court has determined that the person is qualified. The Judicial Council has recently met and determined that appointees must be members in good standing of the Law Society of Alberta with at least five years of related experience at the Bar.
3. The Minister can, without Judicial Council involvement, appoint a person as a “non-presiding Justice of the Peace”. That position carries less authority and involves primarily administrative duties.
4. Sitting and presiding Justices are appointed for non-renewable 10 year terms. Non-presiding Justices hold office at the discretion of the Minister. Section 5, 5.1 and 5.2 which provided security of tenure are repealed.
5. Sitting and presiding Justices in the new regime may be removed only by an established process involving the Judicial Council in accordance with Part 6.1 of the *Judicature Act* R.S.A. 1980 c. J-1. Non-presiding Justices have no such statutory security of tenure.
6. A sitting Justice appointed before these changes and who meets the new qualifications shall be appointed as a sitting Justice under the new system.

Non-sitting Justices appointed before these changes and who meet the new qualifications shall be appointed as presiding Justices under the new system. Had the qualifications not been changed, the Applicants would have been appointed as presiding Justices, with similar authority as now.

A Justice appointed before these changes and who does not meet the new qualifications cannot be appointed as a sitting or presiding Justice and pursuant to Section 2.4(8) “may not exercise any authority or receive any remuneration as a Justice of the Peace after this section comes into force”.

## **THE APPLICANTS**

[7] Devon Gary Ell was appointed a Justice of the Peace in 1987. John Michael Maguire has been a Justice of the Peace since 1982 except for a period of about six months in 1988.

Roselynn Margaret Spencer was appointed in 1977. Among them, they have more than 47 years of experience. They are the only remaining salaried non-sitting Justices under the current legislation. The *Act*, by Sections 5.1 and 5.2 gives them security of tenure, and has since 1991.

## **HISTORICAL BACKGROUND OF JUSTICES OF THE PEACE**

[8] To fully understand the nature and importance of the position, a brief review of the history of Justices of the Peace is useful. I have been provided with much material on that subject. Included is this summary from a 1984 report prepared by Howard Irving, Q.C. (now Irving, J.A.) for the Canadian Bar Association, Alberta Branch, following a review of certain policies and practices of the Alberta Attorney General's Department:

The Justices of the Peace have been playing an important role in our criminal justice system since ancient times. In the English legal system this office was created to perform local government functions, including that of ex officio magistrate. English justices of the peace, although customarily untrained in law and unpaid, were vested with wide powers to commence criminal proceedings, conduct trials and mete punishment in the form of substantial fines or imprisonment up to six months. The office was considered vital to the criminal Justice system partly because of the rural nature of the population and the impracticality of placing judges at each location, and thus ensuring that an accused would not face undue delay, and additionally, the local justice could bring to bear upon a case his knowledge of local affairs and of the accused himself. In England, the justice of the peace was appointed by the Lord Chancellor, and thus the office was separated from the arm of the government.

In Canada, the office of Justice of the Peace was preserved when in 1892 the Criminal Code of Canada was adopted. Pursuant to the Criminal Code, Justices of the Peace are empowered to receive and swear informations, issue warrants for arrest and issue search warrants. As the Canadian Justice system does not have a Lord Chancellor, appointments as a Justice of the Peace, by custom are conferred by the Attorney General.

Initially in Canada such appointments followed the English example in that justices of the peace were not salaried, but paid on a case by case basis. Usually they were untrained local citizens who were not full time government employees. Furthermore, their appointments restricted the nature of the powers they could exercise. As the volume of cases increased, and as the provincial courts were expanded to cover rural areas, it became customary to appoint a senior Court clerk as a justice of the peace to receive informations, as well as grant adjournments and hear bail applications when a provincial judge was not available to do so.

In recent years, in Alberta particularly, the judicial functions of justices of the peace have been enlarged greatly. By virtue of the Provincial Court Judges

Amendment Act, justices of the peace have been granted all the powers with respect to judicial interim release as are exercisable by Provincial Court Judges. They also have the power to receive and swear Informations, issue process, grant search warrants, receive pleas with respect to certain provincial offences, impose fines or time in gaol for default of payment of fine, grant or withhold time for payment of a fine, or extensions of time for payment of a fine.

As a practical development, Justices of the peace in urban centres often are engaged as Hearing Officers and thus exercise their function on a full time basis. While as hearing officers, or Court clerks, they were considered as employees of the Attorney General's Department, particularly as in early years, their functions as Justices of the peace occupied only a small percentage of time, in comparison to their overall clerk or administrative duties.

Because of the dramatic change in the role of the justice of the peace, especially as found in major urban centres, there requires a greater recognition of the judicial functions of justices of the peace. Due to these developments, we recommend that the supervision of their judicial function be transferred from the Attorney General's Department to the Office of the Chief Judge of the Provincial Court. Such a transfer will emphasize the need for the independence and impartiality of the Justice of the Peace.

[9] The recommendation made in the final paragraph above was in fact implemented not long after, with the acknowledged objective of enhancing the real and perceived independence of Justices.

[10] Dr. R.C. Macleod gave evidence for the respondent. He is a Professor of History at the University of Alberta and the author of several works on the history of law enforcement in England and Canada. He is knowledgeable in respect of the evolution of the roles of Justices and Magistrates, particularly in western Canada. After reviewing the legislation he gave his opinion that no security of tenure for Justices of the Peace existed in the Northwest Territories before 1905. He also opined that there was no security of tenure for Justices of the Peace in Alberta until the creation of the Justice of the Peace Review Committee by statutory amendment in 1991. Since 1991 he acknowledged that Justices now have a form of security of tenure to age 70, subject to removal for cause and only after reference to the process established by those amendments. The 1991 amendments appear as Sections 5.1 and 5.2 of the *Justice of the Peace Act*:

- 5.1(1) The Lieutenant Governor in Council shall, subject to the regulations, establish a Justices of the Peace Review Council.
- (2) The Justices of the Peace Review Council shall
  - (a) review complaints respecting the lack of competence of, conduct or misbehaviour of, or neglect of duty by, justices

of the peace or the inability of justices of the peace to perform their duties, and

- (b) make recommendations to the Lieutenant Governor in Council in respect of matters reviewed under clause (a).

5.2 Notwithstanding section 5, the appointment of a justice of the peace may be terminated by the Lieutenant Governor in Council on the recommendation of the Justices of the Peace Review Council.

[11] He acknowledged that it was his understanding that the three applicants in this case were not dismissed for cause and that no attempt, to his knowledge, had been made to remove them from office via the Review Committee process.

[12] It appears that the 1991 amendments which gave security of tenure to Justices arose from a number of reports and studies, which themselves were the result of expressed criticisms of the earlier system. One of those reports was the Irving report referred to earlier. Another was a report authored in 1986 by J.E. Klinck, Assistant Deputy Minister, Department of the Attorney General.

[13] The Klinck Report was to make recommendations for changes to the Justice of the Peace system in Alberta in light of the Irving Report and two recent cases, the most important of which was *Valente v. The Queen* [1985] 2 S.C.R. 673. *Valente* will be summarized in more detail later. For these purposes it is sufficient to note that *Valente* identified the three core characteristics of judicial independence as:

1. Security of tenure.
2. Financial security.
3. Administrative independence.

[14] The Klinck Report's recommendations included:

1. That clerks cease to be appointed as Justices of the Peace.
2. That a Review Council be established to consider appointments and discipline of Justices.
3. That appointments be to age 70 and that appointees be removable only for cause and upon the recommendation of the Review Council.
4. That Justices be protected from civil liability for acts or omissions in the execution of their duties, in the absence of malice.

[15] Discussing security of tenure as a feature of judicial independence, the Klinck Report said at p. 9

The first condition of judicial independence is that of security of tenure. The essential feature of security of tenure is that a judge be removable only for cause, and that cause be subject to independent review and determination by a process by which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure is a tenure, whether until an age of retirement, for a fixed term, or for a special adjudicative task, that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner.

[16] The Klinck Report also said at p. 14:

No guarantee of tenure is provided to any Justice of the Peace in Alberta. By virtue of Section 19 of the Interpretation Act, the appointment of a Justice of the Peace is an appointment at pleasure. In practice, a Justice of the Peace appointment of a hearing officer or a judicial clerk would be terminated with the termination of employment, and the appointment of a fee-for-service Justice of the Peace can be revoked at any time at the discretion of the executive. 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.

[17] This was the basis for Dr. Macleod's opinion that Justices of the Peace had no security of tenure before the 1991 legislative amendment. Whether that reasoning is sound given that the right to judicial independence is constitutionally based is a question that need not be visited here.

[18] The Klinck Report's recommendations for legislative change to ensure security of tenure for Justices were accepted and resulted in Sections 5.1 and 5.2 of the *Justice of the Peace Act*. The Report described the intended effect of its changes as follows:

The Committee notes that this recommendation has the effect of granting tenure to Justices of the Peace. Although the Valente case suggests that other means may be used to achieve security of tenure, the model proposed by the Committee is a model which was expressly approved by the Valente case.

[19] The respondent acknowledges in its brief that a review of the legislative history of the *Interpretation Act* (s.19) "confirms Justices of the Peace were appointed at pleasure from 1906 to 1991". Although section 5 of the *Justice of the Peace Act* pre-dated 1991, it was considered to provide only a mandatory retirement age and not to provide any security of tenure. Thus in 1991, there was established a process intended to put the arbitrary termination of a Justice of the Peace appointment beyond the reach of the executive and so establish a reasonable level of independence.

[20] The lack of independence for Justices had been criticized for a number of years by a variety of reports prepared in several Provinces, all neatly summarized by Dr. Ian Greene. Dr. Greene was called by the respondent to give expert evidence. He is an Associate Dean of Arts and Associate Professor of Political Science at York University in Toronto. His doctoral thesis was on the politics of judicial administration. He has written and lectured widely on that and related subjects. Among others, he cited a report to the Attorney General of Ontario on the Office and Function of Justices of the Peace in Ontario by Alan W. Mewett, 1981 which recommended that Justices of the Peace should be subject to removal only through a process requiring a recommendations for removal from a review council composed of Judges. The earlier McRuer Commission report, Royal Commission Inquiry into Civil Rights, Toronto, Queen's Printer, 1968, had recommended that all appointments be cancelled; re-appointments made, treating Justices as judicial officers; and security of tenure be given. The sequence is important — cancel the appointments, make the changes, and then give security of tenure.

[21] Dr. Greene described the legislative changes which took place in Ontario as a result of the Mewett report and others. In 1990 Ontario enacted a provision which is virtually identical to Section 2.4(8), the impugned section in this application. Based upon that provision in Ontario some Justices of the Peace appointed before 1990 retained their appointments but were not assigned any judicial responsibilities. However, Dr. Greene says that such restriction applied only to Justices of the Peace who were not active, who were over 70 years of age (which was the retirement age) or were unwilling to give up a public service position with the Ministry of the Attorney General in order to become full time Justices of the Peace. That is, of course, a distinctly different result than applies to the applicants in this case. The transition in Ontario was apparently simpler because the reforms there did not require that appointees now have a law degree and did not attempt to apply that new standard retroactively. Nor did Ontario then have in place the statutory security of tenure enjoyed by the applicants here. Thus Dr. Greene offered the opinion that the Ontario reforms involved no violation of judicial independence.

[22] He also reviewed the reforms introduced in Manitoba and Saskatchewan but again noted that at the time of those reforms the non-presiding Justices of the Peace held office at pleasure. None of those provinces had codified a form of judicial independence for non-sitting Justices of the Peace prior to an introduction of their reforms — as Alberta had done by Section 5.1 and 5.2 in 1991.

[23] Dr. Greene did acknowledge that:

It could be argued that the conversion of a Justice of the Peace, who had been appointed to age 70, to a 10 year non-renewable term might violate the independence of the Justice of the Peace because the length of tenure has been curtailed.

One would have thought that such argument could be made with equal force by the applicants who were appointed to age 70 and who face immediate loss of all authority and remuneration.

#### **AUTHORITY, DUTIES AND RESPONSIBILITIES OF A JUSTICE OF THE PEACE**

[24] An understanding of a Justice's authority and responsibility is necessary before considering the issue of independence. The applicants describe their duties as consisting principally of the following:

- conduct judicial interim release show cause hearings
- hear and determine whether to issue search warrants, summons, subpoenas and arrest warrants
- receive informations (private and Crown) and determine their validity
- review affidavits
- swear informations and affidavits
- confirm or cancel police process
- accept first appearance pleas from persons charged under provincial or federal statutes or municipal by-laws
- dispose of charges on guilty pleas by the imposition of specified penalties, grant time to pay or incarceration
- schedule of trials and hearing dates
- order detention or release of accused persons
- back out of province warrants (arrest and search warrants)
- release prisoners on bail and approve surety applicants and receive cash bail
- hear and consider applications to revoke surety
- accept applications for and issue peace bonds
- hear and consider applications for publication bans
- hear and consider validity of traffic infractions and confirm, quash or declare nullity
- hear and consider arrest warrant in dwelling house applications
- hear and review officer-in-charge form 11.1 conditional release conditions

- hear and consider warrant to arrest witness applications
- hear and consider peace officer returns in connections with post search warrant execution.

[25] A Justice of the Peace Manual authored under the authority of the Provincial Court of Alberta is provided to all Justices. It begins with a mission statement:

The primary and continuing purpose of the Justice of the Peace is to safeguard the rights and liberties of the individual and society.

[26] It also contains a Justice of the Peace Code of Conduct which warrants reproduction:

#### JUSTICE OF THE PEACE CODE OF CONDUCT

In that it is essential that all Justices of the Peace understand their duties and obligations, the following Code shall govern the conduct of Justices of the Peace within this province.

#### **A Justice of the Peace shall:**

- (1) render justice within the framework of the law,
- (2) perform the duties of the office of Justice of the Peace with integrity, dignity and honour,
- (3) foster professional competence,
- (4) avoid any conflict of interest and refrain from being placed in a position where the Justice cannot faithfully carry out the functions of the office,
- (5) shall be and be seen to be impartial and objective,
- (6) shall be diligent in performing the duties of the office,
- (7) shall refrain from any activity which is not compatible with the office of Justice of the Peace,
- (8) shall in public act in a reserved and courteous manner,
- (9) shall uphold the integrity and defend the independence of the judiciary, in the best interests of justice and society,

- (10) when acting as an ad hoc Sitting Justice of the Peace shall refrain from appearing as a lawyer before the Court of which the ad hoc Sitting Justice of the Peace is a member.

[27] The respondent describes how, in Alberta, several “working titles” have categorized the non-sitting Justices into three main groups — fee JPs; staff JPs and hearing officers. There is no statutory sanction for these categories which itself may demonstrate the need for reform.

[28] The 190 fee JPs are paid small amounts on a piece work basis. The 242 staff JPs are full time employees of the Government who receive no extra compensation for any Justice of the Peace duties they perform (except perhaps for overtime when required). There is no evidence as to the extent of the judicial functions still performed by fee and staff JPs, as opposed to their many administrative functions. It seems likely, however, that their use as judicial officers may come to an end.

[29] The hearing officers are the three applicants. There are no others. They are the only full time salaried non-sitting JPs. The evidence is uncontradicted that they perform front line and basic judicial functions such as the conduct of bail hearings, the issuance of arrest and search warrants and the confirmation or cancellation of police process.

[30] Counsel for the applicants cites *Walton v. Hebb* [1984] N.W.T.R. 353 (S.C.) as having recognized Justices of the Peace as judicial officers in the context of the consideration of judicial independence. I have no doubt of the correctness of that decision in that respect. By any measure, the applicants are judicial officers of whom Albertans are entitled to expect independence of judgment. At p. 387, de Weerd, J. aptly describes the qualities sought in lay Justices of the Peace:

Lay justices of the peace may receive guidance and information on legal principles and on the law as it is applied and declared by the higher courts, but the qualities for which they are chosen and which are most essential to the proper discharge of their duties have always been, and remain today: a robust common sense, a sense of fairness, a knowledge and understanding of ordinary people in their own communities, a keen awareness of the practical realities of life, and a deep and abiding commitment to do what is right by all persons who come before them or whom their decisions may touch. Matters which require detailed legal knowledge or a consideration of competing legal principles are generally best left to the professional judiciary.

## **PRINCIPLES OF JUDICIAL INDEPENDENCE**

[31] The independence of persons exercising judicial functions is a fundamental public right in a free and democratic society. It is not a private privilege granted to the judiciary to be modified or retracted at the will of the state. Its source is now found in Sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*. Judicial independence has two objectives: to allow judges to hear and decide cases without interference or fear of interference; and to enable courts

to fulfill their role as an independent branch of the government whose duty it is to protect the constitution. See *The Queen v. Beauregard* [1986] 2 S.C.R. 56. Although independence can have several characteristics, basic to it is security of tenure. Without security of tenure, other trappings of independence are of little value. The power to dismiss is the power to control. Thus, even if there can be “levels” of independence, as the respondent here argues, an essential component to any level is security of tenure.

[32] A consideration of the principles of judicial independence must begin with the recent Supreme Court of Canada decision in *RE: Remuneration of Judges of the Provincial Court (P.E.I.)* [1997] 3 S.C.R. 3, (sometimes described here as the Provincial Court Judges case and referred to on p. 1 of these reasons as the Wickman decision.) Several principles relevant to this application emerge:

1. Financial security and security of tenure are merely aspects of judicial independence. The important goal of judicial independence is the maintenance of public confidence in the impartiality of the judiciary. Independence enhances the perception that justice will be done. (See p. 34)
2. It is necessary that there be a reasonable perception of independence in order to ensure public confidence in the justice system. (See p. 79)
3. The perceptions that matter are those of a reasonable and informed person. Lamer, C.J. at p. 80 accepted the standard enunciated by Howland, C.J.O. in his judgment in the Ontario Court of Appeal in *R v. Valente (No. 2)* (1983), 2 C.C.C. (3d) 417:

The question that now has to be determined is whether a reasonable person who is 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].

4. The three core characteristics of judicial independence are security of tenure, financial security and administrative independence. (See p. 80)
5. A consideration of judicial independence must bear in mind the two distinct dimensions: individual independence of a judge and the institutional independence of a Court or tribunal. (See p. 82)
6. Judicial independence is also an unwritten constitutional principle, recognized and affirmed by the preamble to the *Constitution Act, 1867*. (See pp. 67-78)

[33] Reference should also be made to *Valente v. The Queen* [1985] 2 S.C.R. 673 where at p. 694, Le Dain, J. said:

Security of tenure, because of the importance that has traditionally been attached to it, must be regarded as the first of the essential conditions of judicial independence for purposes of Section 11(d) of the Charter.  
(See p. 694)

The essence of security of tenure for the 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. (See p. 698)

[34] The respondent refers to *R v. Jardine*, (1990) 111 A.R. 29 (Alta. C.A.). In that case, an accused attacked a search warrant issued by a Justice of the Peace on the basis of a lack of independence. In a brief decision, the Court noted the complete absence of evidence of the practices and traditions surrounding the office, and the fact that Alberta had not been given notice of the attack at trial. Here, those shortcomings have been remedied.

[35] The respondent also relies upon *Lavoie v. Quebec* [1994] A.Q. No. 133, affirmed at [1995] A.Q. No. 187. Leave to appeal to the Supreme Court of Canada was denied.

[36] The case involved Municipal Court Judges appointed by the province. Legislative proposals were to combine several into one, with the result that not all judges would be re-appointed. Some judges raised the issue of judicial independence.

[37] The trial judge found that the principles of security of tenure were respected where the proposed changes were not arbitrary, but were part of a larger scheme of improvement of the system. The case is quite different from the one before me:

1. The *Municipal Courts Act* expressly provided that the judges would cease to hold office "where the Court is abolished".
2. There apparently was no security of tenure such as in Sections 5.1 and 5.2 of the Alberta legislation.
3. The reason for dismissal from office did not relate to personal qualifications. There were simply fewer Courts.
4. The underlying principle relied upon by the trial judge appears to be that there was no formal constitutional guarantee of tenure for judges of

inferior courts. See his reliance upon an extract from Hogg, P.W. Constitutional Law of Canada (Scarborough: Carswell, 3rd ed., 1992), That, however, cannot stand in the face of the Provincial Court Judges case. In fact, Hogg in his 1998 edition, now says at 7 - 14.4, after referring to the Provincial Court Judges case:

Therefore, all courts, including inferior courts of civil jurisdiction, now enjoy constitutional protection for the independence of their judges. Indeed, once one breaks free of the clear language of s. 99 and s. 11(d), it is not obvious that the unwritten principle would be confined to courts ....

[38] To whom do these principles apply? The respondent in its brief argued that "there is no precedent that security of tenure prevents a province from passing any legislation which affects the jurisdiction or tenure of non-judges". The *Charter* guarantees the independence of a range of courts and tribunals. (See Provincial Court Judges case, at p. 100). The test is not in the title but in the function. Citizens who appear before persons exercising a judicial function have a constitutional guarantee of the independence of those persons. The three applicants here, to use the words of their counsel, do *Charter* work in exercising their jurisdiction under The *Criminal Code of Canada* and the *Provincial Court Act* R.S.A. 1980 c. P-20. It was acknowledged by the respondent's expert, Dr. Greene, that the applicants performed judicial functions in respect of judicial interim release hearings, issuance of arrest or search warrants and the confirmation or cancellation of police process.

[39] It is a different issue entirely for a staff JP who performs only administrative matters to claim security of tenure by reason of *Charter* and constitutional principles. Whether they have it because of Sections 5.1 and 5.2 is not a question before me.

## ANALYSIS

[40] The three applicants are judicial officers carrying out judicial functions which attract constitutional protection. Their authority in respect of the conduct of judicial interim release hearings, issuance of arrest and search warrants and confirmation or cancellation of police process involve the rights and liberties of Albertans and so demands the independence guaranteed by the *Charter*.

[41] Prior to the proposed amendments the applicants enjoyed the first core element of judicial independence — security of tenure — by virtue of Sections 5, 5.1 and 5.2 of the *Justice of The Peace Act*.

[42] The decision of the Judicial Council that sitting and presiding Justices should have law degrees and five years experience will have no impact on the applicants if not made retroactive.

[43] Section 2.4(8) constitutes the arbitrary retroactive imposition of an educational qualification which the applicants cannot meet, with the result that they are deprived of authority and pay as salaried non-sitting Justices of the Peace, all after a combined 47 years experience and in the absence of resort to any hearing process, or complaint as to competence.

[44] Would a reasonable and informed person viewing the matter realistically and practically conclude that the applicants were independent in those circumstances?

[45] While there may be, as the respondent argues, levels of independence, security of tenure is at the core. If a judicial officer can be dismissed by the retroactive imposition of a qualification he or she cannot meet, surely then it would be perceived by a reasonable and informed person that there was no security of tenure and thus no judicial independence on either an individual or an institutional basis.

[46] The respondent says that the intent of the reforms is to improve the perception of independence. I have no doubt that that is the case. However, once it is established that a judicial officer can be stripped of authority and pay by merely raising, retroactively, the educational qualification, then it must follow that the proposed qualification of a law degree plus five years related experience could itself be changed, retroactively, to require, say, ten years experience. Must those judicial officers appointed with only five years experience take care that they be seen by the executive to be doing a good job, under penalty of a change in qualifications that would be made to apply to them. That chilling prospect must impact on the perception of independence in the mind of the reasonable and informed person.

[47] Dr. Greene argued that "judicial independence is a concept ... designed to promote judicial impartiality" and that its essential features of security of tenure, financial security and institutional independence are "procedures designed to prevent any illegitimate interference with the ability of judicial officers to make impartial decisions".

[48] With respect, Dr. Greene in that description, overlooks the critical distinction between impartiality and independence. I refer to the Provincial Court Judges case where at p. 78 Lamer, C.J. said:

The starting point for my discussion is *Valente*, where in a unanimous judgment this Court laid down the interpretive framework for s. 11(d)'s guarantee of judicial independence and impartiality. Le Dain, J., speaking for the Court, began by drawing a distinction between impartiality and independence. Later cases have referred to this distinction as "a firm line": *Généreux, supra*, at p. 283. Impartiality was defined as "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case" (*Valente, supra*, at p. 685 (emphasis added)). It was tied to the traditional concern for the "absence of bias, actual or perceived". Independence, by contrast, focussed on the status of the Court or tribunal. In particular, Le Dain J. emphasized that the independence protected by s. 11(d) flowed from "the traditional constitutional value of judicial independence", which he defined in terms of the relationship of the Court or

tribunal "to others, particularly the executive branch of government" (p. 685). As I expanded in *R v. Lippé*, [1991] 2 S.C.R. 114, the independence protected by s. 11(d) is the independence of the judiciary from the other branches of government, and bodies which can exercise pressure on the judiciary through power conferred on them by the state.

[49] It was from that perspective that Le Dain, J. in *Valente* found the additional requirement that the Court or tribunal be reasonably perceived as independent.

[50] Thus, the guarantee of independence does not depend upon proof of arbitrary action by the Legislature as the respondent suggests. It is the perception of independence as held as by the reasonable and informed person that must be protected.

[51] The independence of a judicial officer, particularly at the level of a Justice of the Peace, is a fragile thing in the face of legislative power. That it is a fundamental right of Canadians enshrined in the *Charter* can no longer be debated.

[52] The Honourable J.C. McRuer, Royal Commission Inquiry into Civil Rights (Toronto): Queen's Printer, 1968 at p. 524, speaking of the need for reform of the system of Justices of the Peace in Ontario, said:

The office should stand as a safeguard of the civil rights of the individual against the exercise of arbitrary police power.

[53] Numerous reports, including the Klinck report in Alberta, recognized that the constitutional principles of judicial independence should apply to the work of Justices of the Peace. That recognition led directly, in Alberta, to the enactment of Sections 5.1 and 5.2 in 1991 to provide for security of tenure and to establish a process for removal only for cause, and after a fair hearing. With respect, it is too late now for the Legislative branch to turn back from that principle.

[54] I am persuaded that the proposed changes have great merit. The need for change has been demonstrated several times over, on the basis of the evidence of Dr. Macleod and Dr. Greene. The single exception is Section 2.4(8) and the precedent it would create and the damage it would do to the principle of the independence of judicial officers.

[55] Were it not for the retroactive effect of Section 2.4(8), the constitutional principle would be protected and the applicants would remain in office. The perception of independence for themselves and their successors would be well-founded. Indeed, had the Judicial Council not changed the qualifications, all of these changes would have proceeded without disruption.

[56] Many aspects of change and reorganization do not strike at judicial independence. Changing titles, qualifications for future appointees may be two examples. Judicial independence should not be seen as an impediment to reform of the judicial branch of government. It should instead be its primary objective, as stated by Alberta's Minister of Justice. Yet the respondent here argues that the constitutional principle of judicial independence is subservient to the

Legislative will, so long as the decision is not arbitrary. That in my view is not a correct principle in law.

[57] Dr. Greene expressed the opinion that this claim that the proposed changes violate judicial independence is an attempt to "inflate" the meaning of judicial independence beyond its proper meaning. A demand for a larger office in the name of judicial independence demeans the concept and trivializes the principle. But removal of all authority and remuneration obviously will exceed the trivial. Recognizing the judicial nature of the functions performed by the applicants as Justices of the Peace does nothing to "inflate" the principles of judicial independence.

[58] On a practical level it would be most unfortunate to go to all of this work to improve the real and perceived independence of these judicial officers, only to demonstrate by the manner of doing so that the Legislative branch can remove them from office without cause and without the benefit of process. As noted, the respondent argued that there are "levels" of independence and that Justices of the Peace attract a lower level. Even if so in some respects, a level of independence where qualification to continue in office can be varied with retroactive effect cannot be adequate.

#### **THE GRANDFATHER ARGUMENT**

[59] The respondent says that if Section 2.4(8) is constitutionally invalid, then Alberta would be required to effectively "grandfather" all incumbent non-sitting Justices (whether fee, staff or these three salaried non-sitting Justices), thus delaying implementation of necessary reform.

[60] There are several answers. First, of course, administrative inefficiency is not a reason to override constitutional principle. In any event, the three applicants are the only full time salaried non-sitting Justices of the Peace. There is no evidence before me whether or how many of the staff or fee JPs still exercise judicial functions which would attract *Charter* protection.

[61] As well, it seems doubtful that great delay would occur. Dr. Greene found that in Ontario "nearly all" of the staff JPs preferred to retain their employment as Court administrators rather than become full time JPs under the new system. Ontario, of course, made its task easier by not attempting to change the educational qualifications for the appointment. The administrative problem here lies not in the reforms in general but in the decision to raise the qualifications and to apply them retroactively. Lastly, the respondent's concern about "grandfathering" and its impact on the pace of reforms seems to have arisen only recently. Ken Hawrelechko, Senior Manager, Operations, Court Services, Department of Justice, the respondent's deponent in these proceedings, said that in November, 1996 a decision was made that future hirings to replace departing salaried non-sitting Justices would be filled by lawyers, to be scheduled on an *ad hoc* basis. At that time the three applicants on this motion were offered three options, one of which was to remain where they were. They did. There was no concern expressed that if they chose that option they stood in the way of necessary reform.

#### **RESORT TO AN INDEPENDENT COMMISSION PROCESS**

[62] The applicants also argue that there is no evidence that these legislative changes were considered by an independent Commission or body as mandated by the Provincial Court Judges case and as recently referenced in *Mackin v. New Brunswick* [1998] N.B.J. No. 267, and so are invalid.

[63] Given that I conclude that the impugned section is invalid for other reasons, I need not deal with this issue save to say that in my view, some infringements upon judicial independence may be so fundamental as to be beyond redemption even after a commission process. The commission process discussed in the Provincial Court Judges case is in the context of the financial security of judges and how that issue should be de-politicized. (See p. 102 for example) The same rationale does not withstand scrutiny in relation to security of tenure. Here, while financial security obviously falls with the loss of security of tenure, the basic issue is the latter. So a change, for example, to appoint judicial officers at pleasure, while having a financial security impact is really a tenure issue and could not be shielded from a *Charter* attack by a Commission process. Thus, in my view, the reference or non-reference of these amendments to a Commission process is not a relevant issue.

## CONCLUSION

[64] For these reasons Section 2.4(8) offends the constitutional principle of judicial independence and is thus of no force and effect insofar as it relates to these applicants. The applicants enjoy security of tenure in accordance with Sections 5, 5.1 and 5.2 of the *Justice of the Peace Act*. There will be a declaration accordingly.

[65] Costs may be spoken to.

**DATED** at Calgary, Alberta this 21st day of January, 1999.

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**J.C.Q.B.A.**

## APPEARANCES:

Alan D. Hunter, Q.C.  
Linda A. Taylor  
for the Applicants

Robert C. Maybank  
L. Christine Enns  
for the Respondent

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DECISION AS TO COSTS  
of the  
HONOURABLE Mr. JUSTICE T.F. McMAHON

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[1] The applicants have been successful in their application for declaratory relief and now seek costs on a solicitor and own client basis, or an enhanced award of costs under Schedule C of the *Rules of Court*.

[2] Solicitor client costs are awarded only in rare and exceptional circumstances. The grounds for such an award are well described in several recent cases and need not be repeated here.

[3] It is sufficient to say that the usual kinds of rare or exceptional circumstances — such as misconduct — do not exist here.

[4] The applicants argue forcefully that this was public interest litigation and that the applicants had a duty to test the constitutionality of the impugned section because of the threat it posed to the principle of judicial independence. The issue invoked s. 11(d) of the *Charter* and a citizen's right to a fair and public hearing by an independent and impartial tribunal. In those circumstances, the applicants say that their personal resources should not be drawn upon to defend and protect the public interest in judicial independence.

[5] There is much merit to that position. The difficult balance was aptly described in *Canadian Newspaper Co. v. Canada (Attorney General)*, (1986) 12 C.P.C. (2d) 203 (Ont.H.C.) at 305:

While it is desirable that *bona fide* challenge is not to be discouraged by the necessity for the applicant to bear the entire burden, it is equally desirable that the Crown should not be treated as an unlimited source of funds with the result that marginal applications would be encouraged.

[6] Here, the right of taxation of accounts can ensure that the Crown is not treated as an "unlimited source of funds" and this successful application can hardly be described as "marginal".

[7] 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.

[8] I note also the New Brunswick Queen's Bench decision in *Mackin v. New Brunswick (Minister of Finance)*, (1998) 21 C.P.C. (4th) 29 and *Rice v. New Brunswick* [1998] N.B.J. 266, both of which support this conclusion. The decision of the Quebec Superior Court in *Ruffo v. Minister of Justice (Quebec)* [1997] A.Q. 3658, (to which the applicants refer) dealt with legal costs incurred by a judge in defending herself before the Judicial Council and is distinguishable on that basis.

[9] Accordingly, the application for solicitor and own client costs is denied.

[10] Rules 601 provides that costs are in the Court's discretion and that the Court may consider factors such as the importance of the issues and the complexity of the proceedings.

[11] I am of the view that the importance of this constitutional challenge greatly exceeded that of usual private interests litigation. Although their personal interests were at stake, it is also true that the applicant's raised an important public interest to be argued and protected. Constitutional law in the context of the issues here is complex and requires particular skill to research, prepare and present. That reality must be recognized in an award of costs.

[12] The respondent acknowledges that Column 5 would be appropriate. The applicants seek a multiple of Column 5.

[13] I conclude that the applicants shall have their costs to be taxed on Column 5 multiplied by 1.5 of Schedule C throughout, plus reasonable disbursements.

[14] Although strictly speaking, this was a Special Chambers application, with *viva voce* testimony, it was in fact conducted as a trial, with evidence over four days including expert evidence, experts' reports and written briefs.

[15] Accordingly, for costs purposes, it will be treated as a trial with the applicants entitled to tax items 9, 10, 11 and 12 of Schedule C, including second counsel fee. The applicants also will be entitled to reasonable disbursements incurred for the preparation of their expert's report and for his attendance at the hearing even though he was not called to testify.

[16] In addition, there will be costs to the applicants for this cost application on Column 5 multiplied by 1.5, item 8 of Schedule C (special application with briefs).

**DATED** at Calgary, Alberta this 18th day of March, 1999.