SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia Presiding Justices of the Peace Association v. Nova Scotia (Attorney General), 2013 NSSC 40

Date: 20130201
Docket: Hfx No. 366780
Registry: Halifax

Between:

Nova Scotia Presiding Justices of the Peace Association

Applicant

v.

Attorney General of Nova Scotia, representing
Her Majesty the Queen in Right of the Province of Nova Scotia

Respondent

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Heard: April 25, 2012

Last Written Submissions: October 25, 2012

Counsel: Peter M. Rogers, Q.C., for applicant
Alex M. Cameron, for respondent

Moir J.:

Introduction

[1] Presiding justices of the peace are those justices who hear and determine cases, such as the trials of some charges under provincial legislation. Three years ago they incorporated a society, the applicant.

[2] The association applies for a declaration that the province's scheme for remunerating the presiding justices is unconstitutional. It says that the scheme fails to protect judicial independence.

[3] In response, the province raises two procedural issues and, in any case, it submits that its remuneration scheme for the justices meets the standards required to ensure independence.

[4] On the procedural issues, the province says that judges cannot sue the Crown and, even if they could, the justices of the peace would have to do so personally, not through their association.

[5] On the substantive issue, regulations provide that part-time justices are to be paid at an hourly rate that is based on the salaries of Provincial Court judges. All of the presiding justices work part-time. The province has never appointed a full-time presiding justice.

[6] The province says that the constitutional standards for judicial independence are met because the hourly rate is tied to a salary that responds to recommendations of an independent commission. The association says that is not enough.

[7] I am grateful to counsel for their written and oral submissions on the interesting issues raised by this application. Also, I requested and received written submissions on *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, which was released lately.

Issues

- Can judges sue the Crown?

- If so, can the association put forward the claim?

- If so, is the remuneration scheme constitutional?

Judges Suing the Crown

[8] *Government's Submission*. Mr. Cameron admits that the province's submission on this subject is novel because there are many cases about judicial remuneration in which judges, or their representatives, were parties.

[9] The province's submission begins with "a Constitution similar in Principle to that of the United Kingdom" is the preamble to the *Constitution Act*, 1867 and the recognition in para. 95 of *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 that this incorporates principles of constitutional law, such as the principle of judicial independence, that are not expressed in the *Constitution Act*.

[10] The submission then proposes, as "[o]ne of the fundamental rules of our constitutional law", the principle "that the Crown prerogative is the source of justice".

[11] So, the Queen "is deemed always to be present in Court": *Halsbury's Laws of England*, 3rd, vol. 7, p. 240 and "all Judges must derive their authority from the Crown, by some commission warranted by law ...": *Halsbury's*, v. 9, p. 344, note (b). Mr. Cameron also refers to Chitty, *A Treatise on the Law of the Prerogative of the Crown* (1820) at p. 76:

> ... It seems, that in very early times our Kings in person, often heard and determined causes between party and party. But by the long and uniform usage of many ages, they have delegated their whole judicial powers to the judges of their several courts; so that, at present, the King cannot determine any cause of judicial proceeding, but by the mouth of his judges whose power is, however, only an emanation of the royal prerogative. The courts of justice, therefore though they were originally instituted by royal power, and can only derive their foundation from the Crown, have respectively, gained a known and stated jurisdiction and their decisions must be regulated by the certain and established rules of law.

[12] The concepts that the Crown is the fountain of justice and that judicial power is a delegated Crown prerogative were recognized by the courts many times. Mr. Cameron cites *Attorney-General v. Times Newspapers Ltd.*, [1974] A.C. 273 (H.L.) at p. 311; *Reference Re: Supreme Court Act Amendment*, [1940]

S.C.R. 49; and, *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, para. 103.

[13] The argument continues to its conclusion: because judges exercise a power to dispense justice as delegates of the Crown, judges cannot sue the Crown. It is said that this is analogous to the proposition, "Prerogative remedies do not lie against the Crown, since it is at the suit of the Crown that they are sought": Wade, *Administrative Law* (5th) at p. 564. See also, Brown and Evans, *Judicial Review of Administrative Action in Canada*, v. 1, p. 1-4; *Cook v. Canada*, 2007 B.C.J. 2556 (S.C.) at para. 26; and, *Lindsay v. Nova Scotia* (1986), 76 N.S.R. (2d) 208 (S.C.).

[14] Mr. Cameron sums up the argument this way:

> So the Crown cannot be both applicant and respondent in the same proceeding. The Crown cannot sue itself. The present proceeding is an attempt to do just that. Presiding Justices of the Peace exercising judicial functions are acting on behalf of the Crown. They are exercising the prerogative power to do justice. They are in consequence, acting for the Crown in carrying out the Crown's power to do justice. They are, in that function, the Crown. Their own suit against the Crown cannot proceed.

[15] *Association's Submission.* The association responds to this argument by asserting that "the authority of the Courts is no longer associated with the absolute power of monarchs." Mr. Rogers refers to *Prohibitions Del Roy* (1607), 12 Co. Rep. 63. Sir Edward Coke said "... no King after the Conquest assumed to himself to give any judgment in any cause whatsoever ... but these were solely determined in the Courts of Justice" and "the King in his own person cannot adjudge any case". So, the association's response is that "the judiciary now exercise functions which the Queen cannot usurp".

[16] Further, judges are not agents of the Crown. They are "appointees whose independence is not to be interfered with."

[17] *Determination*. None of the authorities say that a judge is precluded from suing the government. It is my respectful view that this conclusion does not follow from the idea that the Crown delegated its general "prerogative" to dispense justice to the judiciary at a time before constitutional monarchy.

[18] It does not assist the government that prerogative writs do not lie against the Crown. One needs to take care with the word "prerogative". To refer to a royal

prerogative to dispense justice is to use "prerogative" in a general sense. The prerogative writs were specialized remedies by which a superior court, standing in place of the Crown, reviewed a decision, other activity, or inactivity of a tribunal or official. A writ could not be issued against the Crown because the writs were said to belong to it or to be issued in its name. (The writs are falling into disuse in modern judicial review. See Rule 7.11.)

[19] In *Attorney-General v. Times Newspapers Ltd.*, Lord Diplock distinguished between the function performed by the Attorney General in a prosecution for contempt and the function the Attorney General performs representing the Crown "in the exercise of its executive functions": p. 311. In the former, "he acts in constitutional theory on behalf of the Crown, as do Her Majesty's judges themselves." This does not suggest that there is any basic similarity between the judges when they hear cases and the government when it exercises executive functions. The Crown, in one sense of the word, was able to plead before representatives of the Crown, in another sense.

[20] The other references provided by Mr. Cameron adopt the metaphors about a fountain of justice and the delegation of a general prerogative to do justice, but they do not equate the judiciary and the government.

[21] The argument advanced by the government needs to be put in the broader context of the common law preclusion of suits against the Crown, in the sense of the Crown as the government. In *Smith v. Nova Scotia (Attorney General)*, 2004 NSCA 106 Justice Cromwell explained the common law, i.e. the law before Crown proceedings legislation, on this subject. The Crown could not be sued in the ordinary courts without the Crown's permission, and the Crown could not be sued in tort at all. He said this at para. 81:

> These rules persisted for centuries, but their rationale derives from the feudal principles that the lord could not be sued in his own courts and that the King could do no wrong. As Carol Shield's character observed, history does indeed leave strange accidents behind.

[22] Judges are not excepted from the rights provided by Crown proceedings legislation, or by the constitution, to seek remedies against the government. Does the historical delegation, apparently from before 1066, of judicial authority mean that judges are delegates of the "Crown", equated with the government?

[23] Legislatively, the Crown is a component of Parliament or the legislature. Just as the supremacy of Parliament distinguishes the legislative Crown from the governmental Crown, the principle in *Prohibitions Del Roy* distinguishes the governmental Crown from the judiciary. A constitutional monarchy limits the Crown's involvement with each of the three branches of government. And, the limits are different for each. So different, that the Crown who is a component of Parliament cannot be univocally equated with the Crown who is the head of government in the sense of the executive, and neither can be univocally equated with the Crown who has a symbolic relationship with the judiciary.

[24] Developments more recent than *Prohibitions Del Roy*, make it constitutionally impermissible to associate judges with the government, notwithstanding that the Crown has a symbolic relationship with the judiciary and the titular relationship with the government. The constitutional principle of judicial independence is discussed in the decisions to which I shall refer on the third issue. Whatever symbolic value references to the Crown as the source of justice may have, the constitutional requirement for an independent judiciary is inconsistent with the notion that judges function as delegates of any entity

associated with the government, the executive branch. Our authority may derive "from the Crown, by some commission warranted by law" as *Halsbury's* says, but the moment the commission is made we have to be really and apparently independent from the government that appoints us, from the Crown in the executive sense.

[25] Therefore, judges are not, as judges, prevented from taking the Crown, in the sense of the government, to court.

Standing

[26] *Position of the Parties*. The province challenges the capacity of the association to bring this proceeding. The association says that it has standing as of right, and it alternatively seeks public interest standing.

[27] To challenge the constitutionality of a law "a person need only show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no reasonable and effective manner in which the

issue may be brought before the Court": *Canada (Minister of Justice) v. Borowski*, [1981] 2 S.C.R. 575 at p. 598.

[28] The association relies on *Charlottetown (City) v. Prince Edward Island*, [1998] P.E.I.J. 88 (S.C., A.D.) to support its position that the association is directly interested in the constitutionality of the scheme for remunerating justices of the peace. Although it is a corporation, the City of Charlottetown had a direct interest, and did not have to seek public interest standing, on a question of the constitutionality of new electoral boundaries for constituencies of the Prince Edward Island legislature.

[29] Charlottetown claimed that the constituencies in its borders contained such a disproportionately high number of voters that the city "is inadequately represented in the Legislature of the Province", para. 5. The city wanted to argue that this was contrary to s. 3 of the *Charter*. At para. 8, Mitchell J.A. wrote:

> In this context some deviance from voter equality may be tolerated for the greater good of all. On the other hand, unjustly diminishing the voting rights of any group of individuals, such as urban voters, would obviously have an adverse impact on effective representation for their community as a whole and thus would weaken the democratic process that s. 3, as defined by the Supreme Court, was meant to protect and support. Accordingly, the City of Charlottetown as the local authority for its population has standing in this case to invoke s. 3 based on such a claim

> because it has an interest that falls within the scope and purpose of the right thereby guaranteed.

I emphasize Justice Mitchell's phrase, "as the local authority".

[30] The association says that "how, and how much, Presiding JPs are paid ... affects Presiding JPs directly." And, "As the sole representative of Presiding JPs in the Province with a mandate which includes compensation issues, the Association is likewise affected."

[31] The association is not "the sole representative" in the sense of Rule 36 - Representative Party. Rather, the argument turns on the fact that the association is the only body authorized to make representations on behalf of the justices as a group. Each justice can speak for himself and herself. A justice is directly interested in the question about remuneration. The association speaks to such an interest representatively, i.e. indirectly.

[32] The case is different for a municipality on the constitutionality of over-sized constituencies within its borders. The City of Charlottetown, as the local

authority, had a direct interest in how many of the members of the legislative assembly would be elected to represent areas within municipal borders.

[33] Therefore, the association cannot pursue this litigation as of right. Ought the court grant it public interest standing?

[34] *Discretion to Grant Public Interest Standing*. Public interest standing was the subject of a decision of the Supreme Court of Canada released a couple months ago: *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45. At para. 37, Justice Cromwell wrote for a unanimous court:

> In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts ... .

The association bears the onus:

> The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred. [Also para. 37]

[35] The court in *Downtown Eastside* made it clear that "serious justiciable issue", "genuine interest", and "reasonable and effective way" are not requirements that rigidly control the exercise of the discretion to grant public interest standing. They are "factors" to be applied "flexibly" when determining whether to exercise the discretion. This point is elaborated at para. 20:

> My view is that the three elements identified in *Borowski* are interrelated factors that must be weighed in exercising judicial discretion to grant or deny standing. These factors, and especially the third one, should not be treated as hard and fast requirements or free-standing, independently operating tests. Rather, they should be assessed and weighed cumulatively, in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best serves those underlying purposes.

Thus, the factors are "interrelated considerations to be weighed cumulatively, not individually ...": para. 36.

[36] And, the factors are to be weighed cumulatively "in light of their purposes": para. 36. The purposes are discussed at para. 22 to para. 30 of *Downtown Eastside*. They concern "the need to carefully allocate scarce judicial resources" (para. 26), the need in an adversarial system "for the courts to have the benefit of contending points of view of the persons most directly affected by the issue" (para.

29), and, going primarily to justiciability, "the proper role of the courts and their constitutional relationship to the other branches of government" (para. 30).

[37] *Serious Justiciable Issue*. Public interest standing is often sought long before a determination of the merits. Here, the parties rolled the standing issues into the hearing on the merits, and I will proceed to determine the merits after I explain my reasons for granting the public interest standing to the association.

[38] As will be seen when I turn to the merits, this case engages a "serious issue" in the sense of a "substantial constitutional issue". See *Downtown Eastside*, para. 42.

[39] The government's submissions on *Downtown Eastside* revive its argument that judges are constitutionally incapable of suing the Crown, and they reinforce that argument in light of the concern about "the proper role of the courts and their constitutional relationship to the other branches of government" (para. 30), which informs, in part, the purposive aspect of the approach.

[40] As has been said, I am of the view that judges are not incapable of suing the government, in the sense of the executive branch. As I see it, the discussion of the principle of legality at paras. 31 to 34 in *Downtown Eastside* supports this conclusion. Parties before the justices, and the justices themselves, have a direct interest in the question of the constitutionality of their remuneration scheme. For reasons to be discussed, it would be awkward for justices to sue individually.

[41] The concern that the courts keep to their proper roles pertains to the role of this court in entertaining the issue brought here on behalf of the justices, rather than the role of the justices in bringing it here. However, for the reasons given on the first issue, and recognizing that the principle of legality requires a practical mechanism by which the government can be held to the rule of law on the issue of the justices' remuneration, granting public interest standing is consistent with the proper role of both this court and that of the justices.

[42] In reference to the factor now under discussion and the two factors to be discussed, public interest standing is consistent with the underlying purpose of guarding the role of the judiciary in relation to the other branches of government.

[43] The association presents a serious justiciable issue.

[44] *Genuine Interest*. This factor emphasizes the purpose about conservation of judicial resources that underlies restrictions on standing: *Downtown Eastside*, para. 43.

[45] In 2008, the government wrote to each presiding justice individually about problems with night court remuneration. This led to the formation of an organized group of justices and, later, to the incorporation of the association. As such, the association is routed in a concern to protect judicial independence by avoiding individual negotiations.

[46] The group, and then the association, attempted to have a dialogue with the government about the very issue now presented to this court, the need for a mechanism through which to discuss remuneration. It made representations first to the Director of Court Services, later to the Deputy Minister.

[47] All presiding justices of the peace, except possibly one, are members of the association.

[48] I am satisfied that the association has a genuine interest in the issue before this court, such as would justify the expenditure of judicial resources.

[49] *Reasonable and Effective Way*. The third factor is "whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court."

[50] The government is not about to make a reference, as in *Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] S.C.J. 75. That is clear from its various positions in this case.

[51] Parties to hearings before justices have a direct interest in a justice's independence. Given its position that judges cannot sue the Crown, the government suggests we wait until a party becomes informed about the justice's remuneration and chooses to mount a challenge based on lack of independence. One could wait rather a long wait. In the meantime, one has to be concerned that the justices have taken a public position that seriously calls into question their ability to determine cases with the required independence.

[52] The justices can sue the government. One, or a group of them, could have brought this proceeding. However, taking the issue to court through their association is more effective. That way, the justices speak with a single voice and prosecute their suit under well defined terms. That way, differences among the justices about positions or strategies are kept within the board of directors or the membership rather than aired in public. That way, justices do not stand as those who sued and those who did not sue, with the implications either might have for apparent independence.

[53] *Conclusion*. I will exercise my discretion to grant the association public interest standing to continue this application.

Constitutionality of Remuneration

[54] *Remuneration of the Justices*. The *Justices of the Peace Act* leaves to regulations "the fees, allowances, benefits or salary to be paid to justices of the peace": s. 12(1)(e). A full-time justice, of which there are none, would be paid "an annual salary equal to 50% of the salary of a judge of the Provincial Court":

Justice of the Peace Regulations, NS Reg 51/2002, s. 10(1). Subsection (2) reads "A part-time presiding justice of the peace shall be paid at an hourly rate based on the salary of a full-time presiding justice of the peace ...". And, subsection (3) reads:

> For the purpose of calculating salary payments in accordance with subsection (2), one hour during which a part-time presiding justice of the peace is on call to the Justices of the Peace Centre is equivalent to one-third of an hour during which the justice is in attendance at the Centre.

[55] The *Provincial Court Act* provides an independent process for recommendations to government about "the appropriate level of salaries to be paid to judges of the Provincial Court and the Family Court": s. 21E(1)(a).

[56] A three person tribunal makes the recommendations. One member is appointed by the Provincial Judges Association, one by the Minister of Justice, and the chair is jointly appointed by the first two members or by the Dean of Dalhousie Law School: s. 21A(1), (2), and (5). Members serve three year terms: s. 21A(6).

[57] In conjunction with recommendations about a Provincial Court judge's salary, the tribunal makes recommendations about vacation, see s. 21E(1)(c), and benefits such as sick leave, pension, disability payments, life insurance contributions, health, and dental. The justices receive none of these benefits.

[58] Subsection 21E(3) provides a list of factors to be taken into account when the tribunal makes recommendations on salary, vacation, and benefits. The list reads:

> (a) the constitutional law of Canada;
>
> (b) the need to maintain the independence of the judiciary;
>
> (c) the need to attract excellent candidates for appointment as judges;
>
> (d) the unique nature of the judges' role;
>
> (e) the manner in which salaries and benefits paid to judges in the Province compares to judicial compensation packages in other jurisdictions in Canada, including the federal jurisdiction, having regard to the differences between those jurisdictions;
>
> (f) the provision of fair and reasonable compensation for judges in light of prevailing economic conditions in the Province and the overall state of the Provincial economy;
>
> (g) the adequacy of judges' salaries having regard to the cost of living and the growth or decline in real per capita income in the Province;
>
> (h) the relevant submissions made to the tribunal;

(i) the nature of the jurisdiction and responsibility of the court; and

(j) other such factors as the tribunal considers relevant to the matters in issue.

[59] Members of the public and interested groups are entitled to attend hearings of the tribunal and to make written submissions: s. 21D(2).

[60] The statute provides for the appointment of a new tribunal every three years: s. 21F. Styling itself "The Nova Scotia Tribunal on Provincial Court Salaries and Benefits", a tribunal reported five times since the statute was enacted in 1998. Each report makes recommendations for salary and benefits in a three year period. The latest report was made a year ago for the period of April 1, 2011 to March 31, 2014.

[61] The reports recommend salary increases. They also make recommendations on the differentials for the Chief Judge and the Associate Chief Judge, per diem remuneration for supernumerary judges, vacations, the pension plan, travel compensation, sick leave, disability compensation, allowances for expenses incidental to the office, educational allowance, and life, health, and dental insurance.

[62] The justices receive no remuneration in the form of any benefit. There is no vacation, pension, sick leave, maternity leave, incidental allowance, or insurance for life, health, dentistry, or disability. Their remuneration is tied to a Provincial Court judge's salary without adjustment for a Provincial Court judge's benefits.

[63] In this proceeding, the justices complain that they cannot understand how their salaries are calculated by the province. The province responds by saying that the justices should ask.

[64] The justices were given a statement titled "Calculation of JP Salary", which shows five steps for calculating what a justice is to be paid per shift. It reads:

> Step 1: Provincial Court Judge's salary ($156,960) divided by 2 = $78,480
>
> Step 2: Hours of work at JP Centre versus regular work week
>
> 84 in person
> +
> 42 [84 on call (paid at half of in person)]
> 126
> ÷
> 40 hours (regular work week)
> 3.5 (Equivalent of 3.5 Jps)
>
> Step 3: Number of JP equivalents (3.5) x $78,480 = $274,680

Step 4: Divide annual salaries for JP equivalents by 365 days = $753			(daily amount to cover JP shifts)
Step 5: Allocate Daily amount to shifts:	$376.50	8 hour in person	
	188.25	4 hour in person	
	188.25	12 hours on call	
	$753.00		

The amount for a Provincial Court judge's salary dates this to 2002.

[65] I cannot understand the calculation.

[66] The justices' duties have expanded since 2002. They now determine peace bond applications under the *Criminal Code* and cases of alleged provincial offence violations in Night Court at Halifax, Dartmouth, and Sydney. They are scheduled into Saturday and Sunday shifts for proceedings such as search warrants and applications under the *Domestic Violence Prevention Act*. And, they now accept week long back-up duties.

[67] Four years ago, the province wrote to each justice about remuneration for the new Night Court duties. This led to communications about independence, and process. An impasse was reached when the government rejected the association's

position that the constitution demands an intermediary between government and the justices for the purpose of discussing their remuneration.

[68] The Deputy Minister of Justice wrote "The salary of Provincial Court Judges is set by an independent salary commission and, thus, the Provincial Court judges are what is known as a 'comparator group'." She concluded, "the current approach provides for a fair and independent method of determining remuneration for JPs in Nova Scotia."

[69] *Judicial Remuneration and Independence*. The modern caselaw on this subject began with an effort to characterize an "independent and impartial tribunal" for the purposes of s. 11(d) of the *Charter*, which protects our right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal".

[70] The essentials for judicial independence are security of tenure, financial security, and administrative independence. See *R. v. Valente*, [1985] 2 S.C.R. 673 and *Beauregard v. Canada*, [1986] 2 S.C.R. 56.

[71] The recession of the early 1990s led most governments in Canada to limit or reduce salaries and benefits paid to public servants. In Prince Edward Island, Manitoba, and Alberta the salaries of Provincial Court judges were reduced by statute or regulation.

[72] The government of P.E.I. referred questions to the Supreme Court, Appeal Division about the affects of its legislation on independence for the purposes of s. 11(d). In Manitoba, the Provincial Court judge's association sued the government. In Alberta, several accuseds challenged the independence of Provincial Court judges because of the reduction and because of some remarks made by Premier Kline.

[73] These cases found their way to the Supreme Court of Canada and were disposed of by *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3. Seven members of the court sat on the appeal. Chief Justice Lamer wrote for six. Justice LaForest wrote a vigorous dissent.

[74] The majority decision adopts two broad constitutional principles. One precludes the judiciary, collectively or individually, from negotiating remuneration with the government or with representatives of the legislature: para. 134. The other recognizes that governments or legislatures can reduce, increase, or freeze judicial remuneration, but the "changes to or freezes in judicial remuneration require prior recourse to a special process": para. 134. (It was made clear in para. 174 of the *Provincial Court Judges' Reference* that the majority required that the special process extend to inaction that "might lead to a reduction in judges' real salaries because of inflation".)

[75] The present issue turns on what satisfies the need for a special process. Returning to para. 133 of the *Provincial Court Judges' Reference*, we find that the special process must be "independent, effective, and objective".

> [A]ny changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective, and objective, for determining judicial remuneration, to avoid the possibility of, or the appearance of, political interference through economic manipulation.

[76] The need for independence is satisfied by substituting for the prohibited negotiations an independent body that makes recommendations on remuneration.

> What judicial independence requires is an independent body, along the lines of the bodies that exist in many provinces and at the federal level to set or recommend the levels of judicial remuneration. Those bodies are often referred to as commissions, and for the sake of convenience, we will refer to the independent body required by s. 11(d) as a commission as well. Governments are constitutionally bound to go through the commission process. [para. 133]

[77] However, Chief Justice Lamer left the door open for other mechanisms. Under the title "Independent, Effective and Objective Commissions" the Chief Justice laid down "the general guidelines for these independent commissions": para. 168. Before discussing the guidelines he commented at para. 167:

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

[78] And, after discussing the guidelines he reiterated at para. 185:

> By laying down a set of guidelines to assist provincial legislatures in designing judicial compensation commissions, I do not intend to lay down a particular institutional framework in constitutional stone. What s. 11(d) requires is an institutional sieve between the judiciary and the other branches of government. Commissions are merely a means to that end. In the future, governments may create new institutional arrangements which can serve the same end, but in a

> different way. As long as those institutions meet the three cardinal requirements of independence, effectiveness, and objectivity, s. 11(d) will be complied with.

[79] Mr. Cameron says that what we read in para. 185 tempers para. 133. He says that the tempering should be understood in the context of Justice LaForest's dissent, especially para. 333, to which some of the judges might have been inclined without the tempering.

[80] Mr. Rogers emphasizes the connection between the principle requiring a special process and the principle prohibiting salary negotiations by the judiciary. The commission model discussed in the part of the Chief Justice's remarks on general guidelines involves submissions by the judge's representatives to a commission constituted at regular intervals, recommendations of the commissions, government providing reasons for rejecting a recommendation, and review, review at a low standard but review just the same.

[81] Mr. Cameron points out that even the prohibition on negotiating, which was rejected by Justice LaForest (see, para. 328), was tempered. The Chief Justice wrote at para. 134:

> When I refer to negotiations, I utilize that term as it is traditionally understood in the labour relations context. Negotiations over remuneration and benefits, in colloquial terms, are a form of "horse-trading". The prohibition on negotiations therefore does not preclude expressions of concern or representations by chief justices and chief judges, and organizations that represent judges, to governments regarding the adequacy of judicial remuneration.

Also, one needs to bear in mind that the special process, whether it be a remuneration commission or some other mechanism, has nothing to do with fairness to judges. It is to protect judicial independence, not to better judges.

[82] Eight years after the *Provincial Court Judges' Reference*, the Supreme Court of Canada released a *per curiam* decision in *Provincial Court Judges' Association of New Brunswick v. New Brunswick (Minister of Justice)*, 2005 SCC 44. The case concerned the adequacy of government responses to recommendations on judicial salaries by commissions in New Brunswick, Quebec, Ontario, and Alberta. Also, recommendations on pension options in Ontario.

[83] The *per curiam* decision expressed dismay that the *Provincial Court Judges' Reference* led to a situation in which "Direct negotiations no longer take place but have been replaced by litigation": para. 12. "[T]he principles of the

compensation commission process elaborated in the *Reference* must be clarified":

also, para. 12.

[84] On the requirement for independence, the court said at para. 16:

> One requirement for independence is that commission members serve for a fixed term which may vary in length. Appointments to a commission are not entrusted exclusively to any one of the branches of government. The appointment process itself should be flexible. The commission's composition is legislated but it must be representative of the parties.

On objectivity, it said at para. 17:

> The commission must objectively consider the submissions of all parties and any relevant factors identified in the enabling statute and regulations. Its recommendations must result from a fair and objective hearing. Its report must explain and justify its position.

On effectiveness, it said at para. 18:

> A number of criteria that must be met to ensure effectiveness are identified in the *Reference*. Once the process has started, the commission must meet promptly and regularly. As well there must be no change in remuneration until the commission has made its report public and sent it to the government. The commission's work must have a "meaningful effect" on the process of determining judicial remuneration (*Reference*, at para. 175).

[85] Central to *Provincial Court Judges' Association of New Brunswick v. New Brunswick* was the meaning of "meaningful effect". It does not mean that the recommendations have to be binding, just that they must result from an open process. The court said at para. 21:

> A commission's report is consultative. The government may turn it into something more. Unless the legislature provides that the report is binding, the government retains the power to depart from the commission's recommendations as long as it justifies its decision with rational reasons. These rational reasons must be included in the government's response to the commission's recommendations.

[86] The court commented on the requirements for government's response to commission recommendations at para. 22 to 27. It commented on the review standard, rationality, and the review process at para. 28 to 41, and on the limited remedies available to the reviewing court at para. 42 to 44.

[87] *Application to Justices of the Peace*. The principles in the *Provincial Court Judges' Reference* as elaborated by *Provincial Court Judges' Association of New Brunswick v. New Brunswick* apply to justices who preside over cases like those presided over by members of the Nova Scotia Presiding Justices of the Peace: *Ell v. Alberta*, 2003 SCC 35 and *Provincial Court Judges' Association of New Brunswick v. New Brunswick*, see para. 105 to 131.

[88] As Mr. Cameron points out, the authorities do not decide that the justices' remuneration must be the subject of a commission's recommendations. If the "comparator" process used in Nova Scotia conforms with the constitutional principles, the independence of the justices is uncompromised.

[89] *Use of "Comparators"*. Two decisions of the Ontario Court of Appeal consider linking judicial remuneration for some kinds of judges to an objectively chosen comparator group.

[90] The concept was referred to in *obiter* in *Ontario Deputy Judges' Association. v. Ontario (Attorney General)*, [2006] O.J. 2057 (C.A.). The remuneration of part-time deputy judges who presided over Small Claims Court was set by the Lieutenant Governor-in-Council. The rate, $232 per day, had not been changed for twenty-four years.

[91] The main issue was whether the independence of the deputy judges required the full protection of a special process. The government's arguments against such,

which emphasized the part-time work, were rejected, and it was ordered to set up a process within four months.

[92] Use of an "objectively-chosen comparator group" was mentioned in para. 38 as one of several possible alternatives to a full-blown commission as described in detail in *Reference*.

[93] In *Masters' Association of Ontario v. Ontario*, 2011 ONCA 243 the Ontario Court of Appeal had to decide whether the use of comparators complied with the constitutional requirement for a special process. Justice MacPherson wrote for the court.

[94] Ontario abolished its long practice of appointing masters to assist the superior court. In their place, legislation introduced the office of case management masters and grandfathered two traditional masters.

[95] Litigation over the remuneration of case management masters was settled, and an order-in-council provided "Future adjustments to the salary paid to a Case Management Master will be tied to the salary range applicable to the SMG3

classification ...". The order-in-council went on to provide a formula for calculating case management master's salary that pegged the salary at the top of the range. The SMG3 classification is for assistant deputy ministers in Ontario.

[96] The two remaining traditional masters had their salaries pegged to that of a Provincial Court judge.

[97] In the seven years following the settlement and the order-in-council, the case management masters' salaries went from $155,000 to $190,463. The traditional masters' salaries benefited from increases in Provincial Court salaries that were much greater than the increase in the top end of the assistant deputy ministers' range. Their salaries went from $172,210 to $248,057 in the seven years.

[98] The Masters' Association of Ontario applied for a declaration that the case management masters were entitled to the same salary, benefits, and terms of office as the two grandfathered masters.

[99] The application was heard by Justice Platana, who found that the process for determining salary for case management masters failed to comply with the principles in *Provincial Court Judges' Reference*: *Masters' Association of Ontario v. Ontario*, 2010 ONSC 3714. He wrote at para. 120:

> While it may be appropriate to consider masters' salaries in relation to an appropriate comparator, the process for selecting this comparator must be one which is independent from the sole discretion of the Executive branch. Moreover, the appropriate comparator may change over time. Selecting a comparator, and assuming that it will be appropriate for all eternity, is short sighted and doomed to fail if there is no process in place through which judicial officers can challenge the appropriateness of that comparator in the future.

Writing for the Ontario Court of Appeal, MacPherson, J.A. agreed with the concluding point in this passage from the trial level decision: para. 49.

[100] Justice MacPherson was of the view that the process for the case management masters met the requirements for objectivity and effectiveness: para. 34 and 35. However, the process failed to provide the required independence.

[101] Justice MacPherson said, at para. 38: "The lynchpin for the 'special process' ... is the existence of an independent body to consider the representations of the government and the judiciary about judicial remuneration and to make

recommendations to the government about this subject." He referred to the flexibility the law accords to government for establishing "these independent bodies" at para. 39 and 40. Then he said at para. 41:

> In spite of the flexibility permitted by the case law, there are certain minimum requirements that ground the "independent" component of the special process for setting judicial remuneration. The most important requirement is that there must be a "body" or an "entity" or a "commission" or a "person" in the role of intermediary between the government and the judiciary and this intermediary must be independent of the government. In the case law, this requirement has been described as the need for "an institutional sieve between the judiciary and the other branches of government ...".

A comparator can be used as a factor in the special process, but it cannot be the sole factor: para. 48.

[102] The association submits that using fifty percent of a Provincial Court judge's salary in perpetuity is similar to the unconstitutional use of the assistant deputy ministers' salary. There is no "independent body to consider representations of the government and the judiciary about judicial remuneration" for the justices.

[103] The government submits that the provincial court remuneration tribunals supply the necessary independence. It also relies on some remarks by Justice

MacPherson about the tie between the Provincial Court judges' remuneration and that for the traditional masters to support the view that tying the justices' salary to the judges' salary supplies the necessary independence.

[104] The *Provincial Court Judges' Reference* recognized a third constitutional principle that has been with us as a political principle for a long time: judges cannot be paid so poorly that they are easily open to influence by offers of money. See the discussion in the *Reference* at para. 192 to 196.

[105] The difference between salaries for case management masters and traditional masters was referred to by the Case Management Masters' Association in various contexts. However, at para. 118 of the trial level decision, Justice Platana said:

> Neither party suggests that the current pay of Case Management Masters, by itself, raises concerns relating to financial security. The terms of office of Traditional Masters were established in the context of the abolishment of that office, and in the rapid increase in pay to Provincial Court judges. The salary level established does not reflect constitutional minimum requirements, but is rather the result of the Framework Agreement with the Province.

The Court of Appeal agreed with Justice Platana on these points: para. 36.

[106] The government relies on para. 51 of Justice MacPherson's reasons as supporting its use of the Provincial Court judges' salary as a binding comparator. There, Justice MacPherson made the point that the case management masters were the only group of judges whose remuneration was not subject to hearings before a commission. He included the traditional masters in the rest of the judiciary. "By linkage to provincial court judges, the process also applies to the near obsolete office of traditional Master."

[107] The decision of the Ontario Court of Appeal in *Masters' Association of Ontario* does not support the conclusion that tying the salary of a group of judges to that of another group always complies with the requirement for independence if the second group's salary is the subject of a special process. I emphasize Justice MacPherson's phrases "in the context of the abolition and staged phasing out of the office of traditional Master" in para. 36 and "the near-obsolete office of traditional Master" in para. 51.

[108] In the context of a facet of the judiciary that is down to two judges in a jurisdiction the size of Ontario and that is the subject of a "staged phasing out",

pegging salary to that of another facet may sufficiently link the judges whose office is being phased out to a special process. That is what I read Justice MacPherson to suggest, bearing in mind that the link happened to produce results that were quite favourable for the two masters: para. 36.

[109] On the contrary, the Ontario Court of Appeal rejected perpetual use of any comparator. Comparators can be important factors in the work of an independent commission, but "That said, a comparator cannot be the sole factor and it certainly cannot be the sole factor in perpetuity": para. 48.

[110] *Conclusion on Constitutionality*. Chief Justice Lamer took pains in the *Provincial Court Judges' Reference* to stress the flexibility governments have in establishing a special process for recommendations on judicial remuneration, and his effort may well be understood in light of Justice LaForest's dissent, as Mr. Cameron suggests. However, the flexibility was in "designing judicial compensation commissions" (para. 185), not avoiding them.

[111] If not since the *Provincial Court Judges' Reference*, then since *Provincial Court Judges' Association of New Brunswick*, it is clear that a commission process

of some kind was, to use Justice MacPherson's word, the lynchpin for judicial independence in relation to judicial remuneration. There is no lynchpin connecting the required independence of the presiding justices of the peace and their remuneration. However the exact mechanism is shaped by government, the commission process was "to become the forum for discussions, review and recommendations on issues of judicial compensation": *Provincial Court Judges' Association of New Brunswick*, para. 11.

[112] A forum exclusively for one facet of the judiciary, such as the judges of the Provincial Court of Nova Scotia, cannot be the forum for a separate facet, the justices, except in peculiar circumstances, such as those of the two grandfathered masters in *Masters' Association of Ontario*. We have a forum for discussions, review, and recommendations on issues of Provincial Court judges remuneration. We have no forum for discussions, review, and recommendation on issues of justices' remuneration.

[113] The Provincial Court Judges' Remuneration Tribunal has no authority to, and does not, make recommendations on justices' remuneration. Their process may be independent, objective, and effective as regards the judges. However, it is

not "representative" as regards the justices because they are not involved, it does not "objectively consider ... submissions" about the justices' remuneration because it has no authority to do so, and its work is not "effective" as regards the justices' remuneration because there is no consultative report on that subject.

[114] There is no report to government about justices' remuneration. There is, therefore, no response from government on justices' remuneration and no opportunity to compel a response or to challenge an irrational response.

[115] In short, the lynchpin is missing. Consequently, the independence of the justices is not assured. Therefore, the regulation setting remuneration for Nova Scotia's presiding justices of the peace is unconstitutional.

[116] Further, there is no real link between a justices' remuneration and the special process that ensures the independence of a Provincial Court judge. There is no forum that discusses the percentage, the exclusion of benefits, or the calculation of the hourly rate. Even if a link to a judge's salary were a substitute for a forum regarding a justice's remuneration, the regulation imposes important terms that fix remuneration without any special process.

Remedy

[117] I will grant a declaration that the compensation scheme for presiding justices of the peace is unconstitutional and s. 10 of the *Justices of the Peace Regulations* is of no force or effect. The declaration will be stayed for twelve months to allow the government enough time to take necessary action.

[118] The association also requested a mandatory injunction requiring the province to implement a compensation process before a deadline. Out of respect for the government's authority over composition, structure, power, and procedure of an independent commission, I will follow the approach taken at both levels of *Masters' Association of Ontario* and leave it to the government to determine what to do as a result of the declaration.

[119] The association requested an order directing that the process "allow for compensation retroactive to the date of commencement of these proceedings". Respectfully, this misses the point that special processes for judicial remuneration are to protect judicial independence, not judges. Judicial independence cannot be

restored retroactively. (Retroactivity could be a subject for the forum to be established by the government.)

[120] The government will pay costs to the association. The parties may provide me with written submissions on the amount, if they cannot agree.

J.