SUPREME COURT OF NOVA SCOTIA

Citation: *Mullaly v. Nova Scotia (Attorney General)*, 2020 NSSC 26

Date: 20200123
Docket: Hfx No. 476003
Registry: Halifax

Between:

Elizabeth Mullaly

Applicant

v.

The Attorney General of Nova Scotia, Representing the Queen in Right of the Province of Nova Scotia

Respondent

Decision

Judge:	The Honourable Justice Denise Boudreau
Heard:	December 4, 5, 2019, in Halifax, Nova Scotia
Counsel:	Raymond F. Larkin, QC, for the Applicant Andrew Taillon, for the Respondent

By the Court:

[1] The applicant was a part-time presiding Justice of the Peace for the Province of Nova Scotia until May 22, 2016, her 70th birthday. On that date she was made to retire pursuant to ss. 3(3) of the *Justices of the Peace Act*, RSNS 1989 c. 244 (the "*Act*"). She seeks a ruling from this Court that this section of the *Act* breaches s. 15 of the *Charter* and is unconstitutional. She further seeks that this ruling be made on a retroactive basis back to the date of her mandatory retirement, thereby allowing her to be, effectively, reinstated.

Background to present application

[2] The applicant was appointed by the province as a part-time presiding Justice of the Peace ("presiding JP") on February 22, 2002. In that capacity, and from that point forward, she worked at the Justice of the Peace Centre in Dartmouth on a "shift work basis". She also served at Night Court in Halifax/Dartmouth, and was occasionally on call.

[3] Much of the work of a presiding JP working at the Dartmouth JP Centre is within the sphere of criminal or quasi-criminal law. Duties of presiding JPs are listed in the *Justice of the Peace Regulations*, N.S. Reg 51/2002:

7 (1) A presiding justice of the peace may, subject to the Act and in accordance with the directions of the Chief Judge of the Provincial Court, the Chief Judge of the Family Court or the Chief Justice of the Supreme Court of Nova Scotia, as the case may be,

(a) deal with all matters prescribed to a justice of the peace in the *Criminal Code* and the *Summary Proceedings Act*;

(b) swear an information;

(c) issue a summons;

(d) issue a subpoena;

(e) issue a search warrant;

(f) issue an arrest warrant;

(g) issue a warrant to enter a dwelling-house;

(h) issue a telewarrant;

(i) make a detention order;

(j) make a sealing order;

(k) conduct a judicial interim release hearing;

(l) conduct an arraignment in respect of an offence charged in a summary offence ticket;

(m) preside over a trial in respect of an offence charged in a summary offence ticket;

(n) conduct a hearing in respect of an application for a peace bond;

(o) process an out-of-province warrant;

(p) hear an application to strike out a conviction under subsection 8(18) of the *Summary Proceedings Act*;

(q) preside over a trial in respect of a provincial enactment;

(r) deal with all matters prescribed to a justice in the *Cyber-safety Act*, including conducting a hearing of an application for a protection order under that Act;

(s) deal with all matters prescribed to a justice in the *Missing Persons Act*, including conducting a hearing of an application for a search order or a record-access order under that Act.

[4] In terms of salary, until April 2014, all presiding JPs were paid an hourly rate, set pursuant to regulations. While benefits were provided for (as possible) in the regulations, none were granted.

[5] After 2014, a commission was established (the Nova Scotia Presiding Justices of the Peace Compensation Commission; hereinafter "the Commission"), tasked to consider and make recommendations in relation to remuneration. This change in process was specifically created following a 2013 court decision (*Nova Scotia Presiding Justices of the Peace Association v. Nova Scotia (Attorney General)*, 2013 NSSC 40). In that case the applicant (hereinafter "the Association") brought forward a court challenge to the then-existing scheme for remuneration of presiding JPs, and argued that such was unconstitutional. The evidence showed that presiding JP salaries were then fixed using a calculation based, at its start, on the salary of a provincial court judge (which was set by an independent commission).

[6] The Court undertook a review of cases involving judicial independence and salaries for judicial office holders; it concluded that determination of remuneration in such a case required a "special process".

[7] Following this decision, the Province of Nova Scotia created the Commission to deal with remuneration for presiding JPs; its mandate was encapsulated in a number of new subsections of the *Act* (ss. 11A – 11L). The Commission was tasked to prepare a report relating to hourly rates to be paid to presiding JPs, as well as annual cost-of-living adjustments. Having said that, the new provisions specifically also provided, at ss. 11B(3) "A presiding justice of the peace is not entitled to any benefits.".

[8] The first Commission report (Nova Scotia Presiding Justices of the Peace Compensation Commission, Report and Recommendations for the Period April 1, 2014 to March 31, 2020, dated December 7, 2014, hereinafter the "Archibald report"), came to the following conclusions:

> 33. The Association is clearly seeking something of a "quantum leap" in the hourly rate by which presiding Justices of the Peace are to be paid. The Association stressed, as a continuing theme in its submissions, that: "… it is not fair and reasonable that a Small Claims Court adjudicator makes the equivalent of $145.00 per hour, or a human rights adjudicator makes $100 per hour and a PJP makes $64.75.". This is a heart-felt concern which no doubt has considerable merit, but it does not comport with the core of the statutory scheme under which I must make my decision. When balancing all the factors, particularly in light of what presiding justices of the peace are paid across the country doping roughly similar work, a degree of restraint is in order and a quantum leap in the hourly rate to be paid to our Presiding Justices of the Peace is not in order. The second theme which predominated the Association's presentation was that Nova Scotia's Presiding Justices of the Peace receive no benefits and no pension, and that this supports a qualitative shift upward in the hourly rate. Indeed, the fact that Nova Scotia's Justices of the Peace are "not entitled to any benefits" as per subsection 11B(3) of the Act, in some measure cuts both ways. It may be thought to justify some upward movement of the hourly rate so that presiding Justices of the Peace

> may make personal investments for retirement or purchase private benefit plans, but as the Government points out, for Nova Scotia's part-time Presiding Justices of the Peace who have the opportunity to earn other income, this factor cannot justify a wholesale increase in the hourly rate that they are to be paid. (emphasis is mine)
>
> 34. Taking into account the volumes of information received, the relevant factors under subsection 11B(4) of the Act, and the submissions received in this process, I make the following recommendations under subsections 11B(1) and (2) and 11G of the Act:
>
> **Recommendation 1 – Hourly Rate of Pay**
>
> **That Presiding Justices of the Peace be paid for the period from April 1, 2014 to March 31, 2015 an hourly rate of $73.01.**
>
> ….
>
> **Recommendation 2 – Annual Cost of Living Increases**
>
> **That for each year from April 1, 2015 to March 31, 2020, the hourly rate for Presiding Justices of the Peace shall increase by the percentage increase in the cost of living, if any, as calculated by use of the Consumer Price Index for the Province for the previous year.**
>
> …

[9] The applicant thereafter continued to exercise her function as a presiding JP, at this new rate, until May 22, 2016. On that date she reached her 70th birthday and was removed from her position by the effect of ss. 3(3) *Act*:

> 3 A presiding justice of the peace holds office during good behaviour until age seventy unless the justice is removed from office by the Governor in Council as provided in Section 8A.

[10] The applicant points out that this has caused her to arbitrarily lose her employment, which she greatly enjoyed and took great pride in, in circumstances where she continued to be perfectly healthy and competent to carry out the duties of the job. Compounding the injustice, according to the applicant, was the fact that

since there are no pensions or benefits accorded to presiding JPs, she was forced to leave her employ with nothing provided to replace the income she was losing.

The present application

[11] All of this brings us to the application brought before me. The applicant's Notice seeks the following:

> a. An Order that Section 3(3) of the *Justices of the Peace Act* RSNS 1989 c. 244 as amended is invalid because it violates Section 15(1) of the Canadian Charter of Rights and Freedoms by discriminating based on age; and
>
> b. An order declaring that the Applicant is reinstated to her office as a part-time Presiding Justice of the Peace effective May 22, 2016.

[12] In her written pre-hearing submissions, the applicant has also put forward a claim for damages under s. 24(2) of the *Charter* as an alternative form of relief:

> 93. The Applicant submits that, if this Court declares the challenged provisions of the Act of no force and effect under 52(1) but does not find that she should be afforded a retroactive remedy, or does not find that such a remedy would require that she be reinstated with no loss of pay, the Court should instead provide her with a personal remedy of damages under s. 24(1), equivalent to her lost pay.

New Issue – Section 11(d) *Charter*

[13] In her written pre-hearing submissions to this Court (dated November 15, 2019), the applicant put forward a new, additional claim:

> ISSUE NO.1 – Does the *Justice of the Peace Act* violate s. 11(d) of the *Charter of Rights and Freedoms* by failing to ensure judicial independence of presiding justices of the peace by excluding benefits such as pension or retirement income

> from consideration for recommendations by the independent Commission established under the Act?

[14] The respondent, quite reasonably, objected to this entirely new issue being brought forward at such a late stage without proper notice. At the time of the hearing before me, the applicant agreed that under the circumstances she would not proceed with this claim/argument. I do not address it further.

Section 15 *Charter*

[15] Section 15(1) of the *Charter* reads:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law, without discrimination, and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or physical or mental disability.

[16] It is the applicant's burden to show, on a balance of probabilities, that a *Charter* violation has occurred.

[17] I start with the general observation that s. 15 of the *Charter*, and the proper approach to adopt in applying it, has been and continues to be the subject of much debate. This is evident by the fact that many of the Supreme Court of Canada decisions on the subject will contain multiple dissenting opinions.

Position of the applicant

[18] It is the submission of the applicant that the mandatory retirement of presiding JPs as contained in ss. 3(3) of the *Act* breaches the guarantee of equality enshrined in the *Charter*, as it discriminates on the basis of age, and that such breach is not saved by s. 1 of the *Charter*.

[19] In relation to age discrimination in particular, the applicant has referred me to the case of *McKinney v. University of Guelph*, [1990] 3 SCR 229, which she argues is a decision binding on this Court. In that case, the respondent university had a policy of mandatory retirement at age 65. A number of professors brought forward applications wherein they sought declarations that this policy breached s. 15 of the *Charter*.

[20] The decision from the Supreme Court of Canada shows significant disagreement on a number of issues; while seven judges heard the matter, only three entirely agreed with the majority decision. The majority ultimately found that universities were not "government" within the meaning of the *Charter*, and therefore the *Charter* did not apply.

[21] The majority further decided that, had the *Charter* applied in the case, the mandatory retirement of the university professors would have violated s. 15, as it

made a distinction based upon an enumerated ground, to the disadvantage of individuals over 65 years of age. The majority went on to find that the distinction was saved by s. 1 of the *Charter*, as being proportional, rationally connected to its objective, and minimally impairing to the right infringed.

[22] In a companion case *Stoffman v. Vancouver General Hospital*, [1990] 3 SCR 483 the Court applied the same reasoning to doctors.

[23] Before me, the applicant acknowledges that in *McKinney* and *Stoffman* the impugned provision was ultimately saved by s. 1 of the *Charter*. Having said that, the important aspect of the decision, says the applicant, is that the mandatory retirement policy was found to breach the *Charter* in the first place. That is the question that this Court must first grapple with.

[24] The applicant further notes the case of *Adamson v. Air Canada*, 2015 FCA 153, a case dealing with the mandatory retirement of Air Canada pilots, where the Court stated the following:

> 97. I find that the Judge did so err, given that *McKinney* remains a binding precedent…. Specifically, any part of the reasoning that was necessary for the Court to reach its result has the force of binding authority. As discussed above, the implicit finding that mandatory retirement is a discriminatory practice was an essential part of the Supreme Court's analysis in *McKinney*. As a result, this legal characterization was a binding authority that the Judge had to follow.

[25] As a result of *McKinney*, the applicant submits, I am bound and should conclude that the mandatory retirement of presiding JPs, legislated by ss. 3(3) of the Act, is a breach of s. 15 of the *Charter*. I should, says the applicant, next move on to a s. 1 analysis.

[26] The applicant further argues that even if I find that *McKinney* is not strictly binding on me, a substantive s. 15 analysis in the case at bar would still find a breach, in that ss. 3(3) of the *Act* violates substantive equality; this is particularly so, she argues, when one considers that presiding JPs in this province must not only retire, but also, they retire with no provision made for pension/retirement income.

[27] The framework for the analysis of s. 15 claims has evolved and developed over time, starting with the first case of *Andrews v. Law Society (BC)*, [1989] 1 S.C.R. 143. An often-cited analysis was set out by the Supreme Court of Canada in *Law v. Canada*, [1999] 1 S.C.R. 497 at para. 88 as:

> (1) Does the impugned law
>
> (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics or
>
> (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

> (2) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
>
> (3) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration?

[28] Continuing on (para. 88), the Court noted four contextual factors which were important to consider, although noting that this list was neither universally applicable nor exhaustive:

> 1. Any pre-existing disadvantage, stereotyping, prejudice or vulnerability historically or presently experienced by the individual or group at issue;
> 2. The correspondence or lack thereof between the ground(s) of the claim and the actual need, capacity, or circumstances of the claimant;
> 3. The ameliorative purpose or effect of the impugned law upon a more disadvantaged person or group; and
> 4. The nature and scope of the interest affected by the impugned law.

[29] In *R. v. Kapp*, 2008 SCC 41, the Supreme Court refined s. 15 analyses into a two part test:

> 17 The template in *Andrews*, as further developed in a series of cases culminating in *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.) established in essence a two-part test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? These were divided, in *Law*, in three steps, but in our view the test is, in substance, the same. (emphasis is mine)
>
> 18 In *Andrews*, McIntyre J. viewed discriminatory impact through the lens of two concepts: (1) the perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds; and (2) stereotyping on the basis of these grounds that results in a

decision that does not correspond to a claimant's or group's actual circumstances and characteristics….

19 A decade later, in *Law*, this Court suggested that discrimination should be defined in terms of the impact of the law or program on the "human dignity" of members of the claimant group, having regard to four contextual factors: (1) preexisting disadvantage, if any, on the claimant group; (2) degree of correspondence between the differential treatment and the claimant group's reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected (paras. 62-75).

20 The achievement of *Law* was its success in unifying what had become, since Andrews, a division in this Court's approach to s. 15. Law accomplished this by reiterating and confirming *Andrews*' interpretation of s. 15 as a guarantee of substantive, and not just formal, equality. Moreover, *Law* made an important contribution to our understanding of the conceptual underpinnings of substantive equality.

21 At the same time, several difficulties have arisen from the attempt in Law to employ human dignity *as a legal test*. There can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity…

22 But as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be. Criticism has also accrued for the way Law has allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike.

23 The analysis in a particular case, as *Law* itself recognizes, more usefully focuses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2). (We would suggest, without deciding here, that the third *Law* factor might also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage.)

24 Viewed in this way, *Law* does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in *Andrews* and developed in numerous subsequent decisions. The factors cited in Law should not be read literally as if they were legislative dispositions,

> but as a way of focussing on the central concern of s. 15 identified in Andrews – combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping.

[30] In *Quebec v. A.*, 2013 SCC 5, the Supreme Court dealt with the question of whether the distinction between married and non-married couples in the Quebec Civil Code, as related to family law questions, violated s. 15 of the *Charter*. The majority of the Court confirmed that s. 15 protects substantive equality; that is to say, that it "requires flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group" (para. 331). (Also see: *International Association of Firefighters Local 628 v. Adekayode*, 2016 NSCA 6; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30.)

[31] The applicant is firmly of the view that the distinction created by the *Act* here (those 70 and older, who cannot sit as a presiding JP, versus those younger than 70, who can) meets all of the criteria established by the Supreme Court to show a breach of s. 15. She submits that the distinction clearly amounts to discrimination on the basis of age; and furthermore, that this distinction creates a significant disadvantage to the older group, by preventing them from their chosen work. This is compounded, says she, by the fact that those 70 years of age and older are further disadvantaged, due to having no retirement income or pension.

Position of the respondent

[32] In response, the respondent submits that the constitutional principle of judicial independence and, in particular, one aspect of that principle (i.e., security of tenure), requires the removal of judicial office holders at some appropriate time. Therefore, they submit, ss. 3(3) of the *Act* cannot, and does not, breach the *Charter*.

[33] The respondent submits that judicial office holders are fundamentally different from doctors, pilots, or university professors; this Court, they say, is not bound by the *McKinney* analysis. Presiding JPs such as the applicant are judicial office holders who are guaranteed judicial independence by the *Charter* (section 11(d)). According to the respondent, therefore, such a judicial office holder cannot be dealt with as one would deal with other professions, since their case involves competing constitutional principles. In their submission, in such a case the principles of judicial independence must be factored directly into a s. 15 analysis.

[34] The respondent points out that judicial independence has, as one critical component, the "security of tenure" of judicial office holders. Security of tenure, by definition, specifically includes (as one of its elements) a fixed end date. In

other words, says the respondent, all judicial office holders are treated equally, therefore, there can be no discrimination. This, they say, ends the analysis.

[35] The respondent further notes that end dates for judicial office holders are the norm in Canada. By a large majority, practically all such appointments have an end date (either related to their age, or alternatively, by a fixed term). In relation to JPs, in particular, the respondent notes the following (from pp. 15-16 of the respondent's original brief):

> **Newfoundland and Labrador:** JP appointments are limited to Clerks of the Court, whose appointments terminate when their Clerk appointment terminates;
>
> **New Brunswick**: Has no JPs;
>
> **PEI:** JPs appointed for five-year terms;
>
> **Ontario:** JPs have a mandatory retirement age of 65 with the possibility of an annual appointment by the CJ until 75;
>
> **Manitoba:** No mandatory age;
>
> **Quebec:** JP mandatory retirement age is 70;
>
> **Saskatchewan:** JP mandatory retirement age is 70;
>
> **Alberta:** JPs have a mandatory retirement age of 70 with the possibility of an annual appointment until 75;
>
> **British Columbia:** JPs have mandatory retirement at 75.

Caselaw – Judicial Office Holders

[36] It appears clear to me, from a review of the caselaw, that the authorities are clear and settled as to the constitutional status and importance of the principle of

judicial independence, as well as its component features. The authorities agree that "security of tenure" is an essential component of judicial independence.

[37] In *Valente v. R. (No. 2)*, [1985] 2 SCR 673, the Supreme Court was asked to determine whether an Ontario provincial court judge should be considered a "tribunal" within the meaning of s. 11(d) of the *Charter*. In determining that it was, the Court commented on the concept of judicial independence. The Court held that this principle was comprised of three distinct conditions: (1) security of tenure, (2) financial independence, and (3) administrative independence. As regards the concept of security of tenure, the Court noted:

> 31 In sum, I am of the opinion that, while the provision concerning security of tenure up to the age of retirement which applied to Provincial Court judges when Sharpe Prov. J. declined jurisdiction falls short of the ideal or highest degree of security, it reflects what may be reasonably perceived as the essentials of security of tenure for purposes of 11(d) of the Charter: that the be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure for purposes of s. 11(d) is a tenure, 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. (emphasis is mine)

[38] In *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)*, [2008] O.J. No. 2131, the Court undertook a comprehensive review of the constitutional and legislative history of the mandatory retirement of Ontario justices of the peace, and concluded:

> 72 The following principles emerge from this review. First, judicial independence is a fundamental principle of Canadian constitutional law, enshrined in the *Charter* and the *Constitution Act* and supported by our common law tradition. It is not an end in itself but rather is designed to safeguard the constitutional order and to preserve the rule of law, so as to ensure public confidence in the administration of justice. It exists not for the benefit of the judiciary, but for the benefit of the public. Second, there are three essential elements of judicial independence: security of tenure, financial security and institutional independence. Third, the principle of judicial independence applies fully to justices of the peace who perform an essential role in the administration of justice in Ontario. Fourth, judicial independence does not require that all judges of all courts be treated in identical fashion or that the provisions in respect of their tenure be the same. Variations are appropriate to reflect differences in their functions and responsibilities. Fifth, for the reasons expressed by Professor Baar, and by Justice Ground in *Charles*, mandatory retirement is a necessary consequence of judicial security of tenure. (emphasis is mine)

[39] These are but a few examples of consistent judicial commentary on these principles. I have not been directed to any case that disagrees with these statements of the law; neither with the three conditions of judicial independence (as listed in *Valente*), nor with the proposition that mandatory retirement is a necessary part of security of tenure.

[40] But what does that mean in the context of s. 15 of the *Charter*? There are no decisions from the Supreme Court of Canada on this specific point: where a judicial office holder, facing mandatory retirement at a certain age, argues a s. 15 *Charter* breach. Having said that, provincial trial and appeal courts have grappled with the issue.

[41] In an early case, *Charles v. Canada*, [1995] OJ No. 3263, the Court was faced with a challenge to the mandatory retirement age for Ontario provincial court judges (age 75), pursuant to their provincial legislation.

[42] The Court in *Charles* focused its analysis on whether the mandatory retirement age for judges was a "reasonable limit prescribed by law in a free and democratic society" and therefore saved by s. 1 of the *Charter*. The Court noted the *McKinney* and *Stoffman* decisions, which had previously decided that mandatory retirement did constitute age discrimination, but was saved by s. 1. Nothing, in the Court's view, made the case of Judge Charles distinguishable from those, and so the same conclusion was reached.

[43] This decision was unsuccessfully appealed (*Charles v. Canada*, 158 D.L.R. (4^{th}) 192 (Ont. C.A.)).

[44] In the *Assn. of Justices of the Peace of Ontario* case, Ontario justices of the peace were required to retire at the age of 70 by provincial legislation. They brought a challenge pursuant to s. 15 of the *Charter*, requesting a finding that the legislation was unconstitutional.

[45] It was that Court's first conclusion that arguments related to judicial independence/security of tenure, while an important part of the analysis, were most appropriately to be made at the s. 1 analysis, as a justification for the law:

> 110 …Security of tenure and judicial independence are more appropriately considered as a justification for the limit imposed, rather than the negation of the limit from the outset. They represent the objects of the legislative provisions and do not address whether the chosen age of 70 is discriminatory. As noted above, judicial independence exists for the benefit of the public, not for that of the individual judge who may nevertheless experience loss of dignity as a result of mandatory retirement…
>
> …
>
> 112 Thus, I do not accept the Attorney General's submission that the therapeutic purpose of mandatory retirement of the judiciary should blunt its discriminatory effect. The justification for mandatory retirement of the judiciary is a factor that should be considered in the section 1 analysis, as it was in *McKinney* and *Charles*.

[46] The Court in *Assn. of Justices of the Peace of Ontario* ultimately determined, in its view, that mandatory retirement of JPs at age 70 in Ontario was discriminatory and represented a breach of s. 15. Using the criteria in *Law*, the Court concluded that the legislation was discriminatory on the basis of age, "based on the stereotypical application of a presumed group characteristic that serves to perpetuate the view that they are less capable and deserving of respect in Canadian society" (para. 126).

[47] In *Paquet v. Quebec*, 2010 QCCS 3185, a municipal court judge was made to retire at 70 by virtue of a section of the *Act respecting municipal courts* R.S.Q. c-72.01. He brought an application seeking for the part of the law providing for

mandatory retirement to be declared discriminatory pursuant to s. 15(1) of the *Charter* and unconstitutional.

[48] The Court found that s. 15 was not breached by the mandatory retirement of Quebec municipal court judges. Although obviously the *Act* made a distinction on the basis of age, that distinction was not discriminatory, given that these judges were judicial officers whose term was irretrievably bound with an end date:

> 86 It is clear that section 39 of the Act creates a distinction between persons who are 70 and older and those who are younger, since the former cannot hold office as municipal judges. The differential treatment is based on an enumerated ground: age.
>
> 87 The differential treatment is not discriminatory, however, since it does not create a disadvantage by perpetuating prejudice or stereotyping. The comparator group to be used is judges of all jurisdictions. According to the evidence, mandatory retirement is, barring exception, the norm for persons holding judicial office. For federally appointed judges, the age is 75. For provincially appointed judges in Canada, the normal retirement age is 70.
>
> 88 The evidence submitted by the AGQ also shows that, in a number of democratic countries, the mandatory age for retirement for judges is, barring exception, 70 years old.
>
> 89 The objective of such a provision is to promote judicial independence by setting a term to holding judicial office. Mandatory retirement ensures security of tenure until they reach a predetermined age. Mandatory retirement of judges is therefore not based on a stereotype or prejudice.

[49] *Clément v. Canada*, 2015 QCCS 2207 was again a case involving the mandatory retirement of judicial office holders, in that case of judges of the municipal courts of Quebec. Again, their legislation provided for mandatory retirement at age 70 and, again, a challenge was brought to the law as being

discriminatory and unconstitutional. The Court rejected the application. (I note that this case, in its official version, is written only in the French language. Counsel for the applicant has kindly provided me with an unofficial English version. I will quote from the case in English for the convenience of anglophone readers. I note that I have compared the official French version with the unofficial English translation and it is generally accurate; where it was not, I have amended.)

[50] The Court in *Clément* confirmed that the mere fact that a law differentiates on the basis of age, as the impugned law does, does not automatically mean that it breaches the *Charter*. It must also be shown, as the Supreme Court of Canada has repeatedly said, that the distinction has a discriminatory effect because it perpetuates prejudice or maintains a stereotype.

[51] After providing a comprehensive review of the principles of judicial independence, the Court concluded the following:

> [156] However, the retirement age is at the very heart of the notion of "irremovability" (= security of tenure) without which judicial independence would be meaningless.
>
> [157] Security of tenure means that judges have the right to remain in office and cannot be disqualified or deprived of their office unless their state of health justifies early departure or their conduct renders them unfit to perform judicial duties. They may therefore not be transferred, suspended, dismissed or retired, nor may they be transferred in their status except in accordance with the law. Only this can establish the automatic, objective and neutral trigger for retirement.
>
> [158] Without it, a complex system of analysis should be developed for the retirement of judges on a case-by-case basis based on their abilities and ability to

> continue in their judicial office. However, the Supreme Court in *McKinney* and again in *Stoffman*, already cited, concludes that skill and performance assessment systems can be humiliating, especially when applied to seasoned and experienced professionals, in addition to generating tension. Moreover, a capacity assessment system would need to be accompanied by appeal or review mechanisms, not to mention extraordinary remedies before the superior courts, with the result that judges who no longer have the skills to serve could continue to do so for a long time, thereby jeopardizing public confidence in the judicial system…
>
> [159] It should be added that the difficulties in applying such evaluation mechanisms would be all the greater since judges are neither civil servants nor employees of the State…
>
> [160] Seen in this light, the case of judges facing retirement differs fundamentally from that of hospital doctors or university professors since the public cannot invoke a constitutional right to benefit from independent and constitutionally impartial doctors or professors.

[52] And further:

> [166] In Canada, the trend is to eliminate the mandatory retirement age to allow citizens to choose when they stop working. But the Court considers the choice of 70 years to impose retirement on municipal judges cannot be equated with stereotyping or prejudice in the context of the need to protect judges from the possible arbitrariness of the executive branch, changes in the direction of the legislature or attacks from the media. There is no evidence before me that this choice presumes that after age 70, a person no longer has the intellectual capacity or physical strength to continue in his or her office. Section 39 of the CMA is not intended to separate judges 70 years of age and over from other judges and to treat them more poorly. The sole purpose of this legislative choice is to ensure the "irremovability" (= security if tenure) of judges. On the contrary, 70 years of age presumes that until at least that age, judges have all, with few exceptions, the strength to carry out their responsibilities.
>
> [167] On the other hand, following the plaintiffs' logic would inevitably lead to the abandonment of legislatively establishing an age limit for being a judge and replacing it with complex assessment mechanisms that are less likely to ensure security of tenure. To invoke the dignity of work as a reason for excluding the statutory retirement age ignores the problem of injury to the dignity of persons that would arise from periodic assessments of fitness to continue to perform judicial duties. In this case, the cure could be worse than the disease.

[53] Interestingly, I note the expert witness in the *Assn. of Justices of the Peace of Ontario* had provided a similar conclusion to the Court:

> 49 Professor Baar noted that in the absence of mandatory retirement, it would be necessary to develop a practice for the removal of judges who were incapable of performing at a satisfactory level in order to maintain a high quality of adjudication. This would result in a decline in public respect for the judiciary and would threaten the independence of individual judges… (emphasis is mine)

[54] The Court in *Clément* went on to consider the *Assn. of Justices of the Peace of Ontario* case and disagreed with it for a number of reasons (found at para. 236): *inter alia*, that it did not treat the "irremovability" of judges as a constitutional right created for the benefit of the public; that if the choice of retirement at age 70 was unconstitutional, the choice of retirement at 75 was no less so.

[55] As can be seen, these various provincial decisions appear to follow, generally speaking, two diverging paths of logic when it comes to mandatory retirement of judicial office holders: either 1) judicial independence is factored into the s. 15 stage (and, typically, acts to defeat the *Charter* claim of discrimination), or 2) it is only considered at the s. 1 stage (to consider whether the discrimination is justified).

[56] It would appear that the majority of the cases that I have been provided (and notably, the most recent cases) follow the first path, and decline to find a breach of the *Charter.*

Conclusions – Section 15

[57] I find that in cases involving judicial office holders, courts are not bound by the *McKinney* decision. The s. 15 starting point that has developed by way of the *Andrews, Law, Kapp* decisions, and so on, remain relevant to my considerations: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[58] Having said that, clearly those cases do not conclusively decide the issue, since the principle of judicial independence were not factored into their analyses. I agree that such is a significant and qualitative difference that exists in the present case and distinguishes it.

[59] I have reviewed and carefully considered the two divergent paths of logic that appear in the caselaw. In my view, the only logical and appropriate analysis to follow is that set out in the *Clément* and *Paquet* cases. I find myself entirely in agreement with the reasoning outlined therein.

[60] While it is obvious on its face that ss. 3(3) of the *Act* creates a distinction on the basis of age, it is also clear to me that this distinction does not create a disadvantage by perpetuating prejudice or stereotyping. That is not the law's

purpose, nor is it its effect. The law was, and could only have been, enacted to address a specific issue, that of judicial independence and, in particular, the security of tenure of justices of the peace by way of a legislated "end date".

[61] Once one accepts that an "end date" for all judicial office holders is mandatory, because of constitutional principles, that end date cannot possibly be discriminatory. It is not arbitrary, it does not perpetuate disadvantage, it does not stereotype. In the present case, it applies to all presiding JPs equally, as it must.

[62] During oral submissions, counsel for the applicant disagreed that "security of tenure" had to include a necessary end date. The caselaw is clear that it does, and for very sound reasons. As noted very sensibly in *Clément*, if judicial office holders have no "end date", then the office becomes an office for life. Invariably there comes a day where any (or perhaps every) individual judicial office holder is deemed, by some, to have reached an age and state of physical and/or mental health where they are not performing optimally. How do we protect judicial independence at that point? What process could possibly be developed to deal with individual cases fairly, while protecting judicial independence/security of tenure and also ensuring public respect for the institution and the individual judge? Moreover, who would decide? Who would deal with the inevitable appeals or judicial reviews that would flow from these decisions?

[63] It is entirely clear to me that a mandatory end date for judicial office holders is a vital and necessary part of the appointment. It provides an objective, impartial, and neutral time line.

[64] It may be, of course, that any individual judicial office holder (such as the applicant) could have the health and stamina to sit longer, until 75, or even 80, or indefinitely. It is also possible, on the other side of the spectrum, that other individuals would not have the health or stamina to sit past 60 or 65. But such individual considerations are entirely beside the point. A neutral and impartial day must be chosen.

[65] Again, once that principle is accepted, the analysis becomes very simple. The necessary end date (assuming that it is within a reasonable range, and applies to all) cannot be called discriminatory. It is simply one concrete result of the principle of judicial independence.

[66] With the greatest of respect to the Court in question, I do not accept the reasoning in *Assn. of Justices of the Peace of Ontario*. In my view this case provides us with an example of the contradictory results that occur when one follows this path of reasoning. Despite finding that judicial independence required an end date, the Court went on to find that the mandatory retirement age was

discriminatory, but did not explain how that could be so. The Court next moved on to a s. 1 analysis and found that the means chosen by the legislator (i.e., retirement at 70) was not a minimal impairment to the right guaranteed. The Court went on to "read in" to the *Act*, a new mandatory retirement age of 75.

[67] Again, with the greatest of respect, I disagree. If mandatory retirement of JPs at 70 was discriminatory, how could any other retirement age be better or more constitutionally acceptable? The Court did not explain this contradiction.

[68] It was further suggested by the applicant that, had the legislator here chosen an end date by way of a fixed term (e.g., a justice being appointed for a five or ten year term), such would have been constitutionally acceptable. The unacceptable part here, says she, is the choosing of a date related to age, which is an enumerated ground under s. 15 of the *Charter* and therefore prohibited.

[69] I fail to see the distinction. It is clear to me that a number of ways can legitimately be used to set an end date for judicial office: a fixed term, a particular project, or a date related to age. They have all been deemed acceptable and none has any more constitutional legitimacy than the other.

[70] Furthermore, courts have quite consistently held that the actual age chosen for retirement for judicial office holders is normally a matter for the legislative

branch, within a reasonable range, and that courts should be very slow to arbitrarily inject their own views into the law. The Supreme Court in *McKinney* made the following point as to the choosing of age 65, as opposed to any other age:

> 73 One final point may be mentioned. It may be argued that in these days, 65 is too young an age for mandatory retirement. At best, however, this is an exercise in "line drawing", and in *R. v. Edwards Books and Art Ltd*., supra, at pp. 781-82, 800-801, this Court made it clear that this was an exercise in which courts should not lightly attempt to second-guess the legislature. While the aging process varied from person to person, the courts found on the evidence that on average there is a decline in intellectual ability from the age of 60 onwards, see the reasons of Gray J. (1986) 57 O.R. (2d)1, at pp. 40-41, and of the Court of Appeal (1987), 63 O.R. (2d) 1, at pp. 61-62. To raise the retirement age, then, might give rise to greater demands for demeaning tests for those between the ages of 60 and 65 as well as other shifts and adjustments to the organization of the workplace to which I have previously referred. (emphasis is mine)

[71] And also in *Paquet*:

> 108 Moreover, the suggestion made near the end of the hearing to set Mtre Paquet's retirement at age 75 would be just as discriminatory as setting it for 70. It is not up to the Court to arbitrarily set an age different from that determined by the legislature.
>
> 109 In the view of the Court, a judicial intervention in a problem as complex as the determination of the mandatory age of retirement for judges appears to be an unjustified incursion into the domain of the legislature.

[72] Similar conclusions were reached in *Clément*. I entirely agree with these statements of principle.

[73] Lastly, I am unconvinced by the argument of the applicant that the fact that presiding JPs in Nova Scotia receive no pension income at retirement compounds

the unfairness of their forced retirement and further illustrates the discriminatory effect of the law.

[74] The job of a presiding JP at the JP Centre is part-time, allowing such persons to engage in other employment if they so choose during their appointment, including pensionable employment. Moreover, as a retired justice, the applicant remains able to engage in any other profession for which she is suited, including as far I am aware, the practice of law. Nothing in the requirements of the job itself, nor in the mandatory retirement provision of ss. 3(3) of the *Act*, prevent either of those options to be fully available to the applicant. I also note that the Archibald report took the fact of the absence of pensions / benefits for presiding JPs into account, when the remuneration rates were set.

[75] The claimants in *Clément* made similar arguments that were not accepted.

> [88] According to them, not having a pension plan and not being able to receive a full pension exposes them to the risk of having to plan another career after the judiciary. However, they do not mention the fact that during their careers as session judges, they have been able to practice their profession as lawyers in parallel as permitted by law and, at least in the case of Mr. Paquin, nothing prevents him from continuing to do so now that he has reached the age of 70.

[76] I therefore conclude that the applicant has not shown a breach of s. 15 of the *Charter* in the present case.

Section 1

[77] Should I be incorrect in my analysis, and should ss. 3(3) of the *Act* constitute a breach of s. 15 of the *Charter,* it is my view that such breach is clearly saved by s. 1 of the *Charter*.

[78] Where a court finds a breach of the *Charter*, the onus shifts to the respondent to show that the breach is saved by s. 1 of the *Charter*, which states:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[79] In *R. v. Oakes*, (1986) 26 D.L.R. (4th) 200, the Supreme Court of Canada set out the test for determining whether s. 1 has been met:

> (1) The objective of the legislation must be pressing and substantial;
>
> (2) The impairment of the right must be proportional to the importance of the objective in that
>
> (a) the means chosen must be rationally connected to the objective;
>
> (b) the means chosen must impair the Charter right minimally or "as little as possible"; and
>
> (c) there must be a proportionality between any harmful effect of the measure and its salutary objective, so that the attainment of the legislative goal is not outweighed by the abridgement of the right.

[80] Section 1 of the *Charter* has been fatal to practically all mandatory retirement cases. In nearly all of the cases provided to me by counsel involving mandatory retirement (involving judicial office holders as well as other

professions), the impugned provision was ultimately saved by the application of s. 1. (*McKinney; Stoffman; Paquet;* etc.)

[81] In *Charles*, the Court held that the *McKinney* and *Stoffman* decisions relating to s. 1 would be equally applicable to judges:

> 42 Accordingly, I must conclude that none of the submissions made by Judge Charles persuades me that the analysis of the constitutional validity of mandatory retirement legislation in *McKinney*, supra, and *Stoffman*, supra, is inapplicable to provisions for the mandatory retirement of judges of that such analysis ought not to apply to the provisions of subsection 47(3) of the C.J.A.

[82] In the one notable exception that I have already discussed, *Assn. of Justices of the Peace of Ontario*, the Court found that the breach of s. 15 was not saved by s. 1. Although the Court agreed that there existed a pressing and substantial objective (judicial independence / security of tenure), and that this objective had a rational connection to the impugned law, the Court found that the means chosen were not a minimal impairment to the right breached. The Court went on to "read in" to the Act, mandatory retirement at age 75, instead of 70. The Court's reasoning, as I understand it, was that this new retirement age constituted a "more minimal" impairment. As I have already indicated, I disagree with that reasoning.

[83] In the case at bar, there is clearly a pressing and substantial objective (judicial independence / security of tenure), and this objective clearly has a rational

connection to the impugned law, even in the case of a retirement without pension benefit. On those issues, frankly, there was not much debate.

[84] As to the minimal impairment question, I acknowledge that a breach must be shown to impair the right as minimally as possible, in order to be saved by s. 1. In the context of the mandatory retirement of judicial office holders, however, this is a principle that is difficult to assess. What would be "less impairing" in this context? Would it be the choosing of another age (as found by the Court in *Assn. of Justices of the Peace of Ontario*)? Is that, in fact, less impairing, given that any age would arguably be as discriminatory as 70? Should the Court impose term limits as opposed to a retirement linked to age? Is that any better? Moreover, would any/all these solutions not run afoul of the caselaw that tells courts to avoid inappropriate judicial "line-drawing"?

[85] In my view, none of those options are appropriate. I find the case before me meets the criteria of minimal impairment. The age contained in this law is within a reasonable range and it applies to all presiding JPs equally. It is a minimal impairment to the rights of the individual.

[86] In conclusion, therefore, I find that ss. 3(3) of the *Justices of the Peace Act*, RSNS 1989 c. 244, as amended, does not violate Section 15(1) of the *Canadian*

Charter of Rights and Freedoms. If it does, it is saved by the application of s. 1 of the *Charter*. I reject the applicant's application.

[87] If the parties cannot agree on costs, I seek written submissions from counsel within 60 days of this decision.

Boudreau, J.