



SUPREME COURT OF CANADA

CITATION: Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General), 2016 SCC 39
APPEAL HEARD: January 18, 2016
JUDGMENT RENDERED: October 14, 2016
DOCKET: 36165

BETWEEN:

**Conférence des juges de paix magistrats du Québec,
Christine Auger, Jacques Barbès, Réjean Bédard,
Dominique Benoît, Georges Benoît, Michel Boissonneault,
Suzanne Bousquet, Sylvie Desmeules, Julie Dionne,
Marie-Chantal Doucet, Louis Duguay, Gaby Dumas,
Nathalie Duperron Roy, Réna Émond, Pierre Fortin,
Louise Gallant, Marie-Josée Hénault, François Kouri,
Jean-Georges Laliberté, Robert Lanctôt, Luc Marchildon,
Sylvie Marcotte, Nicole Martin, Danielle Michaud,
Gilles Michaud, Lucie Morissette, Monique Perron,
Jean-Gilles Racicot, Gaétan Ratté, Marc Renaud,
Rosaire Vallières, Pierre Verrette, Johanne White,
Gilles Pigeon, Léopold Goulet, Yannick Couture,
Marie-Claude Bélanger and Patricia Compagnone**
Appellants

and

**Attorney General of Quebec and
Minister of Justice of Quebec**
Respondents

- and -

**Attorney General of Canada, Attorney General of Ontario,
Conférence des juges de la Cour du Québec and
Association of Justices of the Peace of Ontario**
Intervenors

CORAM: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

JOINT REASONS FOR JUDGMENT: Karakatsanis, Wagner and Côté JJ. (McLachlin C.J. and Abella, Cromwell, Moldaver, Gascon and Brown JJ. concurring)
(paras. 1 to 107)

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(Attorney General)**

File No.: 36165.

2016: January 18; 2016: October 14.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Judicial independence — Financial security — Justices of peace — Judicial reform — Provincial legislation amending status of justices of peace, including employment conditions, remuneration and pension plan — Whether new judicial office created — Whether committee review of remuneration and pension plan necessary and if so, when should review occur — Whether legislation infringes constitutional guarantee of judicial independence — If so, whether infringement justifiable — Constitution Act, 1867, preamble — Canadian Charter of Rights and Freedoms, ss. 1, 11(d) — Act to amend the Courts of Justice Act and other legislative provisions as regards the status of justices of the peace, S.Q. 2004, c. 12, ss. 27, 30 and 32 — Décret 932-2008, (2008) 140 G.O. 2, 5681.

Constitutional law — Judicial independence — Financial security — Pensions — Justices of peace — Judicial reform — Section 178 of Courts of Justice Act, CQLR, c. T-16, mandates participation of justices of peace in public service

pension plan — Whether pension plan, as part of overall remuneration, meets minimum constitutional threshold required for judicial office.

In 2004, the Quebec government reformed its justices of the peace regime in response to a Court of Appeal judgment declaring that the existing regime violated the tenure security guarantee of judicial independence. Six sitting justices of the peace were transitioned to the new regime, with the same remuneration as before; however, justices newly appointed to that office received a lower remuneration. None of the legislative provisions affecting remuneration were put to a reviewing committee before 2007, which then made recommendations only on a forward-looking basis. The government followed up on these recommendations by making executive Order 932-2008. In 2008, the Conférence des juges de paix magistrats du Québec and its individual members (presiding justices of the peace (“PJPs”)) challenged ss. 27, 30 and 32 of the *Act to amend the Courts of Justice Act and other legislative provisions as regards the status of justices of the peace* (the “amending Act”) and executive Order 932-2008, as infringing the financial security guarantee of judicial independence. In addition, the PJPs argued that s. 178 of the *Courts of Justice Act* (“CJA”), which mandates their participation in the public service Pension Plan of Management Personnel, also infringes the financial security guarantee. Both the Superior Court and the Court of Appeal, in turn, found no violation of judicial independence because the provisions were part of a reform resulting in the creation of a new judicial office.

Held: The appeal should be allowed in part. Sections 27, 30 and 32 of the *Act to amend the Courts of Justice Act and other legislative provisions as regards the status of justices of the peace* are unconstitutional.

A judicial reform may raise questions of judicial independence both for judges occupying offices that are reformed or abolished, and for judges appointed to newly created positions. Any measure that affects remuneration will automatically trigger the institutional dimension of financial security. The initial remuneration for the new office must meet the constitutional minimum required to ensure judicial integrity. Without committee review of the initial remuneration, there is no guarantee that the constitutional minimum is met. A review is also required where the new judges were transferred from an old judicial office. The government should not be able to replace one office with another, adjust the jurisdiction, transfer the judges and change the remuneration, without any safeguards. Because sitting judges are in an existing relationship with the government, their relationship is more susceptible to the risk of manipulation. This warrants additional protection for sitting judges. Thus, while the government retains the discretion to set the remuneration of newly appointed judges, it cannot change the remuneration of sitting judges until after committee review.

To protect judicial independence when a new judicial office is created, all remuneration must be reviewed within a reasonable time. A reasonable time refers to the time required to implement a judicial reform, to establish the appropriate review

committee and to ensure proper participation by the new judges. It will generally be measured in months, and not in years.

In the context of a judicial reform, the same reasons that justify deferring committee review of the remuneration for newly appointed judges apply equally to sitting judges who are transferred to a new office. Requiring prior review for sitting judges would create delays for judicial reforms that are in the public interest, potentially prolong an unconstitutional judicial regime, undermine judicial independence and negatively impact public perception. The principle of judicial independence exists for the benefit of the public, not for the judge. Viewed from the perspective of the public, a review within a reasonable time for all judges is an effective safeguard for financial security, even if some judges were previously serving in another judicial office.

In determining whether a judicial office has merely been changed, or a new judicial office has been created, the judicial function and the conditions of employment, including tenure, financial security, selection and administrative independence, are relevant considerations. In this case, the 2004 reform created a new judicial office. The PJPs have a different jurisdiction than under the previous regime: they do not have jurisdiction to preside over bail hearings and do not hear summary prosecutions under Part XXVII of the *Criminal Code*. In addition, the PJPs now benefit from greater judicial independence guarantees: they enjoy tenure until the age of 70; their remuneration and other benefits are subject to periodic committee review;

their selection criteria are set out in the *CJA*; and finally, they are integrated into the Court of Québec and are thus subject to the authority of its Chief Judge.

Because the reform created a new judicial office, the remuneration of all the judges appointed to it (whether they were appointed for the first time or transferred from another office) needed to be reviewed retroactively, within a reasonable time after their appointment. Section 32 of the amending Act prohibits any review of the remuneration before 2007, although the judicial office was established in 2004. This contravenes the constitutional requirement that the initial remuneration of judges occupying a new office be reviewed by a committee within a reasonable time after their appointment. There were no compelling reasons why a review could not proceed before 2007. Three years is not a reasonable time. As such, s. 32 of the amending Act infringes the financial security guarantee of judicial independence. In addition, as ss. 27 and 30 provide for a freeze in the remuneration of the sitting judges and the establishment of the remuneration of the newly appointed judges, respectively, without referencing the need to retroactively submit the remuneration to a committee, these sections also infringe judicial independence. Finally, s. 27 infringes judicial independence because it freezes the remuneration of sitting judges before a committee has reviewed this remuneration, contrary to the financial security guarantee. As for the salary gap between the sitting judges and those newly appointed, the gap, by itself, did not infringe the financial security guarantee.

As ss. 27, 30 and 32 of the amending Act did not provide for retroactive committee review within a reasonable time, these sections infringe the institutional financial security guarantee of judicial independence, and are thus contrary to s. 11(d) of the *Charter* and the preamble to the *Constitution Act, 1867*. This infringement of judicial independence is not justified under s. 1 of the *Charter*, because there is no evidence of a dire and exceptional financial emergency. Therefore, ss. 27, 30 and 32 are unconstitutional. Because the infringement arises from the lack of committee review between 2004 and 2007, a review for this period is required for all PJPs as a remedy. The committee must consider all factors bearing on remuneration, including the remuneration of the previous judicial office. While the guarantee of judicial independence was compromised between 2004 and 2007, however, the judicial decisions rendered by the PJPs throughout that period are valid.

Since the government complied with its constitutional obligation to periodically submit PJPs remuneration to a committee from 2007 onwards, public confidence in judicial independence was in no way undermined for that later period. As such, there was no violation of judicial independence after 2007 and no defect in the executive Order 932-2008. Moreover, any impact that the lack of committee review from 2004 to 2007 may have had on PJPs remuneration after 2007 cannot be said to have raised constitutional concerns.

Finally, s. 178 of the *CJA* is valid. While the Pension Plan of Management Personnel may not be as beneficial as that of the judges of the Court of

Québec, as part of overall remuneration, it meets the minimum constitutional threshold required for the office of a judge such that the PJPs are not perceived as susceptible to political pressure through economic manipulation.

Cases Cited

Referred to: *Pomerleau v. The Queen*, 2003 CanLII 33471; *Conférence des juges du Québec v. Québec (Procureur général)*, 2007 QCCS 2672, [2007] R.J.Q. 1556; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Ell v. Alberta*, 2003 SCC 35, [2003] 1 S.C.R. 857; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405; *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, 2005 SCC 44, [2005] 2 S.C.R. 286; *R. v. Gagné*, [1992] 1 S.C.R. 259; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *Masters' Association of Ontario v. Ontario*, 2011 ONCA 243, 105 O.R. (3d) 196; *Ontario Deputy Judges Assn. v. Ontario* (2006), 80 O.R. (3d) 481; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3.

Statutes and Regulations Cited

Act respecting the Pension Plan of Management Personnel, CQLR, c. R-12.1.

Act to amend the Courts of Justice Act and other legislative provisions as regards the status of justices of the peace, S.Q. 2004, c. 12, ss. 1, 26, 27, 30, 32, 35.

Canadian Charter of Rights and Freedoms, ss. 1, 11(d).

Constitution Act, 1867, preamble, ss. 92(14), 96, 101.

Courts of Justice Act, CQLR, c. T-16, Part III.1, ss. 160, 161, 162, 163, 165, 166, 169, 173, 175, 176, 178, 246.29, 246.42, Sch. V.

Criminal Code, R.S.C. 1985, c. C-46, Part XXVII.

Décret 689-2004, (2004) 136 G.O. 2, 3531.

Décret 932-2008, (2008) 140 G.O. 2, 5681.

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Quebec. Comité de la rémunération des juges. *Rapport du Comité de la rémunération des juges*, présidé par Michel Clair, 30 septembre 2013 (en ligne: <http://www.justice.gouv.qc.ca/francais/publications/rapports/pdf/remjuges2013.pdf>).

APPEAL from a judgment of the Quebec Court of Appeal (Dalphond, Bouchard and Vaclair JJ.A.), 2014 QCCA 1654, [2014] AZ-51107397, [2014] Q.J. No. 9733 (QL), 2014 CarswellQue 14611 (WL Can.), affirming a decision of

Mongeon J., 2012 QCCS 1021, [2012] R.J.Q. 729, [2012] AZ-50840226, [2012] J.Q. n° 2260 (QL), 2012 CarswellQue 2373 (WL Can.). Appeal allowed in part.

Raymond Doray and Loïc Berdnikoff, for the appellants.

Sébastien Rochette and Brigitte Bussièrès, for the respondents.

François Joyal and Catherine Lawrence, for the intervener the Attorney General of Canada.

Sarah Kraicer and Josh Hunter, for the intervener the Attorney General of Ontario.

Joël Mercier and Christine Baudouin, for the intervener Confédération des juges de la Cour du Québec.

J. Thomas Curry and Paul-Erik Veel, for the intervener the Association of Justices of the Peace of Ontario.

The judgment of the Court was delivered by

KARAKATSANIS, WAGNER AND CÔTÉ JJ. —

I. Introduction

[1] Legislatures have the constitutional power over the creation, transformation and abolition of judicial offices. However, legislatures must exercise this power in a way that complies with the constitutional principle of judicial independence.

[2] In 2004, the government of Quebec reformed its regime of justices of the peace in response to a Court of Appeal judgment declaring that the existing regime violated the tenure security guarantee of judicial independence. The new regime created two categories of justices of the peace. Six sitting justices were transitioned to the new tenured category, maintaining their remuneration. However, the government set the starting remuneration of the new category well below the previous levels; therefore, judges newly appointed into that office received a significantly lower remuneration than their sitting counterparts. None of the provisions affecting remuneration were put to a remuneration committee (or commission) before 2007; the committee made recommendations only on a forward-looking basis.

[3] In 2008, the appellants — the Conférence des juges de paix magistrats du Québec and its individual members — made an application in the Superior Court. They argued that the transitional provisions relating to the setting and review of remuneration, specifically ss. 27, 30 and 32 of the *Act to amend the Courts of Justice Act and other legislative provisions as regards the status of justices of the peace*, S.Q. 2004, c. 12 (“Act”), and executive Order 932-2008, (2008) 140 G.O. 2, 5681, violate

the financial security guarantee of judicial independence. They also argued that their participation in the public service Pension Plan of Management Personnel mandated by s. 178 of the *Courts of Justice Act*, CQLR, c. T-16 (“CJA”), violates the financial security guarantee.

[4] The courts below found no violation of judicial independence because the provisions were part of a reform resulting in the creation of a new judicial office.

[5] For the reasons that follow, we would allow the appeal in part. In our view, committee review of remuneration is required for any new judicial office, although it can be done retroactively within a reasonable time after the appointments. This is so even where those appointed to the new judicial office were transferred from a previous judicial office. Because ss. 27, 30 and 32 of the Act did not provide for retroactive committee review within a reasonable time after the appointments, these sections violate the financial security guarantee of judicial independence. The constitutional questions and our answers to them are set out in the Appendix to the reasons.

II. Facts

[6] Before 2004, Quebec’s justice of the peace system comprised two categories of justices: justices of the peace with limited powers, who were public servants, and justices of the peace with expanded powers (“JPEPs”), who were authorized to exercise a wide array of judicial functions.

[7] In *Pomerleau v. The Queen*, 2003 CanLII 33471, the Quebec Court of Appeal held that the existing system was unconstitutional because it did not guarantee the independence of justices of the peace. Since justices of the peace with limited powers were subject to removal, the Court declared that they did not have the required minimum guarantees of independence. The Court of Appeal refused to suspend the effects of that declaration.

[8] Six months after *Pomerleau*, the National Assembly adopted the Act, which replaced Part III.1 of the *CJA*, entitled “Justices of the Peace”, with a new part. The new part created the offices of “presiding justice of the peace” (“PJP”) and “administrative justice of the peace”. The key provisions of the Act are set out in the Appendix.

[9] Administrative justices of the peace exercise functions that do not require judicial independence. They are not at issue in this appeal.

[10] The functions of the PJP are similar to those of the JPEP. Unlike the JPEP, however, a PJP cannot preside over bail hearings or hear summary conviction proceedings under Part XXVII of the *Criminal Code*, R.S.C. 1985, c. C-46 (*CJA*, s. 173 and Schedule V). The Act also included changes to the qualifications for PJPs and to the selection and appointment processes (*CJA*, ss. 161, 162 and 163). PJPs are now integrated into the Court of Québec (s. 169). Moreover, they have security of tenure until the age of 70 (ss. 165-66). Their salary and benefits are fixed by the government after receipt of the recommendations of a committee on the remuneration

of judges and justices of the peace (ss. 175 and 176). PJPs participate in the pension plan established by the *Act respecting the Pension Plan of Management Personnel*, CQLR, c. R-12.1 (*CJA*, s. 178). Changes to this plan can be made only after a committee on the remuneration of judges and justices of the peace has reviewed them (s. 178 para. 2; s. 246.29).

[11] The Act also set out rules that governed the transition from the old system to the new. Section 26 of the Act provided that JPEPs who had been appointed before 2004 and were still in office in 2004 were to become PJPs. Section 27 provided that they were to retain the salary they had been receiving before then “until that salary is equal to the salary to be determined by the Government”, thus creating a higher level of remuneration. Further, in 2007, as a result of a Superior Court judgment regarding judges’ salaries for the period from 2001 to 2007, the former JPEPs were awarded a retroactive increase, raising their salary as of June 30, 2004, to \$137,280 (see *Conférence des juges du Québec v. Québec (Procureur général)*, 2007 QCCS 2672, [2007] R.J.Q. 1556).

[12] Moreover, s. 30 of the Act gave the government the power to unilaterally determine the salary of PJPs appointed on or after June 30, 2004. Under that section, the government made an order — Order 689-2004, (2004) 136 G.O. 2, 3531, of June 30, 2004 — in which it fixed the annual salary of PJPs at \$90,000. Section 32 of the Act provided that the committee on the remuneration of judges and justices of the peace was not to begin exercising its functions with regard to PJPs until 2007.

[13] The first new PJPs were appointed in May 2005. The Conférence des juges de paix magistrats was created in December of that year.

[14] In 2008, a committee on the remuneration of judges and justices of the peace chaired by Daniel Johnson (the “Johnson Committee”) tabled its report on, among other subjects, the remuneration of PJPs. It concluded that it lacked the authority to retroactively review remuneration for the period from 2004 to 2007 (*Rapport du comité de la rémunération des juges* (2008) (online), at p. IV-17). The Johnson Committee recommended that the annual salary of PJPs be raised to \$110,000 for the period from 2007 to 2010 (p. IV-26). It recommended that the salary of the former JPEPs, then frozen at \$137,280, be maintained. The government adopted these recommendations by way of Order 932-2008.

[15] In November 2008, the 33 PJPs and the Conférence des juges de paix magistrats commenced proceedings in the Superior Court.

[16] In 2010, a committee on the remuneration of judges and justices of the peace chaired by Alban D’Amours (the “D’Amours Committee”) recommended that the salary of PJPs be raised to \$119,000 (*Rapport du Comité de la rémunération des juges* (2010) (online), at pp. IV-19 to IV-20), and that the salary of PJPs appointed before June 30, 2004, remain unchanged. The government adopted these recommendations. In 2013, a committee on the remuneration of judges and justices of the peace chaired by Michel Clair (the “Clair Committee”) reviewed the remuneration

of PJPs once again. (See *Rapport du Comité de la rémunération des juges* (2013) (online).)

[17] Since 2013, the salary of PJPs appointed after 2004 has been identical to that of the former JPEPs. The existence of two tiers of remuneration has thus been eliminated.

III. Judgments of the Courts Below

A. *Superior Court, 2012 QCCS 1021, [2012] R.J.Q. 729*

[18] The Conférence des juges de paix magistrats challenged the constitutionality of ss. 27, 30 and 32 of the Act, as well as of s. 178 of the CJA and Order 932-2008, on the basis that they compromised the judicial independence — and more specifically, the financial security — of PJPs. The judge dismissed the application.

[19] On the issue of the constitutionality of s. 27 of the Act, the application judge found that it suffices, when the government freezes judges' salaries, that it submit the decision to a committee on the remuneration of judges and justices of the peace within a reasonable time. In this case, the decision to freeze the remuneration of the former JPEPs who had become PJPs was submitted to and accepted by the Johnson and D'Amours committees. The time at issue was reasonable in the circumstances, as the government, although it could have acted more quickly,

submitted the question of the freeze to a committee on the remuneration of judges and justices of the peace within three years.

[20] Turning to s. 30 of the Act, the application judge stressed that it was not until after the order establishing the remuneration of PJPs had been issued that candidates applied for the office and that they did so with full knowledge of the situation. This was therefore not a case of economic manipulation.

[21] The application judge further stated that, although the Johnson Committee had lacked the authority to intervene retroactively in order to assess the remuneration of PJPs for the period from 2004 to 2007, it had effectively validated the government's decision after the fact.

[22] The application judge added that the prerogative for fixing the starting remuneration of judges lies with the government and that there is no authority to the effect that, when creating a new category of judges, the government is first required to submit their employment conditions to an independent committee. He concluded that s. 32 of the Act was valid.

[23] Finally, addressing the issue of the applicable pension plan, the application judge recognized that the plan for management personnel was less advantageous and more onerous than the one for judges of the Court of Québec. That said, two independent committees had considered the plan to be adequate.

[24] As a result, the application judge dismissed the applicants' motion in its entirety, without costs.

B. *Court of Appeal, 2014 QCCA 1654*

[25] The Court of Appeal dismissed the appeal. It found, first, that even though it may have been beneficial to obtain a recommendation from a committee on the remuneration of judges and justices of the peace before fixing the remuneration for the new office of PJP, the government was under no constitutional obligation to do so. In the court's opinion, such an obligation arises only where judges' employment conditions are modified by increasing, reducing or freezing their salary.

[26] The Court of Appeal noted that the Act had had the effect of creating two new offices (those of the PJP and the administrative justice of the peace), which had replaced the two existing categories of justices of the peace. Therefore, no salaries were increased, reduced or frozen; rather, a level of remuneration was fixed for a new office.

[27] Thus, the government's sole obligation was to order a salary level above the minimum threshold that would be required to ensure public confidence in the new judicial office. In this case, it is clear that the Court of Appeal considered the level of remuneration that was fixed to be high enough to guarantee the independence of the new PJPs.

[28] The Court of Appeal added that even if it had found that a prior recommendation from a committee on the remuneration of judges and justices of the peace was required, the remedy being sought would not have been granted, given the level of remuneration that had been ordered and the fact that there was no evidence of an attempt at economic manipulation. In the court's opinion, to make it a systemic obligation to proceed by means of a committee on the remuneration of judges and justices of the peace regardless of the circumstances would be to allow form to prevail over substance. Moreover, the Court of Appeal found that there was nothing unlawful *per se* in the existence of two tiers of remuneration, as the Constitution does not require uniformity in judges' salaries and benefits.

[29] On the issue of the establishment of the employment conditions of the former JPEPs, the Court of Appeal held that a reasonable and well-informed person would find that the Act, as a whole, had the effect of reinforcing the independence of those justices, who now benefit from broader guarantees of independence.

[30] Finally, regarding the pension plan established by s. 178 of the *CJA*, as amended by s. 1 of the Act, the Court of Appeal found that it was not unconstitutional, stating that [TRANSLATION] "the Constitution does not require the implementation of pension plans intended solely for and controlled by judges, but merely that judges benefit from a pension plan that takes into account the specificities of their duties" (para. 111 (CanLII)). Nor does the Constitution require a uniform pension plan for all PJPs. Given that three remuneration committees had concluded

that the new pension plan was adequate, the Court of Appeal was of the opinion that the submissions in this regard should be rejected on the basis that a reasonable and well-informed person would conclude that the requisite minimum threshold was met and that the plan did not expose PJPs to attempts at economic manipulation.

IV. Principles

A. *Judicial Independence: General Principles*

[31] Judicial independence has its basis in the preamble to the *Constitution Act, 1867*, which states that the Constitution of Canada is “similar in Principle to that of the United Kingdom” (see *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at p. 72). It is also based on s. 11(d) of the *Canadian Charter of Rights and Freedoms*, which guarantees an accused the right to a fair trial before an impartial tribunal (*Valente v. The Queen*, [1985] 2 S.C.R. 673, at pp. 685-89). This Court has recognized judicial independence as an unwritten constitutional principle (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (“1997 Reference”), at paras. 83-109). Judicial independence is important both for public confidence in the proper administration of justice and for the constitutional separation of powers (*1997 Reference*; *Ell v. Alberta*, 2003 SCC 35, [2003] 1 S.C.R. 857, at paras. 22-23; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, at paras. 37-38).

[32] The principle of judicial independence applies to all courts (*1997 Reference*, at para. 106). In *Ell*, this Court found that the principle extended to Alberta's justices of the peace because these justices performed numerous judicial functions — most notably presiding at bail hearings and issuing search warrants — that significantly affected the rights and liberties of individuals (paras. 20-26). There is no dispute in this case that judicial independence applies to Quebec's PJPs.

[33] Judicial independence entails three objective guarantees: security of tenure, financial security, and administrative independence (*1997 Reference*, at para. 115; *Valente*, at pp. 697-712). Each of these guarantees has both an individual and an institutional dimension (*1997 Reference*, at para. 118). The manner in which each of these guarantees may be satisfied varies with the context (*Ell*, at paras. 30-32). The ultimate question is whether a reasonable and informed person would perceive that the tribunal enjoys the objective guarantees (*Valente*, at p. 689, cited in *Ell*, at para. 32; see also *1997 Reference*, at para. 112). As such, judicial independence belongs not to judges, but to the public. The guarantees are not intended to be a means for judges to improve their working conditions (*1997 Reference*, at para. 9; *Ell*, at para. 29).

[34] This Court has examined the institutional dimension of the financial security guarantee on a number of occasions. This guarantee has three elements: first, remuneration cannot be changed without recourse to an independent committee (or commission); second, there are to be no negotiations between the judiciary and the

executive or legislature regarding remuneration; and third, any reduction to remuneration cannot take it below a basic minimum level of remuneration required for the office of a judge (*1997 Reference*, at paras. 133-35; *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, 2005 SCC 44, [2005] 2 S.C.R. 286 (“*Bodner*”), at paras. 8-11). The purpose of these elements is to ensure that the process of setting judicial remuneration remains, to the extent possible, consistent with the depoliticized relationship between the judiciary and the other branches of government (*1997 Reference*, at paras. 138-46; *Mackin*, at paras. 53-54; *Bodner*, at paras. 8-11 and 14-21). A minimum level of remuneration protects the integrity of the judicial office.

[35] The role of remuneration committees has been detailed elsewhere (see, in particular, *1997 Reference*, at paras. 147-85, and *Bodner*, at paras. 13-21). Only a few points bear repeating here. The committee must review all proposed changes to remuneration: remuneration cannot be “reduced, increased, or frozen” without prior recourse to a committee (*1997 Reference*, at para. 133; see also para. 174; *Mackin*, at paras. 57 and 69). Further, the committee reviews overall remuneration: salary, pensions, and other benefits are considered together as part of overall remuneration (*Valente*, at p. 704). Finally, the committee’s recommendations are not binding (*Bodner*, at paras. 19-20). The government may depart from the committee’s recommendations provided it gives “rational reasons” (para. 21).

B. *Judicial Independence in the Context of Judicial Reform*

[36] The seminal cases in the judicial independence jurisprudence do not address the issue of the financial security guarantee in the context of broad court reforms. In *Valente*, the question was whether or not the Ontario Provincial Court was an independent tribunal. In *Beauregard*, a Quebec Superior Court judge challenged the constitutional validity of a newly enacted provision providing that Superior Court judges would be required to contribute to the cost of their pension plan. *R. v. G  n  reux*, [1992] 1 S.C.R. 259, for its part, concerned the remuneration of existing members of military tribunals. The *1997 Reference* involved numerous changes made by legislatures to the remuneration of provincial court judges as a result of provincial governments' efforts to balance their budget. In *Mackin*, the violation of judicial independence was the result of the abolition of the status of supernumerary judge and the creation of the position of per diem judge. While the Court found that tenure security was not infringed since there was no removal from office, it nevertheless found that financial security was violated. The absence of an independent remuneration committee was fatal. Finally, *Bodner* concerned the nature of judicial remuneration committees and the obligation of governments to respond to these recommendations.

[37] In *Ell*, the issue was whether a reform to the Alberta justices of the peace regime infringed the tenure security of existing justices who lost their position as a result of this reform. This Court found that since their removal was not arbitrary, it did not violate the security of tenure guarantee (paras. 37-41). However, *Ell*

concerned the tenure guarantee, and did not raise any issue regarding financial security.

[38] Thus, while the principles in these cases assist in our analysis, the application of the financial security guarantee in the context of broad judicial reform is an issue of first impression before this Court.

[39] Legislatures have the power and responsibility to legislate in relation to the administration of justice (*Constitution Act, 1867*, ss. 92(14), 96 and 101). This includes the power to create, transform and abolish judicial offices. Provincial legislatures also have power over the jurisdiction of the courts they create (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at paras. 10-12). Reforms can contribute to public confidence in the administration of justice. Indeed, by implementing reforms to the justice system, governments and legislatures often play an active role in ensuring and enhancing public confidence in the judiciary. Reforms can be driven by a number of reasons: improving the independence and qualifications of judicial officers, adapting to new realities, and increasing access to justice. However, all reforms must respect the constitutional requirements for judicial independence (paras. 36-37) and the core jurisdiction of the courts established under s. 96 of the *Constitution Act, 1867*.

[40] A judicial reform may raise questions of judicial independence both for judges occupying offices that are reformed or abolished, and for judges appointed into newly created positions. Where a reform affects the conditions of sitting judges,

the reform may engage all three objective guarantees of judicial independence (security of tenure, financial security, and administrative independence). However, any measure that affects remuneration will automatically trigger the institutional dimension of financial security (*Mackin*, at para. 61).

[41] In this case, the impact of the reform on the other guarantees of judicial independence — such as tenure security — is not at issue. The appeal raises issues relating to the financial security guarantee in the context of a judicial reform. Thus, the question is whether the requirement for prior committee review of the remuneration of a *new* judicial office is necessary to satisfy a reasonable and informed person that the court enjoys the objective guarantee of financial security.

V. Issues

[42] The specific issues in this case are as follows:

- (1) Is a committee review necessary when a new judicial office is created?
- (2) If committee review is necessary when a new judicial office is created, when should that review take place?
- (3) Should sitting judges “transferred” to a new office be treated differently?
- (4) What qualifies as a “new judicial office”?

(5) Were these requirements satisfied in the case at bar?

VI. Analysis

(1) *Is a Committee Review Necessary When a New Judicial Office Is Created?*

[43] The Court of Appeal found that because the amendments created a new judicial office, no committee review of the initial remuneration was required. The court found that the requirement for prior committee review applied only when judges' remuneration is increased, reduced or frozen, because in these contexts, committee review guards against any government attempt to financially manipulate judges. Similarly, the respondent the Attorney General of Quebec argues that the safeguarding function of the remuneration committee — namely to avoid negotiations and maintain a depoliticized relationship between the judiciary and the other branches — is not required when a legislature creates a new office, because there is no risk of the government exerting political pressure on judges who have not yet been appointed.

[44] We disagree. Such an approach may have the unintended effect of permitting the legislature to use the creation of judicial offices to circumvent the requirements set out in the *1997 Reference*: a legislature could effectively change or freeze judicial remuneration without recourse to a remuneration committee by simply creating a new office and wiping the slate clean.

[45] As noted above, it is a clearly established principle that any changes or freezes in judicial remuneration require prior recourse to a committee to avoid the possibility or appearance of political interference through economic manipulation (*1997 Reference*, at para. 133). This obligation arises whether or not the judicial offices are filled at the time of the proposed change. Although the concern regarding economic manipulation is not as strong when the government establishes the initial remuneration of a new office as it is when it increases, decreases or freezes remuneration in an office with sitting judges, the concern remains real. For example, the government should not be able to simply replace one court with another, adjust the jurisdiction, transfer the judges and reduce the remuneration, without any safeguards. This is especially true where the core jurisdiction remains. Such a scenario would raise the perception of a serious risk of financial manipulation. Personal financial considerations should never be seen as playing any role in judicial decision-making. The public needs assurance that changes to a judicial office that could result in financial consequences for judges cannot by-pass the constitutional assurance of review by an arm's-length committee.

[46] In addition, public confidence in the judiciary may be undermined if the new remuneration does not meet the constitutional minimum required to ensure the integrity of the new office (*1997 Reference*, at para. 193). A certain minimum level of remuneration also promotes a well-qualified judiciary. But without committee review of the initial remuneration, there is no guarantee — or public assurance — that the constitutional minimum is met.

[47] As a result, we are of the view that in order to adequately protect judicial independence in such circumstances, whenever a new judicial office is created, an independent review of the initial remuneration of judges appointed to the new office is always necessary. This ensures that all judicial remuneration is reviewed, regardless of whether the remuneration of an existing office is changed or a new office is created.

(2) *If Committee Review Is Necessary When a New Judicial Office Is Created, When Should That Review Take Place?*

[48] The application judge raised the possibility of review within a reasonable delay after the new office was implemented, albeit in a different context. For its part, the Attorney General of Quebec argues that while retroactive review may be beneficial, if prior review is not required, neither is retroactive review.

[49] In our view, when the government sets the initial remuneration of a newly created judicial office, review by a remuneration committee may take place within a reasonable time *after* the appointment of the new judges. There are both principled and practical reasons for this.

[50] The manner in which the conditions of judicial independence may be satisfied varies with the context (*Ell*, at para. 30). While committee review is always required for the implementation of judicial remuneration, in our view, the manner in which this requirement may be satisfied is different in the context of a new judicial

office. There are two relevant contextual considerations: first, the legislature has the constitutional power to reform courts; and second, as previously noted, the risk of political pressure or economic manipulation is not as strong in the context of a reform that creates a new judicial office. In this context, requiring that the initial remuneration of the new office be subject to a retroactive review by a committee within a reasonable time is a sufficient safeguard for the financial security guarantee. It ensures that remuneration will be reviewed in a timely enough fashion to correct any deficiency if it is found to be below the constitutional minimum. At the same time, it enables legislatures to fulfill their constitutional role effectively.

[51] Such a requirement provides governments with flexibility, while not imposing unwarranted barriers to the effective implementation of court reform initiatives.

[52] Moreover, it is simply more efficient to consider the new office-holders all together. In fact, requiring retroactive review rather than prior review may actually serve to *increase* the protection of financial security. As the Court explained in *Bodner*, at para. 17, a remuneration committee “must objectively consider the submissions of all parties” (emphasis added). But if a committee were required to review remuneration prior to the establishment of a new judicial office and before any judges had been appointed into the new office, there would be no office-holders to make submissions before the committee. Therefore, the proper functioning of the committee would likely be hindered. But where the review takes place within a

reasonable time after the appointment of the judges to the new office, this allows the cohort of newly appointed judges to fully participate in the committee process.

[53] In addition, requiring prior recourse to a remuneration committee before setting the initial remuneration of a new judicial office would necessarily create delays. Establishing a remuneration committee takes time. As the intervener the Attorney General of Ontario points out, in establishing a committee for a new judicial office, “there are many issues, and many options on those issues, that the government will have to consider before establishing an independent, effective and objective special process for setting the remuneration” of that new office (*Masters’ Association of Ontario v. Ontario*, 2011 ONCA 243, 105 O.R. (3d) 196, at para. 70, quoted in I.F., at para. 29). These issues may include the question of whether the appropriate forum is an existing or a new committee, its size, structure, powers and membership and what objective criteria the committee is mandated to consider. While the committee process is a constitutional requirement, it should not cause unnecessary delays in rolling out reforms.

[54] The imposition of structural barriers to reforms aimed at improving the independence and qualifications of judges would undermine the public’s confidence in the administration of justice rather than increasing it. Taking into account that “the conditions of independence are intended to protect the interests of the public”, and that they are a “means to safeguard our constitutional order and to maintain public confidence in the administrations of justice”, such barriers should be avoided (*Ell*, at

para. 29). Therefore, in our view, when a new office is created, a committee must review the initial remuneration, but this review can take place within a reasonable time after the appointment of judges into the new office.

[55] Governments have a variety of options for structuring a judicial remuneration committee so long as it is “[i]ndependent, [e]ffective and [o]bjective” (*1997 Reference*, at paras. 166-74). For example, the government could decide to conduct a simplified process for the first committee review, without “formal hearings, the calling of evidence, commission counsel, intervenors . . . or any of the other accoutrements common to public or judicial commissions” (*Ontario Deputy Judges Assn. v. Ontario* (2006), 80 O.R. (3d) 481 (C.A.), at para. 36).

[56] A “reasonable time” refers to the time it takes to set up a committee process as soon as some judges have been appointed into the new office. Because the minimum adequate remuneration ensures judicial integrity, the retroactive review should be conducted within a reasonable time after the appointment of judges into the new office. In establishing this “reasonable time” requirement, we are not here referring to the three- to five-year period described in the *1997 Reference*. Indeed, that time period serves a different purpose; namely to “guard against the possibility that government inaction could be used as a means of economic manipulation by allowing judges’ real salaries to fall because of inflation, and also to protect against the possibility that judges’ salaries will drop below the adequate minimum required by judicial independence” (*1997 Reference*, at para. 147). In order to achieve this

objective, the Court deemed that “[a] commission must convene if a fixed period of time (e.g., three- to five-years) has elapsed since its last report, in order to consider the adequacy of judges’ salaries in light of the cost of living and other relevant factors” (para. 147). As we are here dealing with very different circumstances and purpose, the “reasonable time” period for retroactive review will be much shorter. It will reflect the time required to implement the reform, to establish the appropriate review committee and to ensure proper participation by the new judicial officers. It will generally be measured in months, and not in years.

(3) *Should Sitting Judges “Transferred” to a New Office Be Treated Differently?*

[57] With respect to sitting judges who are transferred to a new office, the appellants argue that the *1997 Reference* requires that any changes in the remuneration of sitting judges require prior committee review, regardless of whether a new office is created. Governments cannot by-pass this requirement simply by making changes to a judicial office. From the sitting judges’ perspective, whether it occurs in an existing or new judicial office, a change in remuneration has the same implications for them, and for the existing relationship between the executive and the judiciary.

[58] There is some force to these submissions. As discussed, the purpose of the committee process is to maintain a depoliticized relationship between the judiciary and the other branches of government and to guard against the possibility or perception of political interference through economic manipulation (*1997 Reference*,

at paras. 138-47 and 166). No doubt the impact on the judge and on the relationship between the executive and the judge holding a new judicial office is greater where a judicial relationship already exists. According to the appellants, sitting judges should therefore receive the enhanced protections accorded in the *1997 Reference*, namely prior review of all proposed changes in remuneration.

[59] But in our view, in the context of broader judicial reforms, the same reasons that justify deferring committee review for newly appointed judges apply equally to sitting judges. It falls within the legislature's constitutional authority to implement court reforms for important public policy reasons. Requiring prior review for sitting judges would create delays for judicial reforms in the public interest and, as in the case at bar, potentially prolong an unconstitutional judicial regime. As such, though prior review normally affords sitting judges enhanced judicial independence protections, requiring prior review in circumstances where a new judicial office is created for the purposes of remedying an otherwise unconstitutional regime may actually undermine judicial independence and negatively affect public perception. And the principle of judicial independence exists for the benefit of the public, not for the judge. Viewed from the perspective of the public, a review within a reasonable time for all judges is an effective safeguard for financial security, even if some judges were previously serving in another judicial office.

[60] In addition, there are important pragmatic reasons for review within a reasonable time when a new judicial office is filled in part by those transferred from

another judicial office. If remuneration of sitting judges must be reviewed prior to the reform, but remuneration of newly appointed judges may be reviewed after, a committee would need to be convened twice — once before the reform, and once again after. By contrast, if the remuneration of transferred judges is reviewed at the same time as that of the newly appointed judges, the committee can review all the remuneration together, in the context of the whole reform. This enables the committee to better fulfill its mandate.

[61] For example, examining the two groups of judges separately may lead to contradictory results. By contrast, in a unified committee process, where the committee can review all the remuneration of the new judicial office at the same time, the committee may make recommendations about any proposed remuneration differential between judges occupying the same office. Similarly, when provincial legislatures create new courts that include functions that used to be exercised by other judges, these judges' remuneration may be taken into account in the analysis of the overall remuneration of the judges to be appointed. Indeed, since it is dealing with a new or different office, for which the remuneration has not been considered in the past, the remuneration committee has more latitude in its initial review.

[62] This being said, because sitting judges are in an existing relationship with the government, this relationship is more susceptible to the risk of manipulation. The principles in the *1997 Reference* warrant additional protection for sitting judges. Thus, while the government retains the discretion to set the remuneration of newly

appointed judges, the government may not change (increase, decrease or freeze) the remuneration of sitting judges until after the committee review. When the government complies with this obligation to maintain the salaries of the sitting judges until committee review, the committee can make retroactive and forward-looking recommendations with regards to the salaries of the sitting judges.

[63] Thus, in our view, where a new judicial office has been created, judges who have held another judicial office should be treated the same as newly appointed judges when it comes to the timing of the requirement for committee review of remuneration: review within a reasonable time after their appointment is required. However, their remuneration cannot be changed until after the review has taken place.

(4) *What Qualifies as a “New Judicial Office”?*

[64] While the financial security guarantee of judicial independence requires committee review prior to any changes to the remuneration of a judicial office, we have concluded that prior review is not required when a judicial reform results in the creation of a new judicial office. Therefore, in the context of judicial reform, it is important to determine whether a new judicial office has been created. Often, it will be obvious when a new judicial office has been created. But sometimes, the line between a new judicial office and minor changes to an existing office can be hard to draw. The criteria for what constitutes a new judicial office varied in the arguments and judgments below.

[65] The application judge was of the view that the Act created a new judicial office (paras. 4, 47 and 142). However, it is unclear which criteria the application judge applied in coming to this conclusion. The Court of Appeal also opined that the Act established a new judicial office. In doing so, it compared the functions and employment conditions of the old and new offices. In the Court of Appeal's view, because these functions and employment conditions were sufficiently different, the Act created a new judicial office (paras. 72-78). The Attorney General of Quebec endorses the appeal court's analysis. The appellants argue that no new office was created because in reality, judges in the "new" office exercised the same functions as the old office: the new office simply included better tenure guarantees.

[66] We agree with the appellants that mere adjustments to an existing office do not automatically create a new judicial office. Where the remuneration of an existing judicial office is revised in any way, our jurisprudence is clear: prior committee review is essential to guarantee financial security. However, where a new office is created, a legislature's constitutional authority to reform the justice system and the practical realities of real reform justify retroactive review.

[67] Financial security can be implicated both by changes to the mandate of a judicial office, as well as by changes to the conditions that have direct financial implications for the office-holders, because any such changes can be seen as potential pressure or manipulation. Thus, we agree with the Court of Appeal that the judicial function and the conditions of employment are relevant considerations in determining

whether a judicial office has merely been changed, or whether a new judicial office has been created.

[68] At what point do such reforms create a new office, such that they justify deferral of arm's-length review?

[69] In our view, changes to judicial functions, and changes to other conditions that impact judicial independence — including conditions related to such things as tenure, financial security, selection, and administrative independence — are all relevant to assessing whether a new judicial office is created. A new judicial office is created if these changes, viewed as a whole, and in context, create a new office.

[70] The analysis is holistic: the court must look at the change to judicial functions alongside the other changes to the conditions that impact judicial independence, in light of the context of the reform. The focus is on whether the overall effect of the reform is to create a new judicial office.

(5) *Were These Requirements Satisfied in the Case at Bar?*

[71] In the present case, modifications to the Quebec judicial order were necessary and urgent following the judgment of the Quebec Court of Appeal, which concluded that the regime then in place in the province did not adequately ensure the tenure guarantee of judicial independence. The 2004 reforms served the public good and advanced the underlying interests of judicial independence.

[72] However, these reforms must also comply with the requirements for the financial security guarantee of judicial independence. In our view, the reform failed to comply with these requirements. For the reasons that follow, we find that the reform breached the financial security guarantee of judicial independence because the remuneration for 2004 to 2007 was not reviewed within a reasonable time after the new appointments. Indeed, the remuneration for that period has never been reviewed.

(a) Did the Reform Create a New Judicial Office?

[73] We agree with the Court of Appeal that the Act created a new judicial office. Viewed as a whole, the changes from the reform did indeed create a new judicial office.

[74] The context for the reform is relevant: the government implemented a reform to the system of justices of the peace following the Quebec Court of Appeal's decision in *Pomerleau* that the existing system violated judicial independence. The reform provided tenure for the judicial offices.

[75] Looking at the judicial functions, the PJPs have a narrower jurisdiction than the old office of JPEP: the PJPs do not have jurisdiction to preside over bail hearings and do not hear summary prosecutions under Part XXVII of the *Criminal Code*, as the old JPEPs did. Although in practice, the JPEPs never exercised these functions, it remains that, in law, the new office of PJPs had a different jurisdiction

than that of JPEP (trial decision, at paras. 23 and 83; appeal decision, at paras. 10 and 74).

[76] Looking at the conditions that impact judicial independence, there are many differences in these conditions. The PJPs benefit from greater judicial independence guarantees than did the JPEPs. For instance, though both PJPs and JPEPs could only be removed from office by virtue of a report from the Court of Appeal after a request from the Minister of Justice, the JPEPs were appointed for renewable five-year terms, whereas the PJPs now enjoy tenure until the age of 70. Additionally, the remuneration and other benefits associated with the office of PJP are now subject to periodic committee review. Furthermore, the selection criteria of the PJPs are now set out in the *CJA*. Finally, the PJPs are now integrated into the Court of Québec and are thus subject to the authority of the Chief Judge of the Court of Québec, something which was not provided for by the *CJA* with regards to the JPEPs before 2004. As such, clearly there are significant changes to the conditions that impact judicial independence.

[77] It is also worth noting that the Act completely substitutes Part III.1 of the *CJA* (Act, s. 1), which deals with justices of the peace, that s. 26 of the Act provides that former JPEPs “become” PJPs, and that s. 35 of the Act requires that PJPs take a new oath, a logical consequence of holding a new office. Additionally, during the parliamentary debates leading up to the adoption of the Act, there are several references in passing to the creation of a new judicial office (Quebec, Assemblée

nationale, *Journal des débats*, vol. 38, No. 75, 1st Sess., 37th Leg., May 20, 2004, at p. 4543; *Journal des débats de la Commission permanente des institutions*, vol. 38, No. 54, 1st Sess., 37th Leg., May 28, 2004, at p. 18).

[78] Looking at the effects of the reform overall, we conclude that the reform created a new judicial office.

(b) Did a Committee Review the Remuneration Within a Reasonable Time After the Appointment of the Judges?

[79] Since the Act created a new judicial office the initial remuneration of all the judges appointed to this office (whether they were appointed for the first time or transferred from the now-abolished office of JPEP) needed to be reviewed retroactively, within a reasonable time after their appointment.

[80] As s. 32 of the Act provides that “[d]espite sections 2 to 8, the committee on the remuneration of judges will not exercise its functions with regard to presiding justices of the peace until a committee is formed in 2007 with respect to judges of the Court of Québec and municipal courts”, it effectively prohibits any review of the initial PJP remuneration prior to 2007. Indeed, although the office of PJP was established in 2004, the remuneration of the judges occupying this new office could only be reviewed starting in 2007. This contravenes the constitutional requirement that the initial remuneration of judges occupying a new office must be reviewed by a remuneration committee within a reasonable time after their appointment. There are

no compelling reasons why a review could not proceed well before 2007. None were offered. The time period should be measured in months, not years. Obviously, three years is not a reasonable time. As such, s. 32 of the Act infringes the financial security guarantee of judicial independence.

[81] Additionally, as ss. 27 and 30 of the Act respectively provide for a freeze in the remuneration of the six former JPEPs and the establishment of the remuneration of the newly appointed PJPs by executive order, without referencing the need to retroactively submit the remuneration to a remuneration committee, we are of the view that ss. 27 and 30 also infringe judicial independence. Indeed, when a legislature creates a new judicial office, it is constitutionally required to provide for salary committee review in the legislation establishing the new judicial office. Finally, s. 27 of the Act infringes judicial independence because it freezes the remuneration of sitting judges before a committee has reviewed this remuneration, contrary to the requirements of the financial security guarantee.

[82] The appellants also submitted that the government was not permitted to appoint new PJPs at a lower remuneration than the old JPEPs' remuneration. We disagree. Where a reform results in the creation of a new judicial office, and sitting judges are transferred to that new office, the government may be entirely justified in holding their remuneration at existing levels and appointing new judges into the same category at a lower remuneration. But the government does not have *carte blanche* in this matter. Both the remuneration of newly appointed judges and any proposed

changes to the remuneration of the transferred judges must be subject to review by a committee. In the case at bar, three remuneration committees found that the salary gap between the transferred judges and the newly appointed judges was appropriate. Based on the findings of the remuneration committees, we are satisfied that this salary gap, by itself, did not infringe the financial security guarantee of judicial independence.

(c) Was There a Violation of the Financial Security Guarantee After 2007?

[83] The appellants also challenge the validity of executive Order 932-2008, adopting the 2008 Johnson Committee recommendations and setting remuneration for 2007 to 2010. In our view, this Order is valid. Remuneration committees reviewed PJP remuneration periodically starting in 2007. As such, there was no violation of judicial independence after 2007 and no defect in the 2008 Order.

[84] It is true that the post-2007 remuneration derived from an initial level of remuneration which was never reviewed, contrary to constitutional requirements. That being said, the criteria the committees were required to apply make it clear that a change in the baseline remuneration would have had a limited impact on future remuneration reviews. Indeed, under s. 246.42 of the *CJA*, “the level and prevailing trend of the remuneration received by the judges concerned, as compared to that received by other persons receiving remuneration out of public funds” constitutes only one of 10 factors which the committee must consider when determining judges’

remuneration. For instance, the committees were also required to consider remuneration for similar offices in other provinces.

[85] Additionally, we emphasize that judicial independence exists for the benefit of the public, and does not serve as a means of labour arbitration to ensure better remuneration for judges. As this Court stated in *Ell*, at para. 29, judicial independence is “for the benefit of the judged, not the judges”, as “[j]udicial independence serves not as an end in itself, but as a means to safeguard our constitutional order and to maintain public confidence in the administration of justice” (see also *Bodner*, at paras. 4 and 6). Consequently, “[t]he benefit that the members of those courts derive is purely secondary” (*1997 Reference*, at para. 9). As such, even if the actual remuneration of PJPs after 2007 may have been in some way affected by the lack of remuneration committee review from 2004 to 2007, this problem is not one with judicial independence itself, since the constitutional requirements necessary to the protection of judicial independence were met from 2007 onwards. Indeed, since the government complied with its constitutional obligation to periodically submit PJP remuneration to a committee from 2007 onwards, as required by the *1997 Reference*, public confidence in judicial independence was in no way undermined for that period. Any impact that the lack of committee review from 2004 to 2007 may have had on PJP remuneration after 2007 cannot be said to have raised constitutional concerns.

VII. Pensions

[86] The appellants challenge the participation of PJPs in the public service management personnel pension plan. They argue that because the pension plan is not designed for the career of a judge, and is less remunerative than the pension plan for the judges of the Court of Québec, the pension plan does not meet the basic minimum threshold required for the office of a judge. As such, the participation of PJPs in this pension plan infringes judicial independence. To them, changes to pensions should be analyzed separately from changes to remuneration as a whole.

[87] The courts below rejected this argument. The application judge declined to comment on the merits of the pension plan, but relied on the Johnson and D'Amours committees' endorsements of the plan. For its part, the Court of Appeal also relied on the committees' recommendations, since these conclusions were not unreasonable. They found that a reasonable and well-informed person would find that the constitutionally required minimum threshold was met. We agree with the courts below.

[88] The issue before us concerns the adequacy of the pensions and not the impact of the change from a previous pension plan to a new one. In regards to the adequacy argument, it bears repeating that one of the main roles of a remuneration committee is precisely to determine whether the overall remuneration of judges — which includes pensions — is adequate.

[89] As discussed above, the third element of the institutional dimension of financial security is that remuneration may not fall below a basic minimum level

required for the office of a judge (*1997 Reference*, at para. 135; *Bodner*, at para. 8; *Mackin*, at para. 59). This is so because public confidence in judicial independence would be undermined “if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation” (*1997 Reference*, at para. 135; see also paras. 192-96). In articulating this element in the *1997 Reference*, Lamer C.J. stressed that this element is not for the benefit of the judiciary, but for the public (para. 193):

I want to make it very clear that the guarantee of a minimum salary is not meant for the benefit of the judiciary. Rather, financial security is a means to the end of judicial independence, and is therefore for the benefit of the public. As Professor Friedland has put it, speaking as a concerned citizen, it is “for our sake, not for theirs” ([*A Place Apart: Judicial Independence and Accountability in Canada* (1995), at] p. 56).

[90] Pensions are part of judicial remuneration (*Valente*, at p. 704; *Beauregard*, at p. 75). Pensions must be examined with a view to their place in the overall compensation package for judges. For example, a less generous pension may be offset by more substantial salary and other benefits; viewed together, the overall remuneration might well meet the minimum constitutional threshold. This does not mean, however, that specific problems relating to pensions will never arise. For example, the total absence of a pension plan might raise concerns that overall remuneration cannot cure. And, of course, any proposed changes to the pension — as any other changes to remuneration — must be subject to prior review by a remuneration committee.

[91] Judicial independence does not require that a pension plan be exclusive or controlled by judges (*Valente*, at p. 708); nor does it require that all judges enjoy the same level of remuneration. Conversely, there is no reason in principle why a public service pension cannot apply to judges. There is also no reason in principle not to have a distinct and separate part of a pension plan specifically tailored for judges, although the absence of such a tailored plan does not automatically infringe judicial independence. Membership in a public sector pension plan does not preclude adapting that plan to the specific characteristics of judicial office. For example, justices of the peace in Ontario are members of a Public Sector Pension Plan, but are also members of a Supplemental Plan, which provides additional benefits.

[92] The appellants argue that their pension plan does not meet the basic constitutional minimum threshold. The management personnel pension plan is designed for career public servants with around 35 years of service at retirement. But a career as a PJP is typically shorter. Under the current pension plan, a PJP appointed at the age of 43 and retiring at age 65 would only receive 44 percent of their average salary from their three best years before retirement, whereas a judge of the Court of Québec would receive about 65 percent of their average salary from the same period. This pension plan is far less remunerative than that of the judges of the Court of Québec, which is more properly tailored to the shorter career of a judge. The appellants argue that because the pension plan is not designed for the shorter career of a judge, the pension plan does not meet the basic minimum threshold required for the office of a judge.

[93] It is common ground that the Pension Plan of Management Personnel available to PJPs is less advantageous and more costly than the pension plan enjoyed by the judges of the Court of Québec. In fact, in its representations before the D'Amours and Clair committees, the Conférence des juges de paix magistrats asked to participate in the Court of Québec judges' pension plan.

[94] However, the Johnson, D'Amours and Clair committees evaluated the pension plan, and found that it was adequate. While the PJPs may not enjoy a pension plan as beneficial as that of the judges of the Court of Québec, this is not the constitutional question at hand. The question is whether this pension plan, as part of overall remuneration, meets a minimum threshold such that these judges are not "perceived as susceptible to political pressure through economic manipulation" (*1997 Reference*, at para. 135).

[95] In our view, in light of overall remuneration and the findings of the three committees, the remuneration, including the pension, meets the minimum constitutional threshold. Therefore, s. 178 of the *CJA*, which mandates the participation of PJPs in the Pension Plan of Management Personnel, is valid.

VIII. Conclusion

[96] We conclude that ss. 27, 30 and 32 of the Act infringe the institutional financial security guarantee of judicial independence, and are thus contrary to s. 11(d) of the *Charter* and the preamble to the *Constitution Act, 1867*.

[97] This infringement is not justified under s. 1 of the *Charter*. Indeed, an infringement of judicial independence can only be justified where there are “dire and exceptional financial emergencies caused by extraordinary circumstances such as the outbreak of war or imminent bankruptcy” (*Mackin*, at para. 72, citing *1997 Reference*, at para. 137). To justify an infringement, the government must adduce evidence to justify why the independent, effective and objective process has been circumvented (*Mackin*, at para. 73, citing *1997 Reference*, at paras. 277 et seq.). We are far from that threshold here. The Attorney General of Quebec makes no submissions on this issue and adduces no evidence that would justify an infringement. There is no evidence of a dire financial emergency; in fact, the Attorney General of Quebec does not raise financial considerations as the basis or justification for any of the government’s action. Therefore, there is nothing that would meet the high threshold of justification under s. 1.

[98] Having found that ss. 27, 30 and 32 of the Act infringe judicial independence, and that this infringement is not saved by s. 1, we conclude that these sections are unconstitutional.

[99] However, neither Order 932-2008, nor s. 178 of the *CJA* infringe judicial independence.

IX. Remedy

[100] Having determined that the failure to provide for retroactive review of the new judicial office within a reasonable time after the appointments was a breach of the financial security guarantee of judicial independence between 2004 and 2007, there remains the question of the appropriate remedy.

[101] The appellants ask this Court to declare the impugned sections invalid. Further, they argue that if these sections are invalid, then all the executive orders setting remuneration since 2004 are also invalid. They ask this Court to order committee review of all remuneration since 2004. By contrast, the Attorney General of Quebec asks that any remedy be limited to a declaration of invalidity and a declaration that in the future, a committee must review the initial remuneration of a new office.

[102] While we agree there was a breach in the financial security guarantee, the extensive remedy requested by the appellants goes too far.

[103] First, we declare ss. 27, 30 and 32 of the Act invalid. However, the other impugned sections (s. 178 of the *CJA*, and Order 932-2008) remain valid.

[104] Additionally, because the breach to judicial independence arises from the lack of committee review for the period between 2004 and 2007, we order that a remuneration committee review remuneration of all PJPs for this period only. The committee must consider all factors bearing on remuneration, including the remuneration of the previous judicial office. This committee review signals that a

breach of judicial independence cannot remain unaddressed, and serves to promote future government compliance with the requirements of judicial independence.

[105] However, as discussed above, any impact on remuneration after 2007 is not due to a violation of judicial independence after 2007; as a result, judicial independence does not require that the subsequent Order 932-2008 be struck.

[106] That being said, although one of the guarantees of judicial independence was compromised between 2004 and 2007, the judicial decisions rendered by the PJPs throughout that period are valid: “. . . absent a demonstration of positive and substantial injustice in the circumstances of a particular case, the doctrine of necessity will prevent the reopening of past decisions of [courts] by reason only of their lack of independence” (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3, at para. 8).

[107] We would allow the appeal in part, and order costs in favour of the appellants.

APPENDIX

I. Legislative Provisions

Act to amend the Courts of Justice Act and other legislative provisions as regards the status of justices of the peace, S.Q. 2004, c. 12:

26. Justices of the peace appointed before 30 June 2004 in accordance with section 158 of the Courts of Justice Act (R.S.Q., chapter T-16), to whom section 162 of that Act was made applicable by their deed of appointment and who are in office on that date become presiding justices of the peace. They are deemed to have been appointed to hold office during good behaviour in accordance with Division II of Part III.1 of the Courts of Justice Act, as amended by this Act, and, for the purposes of section 161 of that Act, to have established their residence in the place where they were residing on 30 June 2004.

Justices of the peace referred to in the first paragraph who were on leave without pay from the public service are, from the date of coming into force of this section, deemed to have resigned from their public service position.

27. Persons who became presiding justices of the peace by virtue of section 26 retain the salary they were receiving before the coming into force of section 26, until that salary is equal to the salary to be determined by the Government pursuant to section 175 of the Courts of Justice Act.

They also retain the employment conditions, including the employment benefits and the pension plan, formerly applicable to them. However, during the six months following the coming into force of section 26, they may elect to become members of the pension plan established under the Act respecting the Pension Plan of Management Personnel (R.S.Q., chapter R-12.1) by sending a notice to that effect to the Commission administrative des régimes de retraite et d'assurances established under the Act respecting the Government and Public Employees Retirement Plan (R.S.Q., chapter R-10). In that case, and if they were formerly members of the pension plan established under the Act respecting the Civil Service Superannuation Plan (R.S.Q., chapter R-12), section 42 and the first paragraph of section 139 of the Act respecting the Pension Plan of Management Personnel apply, with the necessary modifications.

30. The Government determines, by order, the salary and employment conditions of presiding justices of the peace appointed on or after 30 June 2004, including their employment benefits other than the pension plan. The order remains applicable until the first order is made under section 175 of the Courts of Justice Act (R.S.Q., chapter T-16) enacted by section 1.

32. Despite sections 2 to 8, the committee on the remuneration of judges will not exercise its functions with regard to presiding justices of the peace until a

committee is formed in 2007 with respect to judges of the Court of Québec and municipal courts.

II. Constitutional Questions

The Chief Justice stated the following constitutional questions on August 18, 2015:

1. Do ss. 27, 30 and 32 of the *Act to amend the Courts of Justice Act and other legislative provisions as regards the status of justices of the peace*, S.Q. 2004, c. 12, violate the principle of judicial independence guaranteed by:
 - a) the *Constitution Act, 1867* or
 - b) section 11(d) of the *Canadian Charter of Rights and Freedoms*?
2. If so, in respect of s. 11(d) of the *Canadian Charter of Rights and Freedoms*, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?
3. Does s. 178 of the *Courts of Justice Act*, CQLR, c. T-16, as amended by the *Act to amend the Courts of Justice Act and other legislative provisions as regards the status of justices of the peace*, S.Q. 2004, c. 12, violate the principle of judicial independence guaranteed by:
 - a) the *Constitution Act, 1867* or
 - b) section 11(d) of the *Canadian Charter of Rights and Freedoms*?
4. If so, in respect of s. 11(d) of the *Canadian Charter of Rights and Freedoms*, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

5. Does the Décret 932-2008, (2008) 140 G.O. 2, 5681, concerning the pay and other working conditions of presiding justices of the peace, violate the principle of judicial independence guaranteed by:

a) the *Constitution Act, 1867* or

b) section 11(d) of the *Canadian Charter of Rights and Freedoms*?

6. If so, in respect of s. 11(d) of the *Canadian Charter of Rights and Freedoms*, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

We answer the constitutional questions as follows:

Question 1: Sections 27, 30 and 32 of the Act violate the principle of judicial independence.

Question 2: No.

Question 3: No.

Question 4: It is unnecessary to answer this question.

Question 5: No.

Question 6: It is unnecessary to answer this question.

Appeal allowed in part with costs.

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Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Montréal and Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

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