Court File No. 36165

SUPREME COURT OF CANADA
(ON APPEAL FROM THE QUÉBEC COURT OF APPEAL)

B E T W E E N:

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, LÉOPALD GOULET, YANNICK COUTURE, MARIE-CLAUDE BÉLANGER, and PATRICIA COMPAGNONE

Appellants
(Appellants)

- and -

ATTORNEY GENERAL OF QUÉBEC and MINISTER OF JUSTICE OF QUÉBEC

Respondents
(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

Interveners

MEMORANDUM OF ARGUMENT OF THE INTERVENER, THE ATTORNEY GENERAL OF ONTARIO

(Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

ATTORNEY GENERAL OF ONTARIO
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

Sarah T. Kraicer / Josh Hunter
Tel: (416) 326-2518 / (416) 326-3840
Fax: (416) 326-4015
Email: sarah.kraicer@ontario.ca / joshua.hunter@ontario.ca

Counsel for the Intervener,
the Attorney General of Ontario

BURKE-ROBERTSON LLP
441 Maclaren Street
Ottawa, ON K2P 2H3

Robert E. Houston, Q.C.
Tel: (613) 566-2058
Fax: (613) 235-4430
Email: rhouston@burkerobertson.com

Agent for the Intervener,
the Attorney General of Ontario

TO: THE REGISTRAR

AND TO:

LAVERY, DE BILLY
Bureau 4000
1, Place Ville Marie
Montréal, QC H3B 4M4

Raymond Doray, Ad. E. / Loïc Berdnikoff
Tel: (514) 877-2913 / (514) 877-2981
Fax: (514) 871-2981
Email: rdoray@lavery.ca / lberdnikoff@lavery.ca

Counsel for the Appellants

LAVERY, DE BILLY
Bureau 1810
360, rue Albert
Ottawa, ON K1R 7X7

Paul K. Lepsoe
Tel: (613) 233-2679
Fax: (613) 594-8783
Email: plepsoe@lavery.ca

Agent for the Appellants

ATTORNEY GENERAL OF QUÉBEC
300, boul. Jean-Lesage
Québec, QC G1K 8K6

France Bonsaint
Tel.: (418) 649-3524 x 42070
Fax: (418) 646-1656
Email: france.bonsaint@justice.gouv.qc.ca

Counsel for the Respondent,
the Attorney General of Québec

NOËL & ASSOCIÉS
111, rue Champlain
Gatineau, QC J8X 3R1

Pierre Landry
Tel.: (819) 771-7393 x 14
Fax: (819) 771-5397
Email: p.landry@noelassocies.com

Agent for the Respondent,
the Attorney General of Québec

ATTORNEY GENERAL OF QUÉBEC
Bureau 2.32
1200, route de l'Église
Québec, QC G1V 4M1

Brigitte Bussières
Tel.: (418) 643-1477 x 20777
Fax: (418) 644-7030
Email: brigitte.bussieres@justice.gouv.qc.ca

Counsel for the Respondent,
the Minister of Justice of Québec

NOËL & ASSOCIÉS
111, rue Champlain
Gatineau, QC J8X 3R1

Pierre Landry
Tel.: (819) 771-7393 x 14
Fax: (819) 771-5397
Email: p.landry@noelassocies.com

Agent for the Respondent,
the Minister of Justice of Québec

JUSTICE CANADA
Complexe Guy-Favreau
200, boul. René-Levesque Ouest
Pièce 1202-23
Montréal, QC H2Z 1X4

François Joyal / Catherine Lawrence
Tel.: (514) 283-5880
Fax: (514) 496-7876
Email: francois.joyal@justice.gc.ca

Counsel for the Intervener,
the Attorney General of Canada

JUSTICE CANADA
50 O'Connor St.
Suite 500, Room 557
Ottawa, ON K1A 0H8

Christopher M. Rupar
Tel.: (613) 670-6290
Fax: (613) 954-1920
Email: christopher.rupar@justice.gc.ca

Agent for the Intervener,
the Attorney General of Canada

CASAVANT MERCIER AVOCATS, s.e.n.c.
Bureau 2810
500, Place d'Armes
Montréal, QC H2Y 2W2

Joel Mercier
Tel.: (514) 987-9711
Fax: (514) 987-9717
Email: jmercier@casavantmercier.com

Counsel for the Intervener,
Conférence des juges de la Cour du Québec

SUPREME ADVOCACY LLP
100-340 Gilmour St.
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855 x 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Intervener,
Conférence des juges de la Cour du Québec

LENCZNER SLAIGHT ROYCE SMITH GRIFFIN LLP
130 Adelaide Street West, Suite 2600
Toronto, ON M5H 3P5

J. Thomas Curry
Tel.: (416) 865-9500
Fax: (416) 865-9010
Email: tcurry@litigate.com

Counsel for the Intervener,
Association of Justices of the Peace of Ontario

SUPREME ADVOCACY LLP
100-340 Gilmour St.
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Tel.: (613) 695-8855 x 101
Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca

Agent for the Intervener,
Association of Justices of the Peace of Ontario

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PART I – OVERVIEW AND FACTS

A. Overview

1. This appeal concerns the scope of the requirements of the financial security aspect of judicial independence in the context of reforms to the office of Juges de Paix Magistrats ("JPMs") in the province of Québec. Ontario intervenes in this appeal to make submissions on two issues that have significant implications for Ontario and other jurisdictions: (1) whether governments must have prior recourse to a remuneration commission before setting the initial remuneration of a newly created judicial office; and (2) whether judicial officers must receive pension benefits through a separate judicial pension plan, or whether they can participate as members of a public service pension plan.

2. It is Ontario's position that when governments create new judicial offices for *bona fide* court reform objectives, judicial independence does not require that the office's initial remuneration be first reviewed by a commission process. The setting of an initial remuneration does not raise the same concerns of political pressure or economic manipulation as does a change to ongoing remuneration. Provided that the remuneration of the office is subject to subsequent review by a commission within a reasonable period of time, there is no violation of judicial independence. Requiring prior commission review is an unwarranted barrier to the timely implementation of court reform initiatives and the benefits they bring to the public interest.

3. Similarly, the principles of judicial independence do not preclude judicial officers from being members of broader public sector pension plans that also provide pensions to public servants, so long any changes to the pension benefits of judicial officers are submitted to a commission for review before they are implemented. As numerous commissions have

recognized, public sector pension plans can provide judicial officials with pension benefits that are adequate, fair, and appropriate.

B. Facts

4. Ontario accepts the facts as set out by the Attorney General of Québec.

PART II – QUESTIONS IN ISSUE

5. Ontario makes submissions on the following questions in issue:

1. Do the principles of judicial independence guaranteed by the *Constitution Act, 1867* and s. 11(d) of the *Charter of Rights and Freedoms* require that a government have prior recourse to a remuneration commission before setting the initial salary of a newly created judicial office?

2. Do the principles of judicial independence prohibit membership of judicial officers in public sector pension plans, and instead require their pension benefits to be provided through a separate judicial pension plan?

6. Ontario submits that governments may set the initial remuneration of a newly created judicial office without prior recourse to a remuneration commission so long as the remuneration set is reviewed by a commission within a reasonable period of time after the initial appointments are made to the new office.

7. Ontario further submits that judicial officers may be members of broader public sector pension plans in which public servants are also members, so long as any changes to pension benefits applicable to the judicial officers are reviewed by a commission before they are implemented.

PART III – ARGUMENT

A. Governments May Set the Initial Remuneration of Newly Created Judicial Offices

8. When the Legislature creates a new judicial office for *bona fide* public policy reasons, the constitutional guarantee of judicial independence does not require government to have prior recourse to a remuneration commission before it sets the initial remuneration of that office. The financial security of new judicial officials is safeguarded where all aspects of the office's remuneration are subject to commission review within a reasonable period of time (three to five years) after the first incumbents are appointed. The timely implementation of *bona fide* reforms to improve the administration of justice should not be impeded by requiring the government to first obtain a commission's recommendations regarding the new office's remuneration.

9. This Court has long recognized that, subject to the requirements of judicial independence, the provinces have exclusive jurisdiction over the "Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts."[1] That power includes the power to create, reform, and abolish judicial offices and to design independent, effective and objective remuneration commissions "which are suitable to [those offices'] needs and particular circumstances."[2]

10. As provincial needs and circumstances change, provincial Legislatures reform their provinces' court systems in response. To give but a few recent examples, Ontario has merged its

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[1] Except to the degree the Constitution itself determines or grants jurisdiction to the federal government to determine the appointment, tenure, and remuneration of superior, county, and district court judges. *Constitution Act, 1867* (U.K), 30&31 Vict., c. 3, ss. 92(14) and 96-100; *Ell v. Alberta*, 2003 SCC 35 at para. 4, [2003] 1 S.C.R. 857 ("*Ell*"), Recueil de sources des Appelants ("RSA"), Vol. IV, Tab 37; *Trial Lawyers' Assn. of British Columbia v. British Columbia (A.G.)*, 2014 SCC 59 at paras. 18-23, [2014] 3 S.C.R. 31, BOA, Vol. I, Tab 12; *Ontario v. Criminal Lawyers' Assn. of Ontario*, 2013 SCC 43 at paras. 32-33, [2013] 3 S.C.R. 3, BOA, Vol. I, Tab 6; *Re Therrien*, 2001 SCC 35 at para. 71, [2001] 2 S.C.R. 3, BOA, Vol. I, Tab 10

[2] *Reference re Provincial Court Judges*, [1997] 3 S.C.R. 3 at paras. 167 and 185 ("*Provincial Judges' Reference*"), RSA, Vol. V, Tab 44; *Ell*, *supra* at paras. 30-31, RSA, Vol. IV, Tab 37; *Re Therrien*, *supra* at para. 71, BOA, Vol. I, Tab 10

superior, county, and district courts into one province-wide Superior Court of Justice; merged separate provincial criminal, family, and provincial offence courts into one province-wide Ontario Court of Justice; created Family Courts with the powers of both superior and provincial courts; created a province-wide Small Claims Court whose jurisdiction was later significantly expanded; increased the qualifications for appointment as a justice of the peace; and abolished the office of traditional Master and, several years later, created a new office of Case Management Master to support the implementation of case management. Ontario has also created two new judicial remuneration commissions for Case Management Masters and Small Claims Court Deputy Judges upon the determination that those offices required judicial independence and a commission process.[3]

11. These court reforms are intended to improve the independence and qualifications of judicial officers, increase the efficiency and responsiveness of court administration to the needs of the people of Ontario, and promote access to justice by making courts more accessible to litigants.[4] These reforms and the constitutional principle of judicial independence both share the objective of maintaining and enhancing public confidence in the administration of justice.

12. As this Court held in *Ell*, courts should exercise caution in interpreting the scope of the requirements of judicial independence so as not to put undue barriers in the way of such beneficial court reforms that are enacted in the public interest:

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[3] *Unified Family Court Act, 1976*, S.O. 1976, c. 85, ss. 2-3, BOA, Vol. I, Tab 25; *Courts of Justice Act, 1984*, S.O. 1984, c. 11, ss. 25, 66, 68, 74, and 77, BOA, Vol. I, Tab 14; *Courts of Justice Act, 1984*, *supra*, ss. 9, 10, 21, 23, 31, 33, and 101 as am. by *Courts of Justice Amendment Act, 1989*, S.O. 1989, c. 55, ss. 2 and 10, BOA, Vol. I, Tab 15; *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 21.1 and 21.4 as am. by *Courts of Justice Statute Law Amendment Act, 1994*, S.O. 1994, c. 12, s. 8, BOA, Vol. I, Tab 16; *Courts of Justice Act*, *supra*, s. 86.1 as am. by *Courts Improvement Act, 1996*, S.O. 1996, c. 25, ss. 1(18) , BOA, Vol. I, Tab 17; Ontario, Order in Council 1788/2006, BOA, Vol. I, Tab 34; Ontario, Order in Council 359/2012, BOA, Vol. I, Tab 36

[4] *Ell*, *supra* at paras. 6 and 37-41, RSA, Vol. IV, Tab 37; *Valente v. The Queen*, [1985] 2 S.C.R. 673 at 703-04 ("*Valente*"), RSA, Vol. VI, Tab 47; *Re Currie* (1984), 48 O.R. (2d) 609 at paras. 100-13 (C.A.), BOA, Vol. I, Tab 9; *R. v. Zelinski*, 2011 ONCA 593 at para. 2, BOA, Vol. I, Tab 8; *Ontario Deputy Judges Assn. v. Ontario (A.G.)*, 2012 ONCA 437 at paras. 6-9, BOA, Vol. I, Tab 5

> …it must be considered that the conditions of independence are intended to protect the interests of the public. Judicial 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 *Provincial Court Judges Reference*, *supra*, at para. 9. The principle exists for the benefit of the judged, not the judges. If the conditions of independence are not "interpreted in light of the public interests they were intended to serve, there is a danger that their application will wind up hurting rather than enhancing public confidence in the courts": see *Mackin*, *supra*, at para. 116, per Binnie J., in his dissent.
> …
>
> In my view, a removal from office that is reasonably intended to further the interests that underlie the principle of judicial independence is not arbitrary. Those interests, as noted above, are public confidence in the administration of justice, and the maintenance of a strong and independent judiciary that is able to uphold the rule of law and the values of our Constitution. If the removal from office is necessary in the promotion of these interests, then it cannot be considered arbitrary, and would not undermine the perception of independence in the mind of a reasonable and informed person.
>
> In this case, the question is whether the removal of the respondents from office by the Legislature is arbitrary. With respect to the contrary view of the Court of Appeal, the requirement of cause cannot be rigidly applied in this context without consideration of the purpose of judicial independence. If the removal of the respondents from office reflects a good faith and considered decision of the Legislature intended to advance the public interests that judicial independence is meant to protect, then the prevention of this removal will serve only to frustrate these interests.
>
> Tenure cannot be viewed as an absolute. If an absolute, necessary reforms would be almost impossible. Conversely, to accept the need for reform in required circumstances is to acknowledge that individual persons may be affected.[5]

13. This Court's discussion of the reasons why security of tenure should not be allowed to frustrate beneficial court reforms in *Ell* applies equally to the financial security aspect of judicial independence. The purpose of remuneration commissions is to ensure that "courts both be free and appear to be free from political interference through economic manipulation by the other branches of government, and that they not become entangled in the politics of remuneration from

[5] *Ell, supra* at paras. 29, 33, and 35-36, RSA, Vol. IV, Tab 37

the public purse."[6] The interposition of a commission between the judiciary and the political branches of government is necessary to ensure that "the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary."[7]

14. This Court has recognized in both the *Provincial Judges' Reference* and *Prov. Court Judges' Assn. of N.B.* that judicial independence should be interpreted in a manner that recognizes that the Executive and Legislature are ultimately responsible to the public for the allocation of public funds:

> … judicial salaries must ultimately be fixed by one of the political organs of the Constitution, the executive or the legislature, and that the setting of remuneration from the public purse is, as a result, inherently political.
> …
>
> My starting point is that s. 11(*d*) does not require that the reports of the commission be binding, because decisions about the allocations of public resources are generally within the realm of the legislature, and through it, the executive. The expenditure of public funds, as I said above, is an inherently political matter.[8]

Similarly, in reviewing a government's response to a commission's recommendations, a court may not "encroach upon the provincial legislature's exclusive jurisdiction to allocate funds from the public purse and set judicial salaries."[9]

15. Accordingly, this Court has always carefully balanced the need to ensure the judiciary is secure against political interference or economic manipulation with the need to preserve the ultimate responsibility of the Executive and Legislature over remuneration paid from the public purse. For example, the Court has held that governments have broad scope to design appropriate

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[6] *Provincial Judges' Reference*, *supra* at para. 131, RSA, Vol. V, Tab 44
[7] *Provincial Judges' Reference*, *supra* at para. 140, RSA, Vol. V, Tab 44
[8] *Provincial Judges' Reference*, *supra* at paras. 146 and 176, RSA, Vol. V, Tab 44
[9] *Prov. Court Judges' Assn. of New Brunswick v. New Brunswick*, 2005 SCC 44 at para. 42, [2005] 2 S.C.R. 286 ("*Prov. Court Judges' Assn. of N.B.*"), RSA, Vol. IV, Tab 33

commission processes, commission recommendations need not be binding (unless the government chooses to make them so), and judicial review of government responses to commission recommendations are conducted on a deferential "simple rationality" standard.[10]

16. While this Court has found that "any changes to or freezes in judicial remuneration" require prior recourse to a commission, it has never held that a commission is required to set the ***initial*** remuneration of a newly created office. Interpreting judicial independence to require prior recourse to a commission in these circumstances would not reflect a proper balance of the respective responsibilities of commissions and the government.

17. As the Court of Appeal found, the dangers of political interference, economic manipulation, and improper commentary by the judiciary on matters of public policy against which commissions were intended to guard do not arise when what is at issue is the initial remuneration of a newly created judicial office.[11] There are no individual incumbents whose ability to decide cases fearlessly and without favour might be swayed by fear of a salary reduction or hope of some future reward. Nor is there any office yet in existence that institutionally could be subject to improper political manipulation or pressure.

18. All of the judicial remuneration cases which this Court has considered have involved changes to the remuneration of existing judicial offices, rather than the setting of initial judicial compensation. *Beauregard* involved requiring superior court judges to begin contributing to the cost of their pensions.[12] *Généreux* concerned the remuneration of existing members of military

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[10] *Provincial Judges' Reference, supra* at paras. 167, 176-77, 183, and 185, RSA, Vol. V, Tab 44; *Prov. Court Judges' Assn. of N.B., supra* at paras. 20-21, 29-30, and 42-44, RSA, Vol. IV, Tab 33
[11] Court of Appeal Decision at para. 85, Dossier des Appelants ("DA"), Vol. I, p. 159
[12] *R. v. Beauregard*, [1986] 2 S.C.R. 56 at 62-64, RSA, Vol. V, Tab 42

tribunals.[13] The *Provincial Judges' Reference* involved reductions to the salaries and benefits of existing provincial judges.[14] *Prov. Court Judges' Assn. of N.B.* considered government refusals to implement increases for existing judicial offices proposed by remuneration commissions.[15] And *Mackin* held that supernumerary judges were not a separate office from provincial judges and therefore removing the ability to elect to become supernumerary constituted a decrease in the remuneration attached to the existing office of provincial judge.[16]

19. As noted at paragraph 41 of the Attorney General of Québec's factum, the one occasion that this Court has considered judicial independence requirements in the context of setting the initial terms of a judicial office was in the *Provincial Judges' Reference.* The provision at issue in that case permitted the Executive both to designate the initial place of residence of a judge and to change that designation at any time after the initial appointment. The Court held that the constitutional flaw in that provision was that the Executive's power to designate place of residence was not limited to the initial terms and conditions of the judicial appointment. The power to change that designation (but not the power to make the initial designation itself) violated the constitutional principle of judicial independence because it gave rise to a reasonable perception that it could be used to reward or punish sitting judges for their decisions.

20. This conclusion applies equally well to the reasonable perception arising from the Executive setting the initial salary of a new judicial office, as compared to subsequent changes or freezes to that salary.[17] A reasonable person fully informed of all the circumstances would not see the Executive setting a new office's initial remuneration without prior recourse to a

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[13] *R. v. Généreux*, [1992] 1 S.C.R. 259 at 298-300 and 305-07, BOA, Vol. I, Tab 7
[14] *Provincial Judges' Reference*, *supra* at paras. 198-200, 217-18, and 224-26, RSA, Vol. V, Tab 44
[15] *Prov. Court Judges' Assn. of N.B.*, *supra* at paras. 50-52, 89-91, 108-09, and 142-50, RSA, Vol. IV, Tab 33
[16] *Mackin v. New Brunswick*, 2002 SCC 13 at paras. 47-49 and 63-70, [2002] 1 S.C.R. 405, RSA, Vol. IV, Tab 40
[17] Attorney General of Québec's Factum, paras. 39-42; *Provincial Judges' Reference*, *supra* at paras. 133 and 166, RSA, Vol. V, Tab 44

commission as undermining the office's independent status.[18] As outlined further below, the Executive setting a new office's initial remuneration is a practical solution to the need to determine the initial remuneration before candidates are appointed. Doing so does not give rise to concerns of financial manipulation because the level of remuneration and any changes to it can subsequently be reviewed by a commission once the new office is up and running.

21. The fact that prior recourse to a commission is not required to set the initial remuneration of a newly created judicial office does not mean that there are no protections to ensure the government does not use the creation of a new office to undermine judicial independence.

22. First, the doctrine of colourability allows courts to scrutinize whether the creation of a new office is a *bona fide* public policy measure or a disguised attempt to pressure the judiciary through financial manipulation. As this Court held in *Beauregard*, if a new office were found to have been created for "an improper or colourable purpose, … then serious issues relating to judicial independence would arise and the law might well be held to be *ultra vires*."[19]

23. Second, the constitutional requirement that judicial remuneration not fall below a basic minimum level ensures that the government's ability to set the initial remuneration of a newly created judicial office will not result in an initial level of remuneration that is so low as to tempt judges to "adjudicate cases in a particular way in order to secure a higher salary from the executive or the legislature or to receive benefits from one of the litigants."[20]

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[18] Court of Appeal Decision at paras. 86-87, DA, Vol. I, p. 159; *Valente, supra* at 687-91, RSA, Vol. VI, Tab 47; *Provincial Judges' Reference, supra* at para. 113, RSA, Vol. V, Tab 44; *Mackin, supra* at para. 38, RSA, Vol. IV, Tab 40; *Ell, supra* at paras. 32-33, 37, and 52, RSA, Vol. IV, Tab 37

[19] *Beauregard, supra* at 77, RSA, Vol. V, Tab 42; *Provincial Judges' Reference, supra* at paras. 145 and 152, RSA, Vol. V, Tab 44; *Ell, supra* at para. 38, RSA, Vol. IV, Tab 37

[20] *Provincial Judges' Reference, supra* at paras. 192-96, RSA, Vol. V, Tab 44; *Prov. Court Judges' Assn. of N.B., supra* at paras. 14-15, RSA, Vol. IV, Tab 33; Court of Appeal Decision at paras. 88-93, DA, Vol. I, pp. 149 and 159

24. Third, the government's determination of the initial remuneration of a newly created judicial office must be subject to review within a reasonable period of time by an independent, effective and objective remuneration commission process. As this Court has held, judicial remuneration must be subject to review by a commission every "three to five years" in order to "guard against the possibility that government inaction might lead to a reduction in judges' real salaries because of inflation."[21] Accordingly, the salary set by the government for the new judicial office must be reviewed by a commission within a reasonable period of time.

25. In conducting that initial review, the commission's recommendations are not fettered by the government's initial determination of the appropriate level of remuneration. As this Court has held, where a particular aspect of judicial remuneration has not previously been considered in detail by a commission, a commission considering it for the first time has greater scope to assess whether the existing level of remuneration is appropriate.[22] This subsequent commission review ensures that the remuneration of the newly created judicial office remains appropriate on an ongoing basis. If changes are necessary, the commission can recommend them.

26. It is for the government to determine the specifics of commission structures and processes, including the commencement date for the first commission review of a newly created position, provided that the commission remains independent, objective and effective.[23] Governments may, but are not required to, authorize a first commission to consider the remuneration of a newly created office from an earlier date, such as when the first incumbents

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[21] *Provincial Judges' Reference*, *supra* at para. 174, RSA, Vol. V, Tab 44
[22] *Prov. Court Judges' Assn. of N.B.*, *supra* at paras. 15, 82, 129, and 160-62, RSA, Vol. IV, Tab 33
[23] *Provincial Judges' Reference*, *supra* at paras. 167-85, RSA, Vol. V, Tab 44; *Mackin*, *supra* at para. 77, RSA, Vol. IV, Tab 40; *Ontario Deputy Judges Assn. v. Ontario* (2005), 78 O.R. (3d) 504 at para. 59 (S.C.J.), aff'd (2006), 80 O.R. (3d) 481 at paras. 38-39 (C.A.) ("*Deputy Judges Assn.*"), BOA, Vol. I, Tab 3 and Receuil de sources des intimés ("RSI"), Tab 15; *Masters' Assn. of Ontario v. Ontario*, 2010 ONSC 3714 at paras. 133-37, aff'd 2011 ONCA 243, 105 O.R. (3d) 196 at para. 70 ("*Masters' Assn.*"), RSI, Tabs 10 and 11; *Nova Scotia Presiding Justices of the Peace Assn. v. Nova Scotia (A.G.)*, 2013 NSSC 40 at paras. 118-19, 326 N.S.R. (2d) 312, RSI, Tab 13

were appointed, or, if it is disputed whether the office is subject to judicial independence, when the courts decide that the office requires judicial independence and a remuneration commission.

27. That is the course Ontario adopted for its Deputy Judges and Case Management Masters when both existing offices were found to require judicial independence. Ontario's Deputy Judges were first found to require judicial independence and a remuneration commission on November 16, 2005. The First Deputy Judges Remuneration Commission was established commencing January 1, 2007. The government chose, however, to extend its mandate back to January 1, 2005. As a result, the commission reviewed the Deputy Judges' remuneration from the beginning of the calendar year in which they were found to be entitled to a commission process.[24]

28. Similarly, Ontario's Case Management Masters were found by the Court of Appeal to require judicial independence and a remuneration commission on March 30, 2011. The First Case Management Masters Remuneration Commission was established commencing July 1, 2012. The government chose, however, to extend its mandate back to April 1, 2011, the start of the fiscal year after the Court of Appeal found they required judicial independence.[25]

29. Requiring prior recourse to a remuneration commission process before setting the initial salary of a new judicial office would also create significant practical barriers and delays. Establishing a remuneration commission takes time. In establishing a commission for a new judicial office, "there are many issues, and many options on those issues, that the government

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[24] *Deputy Judges Assn., supra*, BOA, Vol. I, Tab 3 and RSI, Tab 15; Ontario, Order-in-Council 1788/2006, ss. 3(4) and 5(2), BOA, Vol. I, Tab 34. The government accepted the First Deputy Judges Remuneration Commission's recommendations for 2005 but rejected its recommendations for the years 2006 to 2009. The government's response was upheld on judicial review. *Ontario Deputy Judges Assn. v. Ontario* (2009), 98 O.R. (3d) 89 (Div. Ct.), BOA, Vol. I, Tab 4

[25] *Masters' Assn. supra*, RSI, Tabs 10 and 11; Ontario, Order-in-Council 359/2012, ss. 4(4) and 6(1)(a), BOA, Vol. I, Tab 36. The First Case Management Masters' Remuneration Commission has just released its report and the government is currently considering its response. Ontario, First Case Management Masters Remuneration Commission Report, Ontario BOA, Vol. II, Tab 44

will have to consider before establishing an independent, effective, and objective special process for setting the remuneration" of that new office.[26] Issues to be considered include whether the new office's remuneration should be considered by an existing or a new commission, the size and membership of the commission, its structure, powers, and procedures, the length of its mandate, whether its mandate is prospective only or retrospective for some period of time, and what objective criteria the commission is mandated to consider.[27] To allow time for this process to take place, courts which have ordered the establishment of a remuneration commission for the first time have suspended the declaration of invalidity for ten to twenty months to give the government and, if statutory amendments are needed, the Legislature, sufficient time to act.[28] If governments were constitutionally required to establish and implement a full commission process prior to setting the initial remuneration for a new office, Ontario's recent experience suggests that this could add up to one or two years' delay before the office becomes functional.

30. There is no principled reason to find that judicial independence requires prior recourse to a commission before the government can set the initial remuneration of a new judicial office to avoid the risk of political manipulation. Such a requirement would also impose significant practical barriers to effective court reform. Effective safeguards exist to ensure that government cannot misuse this power to jeopardize judicial independence. In these circumstances, a reasonable person who is fully informed of all the circumstances would not consider the

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[26] *Masters' Assn., supra* at para. 70 (C.A.), RSI, Tab 10

[27] *Provincial Judges' Reference, supra* at paras. 167-85, RSA, Vol. V, Tab 44; *Mackin, supra* at para. 77, RSA, Vol. IV, Tab 40; *Deputy Judges Assn., supra* at para. 59 (S.C.J.) and paras. 38-39 (C.A.), BOA, Vol. I, Tab 3 and RSI, Tab 15; *Masters' Assn., supra* at paras. 133-37 (S.C.J.) and para. 70 (C.A.), RSI, Tabs 10 and 11; *Nova Scotia Presiding Justices of the Peace Assn., supra* at paras. 118-19, RSI, Tab 13

[28] *Provincial Judges' Reference, supra* at para. 292, RSA, Vol. V, Tab 44; *Reference re Provincial Court Judges*, [1998] 1 S.C.R. 3 at paras. 15-21, RSA, Vol. V, Tab 45; *Reference re Provincial Court Judges*, [1998] 2 S.C.R. 443 at paras. 1-3, BOA, Vol. I, Tab 11; *Mackin, supra* at para. 77, RSA, Vol. IV, Tab 40; *Deputy Judges Assn., supra* at para. 59 (S.C.J.) and paras. 41-42 (C.A.), BOA, Vol. I, Tab 3 and RSI, Tab 15; *Masters' Assn., supra* at para.141 (S.C.J.) and paras. 69-70 (C.A.), RSI, Tabs 10 and 11; *Nova Scotia Presiding Justices of the Peace Assn., supra* at para. 117, RSI, Tab 13

Executive setting the initial remuneration of the office without prior recourse to a commission to undermine the independent status of the newly created office.[29]

B. Judicial Officers May Participate in the Same Pension Plans as Public Servants

31. Ontario submits that judicial officers may also participate in the same pension plans as public servants so long as proposed changes to the pension benefits provided to judicial officers through such plans are subject to review by a commission before those changes are implemented in order to ensure their financial security. The fact of participation of judicial officials in public sector pension plans in itself does not, as a matter of principle or practice, give rise to judicial pensions that violate a minimum constitutional standard.

32. This Court has already held in *Valente* that membership of judges in the same pension plan as public servants does not itself infringe judicial independence.[30] The Constitution does not require judges to manage, control, or administer their own pension plans.[31] A reasonable and well-informed member of the public would not think that membership in a pension plan which is also available to public servants makes judges appear to be employees of the Executive.[32]

33. Membership in a public sector pension plan often includes many persons paid from the public purse who are not employees of the Executive. Participation in a broader public sector pension plan allows for greater economies of scale, broader sharing of investment risk, and lower

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[29] Court of Appeal Decision at paras. 86-87, DA, Vol. I, p. 159; *Valente, supra* at 687-91, RSA, Vol. VI, Tab 47; *Provincial Judges' Reference, supra* at para. 113, RSA, Vol. V, Tab 44; *Mackin, supra* at para. 38, RSA, Vol. IV, Tab 40; *Ell, supra* at paras. 32-33, 37, and 52, RSA, Vol. IV, Tab 37

[30] *Valente, supra* at 711-12, RSA, Vol. VI, Tab 47

[31] Appellant's Factum, para. 115

[32] *Valente, supra* at paras. 711-12, RSA, Vol. VI, Tab 47; *Provincial Judges' Reference, supra* at paras. 251-53, RSA, Vol. V, Tab 44

costs.[33] In Ontario, the Public Sector Pension Plan (the "PSPP") provides pensions to a wide variety of persons paid from the public purse who are engaged in some form of service to the public. Members of the PSPP include not only persons employed by the Ontario Public Service, but also Case Management Masters of the Superior Court of Justice, Justices of the Peace of the Ontario Court of Justice, full-time members of adjudicative tribunals, and independent officers of the Legislature such as the Auditor General and Deputy Auditor General, the Information and Privacy Commissioner, the Provincial Advocate for Children and Youth, the Ombudsman, the Environmental Commissioner, the French Language Services Commissioner, the Financial Accountability Officer, and the Chief Electoral Officer and Deputy Chief Electoral Officer.[34]

34. Several other provinces also include judicial officers in their public sector pension plans. In British Columbia and Manitoba, both provincial judges and Justices of the Peace are members of the provincial public sector pension plan.[35] Justices of the Peace are members of a public sector plan in Saskatchewan while provincial judges are in Nova Scotia.[36] In light of these examples of public sector pension plans being made available to judicial officers, a reasonable

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[33] Ontario, Third Justices of the Peace Remuneration Commission Report at 30-31, BOA, Vol. II, Tab 38; Ontario, Fifth Justices of the Peace Remuneration Commission Report at paras. 67 and 82, BOA, Vol. II, Tab 40; Québec, 2010 Rapport du Comité de la Rémunération des Juges du Québec ("D'Amours CRJ No. 1") at IV-21, DA, Vol. VII, pp. 117

[34] *Auditor General Act*, R.S.O. 1990, c. A.35, ss. 3, 6, and 22(2)-(5), BOA, Vol. I, Tab 13; *Election Act*, R.S.O. 1990, c. E.6, ss. 4(1) and 116(3), BOA, Vol. I, Tab 18; *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, ss. 49(1)-(2) and 51, BOA, Vol. I, Tab 19; *Financial Accountability Officer Act, 2013*, S.O. 2013, c. 4, ss. 2(1)-(2) and 3(2), BOA, Vol. I, Tab 20; *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, ss. 4(1)-(2), 5(2), and 6(4), BOA, Vol. I, Tab 21; *French Language Services Act*, R.S.O. 1990, c. F.32, ss. 12.1(1) and (3), 12.1.1(2), and 12.1.2(4), BOA, Vol. I, Tab 22; *Ombudsman Act*, R.S.O. 1990, c. O.6, ss. 2-3, 5(2), and 6(4), BOA, Vol. I, Tab 23; *Provincial Advocate for Children and Youth Act, 2007*, S.O. 2007, c. 9, ss. 3(1), 5, 7, and 9(3), BOA, Vol. I, Tab 24; Ontario, Order in Council 611/97, BOA, Vol. I, Tab 31; Ontario, Order in Council 553/2002, BOA, Vol. I, Tab 32; Ontario, Order in Council 457/2003, BOA, Vol. I, Tab 33

[35] *Judicial Compensation Act*, S.B.C. 2003, c. 59, ss. 15-28, BOA, Vol. I, Tab 26; British Columbia, 2013 Judges Compensation Commission Report at 48-51, BOA, Vol. III, Tab 47; *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, 2001 MBQB 191 at para. 11, 158 Man.R. (2d) 6, BOA, Vol. I, Tab 2; *Provincial Court Act*, C.C.S.M., c. C275, ss. 48(3) and 52, BOA, Vol. I, Tab 29

[36] *Justices of the Peace Act, 1988*, S.S. 1988-89, c. J-5.1, ss. 3(2), 10.1, 10.2(6), and 10.8(4), BOA, Vol. I, Tab 27; *Justices of the Peace Regulations, 1989*, R.R.S., c. J-5.1, Reg. 1, s. 14.71(2), BOA, Vol. I, Tab 28; *Provincial Court Act*, R.S.N.S. 1989, c. 238, ss. 22-28, BOA, Vol. I, Tab 30

and well-informed member of the public would not think membership in a public sector pension plan means that judicial officers are being treated as government employees.

35. Nor does membership in a public sector pension plan mean that the Executive can arbitrarily change judicial pensions by simply amending the plan. Whether judicial pensions are provided through a separate judicial plan or membership in a broader public sector plan, judicial independence requires that all changes to the plan must be reviewed by a commission before they can be applied to judicial officers.[37] This commission review of potential pension plan modifications before they can be applied to judicial officers is a unique constitutional requirement for judicial members of public sector pension plans that ensures their financial security. No change to the public sector pension plan that affects judicial pension benefits can be applied to judges without prior recourse to a commission, thereby safeguarding judicial pensions against arbitrary action or economic manipulation by the government.

36. Prior commission review of public sector pension changes before they can be applied to judicial officers has taken place in Ontario on a number of occasions. The Second Justices of the Peace Remuneration Commission recommended that additional benefits and reduced contribution rates awarded to civil servants be extended to Justices of the Peace.[38] The Third Justices of the Peace Remuneration Commission recommended that another temporary contribution reduction be extended to Justices of the Peace.[39] The Fifth Justices of the Peace Remuneration Commission issued a supplementary report accepting a joint submission to increase contribution rates for Justices of the Peace that were initially applied to public servants

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[37] *Provincial Judges' Reference, supra* at para. 136, RSA, Vol. V, Tab 44; *Assn. of Justices of the Peace of Ontario v. Ontario*, 2014 ONSC 4231 at para. 3, BOA, Vol. I, Tab 1
[38] Ontario, Second Justices of the Peace Remuneration Commission Report at 12-13, BOA, Vol. II, Tab 37
[39] Ontario, Third Justices of the Peace Remuneration Commission Report at 33-34, BOA, Vol. II, Tab 38

but not to Justices of the Peace.[40] Most recently, the government changed post-retirement insured benefits for public servant members of the PSPP but did not change those benefits for Justices of the Peace receiving a pension from the PSPP until, in accordance with the process this Court has established for setting judicial remuneration, the Sixth Justices of the Peace Remuneration Commission reviewed the proposed changes and the government issued a response setting out the reasons for applying these changes to Justices of the Peace.[41]

37. Membership in a broader public sector pension does not preclude adapting the plan to take into account the characteristics of specific judicial officers where warranted. Modifications can be made to the plan as has been done for provincial judges in British Columbia, or additional pension benefits can be provided over and above the benefits provided by the public sector pension plan as is the case for provincial judges in Manitoba and Nova Scotia.[42]

38. Ontario has taken the latter route for its Justices of the Peace. Justices of the Peace in Ontario are members of the PSPP but are also members of a Supplemental Plan which provides additional benefits above and beyond the pension benefits provided by the PSPP to Justices of the Peace who retire after age 65.[43]

39. No judicial remuneration commission or court has found that membership in a broader public sector pension plan necessarily results in judicial officers receiving a pension that falls below the basic minimum level required by the Constitution. The purpose of the constitutional

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[40] Ontario, Fifth Justices of the Peace Remuneration Commission Supplementary Report at para. 5, BOA, Vol. II, Tab 41

[41] Ontario, Sixth Justices of the Peace Remuneration Commission Report at paras. 1-4, BOA, Vol. II, Tab 42; Ontario, Response to the Sixth Justices of the Peace Remuneration Commission Report, Sch. A to Order in Council 1637/2015 at 11-13, BOA, Vol. II, Tab 43

[42] *Judicial Compensation Act* (B.C.), *supra*, ss. 16-28, BOA, Vol. I, Tab 26; *Provincial Court Act* (N.S.), *supra*, ss. 22-28, BOA, Vol. I, Tab 30; *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, *supra* at para. 11, BOA, Vol. I, Tab 2

[43] Ontario, Order in Council 1902/2009, BOA, Vol. I, Tab 35

minimum level of remuneration is to ensure judicial salaries do not fall below the point where judges are tempted to "adjudicate cases in a particular way in order to secure a higher salary from the executive or the legislature or to receive benefits from one of the litigants."[44] There is no basis to find that a particular judicial office's pension arrangements do so simply because that office's pension is provided through a public sector pension plan.[45]

40. To the contrary, on repeated occasions, commissions have found that public sector pension plans can provide judicial officers with fair and appropriate remuneration. In Ontario, for example, the Justices of the Peace Remuneration Commission has considered and approved the appropriateness of including Ontario Justices of the Peace in the PSPP on several occasions.[46] The Association of Justices of the Peace of Ontario asked the Second Justices of the Peace Remuneration Commission to recommend the creation of a separate pension plan for Justices of the Peace but it refused to do so. It instead asked the government to submit an estimate of the costs of establishing a separate pension to the Third Justices of the Peace Remuneration Commission.[47]

41. When that estimate was submitted to the Third Commission, the Commission found that creating a separate pension plan providing the same benefits as the PSPP would have resulted in approximately a 6.6% increase in contribution rates. Creating a separate pension plan with

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[44] *Provincial Judges' Reference, supra* at paras. 192-96, RSA, Vol. V, Tab 44
[45] Court of Appeal Decision at paras. 113-115, DA, Vol. I, pp. 153-54
[46] The First Case Management Masters' Remuneration Commission has recently recommended that Case Management Masters be included in the same pension plan as provincial judges. The government has not yet responded to the Commission's recommendations. Ontario, First Case Management Masters Remuneration Commission Report, BOA, Vol. II, Tab 44
[47] Ontario, Second Justices of the Peace Remuneration Commission Report at 11-12, BOA, Vol. II, Tab 37

pension benefits similar to those provided to federally-appointed judges would have resulted in a 44.2% to 71.1% increase in contribution rates, depending on the exact model chosen.[48]

42. The Third Commission then went on to reject the argument that judicial independence prohibited including Justices of the Peace in a public sector pension plan. It held that there was no bar to the "inclusion of members of the judiciary in a public service pension plan provided, however, that any proposed changes in the terms and conditions of the plan is referred, as a matter of course, to a properly constituted judicial remuneration commission."[49]

43. The Fourth Justices of the Peace Remuneration Commission chose not to consider any pension issues.[50] Before the Fifth Justices of the Peace Remuneration Commission, Ontario and the Justices of the Peace made a joint submission which included a request to create the Supplemental Plan discussed above. The Fifth Commission accepted the joint submissions and recommended the creation of the Supplemental Plan. The Commission found the Supplemental Plan to be "a flexible vehicle which can augment the PSPP in response to the specific needs of Justices of the Peace." In particular, the Commission held that the Supplemental Plan "significantly enhances the actual pension benefit for Justices who work beyond age 65 in circumstances where most Justices currently do work beyond age 65."[51]

44. The Justices of the Peace challenged the constitutionality of their continued inclusion in the PSPP before the Sixth Justices of the Peace Remuneration Commission. At the same time, they brought a constitutional challenge in the Superior Court. The Court adjourned their

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[48] Ontario, Third Justices of the Peace Remuneration Commission Report at 30-31, BOA, Vol. II, Tab 38
[49] Ontario, Third Justices of the Peace Remuneration Commission Report at 29-33, BOA, Vol. II, Tab 38
[50] Ontario, Fourth Justices of the Peace Remuneration Commission Report at 9, BOA, Vol. II, Tab 39
[51] Ontario, Fifth Justices of the Peace Remuneration Commission Report at paras. 2, 65-83, and 105 and Appendix C, BOA, Vol. I, Tab 40

application pending the result of the Sixth Commission.[52] The Commission declined to opine on the constitutionality of Justices of the Peace being part of the Sixth Commission.[53] To date, the Justices of the Peace have not sought to continue their Superior Court constitutional challenge.

45. Remuneration commissions in other provinces and federally have also declined to find that Justices of the Peace and Prothonotaries must be provided with the same pension benefits as judges to receive an adequate pension. The 2004 British Columbia Judicial Justices Compensation Committee considered and rejected a request by British Columbia's Judicial Justices to obtain the same pension benefits as provincial judges.[54] In 2013, the Saskatchewan Justice of the Peace Compensation Commission rejected using the provincial judges' pension plan as a comparator when determining the rate at which the government should contribute to the public sector plan of which Justices of the Peace are members.[55] And as discussed in detail at paragraphs 94 to 96 of the Attorney General of Québec's factum, the Johnson, D'Amours, and Clair JRCs all found that membership in the RRPE provided JPMs with an adequate pension.[56]

46. Federally, both Special Advisor Adams and Special Advisor Cunningham recommended significant increases to the accrual rates of Prothonotaries' pensions.[57] Neither, however, found that a constitutional minimum level of pension required that they receive their pension as part of a judicial pension plan rather than a public service pension plan. Nor did either recommend

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[52] *Assn. of Justices of the Peace of Ontario v. Ontario*, *supra* at paras. 4-11, BOA, Vol. I, Tab 1
[53] Ontario, Sixth Justices of the Peace Remuneration Commission Report at paras. 71-73, BOA, Vol. II, Tab 42
[54] British Columbia, 2004 Judicial Justices Compensation Committee Report at 11 and 29, BOA, Vol. III, Tab 46
[55] Saskatchewan, 2013 Justices of the Peace Compensation Commission Report at paras. 331-39, BOA, Vol. III, Tab 48
[56] Québec, 2008 Rapport du Comité de la Rémunération des Juges du Québec ("Johnson CRJ") at IV-20 – IV-21, DA, Vol. V, pp. 23-24; D'Amours CRJ No. 1, *supra* at IV-20 – IV-21, DA, Vol. VII, pp. 116-17; Québec, 2012 Rapport du Comité de la Rémunération des Juges du Québec ("D'Amours CRJ No. 2") at II-28, DA, Vol. IX, p. 40; Québec, 2013 Rapport du Comité de la Rémunération des Juges du Québec ("Clair CRJ") at 128-29, DA, Vol. IX, p. 97-98
[57] Canada, 2008 Report of the Honourable George W. Adams, Q.C. at 62, Ontario's BOA, Vol. III, Tab 45; Canada, 2013 Report of the Honourable J. Douglas Cunningham, Q.C. at 29-30, DA, Vol. IX, pp. 186-87

calculating Prothonotaries' pensions in the same way as Federal Court judges – doing so was a choice of the federal government, which considered the "high administrative costs of providing the recommended benefits under the Public Service Superannuation Act."[58] The federal government's response also continued to offer Prothonotaries the option of remaining in the public service pension plan.

47. Independent, objective, and effective commissions in Québec, Ontario, and federally have found that public service pension plans can, when appropriately designed, provide judicial officers with pensions that not only meet the minimum constitutional standards, but which are adequate, fair and appropriate.

PART IV – SUBMISSIONS ON COSTS

48. As an intervener, Ontario submits that costs should not be awarded to or against it.

PART V – ORAL ARGUMENT

49. Pursuant to Rule 71(5)(c), Ontario is content to limit its oral argument to 10 minutes and does not request the Court to order otherwise.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4TH DAY OF JANUARY, 2016.

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Sarah T. Kraicer

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Josh Hunter

Counsel for the Intervener,
the Attorney General of Ontario

[58] Canada, 2014 Response of the Minister of Justice to the Report of the Special Advisor on Federal Court Prothonotaries' Compensation at 2, DA, Vol. IX, p. 206

PART VI – TABLE OF AUTHORITIES

LEGISLATION

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Ontario, First Case Management Masters Remuneration Commission Report	28, 40
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Canada, 2014 Response of the Minister of Justice to the Report of the Special Advisor on Federal Court Prothonotaries' Compensation	46
British Columbia, 2004 Judicial Justices Compensation Committee Report	45
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PART VII – STATUTES AND REGULATIONS

1. *Constitution Act, 1867* (U.K.), 30&31 Vict., c. 3, Preamble and ss. 92(14) and 96-100

2. *Canadian Charter of Rights and Freedoms*, s. 11(d), Part I of the *Constitution Act, 1982*, being Sch. B to the *Canada Act, 1982* (U.K.), 1982, c. 11

CONSTITUTION ACT, 1867

30 & 31 Victoria, c. 3 (U.K.)

An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith

(*29th March 1867*)

WHEREAS the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America: [(1)]

I. PRELIMINARY

Short title

1. This Act may be cited as the *Constitution Act, 1867*. [(2)]

2. Repealed. [(3)]

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(1) The enacting clause was repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). It read as follows:

Be it therefore enacted and declared by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

(2) As amended by the *Constitution Act, 1982*, which came into force on April 17, 1982. The section originally read as follows:

1. This Act may be cited as *The British North America Act, 1867*.

(3) Section 2, repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.), read as follows:

2. The Provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

28. The Establishment, Maintenance, and Management of Penitentiaries.

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces. [47]

EXCLUSIVE POWERS OF PROVINCIAL LEGISLATURES

Subjects of exclusive Provincial Legislation

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed. [48]
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

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[47] Legislative authority has been conferred on Parliament by other Acts. For further details, see endnote 3.

[48] Class 1 was repealed by the *Constitution Act, 1982*. As enacted, it read as follows:

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.

Section 45 of the *Constitution Act, 1982* now authorizes legislatures to make laws amending the constitution of the province. Sections 38, 41, 42 and 43 of that Act authorize legislative assemblies to give their approval by resolution to certain other amendments to the Constitution of Canada.

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

10. Local Works and Undertakings other than such as are of the following Classes:

    (*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

    (*b*) Lines of Steam Ships between the Province and any British or Foreign Country:

    (*c*) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.

NON-RENEWABLE NATURAL RESOURCES, FORESTRY RESOURCES AND ELECTRICAL ENERGY

Laws respecting non-renewable natural resources, forestry resources and electrical energy

92A. (1) In each province, the legislature may exclusively make laws in relation to

(*a*) exploration for non-renewable natural resources in the province;

VII. JUDICATURE

Appointment of Judges

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Selection of Judges in Ontario, etc.

97. Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

Selection of Judges in Quebec

98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

Tenure of office of Judges

99. (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.

Termination at age 75

(2) A judge of a superior court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age. **(53)**

Salaries, etc., of Judges

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada. **(54)**

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(53) Amended by the *Constitution Act, 1960*, 9 Eliz. II, c. 2 (U.K.), which came into force on March 1, 1961. The original section read as follows:

99. The Judges of the Superior Courts shall hold Office during good Behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

(54) Now provided for in the *Judges Act*, R.S.C. 1985, c. J-1.

LOI CONSTITUTIONNELLE DE 1867

30 & 31 Victoria, ch. 3 (R.-U.)

Loi concernant l'Union et le gouvernement du Canada, de la Nouvelle-Écosse et du Nouveau-Brunswick, ainsi que les objets qui s'y rattachent

(*29 mars 1867*)

Considérant que les provinces du Canada, de la Nouvelle-Écosse et du Nouveau-Brunswick ont exprimé le désir de contracter une Union Fédérale pour ne former qu'une seule et même Puissance (*Dominion*) sous la couronne du Royaume-Uni de la Grande-Bretagne et d'Irlande, avec une constitution reposant sur les mêmes principes que celle du Royaume-Uni :

Considérant de plus qu'une telle union aurait l'effet de développer la prospérité des provinces et de favoriser les intérêts de l'Empire Britannique :

Considérant de plus qu'il est opportun, concurremment avec l'établissement de l'union par autorité du parlement, non seulement de décréter la constitution du pouvoir législatif de la Puissance, mais aussi de définir la nature de son gouvernement exécutif :

Considérant de plus qu'il est nécessaire de pourvoir à l'admission éventuelle d'autres parties de l'Amérique du Nord britannique dans l'union : [(1)]

I. PRÉLIMINAIRES

Titre abrégé

1. Titre abrégé : *Loi constitutionnelle de 1867*. [(2)]

2. Abrogé. [(3)]

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(1) La *Loi de 1893 sur la revision du droit statutaire*, 56-57 Victoria, ch. 14 (R.-U.), a abrogé l'alinéa suivant, qui renfermait la formule d'édiction :

À ces causes, Sa Très Excellente Majesté la Reine, de l'avis et du consentement des Lords Spirituels et Temporels et des Communes, en ce présent parlement assemblés, et par leur autorité, décrète et déclare ce qui suit :

(2) Tel qu'édicté par la *Loi constitutionnelle de 1982*, entrée en vigueur le 17 avril 1982. Texte de l'article original :

1. Le présent acte pourra être cité sous le titre : « *L'acte de l'Amérique du Nord britannique, 1867* ».

(3) Texte de l'article 2, abrogé par la *Loi de 1893 sur la revision du droit statutaire*, 56-57 Victoria, ch. 14 (R.-U.) :

2. Les dispositions du présent acte relatives à Sa Majesté la Reine s'appliquent également aux héritiers et successeurs de Sa Majesté, Rois et Reines du Royaume-Uni de la Grande-Bretagne et d'Irlande.

17. Les poids et mesures.
18. Les lettres de change et les billets promissoires.
19. L'intérêt de l'argent.
20. Les offres légales.
21. La banqueroute et la faillite.
22. Les brevets d'invention et de découverte.
23. Les droits d'auteur.
24. Les Indiens et les terres réservées pour les Indiens.
25. La naturalisation et les aubains.
26. Le mariage et le divorce.
27. La loi criminelle, sauf la constitution des tribunaux de juridiction criminelle, mais y compris la procédure en matière criminelle.
28. L'établissement, le maintien, et l'administration des pénitenciers.
29. Les catégories de sujets expressément exceptés dans l'énumération des catégories de sujets exclusivement assignés par la présente loi aux législatures des provinces.

Et aucune des matières énoncées dans les catégories de sujets énumérés dans le présent article ne sera réputée tomber dans la catégorie des matières d'une nature locale ou privée comprises dans l'énumération des catégories de sujets exclusivement assignés par la présente loi aux législatures des provinces. [(47)]

POUVOIRS EXCLUSIFS DES LÉGISLATURES PROVINCIALES

Sujets soumis au contrôle exclusif de la législation provinciale

92. Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, savoir :

[(47)] D'autres lois ont conféré une autorité législative au Parlement. Voir la note en fin d'ouvrage 3 pour les détails.

11. L'incorporation des compagnies pour des objets provinciaux;

12. La célébration du mariage dans la province;

13. La propriété et les droits civils dans la province;

14. L'administration de la justice dans la province, y compris la création, le maintien et l'organisation de tribunaux de justice pour la province, ayant juridiction civile et criminelle, y compris la procédure en matières civiles dans ces tribunaux;

15. L'infliction de punitions par voie d'amende, pénalité, ou emprisonnement, dans le but de faire exécuter toute loi de la province décrétée au sujet des matières tombant dans aucune des catégories de sujets énumérés dans le présent article;

16. Généralement toutes les matières d'une nature purement locale ou privée dans la province.

RESSOURCES NATURELLES NON RENOUVELABLES, RESSOURCES FORESTIÈRES ET ÉNERGIE ÉLECTRIQUE

Compétence provinciale

92A. (1) La législature de chaque province a compétence exclusive pour légiférer dans les domaines suivants :

a) prospection des ressources naturelles non renouvelables de la province;

b) exploitation, conservation et gestion des ressources naturelles non renouvelables et des ressources forestières de la province, y compris leur rythme de production primaire;

c) aménagement, conservation et gestion des emplacements et des installations de la province destinés à la production d'énergie électrique.

Exportation hors des provinces

(2) La législature de chaque province a compétence pour légiférer en ce qui concerne l'exportation, hors de la province, à destination d'une autre partie du Canada, de la production primaire tirée des ressources naturelles non renouvelables et des ressources forestières de la province, ainsi que de la production d'énergie électrique de la province, sous réserve de ne pas adopter de lois autorisant ou prévoyant des disparités de prix ou des disparités dans les exportations destinées à une autre partie du Canada.

Pouvoir du Parlement

(3) Le paragraphe (2) ne porte pas atteinte au pouvoir du Parlement de légiférer dans les domaines visés à ce paragraphe, les dispositions d'une loi du Parlement

Pensions de vieillesse

Législation concernant les pensions de vieillesse et les prestations additionnelles

94A. Le Parlement du Canada peut légiférer sur les pensions de vieillesse et prestations additionnelles, y compris des prestations aux survivants et aux invalides sans égard à leur âge, mais aucune loi ainsi édictée ne doit porter atteinte à l'application de quelque loi présente ou future d'une législature provinciale en ces matières. [(52)]

Agriculture et Immigration

Pouvoir concurrent de décréter des lois au sujet de l'agriculture, etc.

95. Dans chaque province, la législature pourra faire des lois relatives à l'agriculture et à l'immigration dans cette province; et il est par la présente déclaré que le parlement du Canada pourra de temps à autre faire des lois relatives à l'agriculture et à l'immigration dans toutes les provinces ou aucune d'elles en particulier; et toute loi de la législature d'une province relative à l'agriculture ou à l'immigration n'y aura d'effet qu'aussi longtemps et que tant qu'elle ne sera incompatible avec aucune des lois du parlement du Canada.

VII. JUDICATURE

Nomination des juges

96. Le gouverneur-général nommera les juges des cours supérieures, de district et de comté dans chaque province, sauf ceux des cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick.

Choix des juges dans Ontario, etc.

97. Jusqu'à ce que les lois relatives à la propriété et aux droits civils dans Ontario, la Nouvelle-Écosse et le Nouveau-Brunswick, et à la procédure dans les cours de ces provinces, soient rendues uniformes, les juges des cours de ces provinces qui seront nommés par le gouverneur-général devront être choisis parmi les membres des barreaux respectifs de ces provinces.

Choix des juges dans Québec

98. Les juges des cours de Québec seront choisis parmi les membres du barreau de cette province.

[(52)] Modifié par la *Loi constitutionnelle de 1964*, 12-13 Elizabeth II, ch. 73 (R.-U.). Originalement édicté par *L'Acte de l'Amérique du Nord britannique, 1951*, 14-15 George VI, ch. 32 (R.-U.), l'article 94A se lisait comme suit :

94A. Il est déclaré, par les présentes, que le Parlement du Canada peut, à l'occasion, légiférer sur les pensions de vieillesse au Canada, mais aucune loi édictée par le Parlement du Canada à l'égard des pensions de vieillesse ne doit atteindre l'application de quelque loi présente ou future d'une législature provinciale relativement aux pensions de vieillesse.

Durée des fonctions des juges

99. (1) Sous réserve du paragraphe (2) du présent article, les juges des cours supérieures resteront en fonction durant bonne conduite, mais ils pourront être révoqués par le gouverneur général sur une adresse du Sénat et de la Chambre des Communes.

Cessation des fonctions à l'âge de 75 ans

(2) Un juge d'une cour supérieure, nommé avant ou après l'entrée en vigueur du présent article, cessera d'occuper sa charge lorsqu'il aura atteint l'âge de soixante-quinze ans, ou à l'entrée en vigueur du présent article si, à cette époque, il a déjà atteint ledit âge. **(53)**

Salaires, etc. des juges

100. Les salaires, allocations et pensions des juges des cours supérieures, de district et de comté (sauf les cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick) et des cours de l'Amirauté, lorsque les juges de ces dernières sont alors salariés, seront fixés et payés par le parlement du Canada. **(54)**

Cour générale d'appel, etc.

101. Le parlement du Canada pourra, nonobstant toute disposition contraire énoncée dans la présente loi, lorsque l'occasion le requerra, adopter des mesures à l'effet de créer, maintenir et organiser une cour générale d'appel pour le Canada, et établir des tribunaux additionnels pour la meilleure administration des lois du Canada. **(55)**

VIII. REVENUS; DETTES; ACTIFS; TAXE

Création d'un fonds consolidé de revenu

102. Tous les droits et revenus que les législatures respectives du Canada, de la Nouvelle-Écosse et du Nouveau-Brunswick, avant et à l'époque de l'union, avaient le pouvoir d'approprier, — sauf ceux réservés par la présente loi aux législatures respectives des provinces, ou qui seront perçus par elles conformément aux pouvoirs spéciaux qui leur sont conférés par la présente loi, — formeront un fonds

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(53) Modifié par la *Loi constitutionnelle de 1960*, 9 Elizabeth II, ch. 2 (R.-U.), en vigueur le 1er mars 1961. Texte de l'article original :

99. Les juges des cours supérieures resteront en charge durant bonne conduite, mais ils pourront être démis de leurs fonctions par le gouverneur-général sur une adresse du Sénat et de la Chambre des Communes.

(54) Voir la *Loi sur les juges*, L.R.C. (1985), ch. J-1.

(55) Voir la *Loi sur la Cour suprême*, L.R.C. (1985), ch. S-26, la *Loi sur les Cours fédérales*, L.R.C. (1985), ch. F-7, et la *Loi sur la Cour canadienne de l'impôt*, L.R.C. (1985), ch. T-2.

CONSTITUTION ACT, 1982 [80]

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

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.

Fundamental Freedoms

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association.

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[80] Enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), which came into force on April 17, 1982. The *Canada Act 1982*, other than Schedules A and B thereto, reads as follows:

An Act to give effect to a request by the Senate and House of Commons of Canada

Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The *Constitution Act, 1982* set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act.

2. No Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1982* comes into force shall extend to Canada as part of its law.

3. So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.

4. This Act may be cited as the *Canada Act 1982*.

Limitation

(3) The rights specified in subsection (2) are subject to

(*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10. Everyone has the right on arrest or detention

(*a*) to be informed promptly of the reasons therefor;

(*b*) to retain and instruct counsel without delay and to be informed of that right; and

(*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

(*a*) to be informed without unreasonable delay of the specific offence;

(*b*) to be tried within a reasonable time;

(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(*e*) not to be denied reasonable bail without just cause;

(*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

Equality before and under law and equal protection and benefit of law

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 mental or physical disability.

LOI CONSTITUTIONNELLE DE 1982 [80]

PARTIE I

CHARTE CANADIENNE DES DROITS ET LIBERTÉS

Attendu que le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu et la primauté du droit :

Garantie des droits et libertés

Droits et libertés au Canada

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Libertés fondamentales

Libertés fondamentales

2. Chacun a les libertés fondamentales suivantes :

a) liberté de conscience et de religion;

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

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[80] Édictée comme l'annexe B de la *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-U.), entrée en vigueur le 17 avril 1982. Texte de la *Loi de 1982 sur le Canada*, à l'exception de l'annexe B :

ANNEXE A — SCHEDULE A

Loi donnant suite à une demande du Sénat et de la Chambre des communes du Canada

Sa Très Excellente Majesté la Reine, considérant :

qu'à la demande et avec le consentement du Canada, le Parlement du Royaume-Uni est invité à adopter une loi visant à donner effet aux dispositions énoncées ci-après et que le Sénat et la Chambre des communes du Canada réunis en Parlement ont présenté une adresse demandant à Sa Très Gracieuse Majesté de bien vouloir faire déposer devant le Parlement du Royaume-Uni un projet de loi à cette fin,

sur l'avis et du consentement des Lords spirituels et temporels et des Communes réunis en Parlement, et par l'autorité de celui-ci, édicte :

1. La *Loi constitutionnelle de 1982*, énoncée à l'annexe B, est édictée pour le Canada et y a force de loi. Elle entre en vigueur conformément à ses dispositions.

2. Les lois adoptées par le Parlement du Royaume-Uni après l'entrée en vigueur de la *Loi constitutionnelle de 1982* ne font pas partie du droit du Canada.

3. La partie de la version française de la présente loi qui figure à l'annexe A a force de loi au Canada au même titre que la version anglaise correspondante.

4. Titre abrégé de la présente loi : *Loi de 1982 sur le Canada*.

Affaires criminelles et pénales

11. Tout inculpé a le droit :

a) d'être informé sans délai anormal de l'infraction précise qu'on lui reproche;

b) d'être jugé dans un délai raisonnable;

c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche;

d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

e) de ne pas être privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable;

f) sauf s'il s'agit d'une infraction relevant de la justice militaire, de bénéficier d'un procès avec jury lorsque la peine maximale prévue pour l'infraction dont il est accusé est un emprisonnement de cinq ans ou une peine plus grave;

g) de ne pas être déclaré coupable en raison d'une action ou d'une omission qui, au moment où elle est survenue, ne constituait pas une infraction d'après le droit interne du Canada ou le droit international et n'avait pas de caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations;

h) d'une part de ne pas être jugé de nouveau pour une infraction dont il a été définitivement acquitté, d'autre part de ne pas être jugé ni puni de nouveau pour une infraction dont il a été définitivement déclaré coupable et puni;

i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

Cruauté

12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

Témoignage incriminant

13. Chacun a droit à ce qu'aucun témoignage incriminant qu'il donne ne soit utilisé pour l'incriminer dans d'autres procédures, sauf lors de poursuites pour parjure ou pour témoignages contradictoires.

Interprète

14. La partie ou le témoin qui ne peuvent suivre les procédures, soit parce qu'ils ne comprennent pas ou ne parlent pas la langue employée, soit parce qu'ils sont atteints de surdité, ont droit à l'assistance d'un interprète.