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July 14, 2010

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
P.O. Box 2319
Suite 2700
Toronto, Ontario
M4P 1E4

Dear Ms. Walli:

**Re: Motion (the "Motion") by the Consumers Council of Canada in relation to section 26.1 of the *Ontario Energy Board Act, 1998* (the "*OEB Act*") and Ontario Regulation 66/10.**
**OEB File EB-2010-0184**

**Materials used in Argument**

In my oral submissions yesterday I undertook to provide authority for the propositions I put forward to the panel. The propositions I put forward, and the authority for those propositions, are attached. I also attach copies of the cases relied upon for authority for those propositions.

Please provide a copy of this letter and the attached materials to the panel on this matter.

Sincerely,

George Vegh

c: All Parties and Intervenors.
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**Propositions and Authorities Referred to in Oral Submissions of July 13, 2010.**

**Proposition #1**

"MR. VEGH: [in *Garland v. Consumers Gas*], There was a finding that the order of the Board that authorized the collection was ultra vires the province." (Transcript, p. 57).

**Authority**: *Garland v. Consumers Gas*, [2004] 1 S.C.R. 629 ["*Garland*"] at paragraph 51 **[Tab 1]**:

"As a result, the question of whether the statutory framework can serve as a juristic reason depends on whether the provision is held to be inoperative. If the OEB orders are constitutionally valid and operative, they provide a juristic reason which bars recovery. Conversely, if the scheme is inoperative by virtue of a conflict with s. 347 of the *Criminal Code*, then a juristic reason is not present. In my view, the OEB rate orders are constitutionally inoperative to the extent of their conflict with s. 347 of the *Criminal Code*."

**Proposition #2**

"MR. VEGH: ...And when you go back to the Supreme Court of Canada decision in Garland, when they looked at the question of whether there was unjust enrichment of the utilities, and when did that risk start, the court is quite specific that once Enbridge was put on notice by a statement of claim that its charge was potentially unlawful, Enbridge continued to collect that charge at its risk.

So the utilities here will be faced with the same argument. They are put on notice today by this motion, by this proceeding, that there is a risk that this charge collected from customers may be struck down as unconstitutional." (Transcript, pp. 61-62).

**Authority:**

*Garland*, at paragraph 59 **[Tab 1]**:

"After the action was commenced and Consumers' Gas was put on notice that there was a serious possibility the LPPs violated the *Criminal Code*, it was no longer reasonable for Consumers' Gas to rely on the OEB rate orders to authorize the LPPs [i.e., Late Payment Penalties]."

**Proposition #3**

"MR. VEGH: ... So if the government passes an unconstitutional law, there is no claim for lost profit. So even if you get recovery of the amounts you paid, there is irreparable harm on the profits." (Transcript, p. 62).

**Authority:**

*Mackin v. New Brunswick*, [2002] 1 S.C.R. 405 at paragraph 78 **[Tab 2]**:

"According to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional."

*Super Sam Red Deer v. Lethbridge*, [1990] A.J. No. 1255 (Alta Q.B.) at paragraph 20 **[Tab 3]**:

"The City is not liable for any damage attributable to an invalid by law (Welbridge Holdings Ltd. v. Winnipeg, [1971] S.C.R. 957). It follows that any losses Super Sam would incur upon closing on a Sunday will not be recoverable from the City. There is considerable evidence introduced indicating that Super Sam loses approximately $2,000 net profit per Sunday, which is some $100,000 net profit before tax per year. This is a significant amount that is not recoverable. I am satisfied that this alone is irreparable harm."

**Proposition #4:**

"MR. VEGH: And what's interesting, again, when you go back to Garland, the ultimate damages in the class action suit paid to customers was not paid to the customers who made the payments, because irreparable harm goes to: Can you unscramble the egg? And I'm making the submission that you can't unscramble the egg. Once the utilities make the payment to the government, you cannot unscramble that egg.

So in Garland, for example, even when you had a class action suit against utilities, the Garland plaintiffs who ultimately received recovery were not the people who made the payments. The court applied the cy-près test measure to require Enbridge to pay money into a fund, and then the fund was used for heating and things of that sort."

**Authority:**

*Garland v. Enbridge Gas Distribution*, Endorsement, September 25, 2006 (Ontario Court of Justice), at para. 30 **[Tab 4]**:

"I am also satisfied that this is pre-eminently a case in which a cy pres distribution would be the appropriate method of providing benefits to the class. The class is too large and the settlement amount too small to make a distribution to even an equal amount to each class member a reasonable, and an economically viable, alternative. The distribution proposed in the minutes of settlement would require the settlement fund – net of the fees of class counsel and the payment to the Class Proceedings Fund – to be paid to the United Way of Greater Toronto ("United Way") in trust to be invested and the income applied to form part of its Winter Warmth Fund program and, by so doing, so assist needy customers of the defendant to pay their gas bills."

**EB-2010-0184**

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998* S.O. 1998, c. 15 (Schedule B) (the "**OEB Act**");

**AND IN THE MATTER OF** a motion by the Consumers Council of Canada in relation to section 26.1 of the *Ontario Energy Board Act, 1998* and Ontario Regulation 66/10

**SUPPLEMENT MATERIALS OF UNION GAS LIMITED**

**ON PRELIMINARY MOTION**

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TAB 1

Garland *v.* Consumers' Gas Co., [2004] 1 S.C.R. 629, 2004 SCC 25

**Gordon Garland** *Appellant*

*v.*

**Enbridge Gas Distribution Inc., previously known as Consumers' Gas Company Limited** *Respondent*

and

**Attorney General of Canada, Attorney General for Saskatchewan, Toronto Hydro-Electric System Limited, Law Foundation of Ontario and Union Gas Limited** *Interveners*

**Indexed as: Garland *v.* Consumers' Gas Co.**

**Neutral citation: 2004 SCC 25.**

File No.: 29052.

2003: October 9; 2004: April 22.

Present: Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

on appeal from the court of appeal for ontario

*Restitution — Unjust enrichment — Late payment penalty — Customers of regulated gas utility claiming restitution for unjust enrichment arising from late payment*

*penalties levied by utility in excess of interest limit prescribed by s. 347 of Criminal Code — Whether customers have claim for unjust enrichment — Defences that can be mounted by utility to resist claim — Whether other ancillary orders necessary.*

The respondent gas utility, whose rates and payment policies are governed by the Ontario Energy Board ("OEB"), bills its customers on a monthly basis, and each bill includes a due date for the payment of current charges. Customers who do not pay by the due date incur a late payment penalty ("LPP") calculated at five percent of the unpaid charges for that month. The LPP is a one-time penalty, and does not compound or increase over time. The appellant and his wife paid approximately $75 in LPP charges between 1983 and 1995. The appellant commenced a class action seeking restitution for unjust enrichment of LPP charges received by the respondent in violation of s. 347 of the *Criminal Code*. He also sought a preservation order. In a previous appeal to this Court, it was held that charging the LPPs amounted to charging a criminal rate of interest under s. 347 and the matter was remitted back to the trial court for further consideration. As the case raised no factual dispute, the parties brought cross-motions for summary judgment. The motions judge granted the respondent's motion for summary judgment, finding that the action was a collateral attack on the OEB's orders. The Court of Appeal disagreed, but dismissed the appellant's appeal on the grounds that his unjust enrichment claim could not be made out.

*Held*: The appeal should be allowed. The respondent is ordered to repay LPPs collected from the appellant in excess of the interest limit stipulated in s. 347 of the *Code* after the action was commenced in 1994 in an amount to be determined by the trial judge.

The test for unjust enrichment has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment. The proper approach to the juristic reason analysis is in two parts. The plaintiff must show that no juristic reason from an established category exists to deny recovery. The established categories include a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations. If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case. The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. Courts should have regard at this point to two factors: the reasonable expectations of the parties and public policy considerations.

Here, the appellant has a claim for restitution. The respondent received the monies represented by the LPPs and had that money available for use in the carrying on of its business. The transfer of those funds constitutes a benefit to the respondent. The parties are agreed that the second prong of the test has been satisfied. With respect to the third prong, the only possible juristic reason from an established category that could justify the enrichment in this case is the existence of the OEB orders creating the LPPs under the "disposition of law" category. The OEB orders, however, do not constitute a juristic reason for the enrichment because they are inoperative to the extent of their conflict with s. 347 of the *Criminal Code*. The appellant has thus made out a *prima facie* case for unjust enrichment.

The respondent's reliance on the orders is relevant when determining the reasonable expectations of the parties at the rebuttal stage of the juristic reason analysis even though it would not provide a defence if the respondent was charged under s. 347 of the *Code*. However, the overriding public policy consideration in this case is the fact

that the LPPs were collected in contravention of the *Criminal Code*. As a matter of public policy, criminals should not be permitted to keep the proceeds of their crime. In weighing these considerations, the respondent's reliance on the inoperative OEB orders from 1981-1994, prior to the commencement of this action, provides a juristic reason for the enrichment. After the action was commenced and the respondent was put on notice that there was a serious possibility its LPPs violated the *Criminal Code*, it was no longer reasonable to rely on the OEB rate orders to authorize the LPPs. Given that conclusion, it is only necessary to consider the respondent's defences for the period after 1994.

The respondent cannot avail itself of any defence. The change of position defence is not available to a defendant who is a wrongdoer. Since the respondent in this case was enriched by its own criminal misconduct, it should not be permitted to avail itself of the defence. Section 18 (now s. 25) of the *Ontario Energy Board Act* should be read down so as to exclude protection from civil liability damage arising out of *Criminal Code* violations. As a result, the defence does not apply in this case and it is not necessary to consider the constitutionality of the section.

This action does not constitute an impermissible collateral attack on the OEB's orders. The OEB does not have exclusive jurisdiction over this dispute, which is a private law matter under the competence of civil courts, nor does it have jurisdiction to order the remedy sought by the appellant. Moreover, the specific object of the action is not to invalidate or render inoperative the OEB's orders, but rather to recover money that was illegally collected by the respondent as a result of OEB orders. In order for the regulated industries defence to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the *Code* granted

leeway to those acting pursuant to a valid provincial regulatory scheme. Section 347 does not contain any such indication.

The *de facto* doctrine does not apply in this case because it only attaches to government and its officials in order to protect and maintain the rule of law and the authority of government. An extension of the doctrine to a private corporation regulated by a government authority is not supported by the case law and does not further the doctrine's underlying purpose.

A preservation order is not appropriate in this case. The respondent has ceased to collect the LPPs at a criminal rate, so there would be no future LPPs to which a preservation order could attach. Even with respect to the LPPs paid between 1994 and the present, a preservation order should not be granted because it would serve no practical purpose, because the appellant has not satisfied the criteria in the Ontario *Rules of Civil Procedure*, and because *Amax* can be distinguished from this case. A declaration that the LPPs need not be paid would similarly serve no practical purpose and should not be made.

**Cases Cited**

**Applied:** *Peter v. Beblow*, [1993] 1 S.C.R. 980; **explained:** *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762; **referred to:** *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112; *Sprint Canada Inc. v. Bell Canada* (1997), 79 C.P.R. (3d) 31; *Ontario Hydro v. Kelly* (1998), 39 O.R. (3d) 107; *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690; *Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275; *Sharwood & Co. v.*

*Municipal Financial Corp.* (2001), 53 O.R. (3d) 470; *Rural Municipality of Storthoaks v. Mobil Oil Canada, Ltd.*, [1976] 2 S.C.R. 147; *RBC Dominion Securities Inc. v. Dawson* (1994), 111 D.L.R. (4th) 230; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961; *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249, 2004 SCC 7; *Oldfield v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 742, 2002 SCC 22; *Lipkin Gorman v. Karpnale Ltd.*, [1992] 4 All E.R. 512; *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307; *R. v. Jorgensen*, [1995] 4 S.C.R. 55; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576.

**Statutes and Regulations Cited**

*Civil Code of Quebec*, S.Q. 1991, c. 64, arts. 1493, 1494.

*Constitution Act, 1867*, ss. 91(19), (27), 92(13).

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 15, 347.

*Municipal Franchises Act*, R.S.O. 1990, c. M.55.

*Ontario Energy Board Act*, R.S.O. 1990, c. O.13, s. 18.

*Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B, s. 25.

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 45.02.

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Ziegel, Jacob S. "Criminal Usury, Class Actions and Unjust Enrichment in Canada" (2002), 18 *J. Cont. L.* 121.

APPEAL from a judgment of the Ontario Court of Appeal (2001), 57 O.R. (3d) 127, 208 D.L.R. (4th) 494, 152 O.A.C. 244, 19 B.L.R. (3d) 10, [2001] O.J. No. 4651 (QL), affirming a decision of the Superior Court of Justice (2000), 185 D.L.R. (4th) 536, [2000] O.J. No. 1354 (QL). Appeal allowed.

*Michael McGowan*, *Barbara L. Grossman*, *Dorothy Fong* and *Christopher D. Woodbury*, for the appellant.

*Fred D. Cass*, *John D. McCamus* and *John J. Longo*, for the respondent.

*Christopher M. Rupar*, for the intervener the Attorney General of Canada.

*Thomson Irvine*, for the intervener the Attorney General for Saskatchewan.

*Alan H. Mark* and *Kelly L. Friedman*, for the intervener Toronto Hydro-Electric System Limited.

*Mark M. Orkin, Q.C.*, for the intervener the Law Foundation of Ontario.

*Patricia D. S. Jackson* and *M. Paul Michell*, for the intervener Union Gas Limited.

The judgment of the Court was delivered by

1 IACOBUCCI J. — At issue in this appeal is a claim by customers of a regulated utility for restitution for unjust enrichment arising from late payment penalties levied by the utility in excess of the interest limit prescribed by s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46. More specifically, the issues raised include the necessary ingredients to a claim for unjust enrichment, the defences that can be mounted to resist the claim, and whether other ancillary orders are necessary.

2 For the reasons that follow, I am of the view to uphold the appellant's claim for unjust enrichment and therefore would allow the appeal.

I. Facts

3 The respondent Consumers' Gas Company Limited, now known as Enbridge Gas Distribution Inc., is a regulated utility which provides natural gas to commercial and

residential customers throughout Ontario. Its rates and payment policies are governed by the Ontario Energy Board ("OEB" or "Board") pursuant to the *Ontario Energy Board Act*, R.S.O. 1990, c. O.13 ("*OEBA*"), and the *Municipal Franchises Act*, R.S.O. 1990, c. M.55. The respondent cannot sell gas or charge for gas-related services except in accordance with rate orders issued by the Board.

4 Consumers' Gas bills its customers on a monthly basis, and each bill includes a due date for the payment of current charges. Customers who do not pay by the due date incur a late payment penalty ("LPP") calculated at five percent of the unpaid charges for that month. The LPP is a one-time penalty, and does not compound or increase over time.

5 The LPP was implemented in 1975 following a series of rate hearings conducted by the OEB. In granting Consumers' Gas's application to impose the penalty, the Board noted that the primary purpose of the LPP is to encourage customers to pay their bills promptly, thereby reducing the cost to Consumers' Gas of carrying accounts receivable. The Board also held that such costs, along with any special collection costs arising from late payments, should be borne by the customers who cause them to be incurred, rather than by the customer base as a whole. In approving a flat penalty of five percent, the OEB rejected the alternative course of imposing a daily interest charge on overdue accounts. The Board reasoned that an interest charge would not provide sufficient incentive to pay by a named date, would give little weight to collection costs, and might seem overly complicated. The Board recognized that if a bill is paid very soon after the due date, the penalty would, if calculated as an interest charge, be a very high rate of interest. However, it noted that customers could avoid such a charge by

paying their bills on time, and that, in any event, in the case of the average bill the dollar amount of the penalty would not be very large.

6 The appellant Gordon Garland is a resident of Ontario and has been a Consumers' Gas customer since 1983. He and his wife paid approximately $75 in LPP charges between 1983 and 1995. In a class action on behalf of over 500,000 Consumers' Gas customers, Garland asserted that the LPPs violate s. 347 of the *Criminal Code*. That case also reached the Supreme Court of Canada, which held that charging the LPPs amounted to charging a criminal rate of interest under s. 347 and remitted the matter back to the trial court for further consideration (*Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112 ("*Garland No. 1*")). Both parties have now brought cross-motions for summary judgment.

7 The appellant now seeks restitution for unjust enrichment of LPP charges received by the respondent in violation of s. 347 of the *Code*. He also seeks a preservation order requiring Consumers' Gas to hold LPPs paid during the pendency of the litigation subject to possible repayment.

8 The motions judge granted the respondent's motion for summary judgment, finding that the action was a collateral attack on the OEB order. He dismissed the application for a preservation order. A majority of the Court of Appeal disagreed with the motions judge's reasons, but dismissed the appeal on the grounds that the appellant's unjust enrichment claim could not be made out.

## II. Relevant Statutory Provisions

9 *Ontario Energy Board Act*, R.S.O. 1990, c. O.13

**18.** An order of the Board is a good and sufficient defence to any proceeding brought or taken against any person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

*Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B

**25.** An order of the Board is a good and sufficient defence to any proceeding brought or taken against any person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

*Criminal Code*, R.S.C. 1985, c. C-46

**15.** No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs.

**347.** (1) Notwithstanding any Act of Parliament, every one who

(*a*) enters into an agreement or arrangement to receive interest at a criminal rate, or

(*b*) receives a payment or partial payment of interest at a criminal rate,

is guilty of

(*c*) an indictable offence and is liable to imprisonment for a term not exceeding five years, or

(*d*) an offence punishable on summary conviction and is liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both.

III. Judicial History

A. *Ontario Superior Court of Justice* (2000), 185 D.L.R. (4th) 536

10 As this case raised no factual disputes, all parties agreed that summary judgment was the proper procedure on the motion. Winkler J. found that the appellant's claim could not succeed in law and that there was no serious issue to be tried. In so finding, he held that the "regulated industries defence" was not a complete defence to the claim. On his reading of the relevant case law, the dominant consideration was whether the express statutory language afforded a degree of flexibility to provincial regulators. Section 347 affords no such flexibility, so the defence is not available.

11 Nor, in Winkler J.'s view, did s. 15 of the *Criminal Code* act as a defence. Section 15 was a provision of very limited application, originally enacted to ensure that persons serving the Monarch *de facto* could not be tried for treason for remaining faithful to the unsuccessful claimant to the throne. While it could have a more contemporary application, it was limited on its face to actions or omissions occurring pursuant to the authority of a sovereign power. As the OEB was not a sovereign power, it did not apply.

12 Winkler J. found that the proposed action was a collateral attack on the OEB's orders. The *OEBA* indicated repeatedly that the OEB has exclusive control over matters within its jurisdiction. In addition, interested parties were welcome to participate in OEB hearings, and OEB orders were reviewable. The appellant did not avail himself of any of these opportunities, choosing instead to challenge the validity of the OEB orders in the courts. Winkler J. found that, unless attacked directly, OEB orders are valid and binding upon the respondent and its consumers. The OEB was not a party to the instant proceeding and its orders were not before the court. Winkler J. noted that the setting of rates is a balancing exercise, with LPPs being one factor under consideration.

Applying *Sprint Canada Inc. v. Bell Canada* (1997), 79 C.P.R. (3d) 31 (Ont. Ct. (Gen. Div.)), *Ontario Hydro v. Kelly* (1998), 39 O.R. (3d) 107 (Gen. Div.), and *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Gen. Div.), Winkler J. found that the instant action, although framed as a private dispute between two contractual parties, was in reality an impermissible collateral attack on the validity of OEB orders. It would be inappropriate for the court to determine matters that fall squarely within the OEB's jurisdiction. Moreover, this Court's decision in *Garland No. 1* with respect to s. 347 provided the OEB with ample legal guidance to deal with the matter.

13 In case he was incorrect in that finding, Winkler J. went on to find that s. 18 of the *OEBA* provided a complete defence to the proposed action. He held that s. 18 was constitutionally valid because it did not interfere with Parliament's jurisdiction over interest and the criminal law, or, to the extent that it did, the interference was incidental. Although the respondent did not strictly comply with the OEB order in that it waived LPPs for some customers, this did not preclude the respondent from relying on s. 18.

14 In case that finding was also mistaken, Winkler J. went on to consider whether the appellant's claim for restitution was valid. The parties had conceded that the appellant had suffered a deprivation, and Winkler J. was satisfied that the respondent had received a benefit. However, he found that the OEB's rate order constituted a valid juristic reason for the respondent's enrichment.

15 Having reached those conclusions, Winkler J. declined to make a preservation order, as requested by the appellant, allowed the respondent's motion for summary judgment and dismissed the appellant's action. By endorsement, he ordered costs against the appellant.

B. *Ontario Court of Appeal* (2001), 208 D.L.R. (4th) 494

16 McMurtry C.J.O., for the majority, found that Winkler J. was incorrect in finding that there had been an impermissible collateral attack on a decision of the OEB because the appellant was not challenging the merits or legality of the OEB order or attempting to raise a matter already dealt with by the OEB. Rather, the proposed class action was based on the principles of unjust enrichment and raised issues over which the OEB had no jurisdiction. As such, the courts had jurisdiction over the proposed class action.

17 McMurtry C.J.O. further found that s. 25 of the 1998 *OEBA* (the equivalent provision to s. 18 of the 1990 *OEBA*) did not provide grounds to dismiss the appellant's action. He did not agree that the respondent's failure to comply strictly with the OEB orders made s. 25 inapplicable. Instead, he found that while s. 25 provides a defence to any proceedings in so far as the act or omission at issue is in accordance with the OEB order, legislative provisions restricting citizen's rights of action attract strict construction (*Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275). The legislature could not reasonably be believed to have contemplated that an OEB order could mandate criminal conduct, and even wording as broad as that found in s. 25 could not provide a defence to an action for restitution arising from an OEB order authorizing criminal conduct. He noted that this decision was based on the principles of statutory interpretation, not on the federal paramountcy doctrine.

18 Section 15 of the *Criminal Code* did not provide the respondent with a defence, either. It was of limited application and is largely irrelevant in modern times.

As for the "regulated industries defence", it did not apply because the case law did not indicate that a company operating in a regulatory industry could act directly contrary to the *Criminal Code*.

19 Nonetheless, McMurtry C.J.O. held that the appellant's unjust enrichment claim could not be made out. It had been conceded that the appellant suffered a deprivation, but McMurtry C.J.O. held that the appellant failed to establish the other two elements of the claim for unjust enrichment. While payment of money will normally be a benefit, McMurtry C.J.O. found that the payment of the late penalties in this case did not confer a benefit on the respondent. Taking the "straightforward economic approach" to the first two elements of unjust enrichment, as recommended in *Peter v. Beblow*, [1993] 1 S.C.R. 980, McMurtry C.J.O. noted that the OEB sets rates with a view to meeting the respondent's overall revenue requirements. If the revenue available from LPPs had been set lower, the other rates would have been set higher. Therefore, the receipt of the LPPs was not an enrichment capable of giving rise to a restitutionary claim.

20 In case that conclusion was wrong, McMurtry C.J.O. went on to find that there was a juristic reason for any presumed enrichment. Under this aspect of the test, moral and policy questions were open for consideration, and it was necessary to consider what was fair to both the plaintiff and the defendant. It was therefore necessary to consider the statutory regime within which the respondent operated. McMurtry C.J.O. noted that the respondent was required by statute to apply the LPPs; it had been ordered to collect them and they were taken into account when the OEB made its rate orders. He found that it would be contrary to the equities in this case to require the respondent to

repay all the LPP charges collected since 1981. Such an order would affect all of the respondent's customers, including the vast majority who consistently pay on time.

21 The appellant argued that a preservation order was required even if his arguments on restitution were not successful because he could still be successful in arguing that the respondent could not enforce payment of the late penalties. As he had found no basis for ordering restitution, McMurtry C.J.O. saw no reason to make a preservation order. Moreover, the order requested would serve no practical purpose because it gave the respondent the right to spend the monies at stake. He dismissed the appeal and the appellant's action. In so doing, he agreed with the motions judge that the appellant's claims for declaratory and injunctive relief should not be granted.

22 As to costs, McMurtry C.J.O. found that there were several considerations that warranted overturning the order that the appellant pay the respondent's costs. First, the order required him to pay the costs of his successful appeal to the Supreme Court of Canada. Second, even though the respondent was ultimately successful, it failed on two of the defences it raised at the motions stage and three of the defences it raised at the Court of Appeal. Third, the proceedings raised novel issues. McMurtry C.J.O. found that each party should bear its own costs.

23 Borins J.A., writing in dissent, was of the opinion that the appeal should be allowed. He agreed with most of McMurtry C.J.O.'s reasons, but found that the plaintiff class was entitled to restitution. In his opinion, the motions judge's finding that the LPPs had enriched the respondent by causing it to have more money than it had before was supported by the evidence and the authorities. Absent material error, he held, it was not properly reviewable.

24 However, Borins J.A. found that the motions judge had erred in law in finding that there was a juristic reason for the enrichment. The motions judge had failed to consider the effect of the Supreme Court of Canada decision that the charges amount to interests at a criminal rate and that s. 347 of the *Criminal Code* prohibits the receipt of such interest. As a result of this decision, Borins J.A. felt that the rate orders ceased to have any legal effect and could not provide a juristic reason for the enrichment. A finding that the rate orders constituted a juristic reason for contravening s. 347 also allowed orders of a provincial regulatory authority to override federal criminal law and removed a substantial reason for compliance with s. 347. Thus, he held that allowing the respondent to retain the LPPs was contrary to the federal paramountcy doctrine.

25 According to Borins J.A., finding the OEB orders to constitute a juristic reason would also be contrary to the authorities which have applied s. 347 in the context of commercial obligations. This line of cases required consideration of when restitution should have been ordered and for what portion of the amount paid. Finally, it would allow the respondent to profit from its own wrongdoing.

26 Borins J.A. was not sympathetic to the respondent's claims that its change of position should allow it to keep the money it had collected in contravention of s. 347, even if it could have recovered the same amount of money on an altered rate structure. He also noted that, in his opinion, the issue of recoverability should have been considered in the context of the class action, not on the basis of the representative plaintiff's claim for $75. Borins J.A. would have allowed the appeal, set aside the judgment dismissing the appellant's claim, granted partial summary judgment, and dismissed the respondent's motion for summary judgment. The appellant would have

been required to proceed to trial with respect to damages. He would also have declared that the charging and receipt of LPPs by the respondent violates s. 347(1)(*b*) of the *Criminal Code* and that the LPPs need not be paid by the appellant, and would have ordered that the respondent repay the LPPs received from the appellant, as determined by the trial judge. He would also have ordered costs against the respondent.

27 It should be noted that on January 9, 2003, McLachlin C.J. stated the following constitutional question:

> Are s. 18 of the *Ontario Energy Board Act*, R.S.O. 1990, c. O.13, and s. 25 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, constitutionally inoperative by reason of the paramountcy of s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46?

As will be clear from the reasons below, I have found it unnecessary to answer the constitutional question.

IV. Issues

28 1. Does the appellant have a claim for restitution?

(a) Was the respondent enriched?

(b) Is there a juristic reason for the enrichment?

2. Can the respondent avail itself of any defence?

(a) Does the change of position defence apply?

(b) Does s. 18 (now s. 25) of the *OEBA* ("s. 18/25") shield the respondent from liability?

(c) Is the appellant engaging in a collateral attack on the orders of the Board?

(d) Does the "regulated industries" defence exonerate the respondent?

(e) Does the *de facto* doctrine exonerate the respondent?

3. Other orders sought by the appellant

(a) Should this Court make a preservation order?

(b) Should this Court make a declaration that the LPPs need not be paid?

(c) What order should this Court make as to costs?

V. Analysis

29 My analysis will proceed as follows. First, I will assess the appellant's claim in unjust enrichment. Second, I will determine whether the respondent can avail itself of any defences to the appellant's claim. Finally, I will address the other orders sought by the appellant.

A. *Unjust Enrichment*

30 As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (*Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 848; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 784). In this case, the parties are agreed that the second prong of the test has been satisfied. I will thus address the first and third prongs of the test in turn.

(a) Enrichment of the Defendant

31 In *Peel, supra*, at p. 790, McLachlin J. (as she then was) noted that the word "enrichment" connotes a tangible benefit which has been conferred on the defendant. This benefit, she writes, can be either a positive benefit, such as the payment of money, or a negative benefit, for example, sparing the defendant an expense which he or she would otherwise have incurred. In general, moral and policy arguments have not been considered under this head of the test. Rather, as McLachlin J. wrote in *Peter, supra*, at p. 990, "[t]his Court has consistently taken a straightforward economic approach to the first two elements of the test for unjust enrichment". Other considerations, she held, belong more appropriately under the third element — absence of juristic reason.

32 In this case, the transactions at issue are payments of money by late payers to the respondent. It seems to me that, as such, under the "straightforward economic approach" to the benefit analysis, this element is satisfied. Winkler J. followed this approach and was satisfied that the respondent had received a benefit. "Simply stated", he wrote at para. 95, "as a result of each LPP received by Consumers' Gas, the company has more money than it had previously and accordingly is enriched."

33 The majority of the Court of Appeal for Ontario disagreed. McMurtry C.J.O. found that while payment of money would normally be a benefit, it was not in this case. He claimed to be applying the "straightforward economic approach" as recommended in *Peter*, *supra*, but accepted the respondent's argument that because of the rate structure of the OEB, the respondent had not actually been enriched. Because LPPs were part of a scheme designed to recover the respondent's overall revenue, any increase in LPPs was off-set by a corresponding decrease in regular rates. Thus McMurtry C.J.O. concluded, "[t]he enrichment that follows from the receipt of LPPs is passed on to all [Consumers' Gas] customers in the form of lower gas delivery rates" (para. 65). As a result, the real beneficiary of the scheme is not the respondent but is rather all of the respondent's customers.

34 In his dissent, Borins J.A. disagreed with this analysis. He would have held that where there is payment of money, there is little controversy over whether or not a benefit was received and since a payment of money was received in this case, a benefit was conferred on the respondent.

35 The respondent submits that it is not enough that the plaintiff has made a payment; rather, it must also be shown that the defendant is "in possession of a benefit". It argues that McMurtry C.J.O. had correctly held that the benefit had effectively been passed on to the respondent's customers, so the respondent could not be said to have retained the benefit. The appellant, on the other hand, maintains that the "straightforward economic approach" from *Peter*, *supra*, should be applied and any other moral or policy considerations should be considered at the juristic reason stage of the analysis.

36 I agree with the analysis of Borins J.A. on this point. The law on this question is relatively clear. Where money is transferred from plaintiff to defendant, there is an enrichment. Transfer of money so clearly confers a benefit that it is the main example used in the case law and by commentators of a transaction that meets the threshold for a benefit (see *Peel*, *supra*, at p. 790; *Sharwood & Co. v. Municipal Financial Corp.* (2001), 53 O.R. (3d) 470 (C.A.), at p. 478; P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (1990), at p. 38; Lord Goff and G. Jones, *The Law of Restitution* (6th ed. 2002), at p. 18). There simply is no doubt that Consumers' Gas received the monies represented by the LPPs and had that money available for use in the carrying on of its business. The availability of those funds constitutes a benefit to Consumers' Gas. We are not, at this stage, concerned with what happened to this benefit in the ongoing operation of the regulatory scheme.

37 While the respondent rightly points out that the language of "received and retained" has been used with respect to the benefit requirement (see, for example, *Peel*, *supra*, at p. 788), it does not make sense that it is a requirement that the benefit be retained permanently. The case law does, in fact, recognize that it might be unfair to award restitution in cases where the benefit was not retained, but it does so after the three steps for a claim in unjust enrichment have been made out by recognizing a "change of position" defence (see, for example, *Rural Municipality of Storthoaks v. Mobil Oil Canada, Ltd.*, [1976] 2 S.C.R. 147; *RBC Dominion Securities Inc. v. Dawson* (1994), 111 D.L.R. (4th) 230 (Nfld. C.A.)). Professor J. S. Ziegel, in his comment on the Ontario Court of Appeal decision in this case, "Criminal Usury, Class Actions and Unjust Enrichment in Canada" (2002), 18 *J. Cont. L.* 121, at p. 126, suggests that McMurtry C.J.O.'s reliance on the regulatory framework of the LPP in finding that a benefit was

not conferred "was really a change of position defence". I agree with this assessment. Whether recovery should be barred because the benefit was passed on to the respondent's other customers ought to be considered under the change of position defence.

(b) Absence of Juristic Reason

(i) *General Principles*

38 In his original formulation of the test for unjust enrichment in *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, at p. 455 (adopted in *Pettkus*, *supra*, at p. 844), Dickson J. (as he then was) held in his minority reasons that for an action in unjust enrichment to succeed:

> . . . the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason — such as a contract or disposition of law — for the enrichment.

39 Later formulations of the test by this Court have broadened the types of factors that can be considered in the context of the juristic reason analysis. In *Peter*, *supra*, at p. 990, McLachlin J. held that:

> It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust".
>
> . . . The test is flexible, and the factors to be considered may vary with the situation before the court.

40 The "juristic reason" aspect of the test for unjust enrichment has been the subject of much academic commentary and criticism. Much of the discussion arises out of the difference between the ways in which the cause of action of unjust enrichment is conceptualized in Canada and in England. While both Canadian and English causes of action require an enrichment of the defendant and a corresponding deprivation of the plaintiff, the Canadian cause of action requires that there be "an absence of juristic reason for the enrichment", while English courts require "that the enrichment be unjust" (see discussion in L. Smith, "The Mystery of 'Juristic Reason'" (2000), 12 *S.C.L.R.* (2d) 211, at pp. 212-13). It is not of great use to speculate on why Dickson J. in *Rathwell*, *supra*, expressed the third condition as absence of juristic reason but I believe that he may have wanted to ensure that the test for unjust enrichment was not purely subjective in order to be responsive to Martland J.'s criticism in his reasons that application of the doctrine of unjust enrichment contemplated by Dickson J. would require "immeasurable judicial discretion" (p. 473). The importance of avoiding a purely subjective standard was also stressed by McLachlin J. in her reasons in *Peel*, *supra*, at p. 802, in which she wrote that the application of the test for unjust enrichment should not be "case by case 'palm tree' justice".

41 Perhaps as a result of these two formulations of this aspect of the test, Canadian courts and commentators are divided in their approach to juristic reason. As Borins J.A. notes in his dissent (at para. 105), while "some judges have taken the *Pettkus* formulation literally and have attempted to decide cases by finding a 'juristic reason' for a defendant's enrichment, other judges have decided cases by asking whether the plaintiff has a positive reason for demanding restitution". In his article, "The Mystery of 'Juristic Reason'", *supra*, which was cited at length by Borins J.A., Professor Smith suggests that it is not clear whether the requirement of "absence of juristic reason"

should be interpreted literally to require that plaintiffs show the absence of a reason for the defendant to keep the enrichment or, as in the English model, the plaintiff must show a reason for reversing the transfer of wealth. Other commentators have argued that in fact there is no difference beyond semantics between the Canadian and English tests (see, for example, M. McInnes, "Unjust Enrichment — Restitution — Absence of Juristic Reason: *Campbell* v. *Campbell*" (2000), 79 *Can. Bar Rev.* 459).

42 Professor Smith argues that, if there is in fact a distinct Canadian approach to juristic reason, it is problematic because it requires the plaintiff to prove a negative, namely the absence of a juristic reason. Because it is nearly impossible to do this, he suggests that Canada would be better off adopting the British model where the plaintiff must show a positive reason that it would be unjust for the defendant to retain the enrichment. In my view, however, there is a distinctive Canadian approach to juristic reason which should be retained but can be construed in a manner that is responsive to Smith's criticism.

43 It should be recalled that the test for unjust enrichment is relatively new to Canadian jurisprudence. It requires flexibility for courts to expand the categories of juristic reasons as circumstances require and to deny recovery where to allow it would be inequitable. As McLachlin J. wrote in *Peel*, *supra*, at p. 788, the Court's approach to unjust enrichment, while informed by traditional categories of recovery, "is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice". But at the same time there must also be guidelines that offer trial judges and others some indication of what the boundaries of the cause of action are. The goal is to avoid guidelines that are so general and subjective that uniformity becomes unattainable.

44 The parties and commentators have pointed out that there is no specific authority that settles this question. But recalling that this is an equitable remedy that will necessarily involve discretion and questions of fairness, I believe that some redefinition and reformulation is required. Consequently, in my view, the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. By closing the list of categories that the plaintiff must canvass in order to show an absence of juristic reason, Smith's objection to the Canadian formulation of the test that it required proof of a negative is answered. The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra*), a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*), and other valid common law, equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

45 The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

46 As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. It may be that when these factors are considered, the court will find that a new category of

juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of a case which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments.

47 In my view, this approach to the juristic reason analysis is consistent with the general approach to unjust enrichment endorsed by McLachlin J. in *Peel*, *supra*, where she stated that courts must effect a balance between the traditional "category" approach according to which a claim for restitution will succeed only if it falls within an established head of recovery, and the modern "principled" approach according to which relief is determined with reference to broad principles. It is also, as discussed by Professor Smith, *supra*, generally consistent with the approach to unjust enrichment found in the civil law of Quebec (see, for example, arts. 1493 and 1494 of the *Civil Code of Quebec*, S.Q. 1991, c. 64).

(ii) *Application*

48 In this case, the only possible juristic reason from an established category that could be used to justify the enrichment is the existence of the OEB orders creating the LPPs under the "disposition of law" category. The OEB orders, however, do not constitute a juristic reason for the enrichment because they are rendered inoperative to the extent of their conflict with s. 347 of the *Criminal Code*. The plaintiff has thus made out a *prima facie* case for unjust enrichment.

49 Disposition of law is well established as a category of juristic reason. In *Rathwell*, *supra*, Dickson J. gave as examples of juristic reasons "a contract or disposition of law" (p. 455). In *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445 ("*GST Reference*"), Lamer C.J. held that a valid statute is a juristic reason barring recovery in unjust enrichment. This was affirmed in *Peter*, *supra*, at p. 1018. Most recently, in *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737, the Ontario Court of Appeal held that the legislation which created the Chinese head tax provided a juristic reason which prevented recovery of the head tax in unjust enrichment. In the leading Canadian text, *The Law of Restitution*, *supra*, McCamus and Maddaugh discuss the phrase "disposition of law" from *Rathwell*, *supra*, stating, at p. 46:

> . . . it is perhaps self-evident that an unjust enrichment will not be established in any case where enrichment of the defendant at the plaintiff's expense is required by law.

It seems clear, then, that valid legislation can provide a juristic reason which bars recovery in restitution.

50 Consumers' Gas submits that the LPPs were authorized by the Board's rate orders which qualify as a disposition of law. It seems to me that this submission is predicated on the validity and operability of this scheme. The scheme has been challenged by the appellant on the basis that it conflicts with s. 347 of the *Criminal Code* and, as a result of the doctrine of paramountcy, is consequently inoperative. In the *GST Reference*, *supra*, Lamer C.J. held that legislation provides a juristic reason "unless the statute itself is *ultra vires*" (p. 477). Given that legislation that would have been *ultra vires* the province cannot provide a juristic reason, the same principle should apply if the

provincial legislation is inoperative by virtue of the paramountcy doctrine. This position is contemplated by Borins J.A. in his dissent when he wrote, at para. 149:

> In my view, it would be wrong to say that the rate orders do not provide [Consumers' Gas] with a defence under s. 18 of the *OEBA* because they have been rendered inoperative by the doctrine of federal paramountcy, and then to breathe life into them for the purpose of finding that they constitute a juristic reason for [Consumers' Gas's] enrichment.

51 As a result, the question of whether the statutory framework can serve as a juristic reason depends on whether the provision is held to be inoperative. If the OEB orders are constitutionally valid and operative, they provide a juristic reason which bars recovery. Conversely, if the scheme is inoperative by virtue of a conflict with s. 347 of the *Criminal Code*, then a juristic reason is not present. In my view, the OEB rate orders are constitutionally inoperative to the extent of their conflict with s. 347 of the *Criminal Code*.

52 The OEB rate orders require the receipt of LPPs at what is often a criminal rate of interest. Such receipt is prohibited by s. 347 of the *Criminal Code*. Both the OEB rate orders and s. 347 of the *Criminal Code* are *intra vires* the level of government that enacted them. The rate orders are *intra vires* the province by virtue of s. 92(13) (property and civil rights) of the *Constitution Act, 1867*. Section 347 of the *Criminal Code* is *intra vires* the federal government by virtue of s. 91(19) (interest) and s. 91(27) (criminal law power).

53 It should be noted that the Board orders at issue did not require Consumers' Gas to collect the LPPs within a period of 38 days. One could then make the argument that this was not an express operational conflict. But to my mind this is somewhat

artificial. I say this because at bottom it is a necessary implication of the OEB orders to require payment within this period. In that respect it should be treated as an express order for purposes of the paramountcy analysis. Consequently, there is an express operational conflict between the rate orders and s. 347 of the *Criminal Code* in that it is impossible for Consumers' Gas to comply with both provisions. Where there is an actual operational conflict, it is well settled that the provincial law is inoperative to the extent of the conflict (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961). As a result, the Board orders are constitutionally inoperative. Because the Board orders are constitutionally inoperative, they do not provide a juristic reason. It therefore falls to Consumers' Gas to show that there was a juristic reason for the enrichment outside the established categories in order to rebut the *prima facie* case made out by the appellant.

54 The second stage of juristic reason analysis requires a consideration of reasonable expectations of the parties and public policy considerations.

55 When the reasonable expectations of the parties are considered, Consumers' Gas's submissions are at first blush compelling. Consumers' Gas submits, on the one hand, that late payers cannot have reasonably expected that there would be no penalty for failing to pay their bills on time and, on the other hand, that Consumers' Gas could reasonably have expected that the OEB would not authorize an LPP scheme that violated the *Criminal Code*. Because Consumers' Gas is operating in a regulated environment, its reliance on OEB orders should be given some weight. An inability to rely on such orders would make it very difficult, if not impossible, to operate in this environment. At this point, it should be pointed out that the reasonable expectation of the parties regarding LPPs is achieved by restricting the LPPs to the limit prescribed by s. 347 of

the *Criminal Code* and also would be consistent with this Court's decision in *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249, 2004 SCC 7.

56 Consumers' Gas's reliance on the orders would not provide a defence if it was charged under s. 347 of the *Criminal Code* because the orders are inoperative to the extent of their conflict with s. 347. However, its reliance on the orders is relevant in the context of determining the reasonable expectations of the parties in this second stage of the juristic reason analysis.

57 Finally, the overriding public policy consideration in this case is the fact that the LPPs were collected in contravention of the *Criminal Code*. As a matter of public policy, a criminal should not be permitted to keep the proceeds of his crime (*Oldfield v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 742, 2002 SCC 22, at para. 11; *New Solutions*, *supra*). Borins J.A. focussed on this public policy consideration in his dissent. He held that, in light of this Court's decision in *Garland No. 1*, allowing Consumers' Gas to retain the LPPs collected in violation of s. 347 would let Consumers' Gas profit from a crime and benefit from its own wrongdoing.

58 In weighing these considerations, from 1981-1994, Consumers' Gas's reliance on the inoperative OEB orders provides a juristic reason for the enrichment. As the parties have argued, there are three possible dates from which to measure the unjust enrichment: 1981, when s. 347 of the *Criminal Code* was enacted, 1994, when this action was commenced, and 1998, when this Court held in *Garland No. 1* that the LPPs were limited by s. 347 of the *Criminal Code*. For the period between 1981 and 1994, when the current action was commenced, there is no suggestion that Consumers' Gas was

aware that the LPPs violated s. 347 of the *Criminal Code*. This mitigates in favour of Consumers' Gas during this period. The reliance of Consumers' Gas on the OEB orders, in the absence of actual or constructive notice that the orders were inoperative, is sufficient to provide a juristic reason for Consumers' Gas's enrichment during this first period.

59 However, in 1994, when this action was commenced, Consumers' Gas was put on notice of the serious possibility that it was violating the *Criminal Code* in charging the LPPs. This possibility became a reality when this Court held that the LPPs were in excess of the s. 347 limit. Consumers' Gas could have requested that the OEB alter its rate structure until the matter was adjudicated in order to ensure that it was not in violation of the *Criminal Code* or asked for contingency arrangements to be made. Its decision not to do this, as counsel for the appellant pointed out in oral submissions, was a "gamble". After the action was commenced and Consumers' Gas was put on notice that there was a serious possibility the LPPs violated the *Criminal Code*, it was no longer reasonable for Consumers' Gas to rely on the OEB rate orders to authorize the LPPs.

60 Moreover, once this Court held that LPPs were offside, for purposes of unjust enrichment, it is logical and fair to choose the date on which the action for redress commenced. Awarding restitution from 1981 would be unfair to the respondent since it was entitled to reasonably rely on the OEB orders until the commencement of this action in 1994. Awarding restitution from 1998 would be unfair to the appellant. This is because it would permit the respondent to retain LPPs collected in violation of s. 347 after 1994 when it was no longer reasonable for the respondent to have relied on the OEB orders and the respondent should be presumed to have known the LPPs violated

the *Criminal Code*. Further, awarding restitution from 1998 would deviate from the general rule that monetary remedies like damages and interest are awarded as of the date of occurrence of the breach or as of the date of action rather than the date of judgment.

61 Awarding restitution from 1994 appropriately balances the respondent's reliance on the OEB orders from 1981-1994 with the appellant's expectation of recovery of monies that were charged in violation of the *Criminal Code* once the serious possibility that the OEB orders were inoperative had been raised. As a result, as of the date this action was commenced in 1994, it was no longer reasonable for Consumers' Gas to rely on the OEB orders to insulate them from liability in a civil action of this type for collecting LPPs in contravention of the *Criminal Code*. Thus, after the action was commenced in 1994, there was no longer a juristic reason for the enrichment of the respondent, so the appellant is entitled to restitution of the portion of monies paid to satisfy LPPs that exceeded an interest rate of 60 percent, as defined in s. 347 of the *Criminal Code*.

B. *Defences*

62 Having held that the appellant's claim for unjust enrichment is made out for LPPs paid after 1994, it remains to be determined whether the respondent can avail itself of any defences raised. It is only necessary to consider the defences for the period after 1994, when the elements of unjust enrichment are made out, and thus I will not consider whether the defences would have applied if there had been unjust enrichment before 1994. I will address each defence in turn.

(a) Change of Position Defence

63 Even where the elements of unjust enrichment are made out, the remedy of restitution will be denied where an innocent defendant demonstrates that it has materially changed its position as a result of an enrichment such that it would be inequitable to require the benefit to be returned (*Storthoaks*, *supra*). In this case, the respondent says that any "benefit" it received from the unlawful charges was passed on to other customers in the form of lower gas delivery rates. Having "passed on" the benefit, it says, it should not be required to disgorge the amount of the benefit (a second time) to overcharged customers such as the appellant. The issue here, however, is not the ultimate destination within the regulatory system of an amount of money equivalent to the unlawful overcharges, nor is this case concerned with the net impact of these overcharges on the respondent's financial position. The issue is whether, as between the overcharging respondent and the overcharged appellant, the passing of the benefit on to other customers excuses the respondent of having overcharged the appellant.

64 The appellant submits that the defence of change of position is not available to a defendant who is a wrongdoer and that, since the respondent in this case was enriched by its own criminal misconduct, it should not be permitted to avail itself of the defence. I agree. The rationale for the change of position defence appears to flow from considerations of equity. G. H. L. Fridman writes that "[o]ne situation which would appear to render it inequitable for the defendant to be required to disgorge a benefit received from the plaintiff in the absence of any wrongdoing on the part of the defendant would be if he has changed his position for the worse as a result of the receipt of the money in question" (*Restitution* (2nd ed. 1992), at p. 458). In the leading British case on the defence, *Lipkin Gorman v. Karpnale Ltd.*, [1992] 4 All E.R. 512 (H.L.), Lord Goff stated (at p. 533):

> [I]t is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these [where the defendant has changed his or her position]? The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution.

65 If the change of position defence is intended to prevent injustice from occurring, the whole of the plaintiff's and defendant's conduct during the course of the transaction should be open to scrutiny in order to determine which party has a better claim. Where a defendant has obtained the enrichment through some wrongdoing of his own, he cannot then assert that it would be unjust to return the enrichment to the plaintiff. In this case, the respondent cannot avail itself of this defence because the LPPs were obtained in contravention of the *Criminal Code* and, as a result, it cannot be unjust for the respondent to have to return them.

66 Thus, the change of position defence does not help the respondent in this case. Even assuming that the respondent would have met the other requirements set out in *Storthoaks*, *supra*, the respondent cannot avail itself of the defence because it is not an "innocent" defendant given that the benefit was received as a result of a *Criminal Code* violation. It is not necessary, as a result, to discuss change of position in a comprehensive manner and I leave a fuller development of the other elements of this defence to future cases.

(b) Section 18/25 of the *Ontario Energy Board Act*

67 The respondent raises a statutory defence found formerly in s. 18 and presently in s. 25 of the 1998 *OEBA*. The former and the present sections are identical, and read:

> An order of the Board is a good and sufficient defence to any proceeding brought or taken against any person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

I agree with McMurtry C.J.O. that this defence should be read down so as to exclude protection from civil liability damage arising out of *Criminal Code* violations. As a result, the defence does not apply in this case and we do not have to consider the constitutionality of the section.

68 McMurtry C.J.O. was correct in his holding that legislative provisions purporting to restrict a citizen's rights of action should attract strict construction (*Berardinelli, supra*). In this case, I again agree with McMurtry C.J.O. that the legislature could not reasonably be believed to have contemplated that an OEB order could mandate criminal conduct, despite the broad wording of the section. Section 18/25, thus, cannot provide a defence to an action for restitution arising from an OEB order authorizing criminal conduct. As a consequence, like McMurtry C.J.O., I find the argument on s. 18/25 to be unpersuasive.

69 Because I find that it could not have been the intention of the legislature to bar civil claims stemming from acts that offend the *Criminal Code*, on a strict construction, s. 18/25 cannot protect Consumers' Gas from these types of claims. If the provincial legislature had wanted to eliminate the possibility of such actions, it should have done so explicitly in the provision. In the absence of such explicit provision, s. 18/25 must be read so as to exclude from its protection civil actions arising from violations of the *Criminal Code* and thus does not provide a defence for the respondent in this case.

(c) Exclusive Jurisdiction and Collateral Attack

70 McMurtry C.J.O. was also correct in his holding that the OEB does not have exclusive jurisdiction over this dispute. While the dispute does involve rate orders, at its heart it is a private law matter under the competence of civil courts and consequently the Board does not have jurisdiction to order the remedy sought by the appellant.

71 In addition, McMurtry C.J.O. is correct in holding that this action does not constitute an impermissible collateral attack on the OEB's order. The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70). Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). In *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, this Court described the rule against collateral attack as follows:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Based on a plain reading of this rule, the doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders. Consequently, the collateral attack doctrine does not apply.

72 Moreover, the appellant's case lacks other hallmarks of collateral attack. As McMurtry C.J.O. points out at para. 30 of his reasons, the collateral attack cases all involve a party, bound by an order, seeking to avoid the effect of that order by challenging its validity in the wrong forum. In this case, the appellant is not bound by the Board's orders, therefore the rationale behind the rule is not invoked. The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" (*R. v. Litchfield*, [1993] 4 S.C.R. 333, at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it.

73 In this case, the appellant is not the object of the orders and thus there can be no concern that he is seeking to avoid the orders by bringing this action. As a result, a threat to the integrity of the system does not exist because the appellant is not legally bound to follow the orders. Thus, this action does not appear, in fact, to be a collateral attack on the Board's orders.

(d) <u>The Regulated Industries Defence</u>

74 The respondent submits that it can avail itself of the "regulated industries defence" to bar recovery in restitution because an act authorized by a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state and, as a result, the collection of LPPs pursuant to orders issued by the OEB cannot be considered to be contrary to the public interest and thus cannot be contrary to s. 347 of the *Criminal Code*.

75 Winkler J. held that the underlying purpose of the defence, regulation of monopolistic industries in order to ensure "just and reasonable" rates for consumers, would be served in the circumstances and as a result the defence would normally apply. However, because of the statutory language of s. 347, Winkler J. determined that the defence was not permitted in this case. He wrote, at para. 34, "[t]he defendant can point to no case which allows the defence unless the federal statute in question uses the word 'unduly' or the phrase 'in the public interest'". Absent such recognition in the statute of "public interest", he held, no leeway for provincial exceptions exist.

76 I agree with the approach of Winkler J. The principle underlying the application of the defence is delineated in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 356:

> When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

Estey J. reached this conclusion after canvassing the cases in which the regulated industries defence had been applied. Those cases all involved conflict between federal competition law and a provincial regulatory scheme, but the application of the defence

in those cases had to do with the particular wording of the statutes in question. While I cannot see a principled reason why the defence should not be broadened to apply to cases outside the area of competition law, its application should flow from the above enunciated principle.

77 Winkler J. was correct in concluding that, in order for the regulated industries defence to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the *Criminal Code* granted leeway to those acting pursuant to a valid provincial regulatory scheme. If there were any such indication, I would say that it should be interpreted, in keeping with the above principle, not to interfere with the provincial regulatory scheme. But s. 347 does not contain the required indication for exempting a provincial scheme.

78 This view is further supported by this Court's decision in *R. v. Jorgensen*, [1995] 4 S.C.R. 55. In that case, the accused was charged with "'knowingly' selling obscene material 'without lawful justification or excuse'" (para. 44). The accused argued that the Ontario Film Review Board had approved the videotapes, therefore it had a lawful justification or excuse. This Court considered whether approval by a provincial body could displace a criminal charge. Sopinka J., for the majority, held that in order to exempt acts taken pursuant to a provincial regulatory body from the reach of the criminal law, Parliament must unequivocally express this intention in the legislative provision in issue (at para. 118):

> While Parliament has the authority to introduce dispensation or exemption from criminal law in determining what is and what is not criminal, and may do so by authorizing a provincial body or official acting under provincial legislation to issue licences and the like, an intent to do so must be made plain.

79 The question of whether the regulated industries defence can apply to the respondent is actually a question of whether s. 347 of the *Criminal Code* can support the notion that a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state. In the previous cases involving the regulated industries defence, the language of "the public interest" and "unduly" limiting competition has always been present. The absence of such language from s. 347 of the *Criminal Code* precludes the application of this defence in this case.

(e) *De Facto* Doctrine

80 Consumers' Gas submits that because it was acting pursuant to a disposition of law that was valid at the time — the Board orders — they should be exempt from liability by virtue of the *de facto* doctrine. This argument cannot succeed. Consumers' Gas is not a government official acting under colour of authority. While the respondent points to the Board orders as justification for its actions, this does not bring the respondent into the purview of the *de facto* doctrine because the case law does not support extending the doctrine's application beyond the acts of government officials. The underlying purpose of the doctrine is to preserve law and order and the authority of the government. These interests are not at stake in the instant litigation. As a result, Consumers' Gas cannot rely on the *de facto* doctrine to resist the plaintiff's claim.

81 Furthermore, the *de facto* doctrine attaches to government and its officials in order to protect and maintain the rule of law and the authority of government. An extension of the doctrine to a private corporation that is simply regulated by a government authority is not supported by the case law and in my view does not further

the underlying purpose of the doctrine. In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, this Court held, at p. 756, that:

> There is only one true condition precedent to the application of the doctrine: the *de facto* officer must occupy his or her office under colour of authority.

It cannot be said that Consumers' Gas was a *de facto* officer acting under colour of authority when it charged LPPs to customers. Consumers' Gas is a private corporation acting in a regulatory context, not an officer vested with some sort of authority. When charging LPPs, Consumers' Gas is engaging in commerce, not issuing a permit or passing a by-law.

82 In rejecting the application of the *de facto* doctrine here, I am cognizant of the passage in *Reference re Manitoba Language Rights*, at p. 757, cited by the intervener Toronto Hydro and which, at first glance, appears to imply that the *de facto* doctrine might apply to private corporations:

> . . . the *de facto* doctrine will save those rights, obligations and other effects which have arisen out of actions performed pursuant to invalid Acts of the Manitoba Legislature by public and private bodies corporate, courts, judges, persons exercising statutory powers and public officials. [Emphasis added.]

83 While this passage appears to indicate that "private bodies corporate" are protected by the doctrine, it must be read in the context of the entire judgment. Earlier, at p. 755, the Court referred to the writings of Judge A. Constantineau in *The De Facto Doctrine* (1910), at pp. 3-4. The following excerpt from that passage is relevant:

> The de facto doctrine is a rule or principle of law which . . . recognizes the existence of, and protects from collateral attack, public or private bodies corporate, which, though irregularly or illegally organized, yet, under color of law, openly exercise the powers and functions of regularly created bodies . . . . [Emphasis added.]

In this passage, I think it is clear that the Court's reference to "private bodies corporate" is limited to issues affecting the creation of the corporation, for example where a corporation was incorporated under an invalid statute. It does not suggest that the acts of the corporation are shielded from liability by virtue of the *de facto* doctrine.

84 This view finds further support in the following passage from the judgment (at p. 755):

> That the foundation of the principle is the more fundamental principle of the rule of law is clearly stated by Constantineau in the following passage (at pp. 5-6):
>
> > Again, the doctrine is necessary to maintain the supremacy of the law and to preserve peace and order in the community at large, since any other rule would lead to such uncertainty and confusion, as to break up the order and quiet of all civil administration. Indeed, if any individual or body of individuals were permitted, at his or their pleasure, to challenge the authority of and refuse obedience to the government of the state and the numerous functionaries through whom it exercises its various powers, or refuse to recognize municipal bodies and their officers, on the ground of irregular existence or defective titles, insubordination and disorder of the worst kind would be encouraged, which might at any time culminate in anarchy.

The underlying purpose of the doctrine is to preserve law and order and the authority of the government. These interests are not at stake in the instant litigation. In sum, I find no merit in Consumers' Gas's argument that the *de facto* doctrine shields it from liability and as a result this doctrine should not be a bar to the appellant's recovery.

C. *Other Orders Requested*

(a) Preservation Order

85 The appellant, Garland, requests an "*Amax*-type" preservation order on the basis that the LPPs continue to be collected at a criminal rate during the pendency of this action, and these payments would never have been made but for the delays inherent in litigation (*Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576). In my view, however, a preservation order is not appropriate in this case. Consumers' Gas has now ceased to collect the LPPs at a criminal rate. As a result, if a preservation order were made, there would be no future LPPs to which it could attach. Even with respect to the LPPs paid between 1994 and the present, to which such an order could attach, a preservation order should not be granted for three further reasons: (1) such an order would serve no practical purpose, (2) the appellant has not satisfied the criteria in the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and (3) *Amax* can be distinguished from this case.

86 First, the appellant has not alleged that Consumers' Gas is an impecunious defendant or that there is any other reason to believe that Consumers' Gas would not satisfy a judgment against it. Even if there were some reason to believe that Consumers' Gas would not satisfy such a judgment, an *Amax*-type order allows the defendant to spend the monies being held in the ordinary course of business — no actual fund would be created. So the only thing that a preservation order would achieve would be to prevent Consumers' Gas from spending the money earned from the LPPs in a non-ordinary manner (for example, such as moving it off-shore) which the appellant has not alleged is likely to occur absent the order.

87 Second, the respondent submits that by seeking a preservation order the appellant is attempting to avoid Rule 45.02 of the Ontario *Rules of Civil Procedure*, the only source of jurisdiction in Ontario to make a preservation order. The *Rules of Civil Procedure* apply to class proceedings and do not permit such an order in these circumstances. Rule 45.02 provides that, "[w]here the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just" (emphasis added). The respondent submits that the appellant is not in fact claiming a specific fund here. In the absence of submissions by the appellant on this issue, I am of the view that the appellant has not satisfied the criteria set out in the Ontario *Rules of Civil Procedure* and that this Court could refuse to grant the order requested on this basis.

88 Finally, the appellant's use of *Amax, supra*, as authority for the type of order sought is without merit. The appellant has cited the judgment very selectively. The portion of the judgment the appellant cites in his written submissions reads in full (at p. 598):

> Apart from the Rules this Court has the discretion to make an order as requested by appellants directing the Province of Saskatchewan to hold, as stakeholder, such sums as are paid by the appellants pursuant to the impugned legislation but with the right to use such sums in the interim for Provincial purposes, and with the obligation to repay them with interest in the event the legislation is ultimately held to be *ultra vires*. Such an order, however, would be novel, in giving the stakeholder the right to spend the moneys at stake, and I cannot see that it would serve any practical purpose. [Emphasis added.]

The Court in *Amax* went on to refuse to make the order. So while the appellant is right that the Court in *Amax* failed to reject the hypothetical possibility of making such an

order in the future, it seems to me that in this case, as in *Amax*, such an order would serve no practical purpose. For these reasons, I find there is no basis for making a preservation order in this case.

(b) Declaration That the LPPs Need Not Be Paid

89 The appellant also seeks a declaration that the LPPs need not be paid. Given that the respondent asserts that the LPP is no longer charged at a criminal rate, issuing such a declaration would serve no practical purpose and as a result such a declaration should not be made.

(c) Costs

90 The appellant is entitled to his costs throughout. This should be understood to mean that, regardless of the outcome of any future litigation, the appellant is entitled to his costs in the proceedings leading up to and including *Garland No. 1* and this appeal. In addition, in oral submissions counsel for the Law Foundation of Ontario made the point that in order to reduce costs in future class actions, "litigation by installments", as occurred in this case, should be avoided. I agree. On this issue, I endorse the comments of McMurtry C.J.O., at para. 76 of his reasons:

> In this context, I note that the protracted history of these proceedings cast some doubt on the wisdom of hearing a case in instalments, as was done here. Before employing an instalment approach, it should be considered whether there is potential for such a procedure to result in multiple rounds of proceedings through various levels of court. Such an eventuality is to be avoided where possible, as it does little service to the parties or to the efficient administration of justice.

VI. Disposition

91 For the foregoing reasons, I would allow the appeal with costs throughout, set aside the judgment of the Ontario Court of Appeal, and substitute therefor an order that Consumers' Gas repay LPPs collected from the appellant in excess of the interest limit stipulated in s. 347 after the action was commenced in 1994 in an amount to be determined by the trial judge.

*Appeal allowed with costs.*

*Solicitors for the appellant: McGowan Elliott & Kim, Toronto.*

*Solicitors for the respondent: Aird & Berlis, Toronto.*

*Solicitor for the intervener the Attorney General of Canada: Deputy Attorney General of Canada, Ottawa.*

*Solicitor for the intervener the Attorney General for Saskatchewan: Deputy Attorney General for Saskatchewan, Regina.*

*Solicitors for the intervener Toronto Hydro-Electric System Limited: Ogilvy Renault, Toronto.*

*Solicitor for the intervener the Law Foundation of Ontario: Mark M. Orkin, Toronto.*

*Solicitors for the intervener Union Gas Limited: Torys, Toronto.*

TAB 2

Mackin *v.* New Brunswick (Minister of Finance); Rice *v.* New Brunswick, [2002] 1 S.C.R. 405, 2002 SCC 13

**Her Majesty The Queen in Right of the Province of New Brunswick as represented by the Minister of Finance** *Appellant*

*v.*

**Ian P. Mackin** *Respondent*

and between

**Her Majesty The Queen in Right of the Province of New Brunswick as represented by the Minister of Finance** *Appellant*

*v.*

**Douglas E. Rice** *Respondent*

and

**The Attorney General of Canada,
the Attorney General for Ontario,
the Attorney General of Quebec,
the Attorney General of Manitoba,
the Attorney General of British Columbia,
the Attorney General for Saskatchewan,
the Attorney General for Alberta,
the Canadian Judges Conference and
the Canadian Association of Provincial Court Judges** *Interveners*

**Indexed as: Mackin *v.* New Brunswick (Minister of Finance); Rice *v.* New Brunswick**

**Neutral citation: 2002 SCC 13.**

File No.: 27722.

2001: May 23; 2002: February 14.

Present: L'Heureux-Dubé, Gonthier, Iacobucci, Major, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for new brunswick

*Constitutional law – Judicial independence – Provincial courts – Supernumerary judges – Provincial legislation eliminating system of supernumerary judges and replacing it with panel of retired judges paid per diem – Whether legislation violates guarantees of judicial independence – Canadian Charter of Rights and Freedoms, s. 11(d) – Constitution Act, 1867, Preamble – Act to Amend the Provincial Court Act, S.N.B. 1995, c. 6.*

*Constitutional law – Remedies – Damages – Provincial legislation eliminating system of supernumerary judges and replacing it with panel of retired judges paid per diem – Supernumerary judges successfully challenging constitutionality of legislation – Whether damages claim by supernumerary judges warranted – Constitution Act, 1982, ss. 24(1), 52.*

*Costs – Solicitor-client costs awarded on appeal – Whether solicitor-client costs appropriate.*

In 1995, the New Brunswick *Act to Amend the Provincial Court Act* ("Bill 7") abolished the system of supernumerary judges and replaced it with a panel of retired judges paid on a *per diem* basis. Supernumerary judges, who were judges

under the *Provincial Court Act*, received a salary and fringe benefits equivalent to those given to judges sitting full time. Although the *Provincial Court Act* was silent concerning the size of the reduction in workload, supernumerary judges were normally asked to take on only about 40 percent of the usual workload of a full-time judge. Supernumerary judges in office when Bill 7 came into force were required to choose between retiring or returning to sit full time before April 1, 1995. The change was made in the interest of efficiency and flexibility, and for economic and financial reasons. The respondent R began to sit as a supernumerary judge in 1993, but his workload was not significantly reduced between 1993 and his eventual retirement. When Bill 7 became law, he had to return to full-time judicial office. He retired in 1997 and asked to be placed on the panel of retired judges. Prior to the enactment of Bill 7, R had organized his financial and personal affairs in light of the conditions applying to supernumerary judges. The respondent M began to sit as a supernumerary judge in 1988. Until 1990, his workload was not appreciably reduced, but thereafter, the reorganization of his judicial duties enabled him to spend several winters in Australia. M did not express his intention to retire before April 1, 1995, and was deemed to have resumed his duties as a full-time judge. The respondents instituted separate proceedings, successfully challenging the constitutionality of Bill 7 at trial and on appeal, arguing that it unjustifiably affected the tenure and financial security that form part of judicial independence. The respondents' claim for damages was rejected at trial. The Court of Appeal held that damages could be awarded and referred the question of the appropriate amount back to the trial judge. The respondents were awarded solicitor-client costs.

*Held* (Binnie and LeBel JJ. dissenting): The appeal should be allowed in part. Bill 7 is unconstitutional.

*Per* L'Heureux-Dubé, Gonthier, Iacobucci, Major and Arbour JJ.: Judicial independence is essential to the achievement and proper functioning of a free, just and democratic society based on the principles of constitutionalism and the rule of law. The general test for judicial independence is to ask whether a reasonable person fully informed of all the circumstances would consider that a particular court enjoyed the necessary independent status. This requires independence in fact and a reasonable perception of independence. Only objective legal guarantees are capable of meeting this double requirement. Judicial independence has individual and institutional dimensions, and three essential characteristics: financial security, security of tenure and administrative independence. The constitutional protection of judicial independence requires the existence in fact of these essential characteristics and the maintenance of the perception that they exist. Thus, each of them must be institutionalized through appropriate legal mechanisms.

The opportunity to sit as a supernumerary was not integral to the office of a judge and eliminating that opportunity was not a removal from office. The ability to perform 40 percent of the usual duties but not to work full time should be classified as an inability to perform the duties of a judge. The elimination of the duties of supernumerary judges should be treated as a question relating to financial security. Individually, financial security requires that judges' salaries be provided for by law and that neither the executive nor the legislative branch arbitrarily encroach upon this right in a manner that affects the independence of the courts. Any measure taken by a government that affects any aspect of the remuneration conditions of judges will automatically trigger the application of the principles relating to the institutional dimension of financial security. In particular, governments have a constitutional duty to use an independent, effective and objective body for recommendations on salary reductions, increases or freezes for judges. If these recommendations are ignored, that

decision must be justified, if necessary in a court of law, on the basis of a simple rationality test.

Bill 7 violates the institutional guarantees of judicial independence contained in s. 11(*d*) of the *Canadian Charter of Rights and Freedoms* and the Preamble to the *Constitution Act, 1867* and is therefore declared unconstitutional. The system of supernumerary judges constituted an undeniable economic benefit for judges of the Provincial Court appointed before Bill 7 came into force and for eventual candidates for the position of judge in the court. There is no distinction in principle between a straight salary cut and the elimination of offices that offer a clear economic benefit since both raise controversial questions of public policy and resource allocation and raise the possibility of financial manipulation. By failing to refer the question of the elimination of the office of supernumerary judge to an independent, effective and objective body, the New Brunswick government breached a fundamental duty. The lack of a grandfather clause in favour of the supernumerary judges in office and the judges of the Provincial Court appointed before Bill 7 came into force aggravates the violation.

Since the appellant did not adduce any evidence tending to show that Bill 7's constitutional shortcomings were justified under s. 1 of the *Charter*, Bill 7 must therefore be declared invalid even though the New Brunswick government was pursuing a perfectly legitimate purpose in trying to make certain changes to the organization of its judiciary. The declaration of invalidity applies to both the elimination of the office of supernumerary judge and its replacement by the panel of judges. Except with respect to the respondents, the declaration is suspended for six months from the date of judgment. Although the directives issued by this Court in the *Provincial Court Judges Reference* did not acquire their full effect until September 18,

1998, the respondents instituted their proceedings before that decision was rendered. It would be unjust if they were not allowed to take advantage of the finding of unconstitutionality due to the sequence of events.

The respondents' claim for damages is dismissed. An action for damages brought under s. 24(1) of the *Charter* cannot normally be combined with an action for a declaration of invalidity based on s. 52 of the *Constitution Act, 1982*. In this case, the New Brunswick government did not display negligence, bad faith or wilful blindness with respect to its constitutional obligations. Nor was the Minister of Justice's failure to keep his promise to refer Bill 7 to the Law Amendments Committee an instance of bad faith that justified the damage awards.

The respondents are to have their costs throughout, on a party-and-party basis. Solicitor-client costs are not appropriate in this case.

*Per* Binnie and LeBel JJ. (dissenting): The Provincial Court judges in New Brunswick who elected supernumerary status did not enjoy a constitutional right to work only 40 percent of the time in exchange for 100 percent of the salary of a full-time judge.

The essential guarantees of judicial independence, including financial security, are intended for the benefit of the judged, not the judges.

Although the majority's statement of the broad principles of judicial independence was agreed with, the respondents' expectation of a reduced workload was neither spelled out in the Act nor otherwise put in a legally enforceable form. The workload varied dramatically from region to region and the bare concept of a

"reduced" workload is too elastic to provide a manageable constitutional standard. The legislature was clearly not prepared to guarantee any fixed and defined benefit, or indeed any benefit at all. The doctrine of judicial independence does not protect "understandings" about specific financial benefits that are pointedly not written into the governing legislation. As the Provincial Court judges were given no guarantee in the Act, the anticipated reduced workload attaching to supernumerary status formed no part of the constitutional guarantee of judicial independence. Supernumerary status was a wholly discretionary potential benefit voluntarily conferred on the judges by the legislature, and its repeal could not and did not undermine the Provincial Court's institutional independence.

Even if the respondents could establish all of the elements of the administrative law doctrine of legitimate expectation, it would not be of assistance since the doctrine does not apply to a body exercising purely legislative functions. Nor can it operate to entitle the respondents to a substantive as opposed to procedural remedy. Furthermore the constitutional requirement of an independent, effective and objective process mandated by the *Provincial Court Judges Reference* was not elaborated by this Court until two years after the amendments in issue here.

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By Gonthier J.

**Applied:** *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; **referred to:** *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369;

*Beauregard v. Canada*, [1986] 2 S.C.R. 56; *British Columbia (Provincial Court Judge) v. British Columbia* (1997), 40 B.C.L.R. (3d) 289; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3; *Newfoundland Assn. of Provincial Court Judges v. Newfoundland* (2000), 191 D.L.R. (4th) 225; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42; *Crown Trust Co. v. The Queen in Right of Ontario* (1986), 26 D.L.R. (4th) 41; *Young v. Young*, [1993] 4 S.C.R. 3; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3.

By Binnie J. (dissenting)

*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *R. v. McCully*, N.B. Prov. Ct. (Moncton), February 13, 1996; *R. v. Woods* (1996), 179 N.B.R. (2d) 153; *R. v. Lapointe*, [1997] N.B.J. No. 57 (QL); *R. v. Leblanc* (1997), 190 N.B.R. (2d) 70; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Ridge v. Baldwin*, [1964] A.C. 40; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

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*Canadian Charter of Rights and Freedoms*, ss. 1, 2, 7 to 14, 11(*d*), 24.

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*Constitution Act, 1982*, ss. 35(1), 52.

*Provincial Court Act*, R.S.N.B. 1973, c. P-21 [am. 1987, c. 45], ss. 1 "judge", 2(1), 3.1 [ad. 1996, c. 54, s. 1], 4.1 [am. 1988, c. 37, s. 1], 4.2, 6, 6.1 to 6.13, 8(1), 14(2), 22.01 *et seq*.

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*Universal Declaration on the Independence of Justice*, in Shimon Shetreet and Jules Deschênes, eds., *Judicial Independence: The Contemporary Debate.* Boston: Martinus Nijhoff Publishers, 1985, 447.

APPEAL from a judgment of the New Brunswick Court of Appeal (1999), 40 C.P.C. (4th) 107, 23 C.C.P.B. 1, [1999] N.B.J. No. 544 (QL), allowing the respondent Mackin's appeal and dismissing the province's cross-appeal from a judgment of the Court of Queen's Bench (1998), 202 N.B.R. (2d) 324, 516 A.P.R. 324,

18 C.C.P.B. 30, 21 C.P.C. (4th) 29, [1998] N.B.J. No. 267 (QL). Appeal allowed in part, Binnie and LeBel JJ. dissenting.

APPEAL from a judgment of the New Brunswick Court of Appeal (1999), 235 N.B.R. (2d) 1, 607 A.P.R. 1, 181 D.L.R. (4th) 643, 39 C.P.C. (4th) 195, 22 C.C.P.B. 249, [1999] N.B.J. No. 543 (QL), allowing the respondent Rice's appeal and dismissing the province's cross-appeal from a judgment of the Court of Queen's Bench, [1998] N.B.J. No. 266 (QL). Appeal allowed in part, Binnie and LeBel JJ. dissenting.

*Brian A. Crane, Q.C.*, *Bruce Judah, Q.C.*, and *Ritu Gambhir*, for the appellant.

*J. Brent Melanson*, for the respondent Mackin.

*J. Gordon Petrie, Q.C.*, and *James M. Petrie*, for the respondent Rice.

*Graham R. Garton, Q.C.*, and *Karen Cuddy*, for the intervener the Attorney General of Canada.

*Lori Sterling* and *Sean Hanley*, for the intervener the Attorney General for Ontario.

*Monique Rousseau*, for the intervener the Attorney General of Quebec.

*Deborah Carlson*, for the intervener the Attorney General of Manitoba.

*George H. Copley, Q.C.*, for the intervener the Attorney General of British Columbia.

*Graeme G. Mitchell, Q.C.*, for the intervener the Attorney General for Saskatchewan.

*Robert C. Maybank*, for the intervener the Attorney General for Alberta.

*Leigh D. Crestohl*, for the intervener the Canadian Judges Conference.

*Robert D. Tonn*, for the intervener the Canadian Association of Provincial Court Judges.

The judgment of L'Heureux-Dubé, Gonthier, Iacobucci, Major and Arbour JJ. was delivered by

GONTHIER J. —

I. Introduction

1 This appeal primarily raises the issue of whether the abolition by the legislature of the position of supernumerary judge of the Provincial Court of New Brunswick contravenes the constitutional guarantees of judicial independence in s. 11(*d*) of the *Canadian Charter of Rights and Freedoms* and in the Preamble to the *Constitution Act, 1867*. The incidental issues that arise are whether the respondent

judges should be awarded damages and whether costs should be ordered on a solicitor-client basis.

II. Facts

2 The Provincial Court of New Brunswick was established in 1973 by the *Provincial Court Act*, R.S.N.B. 1973, c. P-21. Section 8(1) of the Act provides that "[e]ach judge is hereby constituted a court of record and, throughout the Province, has all the powers, authority, criminal jurisdiction and quasi-criminal jurisdiction vested in a police magistrate or in two or more justices of the peace sitting and acting together, under any law or statute in force in the Province". It accordingly has substantial criminal jurisdiction. The court is also the youth court designated by the province for the purposes of the *Young Offenders Act*, R.S.C. 1985, c. Y-1. Section 6 of the *Provincial Court Act* provides that a "judge holds office during good behaviour and may be removed from office only for misconduct, neglect of duty or inability to perform his duties". Section 4.2 provides that a "judge shall retire at the age of 75 years". Finally, s. 3.1 states that "[a] judge shall have the same protection and privileges as are conferred upon judges of The Court of Queen's Bench of New Brunswick, for any act done or omitted in the execution of his or her duty".

3 On January 1, 1988, the *Act to Amend the Provincial Court Act*, S.N.B. 1987, c. 45, the purpose of which was to create the office of supernumerary judge and to eliminate that of deputy judge, came into force. A judge of the Provincial Court could thereby elect to sit as a supernumerary judge if he or she met the following conditions: (i) he or she had reached the age of 65 years and had accumulated 15 years

of service; or (ii) he or she had reached the age of 60 years and had accumulated 25 years of service; or, finally, (iii) he or she had reached the age of 70 years and had accumulated 10 years of service. Thus, as the conditions of eligibility for the office of supernumerary judge fully reflected the conditions of eligibility for payment of a retirement pension equivalent to 60 percent of the full salary, an additional choice was given to the judges of the Provincial Court who satisfied these conditions. They could then: retire and receive their pension; continue to sit as a full-time judge; or sit as a supernumerary judge. Section 4.1(5) of the *Provincial Court Act* provided that a supernumerary judge was to remain available in order to perform the duties assigned to him or her "from time to time" by the Chief Judge. It was understood by everyone, however, that while a supernumerary judge of the Provincial Court received a salary and fringe benefits equivalent to those given to judges sitting full time, he or she was in practice asked to take on only about 40 percent of the usual workload of a full-time judge.

4 On April 1, 1995, ss. 1 through 8 of the *Act to Amend the Provincial Court Act*, S.N.B. 1995, c. 6 (also called "Bill 7"), came into force. Section 2 provided for the straight abolition of the system of supernumerary judges and s. 3 provided for its replacement by a panel of retired judges sitting at the request of the Chief Judge or the Associate Chief Judge and paid on a *per diem* basis. Also, the supernumerary judges then in office were faced with a choice of retiring or beginning to sit full time again (s. 9(1)). They were required to give notice to the government of their decision before April 1, 1995. The legislation did not contain a so-called "grandfather" clause that would have allowed the supernumerary judges in office at that time as well as the other judges of the Provincial Court appointed before Bill 7 came into force to retain the

privileges conferred upon them by law. According to the appellant, the government's decision to abolish the position of supernumerary judge was made for reasons of efficiency and flexibility as well as for economic and financial reasons. Thus, in its plea, it stated that "[t]he repeal of the supernumerary provisions by Bill 7 was a legislative initiative undertaken in the context of overall public fiscal restraint and a reasonable attempt to improve the utilization of resources and cost effectiveness in the administration of the Provincial Court".

5 The respondent Judge Douglas E. Rice joined the provincial judiciary on August 16, 1971. On July 2, 1992, upon reaching the age of 65 years and after sitting for more than 15 years, he was entitled to retire and to receive his pension. Rather than doing so, he decided to exercise his right to sit as a supernumerary judge, which he did starting on April 30, 1993. On April 2, 1995, after Bill 7 became law, he was forced, against his will, to return to a full-time judicial office. He finally retired on October 15, 1997 and asked to be placed on the new panel of judges paid on a *per diem* basis starting on December 4 of that year. In his written submissions, Judge Rice mentioned that he had organized his financial and personal affairs in light of the conditions applying to his duties as a supernumerary judge.

6 The respondent Judge Ian P. Mackin joined the provincial judiciary on October 17, 1962. On October 17, 1987, upon reaching the age of 60 years and after accumulating more than 25 years of service, he acquired the right to receive his pension. Nevertheless, on August 15, 1988, he decided, like Judge Rice, to sit as a supernumerary judge. It appears that this reorganization of his judicial duties enabled him to plan the use of his time in such a way that he was able to spend several winters

in Australia. Since he did not express his intentions following the enactment of Bill 7, Judge Mackin was deemed, in accordance with s. 9(1) of the Act, to have resumed his duties as a full-time judge. He still held this office as at the date of the hearing before this Court.

7 Following the coming into force of Bill 7, the two respondents instituted separate proceedings in the New Brunswick courts. Judge Mackin officially informed the government of his intention to bring legal proceedings on April 25, 1995, while Judge Rice submitted his written pleadings on June 24, 1997. The respondents challenged the constitutionality of the legislation abolishing the position of supernumerary judge, arguing that it affected the components of tenure and financial security that form part of judicial independence. Damages and payment of solicitor-client costs were also claimed. In this Court, both cases were joined and argued at the same time.

## III. Judgments Under Appeal

### A. *New Brunswick Court of Queen's Bench*

#### (1) *Mackin v. New Brunswick (Minister of Finance)* (1998), 202 N.B.R. (2d) 324

8 Deschênes J. began by noting the three essential conditions (financial security, security of tenure and administrative independence) and the two dimensions (individual and institutional) of judicial independence as set out by this Court in *Valente v. The Queen*, [1985] 2 S.C.R. 673, and in *Reference re Remuneration of*

*Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Provincial Court Judges Reference*"), in particular. He also mentioned that the judges, whether appointed before or after the creation of the position of supernumerary judge, had definitely developed certain expectations because of the existence of the position. Thus, they were able to plan their professional and financial future accordingly and the facts show that some of them acted in this way. He therefore concluded that, like their pension plan, the existence of the position of supernumerary judge constituted a genuine financial benefit for the judges of the Provincial Court.

9 On the other hand, he was of the opinion that the office of supernumerary judge also had elements that related to the condition of security of tenure, especially in the sense that a supernumerary judge continued to enjoy the same financial benefits as a full-time judge and was forced to take mandatory retirement at the age of 75. On the basis of the test developed in *Valente*, *supra*, at p. 698 — namely, that security of tenure requires "tenure . . . that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner" —, Deschênes J. considered, however, that the legislative abolition of the position of supernumerary judge was not equivalent, strictly speaking, to a dismissal of the supernumerary judges then in office. Consequently, the individual dimension of the condition of security of tenure had not been infringed. However, he added that in terms of both security of tenure and financial security, the issue was institutional in nature rather than individual. Thus, it is not so much the content of the impugned legislation as the process surrounding its enactment that was constitutionally dubious.

10 Starting with the finding that the office of supernumerary judge constituted a financial benefit for the judges of the Provincial Court, Deschênes J. was of the view that the Legislative Assembly of New Brunswick should have submitted its decision to abolish this position to an independent, effective and objective commission in accordance with what was prescribed in the *Provincial Court Judges Reference*. In fact, the decision was political in nature in two respects. First, it was informed by classic objectives of general public policy: spending cuts and a more efficient administration of justice. It also raised the spectre of interference by the legislative branch in the independence of the judiciary by means of financial manipulation. As a result, approval by a commission became necessary in order to ensure that the judiciary would not let itself — or appear to let itself — be dragged onto the political stage and at the same time jeopardize its independence. In fact, if the situation were otherwise, a reasonable person informed of all the circumstances would conclude that there was an insufficient degree of independence.

11 Moreover, Deschênes J. was of the opinion that this violation of the constitutional guarantees of independence could not be justified under s. 1 of the *Charter*. Because the violation consisted of a failure to refer the matter to an independent, effective and objective commission, this failure itself must be demonstrably justified. The government merely raised a defence of the reasonably justified nature of the legislation. Whether the legislation was justified or not, Deschênes J. felt that the amendment had been made arbitrarily without any real consultation with the judges affected. Finally, he mentioned that the lack of a grandfather clause was unfair to the judges of the Provincial Court generally, on the

one hand, and even more unfair to those judges who sat as supernumeraries, on the other.

12 Consequently, Deschênes J. declared that s. 2 of the *Act to Amend the Provincial Court Act* was unconstitutional, ordered that the question of the abolition of the office of supernumerary judge be referred immediately to the existing salary commission and suspended the declaration of unconstitutionality until the commission had issued a report on the question.

13 On the other hand, Deschênes J. refused to award damages to Judge Mackin for the violation of judicial independence by the provincial legislature. First, he noted that s. 24(1) of the *Charter* did not apply because Judge Mackin had not been the victim of a violation or infringement of his rights or freedoms protected by the *Charter*. Second, the general rule of public law, as set out in *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, states that damages will not be awarded for the enactment of legislation that is subsequently declared to be unconstitutional, except in the event of bad faith or other wrongful conduct on the part of government institutions.

14 Finally, on the question of costs, Deschênes J. stated that notwithstanding the use of disputed means, Judge Mackin was advancing the legitimate cause of protecting the independence of the judiciary and that he had been partially vindicated in this regard. He accordingly ordered that he be reimbursed for his costs on a party-and-party basis.

(2) *Rice v. New Brunswick*, [1998] N.B.J. No. 226 (QL)

15 Deschênes J. applied the same reasoning to the situation of Judge Rice. He also rejected Judge Rice's argument to the effect that the legislation abolishing the office of supernumerary had been enacted for ulterior or wrongful reasons.

B. *New Brunswick Court of Appeal*

(1) *Rice v. New Brunswick* (1999), 235 N.B.R. (2d) 1

(a) *Ryan J.A.*

16 Ryan J.A. viewed the actions of the provincial government as a violation of the concept of judicial independence. He began by finding that the office of supernumerary judge was a genuinely separate judicial office as opposed to a mere status or position. He then expressed the view that the elimination of the position of supernumerary judge had violated both the condition of financial security and that of security of tenure.

17 According to Ryan J.A., financial security was violated in both its individual and institutional dimensions. With respect to judges who were performing supernumerary duties at the time, their financial security was affected in its individual dimension whereas in respect of the other judges of the Provincial Court, it was affected in its institutional dimension. He also concluded that there was in fact political interference as a result of financial manipulation. By contrast, he asserted

that the guarantee of security of tenure was affected only in its individual dimension because, for the supernumerary judges in office at that time, the abolition of their positions was equivalent to an arbitrary and premature removal.

18 Since there was a violation of financial security, Ryan J.A. agreed with the trial judge in stating that the case should at the very least have been submitted to an independent, effective and objective commission. However, given his further findings concerning the violation of the condition of security of tenure, he felt that a referral to the existing commission would not be sufficient and that the Act quite simply had to be declared invalid. In any event, he added that the jurisdiction of this commission — which was limited to examining salaries, pension, vacation and sick leave benefits (s. 22.03(1) of the *Provincial Court Act*) — did not extend to the question of the abolition of the position of supernumerary judge.

19 Moreover, Ryan J.A. felt that the legislation could not be justified under s. 1. First, he maintained that judicial independence went beyond the provisions of the *Charter* and that an attack on an institution that was so fundamental to the Canadian constitutional system was well and truly unjustifiable. He then referred to the arbitrary and unfair nature of the government's actions. Finally, he noted that the lack of a grandfather clause for the benefit of the supernumerary judges and the other judges of the Provincial Court precluded any claim that the violation of judicial independence was minimal.

20 Concerning the awarding of damages, Ryan J.A. noted that the case related to an exceptional situation involving a veritable attack by the legislative and executive

branches against the judiciary. The government of the time could not have been oblivious to what it was doing and must have been aware of the effects its decision would have on the independence of the judiciary. He concluded accordingly that it was necessary to set aside the principle of qualified government immunity referred to in *Guimond, supra*. Consequently, neither negligence nor bad faith necessarily had to be established. Furthermore, there was a direct causal link between the violation of the rights of judges and the harm sustained. Thus, damages could be awarded under s. 24(1) of the *Charter*, or because of the duty of mutual respect owed by the different branches of government to one another. In the alternative, Ryan J.A. considered that the failure of the then-Minister of Justice to keep the promise made to the provincial judges to refer the legislation eliminating the office of supernumerary judge to the Law Amendments Committee constituted sufficient evidence of bad faith justifying the award of damages. However, he decided to refer the question of determining the appropriate amount back to the trial judge.

21 Finally, Ryan J.A. ordered that Judge Rice be paid his legal costs on a solicitor-client basis.

(b) *Drapeau J.A.*

22 Drapeau J.A. concurred with Ryan J.A. He nevertheless made a number of comments of his own on the question of damages. He began by expressing his agreement with Ryan J.A. that evidence of bad faith was not required in order for damages to be awarded in this case. The individual dimension of judicial independence was at issue and both the public and the supernumerary judges

personally bore the cost of the provincial government's decision unilaterally to abolish the office of supernumerary judge. He added that the legislation was enacted despite a clear awareness of its effects on the independence of the judiciary and on the supernumerary judges. He accordingly concurred with Ryan J.A. in finding that the traditional rules concerning the award of damages in constitutional proceedings should be set aside. Damages should be awarded not only to compensate the supernumerary judges but also to discourage any other attempt at legislative interference with judicial independence.

(c) *Daigle C.J.N.B., dissenting*

23 Daigle C.J.N.B. examined each of the first two conditions of judicial independence in order to determine whether they were violated by the enactment of Bill 7. His analysis focused first on the question of financial security. In his opinion, it was compromised in that the abolition of the office of supernumerary judge was likely to affect the judges' planning of the conditions for their retirement. Thus, although the situation did not involve a reduction as such in their net salary — since they retained the possibility of earning the equivalent of a full-time salary — the fact remained that the judges of the Provincial Court could legitimately rely on the existence of such a position in order to make certain plans of an economic and financial nature.

24 According to Daigle C.J.N.B., however, the guarantee of financial security was affected only in its institutional dimension. According to the principles set out in *Provincial Court Judges Reference*, *supra*, the Legislative Assembly of New Bunswick

had a duty to refer the question of the elimination of the office of supernumerary judge to an independent, effective and objective commission. However, he noted that there was no evidence in the case to suggest that there might have been any attempt at economic interference on the part of the legislature at the expense of the judges of the Provincial Court.

25 Daigle C.J.N.B. was, moreover, of the view that the constitutional guarantees of security of tenure were not infringed since it was possible for the supernumerary judges to resume their duties full time. An analysis of the *Provincial Court Act* supported him in this conclusion. First, he noted that s. 1 of the Act defined "judge" as including both a judge and a supernumerary judge. He added that s. 6 provided that a judge should hold office during good behaviour and could be removed from office only for misconduct, neglect of duty or inability to perform his duties. He also noted that a judge did not have to retire in order to become supernumerary. Rather, a supernumerary judge continued to exercise his duties as a judge of the Provincial Court until retiring. In short, Daigle C.J.N.B. found that there was no separate judicial office relating to the office of supernumerary judge. Consequently, the abolition of this position was of no consequence in terms of the security of tenure of the judges of the Provincial Court.

26 He was of the opinion, moreover, that the violation of the institutional guarantees of financial security was not justified under s. 1 of the *Charter*, since the government did not direct its argument to the legitimacy of its decision to ignore its duty to refer the question to an independent, effective and objective commission.

27 On the subject of damages, Daigle C.J.N.B. proceeded to apply the general rules governing the liability in tort of government institutions for enacting legislation that is subsequently declared unconstitutional. Thus, he was of the view that in such cases, damages would be awarded only in very rare instances, including where an act was passed in bad faith or for unworthy reasons. A bare allegation of unconstitutionality could not, on the other hand, justify an award of damages. In this case, not only was the refusal of the Minister of Justice to honour his promise to submit the legislative amendments to the Law Amendments Committee not alleged in the pleadings but, moreover, it does not support a finding of bad faith.

28 Daigle C.J.N.B. added that any relief under s. 24(1) of the *Charter* constituted a personal right that could be exercised only by a person whose fundamental rights had been violated. In this situation, only the institutional dimension of judicial independence was at issue. Furthermore, judicial independence exists for the benefit of the litigants and not for that of the judges. Finally, and in any event, he was of the opinion that a claim for damages could not succeed because the province enacted the legislation in good faith and in accordance with the constitutional teachings of the time. In fact, when Bill 7 came into force, the decision in *Provincial Court Judges Reference*, *supra*, had not yet been rendered.

29 Because of the infringement of the institutional dimension of financial security, Daigle C.J.N.B. declared Bill 7 to be unconstitutional. However, he ordered a suspension of this declaration for a period of six months to allow the province to correct its approach. He refrained from referring the matter to the existing salary commission since the province could rectify the problem by other means.

30 Finally, he agreed with the trial judge's opinion that the award of costs as between solicitor and client was quite simply not appropriate in this case. As far as the appeal proceedings were concerned, since each party should, in his view, be successful in part, he would have ordered that they pay their own costs.

(2) *Mackin v. New Brunswick (Minister of Justice)* (1999), 40 C.P.C. (4th) 107

31 All three judges in the Court of Appeal adopted their reasoning in *Rice* for the decision in *Mackin*.

IV. Relevant Statutory Provisions

32 *Provincial Court Act*, R.S.N.B. 1973, c. P-21 (as of March 30, 1995)

> **4.1**(1) A judge appointed under subsection 2(1) may elect to become a supernumerary judge upon meeting the requirements under this Act.
>
> **4.1**(2) Where a judge appointed under subsection 2(1) intends to become supernumerary, the judge shall give notice to the Minister of election two months prior to the effective date specified in the notice, being a day on which the judge will be eligible to so elect, and the judge shall, effective on that day, be deemed to have elected and given notice on that day.
>
> **4.1**(3) Where a judge appointed under subsection 2(1) has notified the Minister of the judge's election to give up regular judicial duties and hold office only as a supernumerary judge, the judge shall upon the effective date hold the office of supernumerary judge and shall be paid the salary annexed to that office until the judge ceases to hold office.
>
> **4.1**(4) A judge appointed under subsection 2(1) may elect to hold office as a supernumerary judge upon
>
> *(a)* attaining the age of sixty-five years and having continued in judicial office for at least fifteen years,

*(a.1)* attaining the age of sixty years and having continued in judicial office for at least twenty-five years, or

*(b)* attaining the age of seventy years and having continued in judicial office for at least ten years.

**4.1**(5) A judge appointed under subsection 2(1) who has elected to hold the office of supernumerary judge shall be available to perform such judicial duties as may be assigned to the judge from time to time by the chief judge or associate chief judge.

**6.** Subject to this Act, a judge holds office during good behaviour and may be removed from office only for misconduct, neglect of duty or inability to perform his duties.

*An Act to Amend the Provincial Court Act*, S.N.B. 1995, c. 6

**1** Subsection 1(1) of the Provincial Court Act, chapter P-21 of the Revised Statutes, 1973, is amended in the definition "judge" by striking out "and a supernumerary judge".

**2** Section 4.1 of the Act is repealed.

**9**(1) A judge who is a supernumerary judge under the Provincial Court Act immediately before the commencement of this section shall elect, before April 1, 1995, whether to resume the duties of judicial office on a full-time basis or to retire.

**9**(2) An election by a judge under subsection (1) shall be in writing to the Minister of Justice and shall be effective as of April 1, 1995, if no date is specified in the election, or upon the date specified in the election, whichever is the earlier.

**9**(3) If a judge fails to make an election under subsection (1) or if the Minister of Justice fails to receive a notice in writing before April 1, 1995, from a judge pursuant to subsection (2), the judge shall be deemed to have resumed the duties of judicial office on a full-time basis in accordance with the Provincial Court Act, effective April 1, 1995.

V. Issues

33 On December 12, 2000, the following constitutional questions were stated:

1. Does *An Act to Amend the Provincial Court Act*, S.N.B. 1995, c. 6, which repealed the supernumerary scheme for Provincial Court judges in New Brunswick, interfere with the judicial tenure and financial security of members of the Provincial Court and thereby violate in whole or in part the principle of judicial independence as guaranteed by:

   (a) the Preamble of the *Constitution Act, 1867*, or

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

2. Does *An Act to Amend the Provincial Court Act*, S.N.B. 1995, c. 6, which repealed the supernumerary scheme for Provincial Court judges in New Brunswick, and which was enacted without reference to an independent remuneration commission, thereby violate in whole or in part the principle of judicial independence as guaranteed by:

   (a) the Preamble of the *Constitution Act, 1867*, or

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

3. If the answer to question 1(b) or question 2(b) is yes, is the Act demonstrably justified as a reasonable limit prescribed by law under s. 1 of the *Charter*?

## VI. Analysis

### A. *Constitutional Questions*

#### (1) Introduction: Judicial Independence

34 Judicial independence is essential to the achievement and proper functioning of a free, just and democratic society based on the principles of constitutionalism and the rule of law. Within the Canadian Constitution, this fundamental value has its source in s. 11(*d*) of the *Charter* and in the Preamble to the *Constitution Act, 1867*, which states that the Constitution of Canada shall be "similar

in Principle to that of the United Kingdom". It was in *Provincial Court Judges Reference*, *supra*, at paras. 82 *et seq.*, that this Court explained in detail the constitutional foundations and scope of judicial independence.

35 Generally speaking, the expanded role of the judge as an adjudicator of disputes, interpreter of the law and guardian of the Constitution requires that he or she be completely independent of any other entity in the performance of his or her judicial functions. Such a view of the concept of independence may be found in art. 2.02 of the *Universal Declaration on the Independence of Justice* (reproduced in S. Shetreet and J. Deschênes, eds., *Judicial Independence: The Contemporary Debate* (1985), 447, at p. 450), which states:

> Judges individually shall be free, and it shall be their duty, to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. [Emphasis added.]

The adoption of a broad definition of judicial independence by this Court was confirmed, moreover, in *Provincial Court Judges Reference*, *supra*, at para. 130, where Lamer C.J., for the majority, stated the following:

> Finally, although I have chosen to emphasize that judicial independence flows as a consequence of the separation of powers, because these appeals concern the proper constitutional relationship among the three branches of government in the context of judicial remuneration, I do not wish to overlook the fact that judicial independence also operates to insulate the courts from interference by parties to litigation and the public generally: *Lippé*, *supra*, at pp. 152 *et seq.*, *per* Gonthier J. [Emphasis added.]

36 On the other hand, in order for a judge to remain as far as possible sheltered from pressure and interference from all sources, he or she "should be removed from financial or business entanglement likely to affect or rather to seem to affect him in the exercise of his judicial functions" (S. Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges", in Shetreet and Deschênes, *op. cit.*, 590, at p. 599).

37 The concept of independence accordingly refers essentially to the nature of the relationship between a court and others. This relationship must be marked by a form of intellectual separation that allows the judge to render decisions based solely on the requirements of the law and justice. The legal standards governing judicial independence, which are the sources governing the creation and protection of the independent status of judges and the courts, serve to institutionalize this separation. Moreover, the Preamble to the *Constitution Act, 1867* and s. 11(*d*) of the *Charter* give them a fundamental status by placing them at the highest level of the legal hierarchy.

38 The general test for the presence or absence of independence consists in asking whether a reasonable person who is fully informed of all the circumstances would consider that a particular court enjoyed the necessary independent status (*Valente*, *supra*, at p. 689; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369). Emphasis is placed on the existence of an independent status, because not only does a court have to be truly independent but it must also be reasonably seen to be independent. The independence of the judiciary is essential in maintaining the confidence of litigants in the administration of justice. Without this confidence, the Canadian judicial system cannot truly claim any legitimacy or

command the respect and acceptance that are essential to it. In order for such confidence to be established and maintained, it is important that the independence of the court be openly "communicated" to the public. Consequently, in order for independence in the constitutional sense to exist, a reasonable and well-informed person should not only conclude that there is independence in fact, but also find that the conditions are present to provide a reasonable perception of independence. Only objective legal guarantees are capable of meeting this double requirement.

39 As was explained in *Valente*, *supra*, at p. 687, and in the *Provincial Court Judges Reference*, *supra*, at paras. 118 *et seq.*, the independence of a particular court includes an individual dimension and an institutional dimension. The former relates especially to the person of the judge and involves his or her independence from any other entity, whereas the latter relates to the court to which the judge belongs and involves its independence from the executive and legislative branches of the government. The rules relating to these dimensions result from somewhat different imperatives. Individual independence relates to the purely adjudicative functions of judges — the independence of a court is necessary for a given dispute to be decided in a manner that is just and equitable — whereas institutional independence relates more to the status of the judiciary as an institution that is the guardian of the Constitution and thereby reflects a profound commitment to the constitutional theory of the separation of powers. Nevertheless, in each of its dimensions, independence is designed to prevent any undue interference in the judicial decision-making process, which must be based solely on the requirements of law and justice.

40 Within these two dimensions will be found the three essential characteristics of judicial independence set out in *Valente*, *supra*, namely financial security, security of tenure and administrative independence. Together, these characteristics create the relationship of independence that must exist between a court and any other entity. Their maintenance also contributes to the general perception of the court's independence. Moreover, these three characteristics must also be seen to be protected. In short, the constitutional protection of judicial independence requires both the existence in fact of these essential characteristics and the maintenance of the perception that they exist. Thus, each of them must be institutionalized through appropriate legal mechanisms.

41 This being the case, it remains for me to determine whether the elimination of the office of supernumerary judge in the Provincial Court of New Brunswick violates judicial independence by breaching one or more of its essential characteristics in either of its dimensions.

(2) Elimination of the Office of Supernumerary Judge and Judicial Independence

(a) *Security of Tenure*

42 In *Valente*, *supra*, at p. 695-96, it was found that in its individual dimension, the security of tenure provided for provincial court judges in Canada generally required that they may not be dismissed by the executive before the age of retirement except for misconduct or disability, following a judicial inquiry. Similarly, in New Brunswick, s. 4.2 of the *Provincial Court Act* provides that a judge shall retire

at the age of 75 and ss. 6.1 to 6.13 provide that a judicial inquiry shall be held in order to adjudicate on the merits of a recommendation that a judge be removed from office.

43 It was stated further that, in order for the individual dimension of security of tenure to be constitutionally protected, it was sufficient that a judge could be removed from office only for a reason relating to his or her capacity to perform his or her judicial duties (*Valente*, *supra*, at p. 697). Any arbitrary removal is accordingly prohibited. In this context, s. 6 of the *Provincial Court Act* seems to create adequate protection for judges of the Provincial Court of New Brunswick by indicating that "a judge holds office during good behaviour and may be removed from office only for misconduct, neglect of duty or inability to perform his duties".

44 In the first place, therefore, it is necessary to determine whether the elimination of the office of supernumerary judge constituted an arbitrary removal of the respondent judges from office. To this end, the nature of their office must be examined and defined on the basis of the relevant legislation.

45 In order to find that there was a removal from office, the judges in the majority in the Court of Appeal relied first on the proposition that the functions of the supernumerary judge constituted a genuine separate judicial office, as opposed to a mere status. Therefore, according to Ryan J.A., the characteristic of security of tenure would apply separately to this office and consequently, a supernumerary judge could not be removed from office otherwise than for a reason linked to his or her ability to perform the duties of that office and following a judicial inquiry. Since the respondents had their offices as supernumerary judges abolished by legislation with

no reason given that related to their ability to perform their duties and without any form of inquiry, not only was there a removal from office but this removal was arbitrary and unconstitutional in nature.

46 With the greatest respect, it is my opinion that this reasoning is ill-founded to the extent that the interpretation of the relevant legislation as a whole does not support its essential premise. In my judgment, there was simply no removal from the judicial office held by the respondent judges in this case.

47 First, s. 1 of the *Provincial Court Act* defined "judge" as including both a judge and a supernumerary judge. This means that, in electing to become a supernumerary, a judge nevertheless remained a judge of the Provincial Court. This finding is supported by the fact that a judge did not previously have to retire in order to become supernumerary. Rather, the judge decided to exercise his or her duties as a judge of the Provincial Court under different terms until he or she retired. Finally, it must be borne in mind that s. 9(1) of Bill 7 gave the supernumerary judges the possibility of resuming their duties full time. Obviously, therefore, there simply was no separate office linked to the position of supernumerary judge. Essentially, this position merely involved a reorganization of the workload of a judge of the Provincial Court. Consequently, there never was a real removal from office in this case and Judges Mackin and Rice at all times retained their security of tenure as judges of the Provincial Court.

48 Moreover, it was suggested that the possibility of sitting as a supernumerary judge was an integral part of the office of Provincial Court judge so

that the elimination of this position could affect its integrity. The security of tenure of all provincial judges appointed before Bill 7 came into force would therefore have been infringed since the conditions applying to their office would have been fundamentally altered. Here again, I cannot accept such an argument. It seems to me to be a clear exaggeration to suggest that the possibility that a judge of the Provincial Court can sit as a supernumerary is an integral part of his main office and that the elimination of this possibility is therefore equivalent to removal from office. As I noted earlier, I view the definition of the duties of a supernumerary judge as pertaining to the office of a judge of the Provincial Court and not to a separate judicial office. The question as to whether, in certain circumstances, the conditions applying to a particular judicial office can be changed to the point where they are equivalent to a removal from office does not therefore arise in this case.

49 Finally, it was argued that the elimination of the position of supernumerary judge was contrary to security of tenure in that a judge able to perform 40 percent of the usual duties but unable to work full time could be forced to take early retirement. In my opinion, such a possibility should be classified as an inability to perform the duties of a Provincial Court judge rather than as a removal of that judge from office. Security of tenure within the meaning of the Constitution is therefore not affected. In short, the elimination of the duties of supernumerary judges affects first and foremost the definition of the duties of Provincial Court judges and must accordingly be treated as a question relating to the protection of financial security rather than security of tenure.

(b) *Financial Security*

(i) Overview

50 In *Valente*, *supra*, only the individual dimension of financial security was considered in connection with the determination of salaries by the executive branch. It was determined at that time that the constitutional requirements in this regard were limited to ensuring that the judges' salaries were provided for by law and that the executive could not arbitrarily encroach upon this right in a manner that affected the independence of the courts. In *Beauregard v. Canada*, [1986] 2 S.C.R. 56, it was confirmed that this obligation also applied to the legislative branch.

51 In the *Provincial Court Judges Reference*, *supra*, at para. 121, it was clearly indicated that the financial security of provincial court judges also had an institutional dimension, shaping the relationships between the judiciary, on the one hand, and the executive and legislative branches, on the other.

52 Although it is a creation of the legislature, the provincial judiciary has important constitutional functions to perform, especially in terms of what it may do: ensure respect for the primacy of the Constitution under s. 52 of the *Constitution Act, 1982*; provide relief for violations of the *Charter* under s. 24; apply ss. 2 and 7 to 14 of the *Charter*; ensure compliance with the division of powers within Confederation under ss. 91 and 92 of the *Constitution Act, 1867*; and render decisions concerning the rights of the aboriginal peoples protected by s. 35(1) of the *Constitution Act, 1982*. In short, given the position occupied by the provincial courts within the Canadian legal system, the Constitution requires them to remain financially independent of the other political branches (*Provincial Court Judges Reference*, *supra*, at paras. 124-30).

53 We are here dealing with a situation in which the New Brunswick legislature decided to make changes in the organization of its judiciary by means of a statute applying to all the judges of the Provincial Court. Such an exercise of power affects interactions of a purely institutional nature between the legislative and judicial branches and is accordingly likely to be subject to the requirements of the institutional dimension of financial security. A violation of the institutional aspect of financial security will, furthermore, have a concrete impact on the financial security of all judges of the Provincial Court.

54 As was stated in *Provincial Court Judges Reference*, *supra*, at para. 131, each of the elements of financial independence at the institutional level results from the constitutional imperative that, as far as possible, the relationship between the judiciary and the other two branches of government should be depoliticized. This imperative makes it necessary for the judiciary to be protected against political interference from the other branches through financial manipulation and for it to be seen to be so protected. Furthermore, one must ensure that it does not become involved in political debates concerning the remuneration of persons paid out of public funds. In fact, the judge's role as a constitutional adjudicator requires that it be isolated therefrom and be seen to be so.

55 On the other hand, one must seek to enhance the impartiality of judges as well as the perception of such impartiality by minimizing their involvement in questions concerning their own remuneration while preventing the other branches of

government from using their control of public funds in order to interfere with their adjudicative independence.

56 In the *Provincial Court Judges Reference*, *supra*, at paras. 133-35, three elements or principles were found to be essential to the institutional dimension of financial security.

57 First, the salaries of provincial court judges may generally be reduced, increased or frozen but in order to do this, governments must resort to a body (usually called a "salary commission") that is independent, effective and objective, and that will make recommendations. The provincial governments have a constitutional duty to make use of this process. The existence of such a body makes it possible for the legislative or executive branch to determine the level of remuneration while allaying the possibility of interference by way of financial manipulation or the perception that such a possibility of interference exists. The recommendations of this commission are not binding on the executive or the legislature. However, they may not be ignored lightly. If a decision is made to ignore them, the decision must be justified, if necessary, in a court of law on the basis of a simple rationality test. Such a process accordingly promotes the impartiality of the judiciary and its appearance by ensuring that the financial security of judges will not be at the mercy of political meddling.

58 Further, any negotiation — in the sense of trade-offs — concerning the salaries of the judges between a member or representative of the judiciary, on the one hand, and a member or representative of the executive or legislative branch, on the other hand, is prohibited. Such negotiations are fundamentally inconsistent with the

independence of the judiciary. First, they are inevitably political as a result of the intrinsic nature of the question of salaries paid from the public purse. Second, the holding of such negotiations would undermine the perception of the independence of the judiciary since the jurisdiction of the provincial courts entails that the government is frequently a party to disputes before those courts and salary negotiations are likely to give rise to certain obvious fears concerning the independence of the judiciary arising from the attitude of the parties to these negotiations.

59 Finally, reductions in the salaries of judges must not result in lowering these below the minimum required by the office of judge. Public trust in the independence of the judiciary would be weakened if the salaries paid to judges were so low that they led people to think that the judges were vulnerable to political or other pressures through financial manipulation. In order to counter the possibility that government inaction could function as a means of financial manipulation because the salaries of judges in constant dollars would be allowed to decline as a result of inflation and also to counter the possibility that these salaries would fall below the minimum required to ensure the independence of the judiciary, the salary commission must convene when a specified period has passed since its last report was submitted in order to examine the adequacy of the judges' salaries in light of the cost of living and other relevant factors.

60 *Thus, the need to ensure that the process is depoliticized imposes negative* and positive obligations on the legislative and executive branches because not only must they refrain from using their financial powers to influence judges in the

performance of their duties, but they must also actively protect the independence of the judiciary by enacting appropriate legislative and institutional instruments.

61 The *Provincial Court Judges Reference*, *supra*, at para. 136, also indicates that these principles apply to the pensions and other benefits given to judges. Hence, any measure taken by government that affects any aspect of the remuneration conditions of judges will automatically trigger the application of the principles relating to the institutional dimension of financial security.

62 It is now necessary to examine whether the functions of supernumerary judges and their abolition have an impact on the financial security of judges of the Provincial Court.

(ii) Application to the Instant Case

1. *Does the Elimination of the Office of Supernumerary Judge Violate the Financial Security of the Judges of the Provincial Court?*

63 It appears that when it was created, the office of supernumerary judge was thought to provide a certain flexibility within the organization of the provincial judicial system. On the other hand, it enabled the government to benefit from the expertise of experienced judges while paying only the difference between a full salary and the pension that would in any event have been paid to a judge who had elected to retire. Hence, the conditions of eligibility for the office of supernumerary judge have always accurately reflected those of eligibility for a retirement pension. Moreover, these duties have already been described as creating a "useful bridge towards

retirement" (M. L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (1995), at p. 46 (emphasis added)).

64 For a judge of the Provincial Court of New Brunswick who had met certain conditions of age and seniority, the possibility of becoming a supernumerary judge was added to those of retiring and receiving a pension, on the one hand, and continuing to sit full time, on the other hand. Clearly, the only way to make such a position attractive was to offer conditions that were more advantageous than those linked to retirement or full-time duties.

65 Normally, a judge of the Provincial Court of New Brunswick who became a supernumerary judge enjoyed a substantial reduction in his or her workload while receiving a full salary. However, the *Provincial Court Act* was silent concerning the relative size of this reduction and, in s. 4.1(5), merely left this decision to the Chief Judge of the Court. In theory, therefore, this reduction could have been minimal or even non-existent. That was, in fact, what happened in the case of Judge Rice, who had to sit full time despite his supernumerary status because of the shortage of judges. However, if such a practice had been widespread, it would almost certainly have eliminated access to the office of supernumerary judge as a reasonable choice for a judge who met the conditions of eligibility. The government of New Brunswick would then have been deprived of the benefits of flexibility and expertise contemplated when it created this office. Consequently, I do not believe that it is possible to examine the nature of the office of supernumerary judge on the basis of such an abstract reading of s. 4.1(5) of the Act that we end up completely ignoring the factual and legal contexts in which this provision was enacted. Moreover, by its very wording, which

indicates that a supernumerary judge "shall be available to perform such judicial duties as may be assigned to the judge from time to time by the chief judge or associate chief judge" (emphasis added), the Act appears to suggest a reduced workload.

66 In my opinion, therefore, it is necessary to take into account the uncontradicted evidence showing that it was understood by everyone that a supernumerary judge had to perform approximately 40 percent of the usual workload of a judge of the Provincial Court. The retirement pension received by a judge of the Provincial Court was equivalent to 60 percent of the full salary. The reasoning behind this understanding was accordingly that it was logical for a judge who was eligible for a pension equivalent to 60 percent of his or her full salary to be given an opportunity to perform 40 percent of his or her former duties in return for a full salary.

67 In light of what has been said above, it is my view that the system of supernumerary judges constituted an undeniable economic benefit for all the judges of the Provincial Court appointed before Bill 7 came into force and for eventual candidates for the position of judge in the court. In other words, this type of benefit was certainly taken into consideration both by sitting judges and by candidates for the office of judge in planning their economic and financial affairs. Thus, it seems to me to be wrong to suggest that the abolition of the office of supernumerary judge did not violate the collective dimension of the financial security of the Provincial Court of New Brunswick. At the very least, this office provided a right to a potential benefit of a reduced workload, the extent of which was established by the Chief Judge, that is by judicial authority independent of the Executive or other government authority. Its abolition constituted a change in the conditions of office which were advantageous

to the judges by denying them the option of being eligible for a less demanding workload to be determined in a manner respectful of the institutional independence of the court. This benefit was likely to be substantial, impacting the quality and style of life of judges in their latter years. The issue here is not whether this benefit is a sufficient guarantee of financial security or judicial independence, as was the issue in *Valente* to which my colleague Binnie J. refers, but whether the supernumerary status provided a substantial benefit pertaining to financial security likely to give rise to negotiation and politicization.

68 In my opinion, there is no distinction in principle between a straight salary cut and the elimination of offices that offer a clear economic benefit. Both give rise to the political aspects mentioned in the *Provincial Court Judges Reference*, *supra*, that is to say they raise controversial questions of public policy and resource allocation and raise the possibility of interference by the other branches of government in the independence of the judiciary by means of financial manipulation. Indeed, as my colleague Binnie J. states, supernumerary status was adopted in New Brunswick after lengthy discussions between the government and the Provincial Court judges. Thus, the elimination of the office of supernumerary judge violates the institutional dimension of the financial security of judges of the Provincial Court of New Brunswick. A similar conclusion was drawn, moreover, by Parrett J. in *British Columbia (Provincial Court Judge) v. British Columbia* (1997), 40 B.C.L.R. (3d) 289 (S.C.), at pp. 314-15.

69 In short, I consider that the opinion stated by this Court in the *Provincial Court Judges Reference*, *supra*, requires that any change made to the remuneration

conditions of judges at any given time must necessarily pass through the institutional filter of an independent, effective and objective body so that the relationship between the judiciary, on the one hand, and the executive and legislative branches, on the other, remain depoliticized as far as possible. That is a structural requirement of the Canadian Constitution resulting from the separation of powers and the rule of law. By failing to refer the question of the elimination of the office of supernumerary judge to such a body, the government of New Brunswick breached this fundamental duty. The lack of a grandfather clause in favour of the supernumerary judges in office and the judges of the Provincial Court appointed before Bill 7 came into force also aggravates this initial violation. Consequently, Bill 7 must be declared invalid.

70 However, the foregoing reasoning must not be interpreted as negating or ossifying the exercise by the provinces of their legislative jurisdiction under s. 92(14) of the *Constitution Act, 1867*. While the provincial legislative assemblies have exclusive jurisdiction over "[t]he Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction", that jurisdiction must nevertheless be exercised in accordance with the structural principles of the Canadian Constitution, including the independence of the judiciary. In other words, the New Brunswick government was pursuing a perfectly legitimate purpose in trying to make certain changes to the organization of its judiciary for reasons of efficiency, flexibility and cost savings. In light of the impact of the elimination of the position of supernumerary judge on the financial security of Provincial Court judges, it should however have exercised its legislative jurisdiction while complying with the process of review by an independent, effective and objective body prescribed by the Constitution.

2. *Justification and Section 1 of the Charter*

71 As I indicated at the beginning of my analysis, judicial independence is protected by both the Preamble to the *Constitution Act, 1867* and s. 11(*d*) of the *Charter*. Thus, not only is it a right enjoyed by a party subject to the threat of criminal proceedings but it is also a fundamental element underlying the very operations of the administration of justice. In other words, judicial independence functions as a prerequisite for giving effect to a litigant's rights including the fundamental rights guaranteed in the *Charter*.

72 Given the vital role played by judicial independence within the Canadian constitutional structure, the standard application of s. 1 of the *Charter* could not alone justify an infringement of that independence. A more demanding onus lies on the government. Thus, in the *Provincial Court Judges Reference*, *supra*, at para. 137, it was indicated that the elements of the institutional dimension of financial security did not have to be followed in cases of dire and exceptional financial emergencies caused by extraordinary circumstances such as the outbreak of war or imminent bankruptcy. In this case, it is clear that such circumstances did not exist in New Brunswick at the time when Bill 7 was passed. Moreover, no arguments were made by the appellant in this regard.

73 Since it had been decided in the *Provincial Court Judges Reference*, *supra*, to resolve the questions in dispute solely on the basis of s. 11(*d*) of the *Charter*, the question as to whether the violation of this provision could be justified under s. 1 was

examined (paras. 277 *et seq.*). In this process, it was stated: (i) that the government had to adduce evidence to justify the violation; and (ii) that it was the fact that the independent, effective and objective process had been circumvented that had to be justified and not the content of the government measures. Although in my opinion a s. 1 analysis alone is not adequate to resolve the question as to whether the violation is justified, these principles remain applicable to the more demanding analysis required by the fundamental nature of judicial independence. In this case, the appellant did not adduce any evidence tending to show that its constitutional shortcomings were justified. Furthermore, in my judgment, the lack of a grandfather clause in Bill 7 aggravates the violation of judicial independence.

3. *Appropriate Relief*

74 Some of the interveners suggested that the appellant did not breach its constitutional obligations set out in the *Provincial Court Judges Reference*, *supra*, simply because under the directives issued by this Court on the rehearing in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3, these obligations did not acquire their full effect until September 18, 1998 while Bill 7 came into force on April 1, 1995.

75 It is true that in order to ensure continuity in the proper administration of justice, the Court decided in the rehearing of the *Provincial Court Judges Reference*, to suspend all aspects of the requirement relating to the judges' salary commission, including any reimbursement for past salary reductions for one year following the date of the judgment in the first reference (para. 18). This order was designed to permit the

courts whose independence was at issue to function nevertheless, while the governments proceeded to establish and implement the process of review by a commission required by the first *Provincial Court Judges Reference*. According to the order, the requirement relating to the judges' salary commission applied for the future, effective September 18, 1998. Lamer C.J. added at para. 20:

> I note that the prospectiveness of the judicial compensation requirement does not change the retroactivity of the declarations of invalidity made in this case. . . . In the rare cases in which this Court makes a prospective ruling, it has always allowed the party bringing the case to take advantage of the finding of unconstitutionality. [Emphasis added.]

76 A similar solution is appropriate in this case. The respondents instituted their legal proceedings before the *Provincial Court of Judges Reference*, *supra*, was rendered. An injustice would be perpetuated if they were not allowed to take advantage of the finding of unconstitutionality in the same way as the parties to the *Provincial Court Judges Reference*, *supra*, solely on the basis of this sequence of events. As I indicated in the preceding paragraph, the suspension of the requirement for a commission was ordered solely on the basis of necessity, in order to permit the provincial courts to operate in the meantime in the absence of the required level of independence. However, it was certainly not a case of a blanket suspension of the constitutional obligations explained in the *Provincial Court Judges Reference*, *supra* (see *Newfoundland Assn. of Provincial Court Judges v. Newfoundland* (2000), 191 D.L.R. (4th) 225 (Nfld. C.A.), at pp. 266-80 (*per* Green J.A.)). Also, in all fairness, I consider that the declaration of invalidity must benefit the respondents who are, for all practical purposes, in the same position as the successful parties in the *Provincial Court Judges Reference*, *supra*.

77 Moreover, this declaration applies to both the elimination of the office of supernumerary judge and its replacement by a new panel of part-time judges paid on a *per diem* basis since it is impossible for all practical purposes to dissociate both these aspects of Bill 7 (*Schachter v. Canada*, [1992] 2 S.C.R. 679, at pp. 710-11; *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503 (P.C.), at p. 518). However, in order to fill the legal vacuum that would be created by a simple declaration of invalidity, the declaration will initially be suspended *erga omnes* for a period of six months to allow the government of New Brunswick to provide a solution that meets its constitutional obligations (*Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721). However, it is not appropriate for this Court to dictate the approach that should be taken in order to rectify the situation. Since there is more than one way to do so, it is the government's task to determine which approach it prefers. It is also the responsibility of the government to decide whether the existing judges' salary commission established by ss. 22.01 *et seq.* of the *Provincial Court Act* may validly consider the question of the abolition of the office of supernumerary judge.

B. *Other Questions*

(1) Damages

78 According to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is

subsequently declared to be unconstitutional (*Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42). In other words "[i]nvalidity of governmental action, without more, clearly should not be a basis for liability for harm caused by the action" (K. C. Davis, *Administrative Law Treatise* (1958), vol. 3, at p. 487). In the legal sense, therefore, both public officials and legislative bodies enjoy limited immunity against actions in civil liability based on the fact that a legislative instrument is invalid. With respect to the possibility that a legislative assembly will be held liable for enacting a statute that is subsequently declared unconstitutional, R. Dussault and L. Borgeat confirmed in their *Administrative Law: A Treatise* (2nd ed. 1990), vol. 5, at p. 177, that:

> In our parliamentary system of government, Parliament or a legislature of a province cannot be held liable for anything it does in exercising its legislative powers. The law is the source of duty, as much for citizens as for the Administration, and while a wrong and damaging failure to respect the law may for anyone raise a liability, it is hard to imagine that either Parliament or a legislature can as the lawmaker be held accountable for harm caused to an individual following the enactment of legislation. [Footnotes omitted.]

79 However, as I stated in *Guimond v. Quebec (Attorney General)*, *supra*, since the adoption of the *Charter*, a plaintiff is no longer restricted to an action in damages based on the general law of civil liability. In theory, a plaintiff could seek compensatory and punitive damages by way of "appropriate and just" remedy under s. 24(1) of the *Charter*. The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances.

Consequently, the reasons that inform the general principle of public law are also relevant in a *Charter* context. Thus, the government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded (*Crown Trust Co. v. The Queen in Right of Ontario* (1986), 26 D.L.R. (4th) 41 (Ont. Div. Ct.)).

80 Thus, it is against this backdrop that we must read the following comments made by Lamer C.J. in *Schachter*, *supra*, at p. 720:

> An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with an action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. [Emphasis added.]

81 In short, although it cannot be asserted that damages may never be obtained following a declaration of unconstitutionality, it is true that, as a rule, an action for damages brought under s. 24(1) of the *Charter* cannot be combined with an action for a declaration of invalidity based on s. 52 of the *Constitution Act, 1982*.

82 Applying these principles to the situation before us, it is clear that the respondents are not entitled to damages merely because the enactment of Bill 7 was unconstitutional. On the other hand, I do not find any evidence that might suggest that the government of New Brunswick acted negligently, in bad faith or by abusing its powers. Its knowledge of the unconstitutionality of eliminating the office of supernumerary judge has never been established. On the contrary, Bill 7 came into force on April 1, 1995, more than two years before this Court expressed its opinion in the *Provincial Court Judges Reference*, *supra*, which, it must be recognized, substantially altered the situation in terms of the institutional independence of the judiciary. Consequently, it may not reasonably be suggested that the government of New Brunswick displayed negligence, bad faith or wilful blindness with respect to its constitutional obligations at that time.

83 Furthermore, I cannot accept the statement of Ryan J.A. of the Court of Appeal that the failure of the Minister of Justice to keep his promise to refer Bill 7 to the Law Amendments Committee was an instance of bad faith that justified the awards of damages. Even if admitted to be true, such evidence is far from establishing a negligent or unreasonable attitude on the part of government. In fact, it has no probative value as to whether, in the circumstances, the legislation was enacted wrongly, for ulterior motives or with knowledge of its unconstitutionality.

84 The claim of the respondent judges for damages is accordingly dismissed.

(2) Costs

85 Although the appeal is allowed in part, the fact remains that the respondents are successful on the principal issue, namely the constitutional invalidity of the legislation in question. I would accordingly award their costs throughout.

86 At trial, the respondents were awarded party-and-party costs. In the Court of Appeal, this decision was reversed and it was decided that the government's conduct justified the award of solicitor-client costs. It is established that the question of costs is left to the discretion of the trial judge. The general rule in this regard is that solicitor-client costs are awarded only on very rare occasions, for example when a party has displayed reprehensible, scandalous or outrageous conduct (*Young v. Young*, [1993] 4 S.C.R. 3, at p. 134). Reasons of public interest may also justify the making of such an order (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 80).

87 Although judicial independence is a noble cause that deserves to be firmly defended, it is not appropriate in my opinion to grant such a form of costs to the respondents in this case. I would accordingly award them their costs on a party-and-party basis.

VII. Disposition

88 The appeal is allowed in part. The *Act to Amend the Provincial Court Act* (Bill 7) is declared unconstitutional because it violates the institutional guarantees of

judicial independence contained in s. 11(*d*) of the *Charter* and the Preamble to the *Constitution Act, 1867*. Except with respect to the respondents, however, this declaration of unconstitutionality is suspended for a period of six months from the date of this judgment* to allow the government of New Brunswick to rectify the situation in accordance with its constitutional obligations as described in this decision and in the *Provincial Court Judges Reference, supra*. Accordingly, the constitutional questions are answered as follows:

Answer to question 1: Yes, with respect to financial security.

Answer to question 2: Yes.

Answer to question 3: No.

89 The respondents' claim for damages is dismissed.

90 However, since the respondents were successful on the main issue, they are entitled to their costs throughout.

The reasons of Binnie and LeBel JJ. were delivered by

91 BINNIE J. (dissenting) — I have had the benefit of reading the reasons of my colleague Gonthier J. I agree with his statement of the broad principles of judicial independence but, with respect, I do not agree that supernumerary status as defined in

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*On June 17, 2002, the period of suspension was extended to February 14, 2003. On January 24, 2003, the period of suspension was further extended to August 14, 2003.

the New Brunswick *Provincial Court Act*, R.S.N.B. 1973, c. P-21, constituted an economic benefit protected by the Constitution. The respondents' expectation that they would work only 40 percent of the time for 100 percent of the pay of a full-time judge was neither spelled out in the Act nor otherwise put in a legally enforceable form.

92 My colleague notes "the uncontradicted evidence showing that it was understood by everyone that a supernumerary judge had to perform approximately 40 percent of the usual workload of a judge of the Provincial Court" (para. 66 (emphasis added)). I do not doubt it. It seems clear that it was thus understood by both judges and government officials. The question, however, is whether the doctrine of judicial independence protects "understandings" about specific financial benefits that are pointedly not written into the governing legislation.

93 My colleague says that judicial independence must be protected by "objective legal guarantees" (para. 38). I agree. What we have here, however, is neither objective nor a guarantee. As my colleague notes (para. 65) the repealed provision of the New Brunswick *Provincial Court Act* defined the workload of a supernumerary judge only in terms of being "available to perform such judicial duties as may be assigned to the judge from time to time by the chief judge or associate chief judge" (s. 4.1(5)). The problem is not simply that the extent of the discretionary benefit was not specified in the Act. The more fundamental problem is that, as I read it, the legislation *guaranteed* no benefit at all.

94 We are not dealing here with the broad unwritten principles of the Constitution. There is no general constitutional entitlement for judges to work 40 percent of the time for a 100 percent salary. What is at issue is the claim to a particular supernumerary benefit said to be voluntarily conferred by the legislature in the 1988 Act, and thereafter unconstitutionally withdrawn in 1995. The argument is that once conferred, a benefit becomes wrapped in constitutional protection and beyond legislative recall except in accordance with the independent, objective and effective procedure mandated by the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Provincial Court Judges Reference*").

95 In this case, however, the New Brunswick legislature refused to make a reduced workload commitment in framing the supernumerary provisions of the 1988 amendments. (No one argues that such refusal was itself contrary to unwritten constitutional guarantees.) The omission of any guarantee of a reduced workload in the original 1988 amendments was plain for all to see from the outset. The legislature thereafter refused to make sufficient funds available to fund a number of new judicial appointments to permit the supernumerary scheme to work as the judges had anticipated. The budget allocation fell well short of the earlier expectations raised by government officials, but it was consistent with the legislature's refusal throughout to provide any sort of a legislated guarantee of a reduced workload. The result was that, while a judge on supernumerary status was required by law to do whatever judicial duties were assigned by the Chief Judge, the Chief Judge was prevented by a shortage of judges from giving effect in most cases to the expectations of the judges who elected supernumerary status.

96 As the Provincial Court judges were given no guarantee in the Act, it follows that the anticipated reduced workload attaching to supernumerary status contended for by the respondents formed no part of the constitutional guarantee of judicial independence of the court of which they were members. The repeal of a potential benefit voluntarily conferred by the legislature, that was wholly discretionary as to whether in practice it produced any benefit at all, could not and in my view did not undermine their institutional independence. I would therefore allow the appeal.

Facts

97 Supernumerary status was introduced in New Brunswick by the 1987 amendments to the Act, which came into force January 1, 1988. From then until its repeal seven years later, six Provincial Court judges elected supernumerary status. Their varied work histories illustrate the basic flaw in the respondents' legal argument, namely the absence of *any* guaranteed benefit — let alone a 40 percent workload benefit — attaching to supernumerary status under the legislative scheme.

98 The respondent, Judge Douglas Rice, elected supernumerary status on April 30, 1993 after more than 21 years on the bench. His workload was not reduced to 40 percent of what it had been. It seems not to have been reduced significantly between 1993 and his eventual retirement.

99 In the companion case the respondent, Judge Ian Mackin elected to become supernumerary on August 15, 1988 after 25 years on the bench. In the initial period

his workload did not reduce appreciably either but thereafter he eased off, travelled extensively, and for at least five years prior to 1995 was able to winter for six months or so in Australia while drawing 100 percent of the salary of a Provincial Court judge on regular status.

100 Judge James D. Harper, one of the other judges who elected supernumerary status continued, like Judge Rice, more or less at full throttle. Some of the supernumerary judges he thought did "little or no work", i.e., much less than a 40 percent workload. Others he thought worked "very hard indeed". On November 7, 1994 Judge Harper wrote to Chief Judge Hazen Strange:

> Naturally, I have been well aware that many of the supernumeraries had not been pulling their weight and were receiving full pay for little or no work. As you well know, however, there are at least two such Judges who work very hard indeed.

101 The uneven workload was caused by many factors, including both the receptiveness and/or professionalism of supernumerary judges and, more importantly, the severe resource constraints confronting the Provincial Court as a whole. There were only six supernumerary judges and, as stated, the government failed to appoint judges to replace at least two of them, namely Judge Rice and Judge Harper. As the Chief Judge explained in his testimony:

> A. The most difficult administrative responsibility and the one that took the most time was assigning judges around the Province. At some stages we had more courts sitting on a given day, almost, than we had judges, and we had a number of satellite courts — I think at one stage 21 — I think we had at one stage 24 permanent courts and we only had something like 23 judges. So the most difficult part of my job, really, was to assign judges to courts so that they wouldn't go empty.

Q. Okay.

A. And that was true for ten years.

102 The administrative troubles of the Chief Judge did not end on March 3, 1995, when royal assent was given to *An Act to Amend the Provincial Court Act*, S.N.B. 1995, c. 6 repealing the provisions permitting supernumerary status. By law, each of the six incumbent judges on supernumerary status was required to elect by April 1, 1995 whether to retire or to work full-time as a member of the court. Each of them did so except the respondent Judge Mackin who refused to elect one way or the other, apparently taking the view that to make an election would be to give the 1995 repeal undeserved credibility. In his view the repeal was unlawful, and on April 25, 1995, he gave notice to the Crown of his intention to challenge in court its constitutionality.

103 The following day, April 26, 1995, without waiting for his constitutional challenge to proceed, Judge Mackin entered a courtroom that was not in session in the provincial courthouse at Moncton and in the presence of a couple of Crown attorneys and other members of the bar declared that he would no longer "sit, hear and decide cases under the duress of these amendments".

104 By letter dated May 17, 1995 he was ordered back to work by his Chief Judge. Judge Mackin declined to comply. In his view he could no longer be considered "independent" within the meaning of s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

105 On June 16, 1995 Judge Mackin's application for an injunction to restrain the Chief Judge from "assigning, designating or otherwise requiring [him] to perform Judicial . . . duties" was dismissed by Russell J. of the Court of Queen's Bench.

106 The Chief Judge took the view that Judge Mackin's constitutional objection had been overruled by a superior court, and that public confidence in the judiciary would suffer unless Judge Mackin accepted that legal result unless and until it was overturned by a higher court. Thus, on July 19, 1995, although he appeared to share Judge Mackin's view of the invalidity of the legislation repealing supernumerary status, the Chief Judge wrote to Judge Mackin to say "I believe you have had sufficient time to study the decision by Justice RUSSELL". He then reiterated his insistence that Judge Mackin return to work. Judge Mackin's response was to declare himself on sick leave. This was eventually supported by a one-sentence "report" from a Dr. Paul Doucet dated August 2, 1995 advising that Judge Mackin would not be returning to work for "an undetermined period of time because of medical reasons". When asked by the Chief Judge for an explanation from Dr. Doucet of the "medical reasons", Judge Mackin had his lawyers respond that it was "entirely possible" that the Chief Judge's request for an explanation was in contravention of the provincial *Human Rights Act*. The legal basis for such a curious suggestion was not disclosed.

107 Eventually a pattern developed whereby Judge Mackin, when he worked at all, would go into court and frequently either adjourn matters for lengthy periods of time or enter a stay of proceedings. As Chief Judge Strange testified:

> What was happening — there was one case, particularly — it was a rather terrible one where the alleged victim was a young person, a sexual assault

> — that was just put over for a month or two or three or four. Witnesses were showing up; the Crown was bringing witnesses in, sometimes from far away, sometimes from right there. It would just be adjourned, adjourned, adjourned, and it was making a farce of the situation; it wasn't fair to the accused; it wasn't fair to the prosecutors; it wasn't fair to the witnesses, and simply nothing was going ahead in his court . . . .

108 On November 14, 1995, the Chief Judge obtained from the Court of Queen's Bench a *mandamus* order requiring Judge Mackin "to hold sittings at the places and on the days designated by the Chief Judge of the Provincial Court of New Brunswick and to hear and determine cases properly brought before him during such sittings". Judge Mackin's appeal from this order was dismissed (with a variation in costs) on April 12, 1996.

109 In the meantime Judge Mackin had continued with his policy of granting a stay of proceedings to any accused who requested it. This had the effect of preventing the further prosecution of some quite serious criminal charges. In *R. v. McCully* on February 13, 1996, for example, the following exchange took place in Judge Mackin's court:

> [Crown Attorney]: . . . I wish the record to indicate clearly that the Crown was prepared to proceed. Our witnesses, who are present, we had nothing to give notice of any motion [i.e. for a stay of proceedings].
>
> Court: Yeah, so the — this case is stayed due to the non-structural independence of the Provincial Court.
>
> [Crown Attorney]: Might I presume, Your Honour, that in all cases in which you're going to be sitting, you'll be staying proceedings?
>
> Court: If anybody requests it.
>
> [Crown Attorney]: As long as someone makes the request?
>
> Court: Yeah.

[Crown Attorney]: Okay.

Court: Well, that's my decision.

110 As regularly as Judge Mackin granted a stay of proceedings in these cases his decision was reversed by the New Brunswick Court of Appeal. On June 26, 1996 it reversed Judge Mackin in *R. v. Woods* (1996), 179 N.B.R. (2d) 153. On February 12, 1997 he was again corrected in *R. v. Lapointe*, [1997] N.B.J. No. 57 (QL) (C.A.). On June 23, 1997 the Court of Appeal had to repeat again its disapproval of the entry of a stay of proceedings in similar circumstances in *R. v. Leblanc* (1997), 190 N.B.R. (2d) 70.

111 On April 10, 1996, the New Brunswick Minister of Justice complained about Judge Mackin's conduct to the Judicial Council of New Brunswick. About a week later, on April 19, 1996, Judge Mackin retaliated with a letter to the provincial Solicitor General requesting that contempt proceedings be brought against the provincial Minister of Justice. The province eventually rejected Judge Mackin's demand based on an opinion from the Deputy Attorney General of Alberta.

112 On June 5, 1996 the Judicial Council took the view that it ought not to take action in Judge Mackin's case until the various court proceedings had been "finally dealt with" and concluded that "the present complaint is premature".

113 Those who were required to appear in Judge Mackin's court bore the brunt of the difficulties. A number of extracts from the testimony of Chief Judge Strange

(who, as stated, continued to express support for the constitutional challenge itself) gives the flavour of the situation in which members of the public found themselves:

> This was causing a terrible situation. We had witnesses showing up, sometimes on relatively serious matters, sometimes from a great distance, and lawyers showing up, prosecutors showing up and so on, and matters were simply being stayed or more likely adjourned over to a lengthy date. And it was reaching the stage where it was simply upsetting the whole court system down there.
>
> . . .
>
> [Judge Mackin's] going to the courtroom and he's adjourning cases in 90 percent of the time. I was getting calls constantly that he wouldn't do any cases. He would adjourn them, adjourn them, and this has continued right up until – well, as recently I know is last December [1997] when there were 112 charges adjourned to one afternoon on December 15th. I mean that was not conducive to putting cases properly through the court and it was not conducive to treating people properly.

114 In these circumstances, the Chief Judge and his colleagues ultimately decided not to ask Judge Mackin to take on cases of any importance, as the Chief Judge explained in evidence:

> I didn't want, as Chief Judge, any big cases where victims would be humbled or hurt or witnesses would show up and be sent home. I didn't want anything like that going in there. We'd had enough of that and it was wrong.

115 The respondent Judge Douglas Rice carried his full work load through to the date of his retirement on October 15, 1997. No replacement judge was named until after his departure. Judge Harper died in office. No replacement judge was named until after his death. The respondent Judge Ian Mackin reached mandatory retirement age on April 7, 2000.

Analysis

116 Judicial independence is a cornerstone of constitutional government. Financial security is one of the essential conditions of judicial independence. Yet, unless these principles are 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.

117 In *Valente v. The Queen*, [1985] 2 S.C.R. 673, this Court made the fundamental point that the guarantee of judicial independence was for the benefit of the judged, not the judges. Its purpose was not only to ensure that justice is done in individual cases, but to ensure public confidence in the court system as a whole. Le Dain J. stated at p. 689:

> Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.

118 A similar note was struck by Lamer C.J. in *R. v. Lippé*, [1991] 2 S.C.R. 114, at p. 139:

> The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a "means" to this "end". If judges could be perceived as "impartial" without judicial "independence", the requirement of "independence" would be unnecessary. However, judicial independence is critical to the

> public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality.

It should be stated that neither Judge Rice nor Judge Mackin suggest that the 1995 repeal affected in any way their impartiality. Nor, I think can the repeal be said to have undermined their individual independence because their full salary and security of tenure were not affected. Their argument is that it undermined the *institutional* independence of the court of which they were members.

119 In the *Provincial Court Judges Reference*, *supra*, Lamer C.J. returned to the need for a purposive interpretation of the guarantee of judicial independence at para. 156 where he adopted this proposition:

> Financial security is an essential condition of judicial independence. It must not, however, be considered abstractly. It must be considered in relation to its purpose, which is, ultimately, to protect the judiciary from economic manipulation by the legislature or executive.

120 Lamer C.J. emphasized the point again at 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". . . .

121 The solution mandated in the *Provincial Court Judges Reference*, *supra*, was to erect an institutional barrier (an "independent, effective and objective process") between the legislature and executive on the one hand and the judiciary on the other

to deal with matters related to the judges' financial security. The constitutional requirement was to "depoliticize" the relationship. This appeal does not put in issue the merits of the solution. It does put in issue the boundaries of what may fairly be described as matters related to the guarantee of financial security.

122 The need for a purposive approach was acknowledged by the New Brunswick Court of Appeal in these cases, *per* Ryan J.A.:

> The *Re Provincial Court Judges* case focused on the independence of the judiciary, a concept frequently misunderstood because its purpose is a protection to the public, not a benefit to judges. [Emphasis added.]
>
> ((1999), 235 N.B.R. (2d) 1, at para. 25)

In light of the history of this litigation it would not be surprising if the witnesses and parties and members of the public in Judge Mackin's court from 1995 onwards "misunderstood" the concept of judicial independence in so far as it is said to be for their benefit, and not for the benefit of the judges.

123 The legislature *could* have provided (but did not) that a supernumerary judge was obliged to work no more than 100 of the 251 court sitting days per year. In that event, I would have agreed with my colleague Gonthier J. that legislative repeal of such a significant fixed benefit without a prior review by an independent, effective and objective process (such as a remuneration commission) would be unconstitutional. Nothing in these reasons should be read as dissenting in any way from the process mandated in the *Provincial Court Judges Reference* to depoliticize the adjustment of judicial compensation.

124 My disagreement with my colleague is therefore quite narrow, and proceeds in the following steps:

(i) the essentials of judicial independence, including financial security, necessarily reside in objective and enforceable guarantees established in the governing law;

(ii) Provincial Court judges on supernumerary status in New Brunswick were guaranteed a full-time salary. The guarantee was honoured;

(iii) Provincial Court judges on supernumerary status were guaranteed security of tenure. The guarantee was honoured;

(iv) Provincial Court judges on supernumerary status were not guaranteed a 40 percent workload in exchange for full pay, or indeed any reduction in workload of an enforceable nature;

(v) a constitutional rule that provided that any decrease or increase in an undefined judicial workload could only be initiated through a remuneration commission would be unworkable;

(vi) the existence (or repeal) of discretionary benefits does not threaten judicial independence;

(vii) the disappointed expectations of the Provincial Court judges, however understandable, do not justify a finding of unconstitutionality.

I propose to deal with each of these points in turn.

(i) *The essentials of judicial independence, including financial security, necessarily reside in objective and enforceable guarantees established in the governing law.*

125 The bedrock of judicial independence, whether in relation to the individual judge or to the court of which he or she is a member, is the requirement of objective non-discretionary guarantees. Thus in *Valente*, Le Dain J. referred at p. 688 to the test adopted in that case by the Ontario Court of Appeal, namely whether the alleged deficiencies in "the status of [the judges of the Ontario Provincial Court] gave rise to a reasonable apprehension that the tribunal lacked the capacity to adjudicate in an independent manner". Le Dain J. added, "[t]his I take to be more clearly a reference to the objective status or relationship of judicial independence, which in my opinion is the primary meaning to be given to the word 'independent' in s. 11(*d*)" (emphasis added). Thus, he concluded, "judicial independence is a status or relationship resting on objective conditions or guarantees" (p. 689).

126 The essential guarantees of judicial independence (both individual and constitutional) are security of tenure, financial security and administrative independence in relation to adjudicative matters.

127 For present purposes, the discussion in *Valente* of financial security is instructive. According to Le Dain J., the salaries of superior court judges, "fixed" in a federal statute pursuant to s. 100 of the *Constitution Act, 1867*, represent "the highest degree of constitutional guarantee of security of tenure and security of salary and pension" (p. 693), but this is not essential. While Ontario Provincial Court judges' salaries were not "fixed" by legislation, they were guaranteed by regulation. "The essential point", Le Dain J. said, "is that the right to salary of a provincial court judge is established by law, and there is no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge" (p. 706).

128 The situation here is very different. There were no guarantees of reduced workload in the Act. As the respondent Judge Rice testified, "If the Chief Judge asked me to do something, I did it". The rule that security of tenure, financial security and administrative independence in relation to adjudicative matters must be guaranteed in the law in *explicit non-discretionary terms*, was endorsed in *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at p. 75, and *Lippé*, at p. 143. Thus, if a measure is essential to judicial independence it cannot be left up in the air as a matter of discretion.

129 In the *Provincial Court Judges Reference*, Lamer C.J. pointed out at para. 112 that "the objective guarantees define th[e] status" of independence (emphasis in original). In that case statutory provisions that lacked concrete guarantees were held insufficient to ensure judicial independence. Thus an Alberta statutory provision that said the government *may* set judicial salaries for provincial judges was declared unconstitutional even though a regulation subsequently made under the same Act made it mandatory (paras. 221-22). A Manitoba statutory provision withdrawing provincial

court staff as a cost cutting measure on specific days ("Filmon Fridays") was declared unconstitutional because the Court refused to "read down" the legislation to eliminate the objection. Lamer C.J. stated that "to read down the legislation to its proper [i.e. constitutional] scope would amount to reading in those objective conditions and guarantees" (para. 276). This, he said, was not permissible.

130 In this case we are asked to read specific guarantees of workload reduction into the *Provincial Court Act* in order that we can declare their repeal to be unconstitutional.

131 It is only by reading in such guarantees that repeal of the statutory provisions could be said to require recourse to a remuneration commission. If, as I believe, there is no guarantee in the legislation of workload reduction, there is nothing to repeal that could be said to entail one of the objective guarantees that "define" the status of judicial independence (*Provincial Court Judges Reference*, *supra*, at para. 112).

132 Perhaps the closest analogy to the case now before us is provided by one of the provisions struck down in *Valente*, *supra*. It authorized the reappointment of retired Ontario Provincial Court judges to sit "at pleasure" (p. 699). The evidence accepted by the Court was that by *tradition* these appointments were as secure as the tenure of regular Provincial Court judges who held office during good behaviour. The existence and strength of this tradition was accepted by the Ontario Court of Appeal as sufficient to guarantee judicial independence. Le Dain J. noted that "Howland C.J.O. placed considerable emphasis on the role of tradition as an objective condition

or safeguard of judicial independence" (p. 699). Howland C.J.O. had cited, *inter alia*, P. W. Hogg, *Constitutional Law of Canada* (1977), at p. 120:

> The independence of the judiciary has since become such a powerful tradition in the United Kingdom and Canada that there may be little point in a fine analysis of the language of the provisions by which it is formally guaranteed.

133 This Court disagreed. The "fine analysis of the language of the provisions" was thought to be very important indeed. Le Dain J., speaking for a unanimous Court, ruled that traditions and expectations, however strongly observed, "cannot supply essential conditions of independence for which specific provision of law is necessary" (p. 702 (emphasis added)). This is particularly the case where the terms of the law are at odds with the alleged expectation. The Ontario law provided, contrary to the alleged tradition, that retired judges would on reappointment hold office "at pleasure" (p. 699). Here the law simply provided that the judge on supernumerary status would be available to perform whatever judicial duties were assigned. To read a specific workload limitation into such a provision would be to amend the legislation.

134 In my view, with respect, there must be a specific provision of law to guarantee a judge full-time pay for part-time work if it is sought (as here) to make that guarantee part of the bulwark of judicial independence.

135 The lesson from these cases is that traditions and expectations, however widely shared, do not constitute "objective conditions" for the purposes of defining the judicial independence required by s. 11(*d*) of the *Charter*. The Court cannot amend the legislation by reading in expectations, however widely shared (as in the

anticipation of a 40 percent workload of supernumerary judges in New Brunswick) or expectation based on longstanding tradition (as in the tenure of post-retirement appointees to the Ontario provincial bench).

136 I do not underestimate the importance of the unwritten customs and traditions that support the institutional independence of the courts. I say only that a particular workload benefit, which never rose to the level of being specified let alone guaranteed in law, does not constitute part of the "objective guarantees" that define the status of judicial independence and which thereby attract constitutional protection.

137 If the legislative provision is so imprecise as not to be capable of constituting part of the guarantee of financial security (or, more broadly, of judicial independence), its existence is not essential to the constitutionality of the court, and its repeal is not therefore constitutionally prohibited.

(ii) *Provincial Court judges on supernumerary status in New Brunswick were guaranteed a full-time salary. The guarantee was honoured.*

138 In *Valente*, *Beauregard*, *Lippé*, and the *Provincial Court Judges Reference*, the Court established "the essential" guarantees of judicial independence. One of these is financial security. No objection is taken to the statutory guarantee of a fixed salary to Provincial Court judges on regular status (s. 14(2)). The judges on supernumerary status were guaranteed the same salary by their inclusion in the definition of "judge" in s. 2(1) of the Act. When the respondents returned to regular status on April 1, 1995, there was no change in either the amount of their pay or its protected status.

(iii) *Provincial Court judges on supernumerary status were guaranteed security of tenure. The guarantee was honoured.*

139 The respondents Mackin and Rice continued to enjoy the same security of tenure as Provincial Court judges on regular status. As mentioned, they were included in the definition of "judge". I agree with my colleague Gonthier J. (at para. 47) that their supernumerary status did not give rise to any special tenure. Those who elected to become supernumerary were not "appointed" or "re-appointed". The original appointment continued in effect with the *potential* of a reduction in workload of an indeterminate amount at an indeterminate time. As the respondent Judge Rice wrote in his letter of February 17, 1993 to the Minister of Justice electing supernumerary status:

> This election is not, in any way, to be considered as my resignation from my appointment as a Judge of the Provincial Court.

140 In the New Brunswick Court of Appeal, Ryan J.A. argued that the use of the word "office" in s. 4.1(3) implied a separate and distinct tenure that was wiped out by the 1995 amendments. It is true that the word "office" has a special connotation in law, but it is not associated with any particular security of tenure: *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.), *per* Lord Reid, at p. 65. In *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, the "office" holder was a probationary police constable whose tenure was at pleasure. If Ryan J.A. were correct that use of the word "office" connoted a distinct and separate tenure from that of the Provincial Court judges on regular status, the result would have been an office without clear legislative definition. The holders of the allegedly distinct office of

supernumerary judge would have lacked from the outset the objective guarantees of judicial independence. Such a judicial "office" would have been unconstitutional. As pointed out by Lamer C.J. in the extract from the *Provincial Court Judges Reference* previously cited at para. 39, it would not be for the Court to read into the word "office" the necessary guarantees of tenure to make up for the legislative deficiency.

(iv) *Provincial Court judges on supernumerary status were not guaranteed a 40 percent workload or any other reduction.*

141 Supernumerary status was adopted in New Brunswick in 1988 after lengthy discussions between the government and the Provincial Court judges which had commenced in about 1981.

142 The theory underlying the 40 percent workload expectation was that to be eligible for supernumerary status a Provincial Court judge must meet all the conditions for retirement except the desire to retire. If he or she elected to retire, the state would be required to pay a pension equivalent to 60 percent of the average of specified years of judicial earnings. There would be no further judicial work. If he or she elected supernumerary status, however, the judge could make up the 40 percent loss of income occasioned by retirement by continuing to work 40 percent of the time. This expectation of a greatly reduced workload was widely shared by Ministers, judges, civil servants and others in New Brunswick. But it was not written into the *Provincial Court Act*.

143 To be clear, the respondent Rice, as a Provincial Court judge with supernumerary status, was *not* a retired person with a part-time job. He was eligible

to retire but he had elected not to. He was not drawing a pension "topped up" by 40 percent pay for 40 percent workload. He was receiving a full-time salary and all the benefits of a judge on regular status. He continued to receive medical coverage. His life insurance continued to be subsidized to the extent (at the date of his retirement) of over $2,000 per month. Any increase in annual salary would translate into a higher base on which his pension would eventually be calculated (albeit, as with judges on regular status, he was required to continue pension contributions in the interim). The respondent Mackin was in a similar position. In exchange for these benefits they continued to hold themselves available for work as assigned by the Chief Judge. In a province short on judicial resources, the assignments in some cases amounted more or less to full-time employment. If the assignments proved unexpectedly onerous, either one of them could have elected to retire on full pension at any time.

144 The key provision, as stated, is s. 4.1(5) of the *Provincial Court Act*, which said:

> **4.1**(5) A judge appointed under subsection 2(1) who has elected to hold the office of supernumerary judge shall be available to perform such judicial duties as may be assigned to the judge from time to time by the chief judge or associate chief judge.

145 If "full" workload for a Provincial Court judge is taken to be plus or minus 251 court days a year (which is the assumption on which the repealing legislation is based), 40 percent of that is plus or minus 100 days a year. The legislation establishing supernumerary status obviously could have specified a precise figure but just as obviously it did not do so. Instead the obligation was to do the judicial work assigned by the Chief Judge, whatever and whenever it might be.

146 My colleague Gonthier J., in para. 65, places emphasis on the words "time to time" in s. 4.1(5). It was not, of course, contemplated that the first assignment by the Chief Judge would necessarily be the last. It was to be expected that from "time to time" the assignments would change. In my view that phrase indicates a multiplicity of assignments, not a reduction in workload. With respect, an *increase* in overall workload would be equally consistent with the statutory language (such as, for example, a transfer to a busier court).

147 When the respondent, Judge Rice, who at the time was a judge of over 20 years' experience, was considering whether to elect supernumerary status in 1992, he sought a number of clarifications from the Minister of Justice. He asked for information as follows:

> (3) WORK ASSIGNMENTS. Supernumerary Judges are required to sit a minimum of 40% of working days each year, as assigned by the Chief Judge, the Associate Chief Judge, or a Judge designated for the purpose of assigning Judges in a Judicial District. [Emphasis in original.]

This was confirmed by the Minister in writing on March 16, 1992:

> A supernumerary judge is required to sit the equivalent of a minimum of 40% of a full-time judge's work year. The Chief Judge, or the Associate Chief Judge, is responsible to assign sittings. [Emphasis added.]

148 Neither the respondent, Judge Rice, nor the Minister suggested that there existed a *maximum* workload short of 100 percent of the workload of a judge on regular status. Having regard to the varied work experiences of Judge Rice, Judge

Harper and Judge Mackin, I do not think, with respect, that the evidence supports my colleague's conclusion, at para. 65, that "[n]ormally" a judge on supernumerary status "enjoyed a substantial reduction in his or her workload". The experience was too mixed to permit any generalization in that regard, in my opinion.

149 The assignment responsibility rested with the Chief Judge, but the reality was that he could only work within the resources the province provided. The respondents' position is, in truth, not only that the 40 percent workload should be read into the Act, but that the province had a constitutional responsibility to provide enough judges to make the 40 percent workload achievable. This, with respect, is too much to "read into" a statute that simply says a judge is to do the work assigned by the Chief Judge.

(v) *A constitutional rule that provided that any decrease or increase in an undefined judicial workload could only be initiated through a remuneration commission would be unworkable.*

150 The judgments on appeal state that the 1995 repeal of supernumerary status was unconstitutional because it did not receive prior review by an independent, effective and objective process (e.g. a remuneration commission). Quite apart from the fact the constitutional requirement of an independent, effective and objective process was not elaborated by this Court until the *Provincial Court Judges Reference* in 1997, two years after the amendments in issue here, I cannot accept this argument.

151 It is useful to reiterate that the respondents received the same salary after the repeal of the supernumerary status as they did beforehand.

152 In oral argument it was suggested that if a supernumerary judge were required to do more work for the same amount of money, his hourly rate, if it may be so conceived, was reduced. Instead of earning a full salary for a 40 percent workload he had to work a full year for the same amount of money. However, once the debate is properly focused on workload, and the so-called workload guarantee is related to the process mandated by the *Provincial Court Judges Reference*, the question arises as to how a remuneration commission would be supposed to give *prior* effective review to increases or decreases in judicial workload across the province.

153 The evidence shows that in 1990-91 each judge in the Provincial Court at Fredericton disposed of 2,714 cases a year. In Campbellton the equivalent per year was 1,775 cases and in St. John it was 2,729 cases. The busiest Provincial Court was Moncton where each of the judges disposed of about 5,335 cases per year. In each instance the Provincial Court judge on regular status received the same salary. If the statistics are to be believed, judges in different regions therefore had a very different workload and, because each earned the same salary, a very different "hourly" rate.

154 The Chief Judge testified that the statistics were simplistic and failed to take into account many factors, including the nature of the cases. I agree with his criticism, but even making a generous allowance for the crudity of the statistics, the workload variation is impressive. In these circumstances how many hours a year constitutes a 100 percent workload on which the 40 percent workload is to be calculated? Are we to take a provincial average or is a judge entitled to look at the historical average for his or her region? Or his or her personal history? This again

provides unevenly moving targets. The statistics show that whereas the workload in Moncton was expected to grow by 17 percent in 1991-92, the increase in St. John was only 2 percent. In Campbellton the expected growth was 66 percent.

155 The constitutional requirement is for prior reference of a change in benefits to the remuneration commission. Unless the Legislature was prepared to fix a specific number of work days per year (and, as stated, 100 days would be 40 percent of a notional 251 days a year sat by Provincial Court judges on regular status), I do not understand how "workload" as an abstract statistic can be fixed in advance. The bare concept of a *reduced* workload is too elastic to provide a manageable standard. The legislature, as stated, was clearly not prepared to guarantee any fixed and defined benefit, or indeed any benefit at all.

156 The bottom line is that the 1995 New Brunswick legislation established a *potential* benefit of wholly indeterminate value. It offered the possibility of less work for the same amount of pay, but the possibility of achieving this expectation was always subject to the exigencies of each court location and the resources available to the Chief Judge to get done the judicial work that had to be done. The *Provincial Court Judges Reference* established the requirement of an independent, effective and objective process to deal with financial security. The salary of supernumerary judges was secure. Each supernumerary judge received full pay. An extension of the remuneration commission process to an undefined "reduced" workload is neither sensible nor required. Yet it is the repeal of the workload benefit supposedly guaranteed by supernumerary status that is said to be unconstitutional because the province did not first go through a remuneration commission process.

(vi) *The existence (or repeal) of discretionary benefits does not threaten judicial independence.*

157 The potential advantages of supernumerary status lay either in the discretion of the Chief Judge or his delegate who was responsible for assigning the work (or assigning a specific courtroom) to the supernumerary judge or, alternatively in the discretion of the provincial government in its overall budgetary allocation for the Provincial Court and its willingness to appoint new judges to replace supernumerary judges to help to deal with the expanding workload.

158 In my view the culprit here, if culprit there be, is the provincial government's refusal to allocate adequate resources to the court. Chief Judge Strange was clearly willing to exercise his discretion to allow very significant workload reductions to supernumerary judges, but his priority was to staff the courts on a week-to-week basis, and the lack of adequate resources left him unable to accomplish both objectives. As between the public interest in seeing the courts operate on a full-time basis and the private interest of some of the judges on supernumerary status in realizing their expected benefits, he chose correctly, and inevitably, the public interest. The issue, therefore, is really about the government's exercise of its discretion over the Provincial Court budget.

159 In *Valente* it was contended that government control over such discretionary matters as post-retirement reappointment, or leaves of absence with or without pay, or permission to engage in extra-judicial employment, violated judicial independence. This argument was rejected. Le Dain J. stated at p. 714:

> While it may well be desirable that such discretionary benefits of advantages, to the extent that they should exist at all, should be under the control of the judiciary rather than the Executive, as recommended by the Deschênes report and others, I do not think that their control by the Executive touches what must be considered to be one of the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*. In so far as the subjective aspect is concerned, I agree with the Court of Appeal that it would not be reasonable to apprehend that a provincial court judge would be influenced by the possible desire for one of these benefits or advantages to be less than independent in his or her adjudication.

160 When a similar objection was raised in the *Provincial Court Judges Reference* in relation to the discretion of the Government of Prince Edward Island over judges' sabbatical leave, Lamer C.J. simply cited the above passage from *Valente* and added, "To my mind, the same reasoning applies here" (para. 207).

161 Even if one were to assume (as I do) that the variable benefits of supernumerary status were a function of the government's budget control rather than within the gift of the Chief Judge, I do not think either the existence of these benefits or their ultimate repeal in 1995 violated the "objective guarantees" of judicial independence. As noted by Lamer C.J. in the *Provincial Court Judges Reference* at para. 113, the question is whether a reasonable person, who was informed of the relevant statutory provisions, their historical background and other relevant facts, after viewing the matter realistically and practically, would conclude that the tribunal or court was independent. In my view such persons would not regard the creation, continuation or ultimate repeal of the discretionary workload benefit associated with supernumerary status as compromising judicial independence. They would hold, I believe, a loftier view of their judges.

(vii) *The disappointed expectations of the Provincial Court judges, however understandable, do not justify a finding of unconstitutionality.*

162 In the end this appeal comes down to the fact that the respondents formed a quite legitimate expectation of a substantially reduced workload if they elected supernumerary status and their expectation was not honoured. A reduction to roughly 40 percent of a notional workload was permitted, but not required, by the *Provincial Court Act*. The evidence does not clearly source this expectation in the Minister's office (i.e., the Minister's letter talked about a minimum of 40 percent), but even if the respondents could establish all of the elements of the administrative law doctrine of legitimate expectation as set out in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, it would not assist the respondents' attack on the repealing legislation. As Sopinka J. pointed out in *Canada Assistance Plan*, at p. 558, the doctrine does not apply "to a body exercising purely legislative functions". Nor can it operate to entitle the respondents to a substantive as opposed to procedural remedy. In some ways the respondents' effort to use their disappointed expectations to attack the validity of the legislative amendments in this case parallels the unsuccessful effort of the Government of British Columbia to use expectations created by federal-provincial funding arrangements to attack the validity of amendments to the Canada Assistance Plan in that case. The attempt was rejected there and it should be rejected here as well.

163 In summary, the 1988 amendments to the *Provincial Court Act* enacted a form of supernumerary status that created expectations but not guarantees. Its repeal, as high-handed and offensive as it may have appeared to the respondents, did not undermine the judicial independence of the Provincial Court judges or the court of which they were members. The repeal was undertaken in a period of budgetary cuts which impacted all the residents of New Brunswick. Supernumerary benefits for judges competed with the closure of hospital beds and the reduction or elimination of crucial public expenditures in other areas. The New Brunswick legislature sought to change a system (which had so unevenly benefited Judge Rice, Judge Harper and Judge Mackin) to a pay-for-work system in which a retired judge who in fact works about 100 days a year (i.e., 40 percent of a notional 251 court days) while drawing a full pension (i.e., equivalent to 60 percent of a full salary) would receive "top up" *per diem* payments equivalent to the remaining 40 percent of the full salary. The new system, according to the evidence, was designed to allow judges on supernumerary status to get the same financial benefits as under the 1988-95 scheme but by means of a method of payment that tied rewards to actual work. It appears that all retired Provincial Court judges are eligible for *per diem* work if they want it. Work assignments are still made by the Chief Judge within an overall budget. Whether the new system is better or fairer than the old system is not for us to judge. The only question before us is whether the change is unconstitutional. In my view, for the reasons discussed, the repeal of the former system of supernumerary status, as much as the original enactment, was within the legislative competence of the Province of New Brunswick in relation to "[t]he Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts" under s. 92(14) of the *Constitution Act, 1867*.

Conclusion

164 I would allow the appeal with costs. I would therefore answer the first two constitutional questions in the negative and, in light of that conclusion, the third constitutional question does not arise.

*Appeal allowed in part with costs,* BINNIE *and* LEBEL JJ. *dissenting.*

*Solicitor for the appellant: The Attorney General for New Brunswick, Fredericton.*

*Solicitors for the respondent Mackin: Wood Melanson, Fredericton.*

*Solicitors for the respondent Rice: Stewart McKelvey Stirling Scales, Fredericton.*

*Solicitor for the intervener the Attorney General of Canada: The Attorney General of Canada, Ottawa.*

*Solicitor for the intervener the Attorney General for Ontario: The Attorney General for Ontario, Toronto.*

*Solicitor for the intervener the Attorney General of Quebec: The Department of Justice, Sainte-Foy.*

*Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.*

*Solicitor for the intervener the Attorney General of British Columbia: The Ministry of the Attorney General, Victoria.*

*Solicitor for the intervener the Attorney General for Saskatchewan: The Attorney General for Saskatchewan, Regina.*

*Solicitor for the intervener the Attorney General for Alberta: The Attorney General for Alberta, Edmonton.*

*Solicitors for the intervener the Canadian Judges Conference: Ogilvy Renault, Montréal.*

*Solicitors for the intervener the Canadian Association of Provincial Court Judges: Myers Weinberg, Winnipeg.*

TAB 3

*Indexed as:*

# Super Sam Red Deer (c.o.b. Super Sam) v. Lethbridge (City)

[1990] A.J. No. 1255

73 Alta. L.R. (2d) 85

104 A.R. 291

50 M.P.L.R. 153

Action No. 9006-00154

Alberta Court of Queen's Bench
Judicial District of Lethbridge

**Conrad J.**

February 14, 1990.

**Counsel:**

T.W. Wakeling, G.D. Chipeur, for the plaintiffs.
R.A. Jerke, for the defendant.

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1 **CONRAD J.**:-- The plaintiffs have commenced an action seeking an interlocutory as well as a permanent injunction to restrain the defendant from enforcing a Sunday closing by-law. The present application deals only with the interlocutory injunction pending trial, and a final determination by the court as to the validity of the by-law.

2 The plaintiff, Super Sam, has been operating a retail food store in West Lethbridge since 1981, and has operated its business on Sundays since May of 1982. It is open for business 7 days a week.

3 Between May 1982 and May 1985 14 charges were laid and convictions entered under an earlier By-law, 3494, for opening on Sunday. On May 21, 1985, By-law 4021 was passed by City Council, and the plaintiff remained open for business on each Sunday from May 26, 1985 between the hours of 9 a.m. to 9 p.m. The plaintiff, in compliance with that by-law, restricted its business area to the required size.

**4** On November 27, 1989, By-law 4341 was passed by City Council, and the plaintiff complied with that by-law and remained closed. On December 13, 1989, By-law 4354 was passed by City Council, and it did not restrict the opening of the plaintiff. The plaintiff was open and doing business, as at January 29, 1990, when By-law 4357 was passed, amending By-law 4341 and restricting the size to less than that of Super Sam.

**5** An application for an interim injunction pending this hearing was made by the plaintiff on short notice, and an interim injunction was granted until this matter was fully heard. Entered into evidence were the minutes of a public meeting held in Lethbridge on November 27, 1989 reflecting numerous divergent and opposing views with respect to Sunday closing. The last three by-laws followed a plebiscite held on October 16, 1989, where the following question was put to electors: "Are you in favour of open Sunday shopping?" Fifty four per cent of those answering favoured "No". The plaintiff and other large retailers put together a proposal suggesting limited hours on a Sunday.

**6** By-law 4341, as amended, is a by-law to regulate the days and hours when retail stores within the City of Lethbridge shall be required to close. The relevant portion of the by-law is as follows:

> "Whereas the Municipal Government Act empowers the City of Lethbridge to regulate and control by by-law the days and hours during which businesses are required to close;
>
> And whereas the Council of the City of Lethbridge wishes to restrict the hours of business within the City of Lethbridge in order that commercial retail activity might be confined within reasonable limits;
>
> And whereas the Council of the City of Lethbridge wishes to ensure that at least one day in the week remains substantially free of commercial retail activity so that the citizens of Lethbridge might benefit thereby and be permitted to engage in family, social, recreational and other activities so as to enhance the quality of life and to generally promote the health and welfare of the citizens and the City of Lethbridge;
>
> And whereas the Council of the City of Lethbridge wishes to enact a by-law consistent with and not contrary to the rights and freedoms guaranteed every Canadian by the Canadian Charter of Rights and Freedoms;
>
> And whereas the Council of the City of Lethbridge declares the object of this by-law to be secular in nature as stated above;
>
> And whereas the majority of the electors of the City of Lethbridge by plebiscite conducted on October 16th, 1989 favoured the restriction of retail hours on Sundays;
>
> 2.(k) 'Retail Food Store' means a retail business establishment where the principal business is the selling or offering for sale of food stuffs.

. . .

3. No person shall conduct retail business in the City of Lethbridge on a Sunday or holiday and . . .
5. (as amended in by-law 4357) Section 3 does not apply to a retail food store. Retail food stores shall be subject to the following hours of operation:

    (a) Retail food stores having an area of business of not more than 929 square meters (10,000 square feet) may remain open 24 hours per day any day of the week.
    (b) Retail food stores having an area of business of more than 929 square meters (10,000 square feet) shall close and remain closed on Sundays and holidays.

9. Every person who contravenes section 8 is guilty of an offence and is liable upon summary conviction to

    (a) . . .
    (b) . . .
    (c) . . .
    (d) A fine of not less than $10,000 for a fourth or subsequent offence.

10. If a court of competent jurisdiction shall declare any section or sub-section of this by-law to be invalid, such section or sub-section shall not be construed as having persuaded or influenced council to pass the remainder of the by-law and it is hereby declared that the remainder of the by-law shall be valid and remain in force."

Tri-partite Test

7 It is common ground that the plaintiff must satisfy the onus set out by the Supreme Court of Canada in Manitoba (Attorney-General) v. Metropolitan Stores Ltd., [1987] 1 S.C.R. 110, which sets out a threefold test to be applied in assessing applications for the granting of interlocutory injunctions in constitutional cases.

1. Is there a serious question to be tried as opposed to a frivolous or vexatious claim?
2. Would the litigant who seeks the interlocutory injunction "suffer irreparable harm" unless the interim injunction is granted, that is, harm not susceptible or difficult to be compensated in damages?
3. The balance of convenience must lie in favour of granting of the injunction. Which of the two parties will suffer the greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits? In considering the balance of convenience where a constitutional issue has been raised, it is necessary to consider the public interest and give it appropriate weight.

**8** In addition to the above principles, Justice Beetz in Manitoba (Attorney-General) v. Metropolitan Stores Ltd., supra, at p. 150 stated:

> "[I]n cases where an interlocutory injunction issues in accordance with the above-stated principles, the parties should generally be required to abide by the dates of a preferential calendar so as to avoid undue delay and reduce to the minimum the period during which a possibly valid law is deprived of its effect in whole or in part."

1. Is There a Serious Issue to be Tried?

**9** Applying the above principles to the present case, I must firstly do a preliminary and tentative assessment of the merits of the case to determine if there is a serious question to be tried, as opposed to this being a frivolous and vexatious claim. Beetz J. confirmed in Manitoba (Attorney-General) v. Metropolitan Stores Ltd. that this test is sufficient where the public interest is taken into account (p. 128).

**10** The plaintiff raised many issues in its pleadings. Argument concentrated primarily on the following:

1. The by-law contravenes s. 2(a) of the Charter relating to freedom of conscience and religion.
2. The by-law is void for uncertainty.
3. The by-law has exceeded its statutory authority by enacting penalty provisions in s. 9 of the by-law not authorized by the Municipal Government Act, R.S.A. 1980, c. M-26 in that the maximum fine under the Act is not less than $5,000 and not more than $10,000 for a third or subsequent offence.

**11** I am satisfied there is a serious issue to be tried on the first issue alone. Section 2(a) of the Charter of Rights states: "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion."

**12** In R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, Dickson C.J.C. states at p. 336:

> "If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint."

**13** In the same case, Chief Justice Laycraft of the Alberta Court of Appeal stated in [1984], 1 W.W.R. 625, at p. 641:

> "[I]n Canada government shall not choose sides in sectarian controversy. Standards shall not be imposed for purely sectarian purposes. Sectarian observance shall neither be enforced nor forbidden, whether by economic sanction or the more subtle (but even more devastating) means of imposing the moral power of the state on one side or the other."

**14** In R. v. Edwards Books & Art Ltd., [1986] 2 S.C.R. 713 at 763-767, Chief Justice Dickson found that a Sunday closing law imposed a burden on both Saturday observing retailers and consumers.

**15** There is no attempt in this legislation to accommodate Saturday worshippers. The by-law falls on the heels of a narrowly won plebiscite dealing only with Sunday closings. Even if it can be argued that its purpose was not to prefer one religion over another, there is a real issue as to whether or not its effect is just that. In my view, there is a very serious question to be tried, and while it is unnecessary to so decide, I believe the plaintiff has a strong prima facie case that the by-law is invalid.

**16** It is also argued that the by-law is void for uncertainty. The plaintiffs rely on R. v. Debaji Foods Ltd., 124 D.L.R. (3d) 254, Arcade Amusements v. Montreal; Fountainhead Fun Centres Ltd. v. Montreal, [1985] 1 S.C.R. 368; Swan City Foods Ltd. v. R., (1983) 27 Alta. L.R. (2d) 261, and Re Dartmouth and S.S. Kresge Co. (1966) 58 D.L.R. (2d) 229.

**17** In this case, ss. 2(k) and 5 are questioned. Section 2(k) defines retail food store using the phrase "principal business", a phrase identical to that found to be fatal in Swan City Foods Ltd., supra, and Dartmouth, supra. Moreover, they argue severance does not save the by-law, because excising ss. 2(k) and 5 will completely revise the by-law and make it a new and different by-law. Again, I think it is a serious issue, and one for which there is judicial support. This issue also is one which goes far beyond being merely frivolous or vexatious.

**18** It is not necessary for me to deal with the other issue raised.

2. Is there Irreparable Injury?

**19** There is evidence before the Court on behalf of the plaintiff that for every Sunday it is closed, it loses profits. Irreparable harm is "harm that is not susceptible or difficult to be compensated in damages" (Manitoba (Attorney-General) v. Metropolitan Stores Ltd. at p. 128).

**20** The City is not liable for any damage attributable to an invalid by-law (Welbridge Holdings Ltd. v. Winnipeg, [1971] S.C.R. 957. It follows that any losses Super Sam would incur upon closing on a Sunday will not be recoverable from the City. There is considerable evidence introduced indicating that Super Sam loses approximately $2,000 net profit per Sunday, which is some $100,000 net profit before tax per year. This is a significant amount and is not recoverable. I am satisfied this alone is irreparable harm. Mason J. in London Drugs Ltd. v. Red Deer (City), (September 10, 1987), Doc. No. Red Deer 8510-02601 (Alta. Q.B.) followed an earlier decision of Justice Holmes and stated at pp. 3-4: "The plaintiff will suffer irreparable harm . . . , in this case unrecoverable damages, for lost profits."

**21** In addition to the unrecoverable damages, there is evidence of a disruption of present and future business resulting from transfer of Sunday business to stores of a smaller square footage which are allowed to stay open, and damage is difficult to assess. (See Montana Mustard Seed Co. v. Continental Grain Co. (Canada) (No. 2) (1974), 42 D.L.R. (3d) 624 (Sask. C.A.) at pp. 626-627).

3. The Balance of Convenience

**22** The third test involves a consideration of the balance of convenience. Who has the most to lose if the injunction is granted or denied, keeping in mind the public interest, in making that assessment?

**23** The plaintiffs urge me to follow the decision of Holmes J. in London Drugs Ltd. v. Red Deer (City), [1986] 3 W.W.R. 326 and Mason J. in London Drugs Ltd. v. Red Deer (City) (supra).

Holmes J. stated at pp. 331 to 332: "There is not any evidence before the court that the quality of life of the citizens of Red Deer or their health and welfare is seriously affected by allowing the plaintiffs' business to operate every day of the week."

**24** Counsel for the defendant argues that Mr. Justice Holmes's judgment predated the Metropolitan Stores case and failed to give, sufficient weight to the rule of law. He refers to Beetz J.A.'s reasons in Manitoba (Attorney-General) v. Metropolitan Stores Ltd. at 135:

> "Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically-elected legislatures and are generally passed for the common good, for instance: the providing and financing of public services such as educational services, or of public utilities such as electricity, the protection of public health, natural resources and the environment, the repression of what is considered to be criminal activity, the controlling of economic activity such as the containing of inflation, the regulation of labour relations, etc. It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good.

**25** The defendant argues that the interest of the public in the rule of law is such that the application for an injunction should be denied. I do not read Manitoba (Attorney-General) v. Metropolitan Stores Ltd. as going that far.

**26** It is interesting to note that Beetz J.A. recognizes the supremacy of the constitution when he states at p. 135:

> "While respect for the Constitution must remain paramount, the question then arises whether it is equitable and just to deprive the public, or important sectors thereof, from protection and advantages of impugned legislation, the invalidity of which is merely uncertain, unless the public interest is taken into consideration in the balance of convenience and is given the weight it deserves." [Emphasis added.]

**27** He further states at pp. 147-148 of the Metropolitan case:

> "This being said, I respectfully take the view that Linden J. has set the test too high in writing in Morgentaler, supra, that it is only in 'exceptional' or 'rare' circumstances that the courts will grant interlocutory injunctive relief. It seems to me that the test is too high at least in exemption cases when the impugned provisions are in the nature of regulations applicable to a relatively limited number of individuals and where no significant harm would be suffered by the public; it does not seem to me, for instance, that the cases of Law Society of Alberta v. Black, supra, and Vancouver General Hospital v. Stoffman, supra, can be considered as exceptional or rare. Even the Rio Hotel case, supra, where the impugned provisions were broader, cannot, in my view, be labelled as an exceptional or rare case.

> On the other hand, the public interest normally carries greater weight in favour of compliance with existing legislation in suspension cases when the impugned provisions are broad and general and such as to affect a great many persons. And it may well be that the above mentioned test set by Linden J. in Morgentaler, supra, is closer to the mark with respect to this type of case. In fact, I am aware of only two instances where interlocutory relief was granted to suspend the operation of legislation and, in my view, these two instances present little precedent value." [Emphasis added.]

**28** Holmes J., in London Drugs Ltd. v. Red Deer (City) at p. 332, came to the conclusion that granting the application on a similar by-law would not cause "loss of respect for the law generally."

**29** In my view, the authorities establish that it is essential in a constitutional case to consider the public interest in the weighing of convenience. One cannot simply say the city as the authority suffers no harm from the granting of the injunction. It is necessary to look to see if the public, in whose favour the by-law was passed, would suffer from the granting of the injunction and consider it in the weighing process.

**30** To suggest that the rule of law should receive so much weight that an injunction will almost always be denied in a constitutional challenge is not what I understand the Metropolitan case to say.

**31** The constitution exists to protect and enshrine certain fundamental individual rights. It makes the law and the democratic process subject to it. If a public interest argument can be met merely by saying the rule of law must prevail while the validity is challenged, it is not difficult to imagine a series of by-laws that could permanently frustrate the individual constitutional right.

**32** In my view, the authorities direct the courts to consider all inconvenience that would be caused by the granting or withholding of interlocutory relief. Included in that would be an obligation to consider carefully the nature and type of the challenged legislation, the public interest it protects, all the nature of the constitutional right being protected. It is necessary to consider and give due weight to the rule of law.

**33** To apply the reasons suggested by the defendant and simply enforce the right to protect the rule of law without due consideration to the nature of all of the various interests involved could be to relegate the very fundamental constitutional right to something much less than the paramountcy those rights were intended to have. I do not interpret the Metropolitan Stores case to say that. I must weigh all competing interests, including those of the public, and see who will suffer most from the granting or withholding of the injunction.

**34** In assessing the public good, it is interesting to note that there was a referendum in the last civic election which passed by a small majority, 54 per cent. Forty-six per cent obviously voted in favour of "open Sunday shopping". It is not known how many might have favoured a restricted Sunday opening, such as the by-law here. This is a situation where a large sector of the public would welcome open Sunday shopping while others voted against it.

**35** There was evidence of high-volume shoppers at Super Sam on Sundays. There was evidence that employees may have to be laid off if stores close. The minutes of a public meeting also indicated many divergent views relating to the open shopping and indicated many members of the public favoured it, for a variety of reasons.

**36** What, then, is the inconvenience caused, or detriment to the public, that would occur if this injunction is granted? What public interest does it protect?

**37** The by-law itself refers as its object to the promotion of family, social, recreational and other activities so as to enhance the quality of life. The defendant argues that the curbing of retail shopping will preserve the serenity or slow pace of life in the small city. However, this is not a mandatory by-law that forces people to do something. Those who do not like Sunday shopping certainly do not have to shop simply because the stores are open. Individual citizens who do not want Sunday shopping are free to remain at home promoting family, social, recreational and other activities. The fact that shopping continues should not affect that. There is no evidence to suggest the quality of life and general health and welfare of the citizens of Lethbridge will be in any way affected by the granting of this injunction.

**38** Considering the nature of this by-law, I agree with Holmes J.'s assessment referred to earlier, where he said it is hard to imagine there would be any loss of respect for the law because the by-law was not enforced while its validity is determined. Indeed, I think there would be more danger that the enforcement of this by-law, when it deprives a private citizen of substantial profits, if it turns out to be constitutionally invalid, would result in a much greater loss of respect for the law.

**39** Indeed, on the evidence before me, it is obvious there are many members of the public who want to shop and many members of the public who want to do business. There is a risk that some employees would lose jobs due to closing of this store. There is of course the plaintiff's individual and substantial inconvenience and loss if the injunction is not granted.

**40** When one really examine this by-law, it is a restrictive by-law in that its enforcement directly affects the actions of many citizens - those wanting to shop and carry on business. The granting of the injunction will allow those citizens to exercise their own choice while not at all interfering with the right of those citizens who do not want to carry on business or shop. They may choose not to shop or do business whether or not an injunction issues. It is difficult to see that there is a major or substantial public interest that will be affected by the granting of an injunction. On the other hand, there can be no doubt that the plaintiff's rights are seriously affected, and he is left without redress in the event his constitutional challenge is valid.

**41** After consideration of the nature and type of by-law, competing interests, the public interest, including the importance of the rule of law, I am satisfied that there will be immeasurably less inconvenience to the defendant, including the public, if I grant the injunction, than there will be to the plaintiff if I fail to grant it.

**42** There were numerous arguments with respect to the status quo. Certainly the immediate status quo, prior to the passing of this by-law, was that a short term by-law had been passed by the City of Lethbridge, allowing Super Sam to operate. The City of Lethbridge argued that over the years there have been restrictive by-laws in force. In my view, the status quo at the time of this by-law favoured Super Sam, but I do not need to rely on it because I think that the convenience test is overwhelmingly in favour of granting the injunction. Even if the status quo argument was in the City's favour, it would not affect my decision.

**43** There will be an order for an interlocutory injunction to issue, restricting the defendant from enforcing By-law 4341 against the plaintiffs, their legal representatives, officers, employees or servants until final adjudication at the trial of this action.

**44** In the interests of justice, the plaintiffs must move expeditiously to have this matter tried and finally determined, and I direct that the trial shall be proceeded with not later than the end of June 1990, without leave of the Court.

**45** Super Sam has offered and will grant an undertaking as to damages. The parties are at liberty to speak to costs.

CONRAD J.

qp/s/nnb

TAB 4

**COURT FILE NO.:** 94-CQ-50711
**DATE:** 20060925



**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Gordon Garland - - Plaintiff - and - Enbridge Gas Distribution Inc. (formerly The Consumers Gas Company Limited) - - Defendant

**BEFORE:** Justice Cullity

**COUNSEL:** ***Michael McGowan*** and ***Barbara L. Grossman*** - - for the plaintiff

***John Longo*** - - for the defendant

***Sean Dewart*** - - for the plaintiff in his personal capacity

**DATE HEARD:** September 6, 2006

Proceeding under the *Class Proceedings Act, 1992*

**ENDORSEMENT**

[1] The plaintiff, and class counsel, moved jointly for an order approving and implementing a settlement of this class action, approving the fees of class counsel and determining the amount of the representative plaintiff's compensation.

[2] For the reasons that follow, I am not prepared to grant the orders requested on the basis of the material filed. I will, however, not dispose of the motion until the parties have had an opportunity to consider whether they wish to amend the minutes of settlement.

[3] This protracted proceeding was commenced by a statement of claim issued on April 25, 1994. The plaintiff claimed a declaration that late-payment penalties charged by the defendant to its customers included interest at a rate proscribed by section 347 of the *Criminal Code of Canada,* together with an order for restitution.

[4] The litigation was strongly contested by the defendant. On two occasions the plaintiff was ultimately successful in the Supreme Court of Canada after motions for summary judgment had been granted against him in this court, and his appeals to the Court of Appeal had been dismissed.

[5] In the first of the decisions - reported at [1998] 3 S.C.R. 112 - it was held that the late payment penalties involved an interest charge within the meaning of section 347 and that they

fell within the scope of the section. In the second - [2004] 1 S.C.R. 629 - the plaintiff's claim for a restitutionary remedy based on unjust enrichment was upheld.

[6] While these decisions resolved the principal issues relating to the defendant's liability, they did not terminate the litigation. A motion to certify the proceedings had not yet been heard and there were difficult questions relating to the computation of a restitutionary award (referred to in the minutes of settlement as "damages") even if an aggregate assessment was ordered at trial. Mediation was conducted for the purpose of the certification motion in December, 2004. The possibility of settling the litigation as a whole was then raised and, for this purpose, it was agreed that the defendant would provide a random sample of its billing records together with an estimate of damages prepared with expert assistance. The plaintiff's experts were to review this data and the damages estimate and provide their own estimate. The defendant delivered extensive data and its estimate of damages by the end of January, 2005. The task of reviewing this with the assistance of an actuary and an economist was more complex than the plaintiff and his advisers had contemplated. His response was provided to the defendant on August 25, 2005. The defendant replied in December, 2005 and a further mediation was scheduled for April 18 and 19, 2006. No agreement was reached as a result of the mediation and the plaintiff proceeded to serve a notice of the return of the motion for certification. The motion was not proceeded with. Instead, another mediation was held and, after more discussions and negotiations between the parties, minutes of settlement dated July 19, 2006 were executed.

[7] The minutes of settlement are brief. They include an agreement for a payment of $19.175 million as damages and interest by the defendant, together with partial indemnity costs of $2 million, and a release of all claims against it. They also contain the parties' consent to a draft implementation order that is attached as a schedule. Finally, it is provided that the settlement is subject to court approval pursuant to the CPA and is to be null and void if such approval is not granted. At the hearing of the motion, the parties confirmed that their intention was that all the terms of the implementation order were to be considered as incorporated in the settlement so that, if any were not approved by the court, the settlement would not be binding upon the parties. I was told that the settlement should be considered to be a package that was to be rejected if its terms - including the provisions of the implementation order - were not approved in their entirety.

[8] The draft implementation order provides for certification of the proceeding under the CPA and the manner in which class members may opt out. Other orders that are to be considered as part of the package presented to the court for its acceptance, or rejection, in its entirety would require the settlement amount of $19.175 million, plus the $2 million of costs, to be dealt with as follows:

> (a) the defendant would pay $1,917,500 to the Class Proceeding Fund (paragraph 7 (b));
>
> (b) the defendant would pay $8,257,500 to class counsel in trust to be applied to legal fees, disbursements and GST and the class representative's compensation as more particularly described in paragraph 11 of the order (paragraph 7 (c));

(c) the $2 million of partial indemnity costs would be released from trust and applied to the fees and disbursements of class counsel (paragraph 9);

(d) the defendant would pay $9 million to the United Way of Greater Toronto ("United Way") (paragraph 7 (d); and

(e) the $9 million would be applied *cy pres* by the United Way to benefit the defendant's customers who qualify under the United Way's Winter Warmth Fund program (paragraph 8).



[9] Paragraph 11 of the order provides:

> 11. THIS COURT ORDERS that $_____ [amount *to be determined by the court at the fairness hearing*] of the $8,257,500 referred to in paragraph 7 (c) be paid to the plaintiff as compensation for serving as class representative, and the balance of the $8,257,500 be applied to the fees and disbursements of the solicitors for the class and applicable GST.

[10] Apart from the release of the defendant of all claims by class members who do not opt out, the order then approves the settlement "as set out in the minutes of settlement" and the fees of class counsel in the amounts indicated in paragraph 9 and 11, plus $825,000 previously paid pursuant to an award of costs to the plaintiff by the Supreme Court of Canada.

[11] Finally, under the heading "Jurisdiction of the court", the order provides in paragraph 15 as follows:

> THIS COURT ORDERS that the Honourable Mr Justice Winkler, or his successor as case management judge for this action, shall continue to oversee the case, and may, if need be, amend this order or make any case management order permitted by the Class Proceedings Act or the rules of court. Notwithstanding the foregoing, the court shall not make any changes to the distribution of funds under paragraph 7 (d) or paragraph 8 without the consent of the parties. Further, the court does not have jurisdiction to revive any claims released under paragraph 10 and may not require the defendant to pay any additional moneys or incur any additional expenses with the exception that the court has a discretion to award costs relating to future motions or proceedings in this action which are presently unforeseen.

[12] While I believe certain of the provisions of the settlement, and of the draft order, may be open to more than one interpretation, it was clearly the understanding of counsel for the parties that the amounts to be "applied" to the fees and disbursements of class counsel were the fees that the court was asked to approve. Class counsel were, moreover, equally firm in their

understanding - and urged me to accept - that it was intended that, unless the court approved such fees, the settlement would be null and void. In their submission, judicial approval of the fees was as much a precondition to the binding effect of the settlement as approval of any of the other provisions of the minutes of settlement and the draft implementation order.



[13] The jurisdiction of the court to determine the fees of class counsel is dealt with in sections 32 and 33 of the CPA. Section 33 is concerned specifically with contingency fee agreements. Such agreements are also governed by the more general provisions of section 32. These are as follows:

> 32 (1). An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,
>
> > (a) state the terms under which fees and disbursements will be paid;
> >
> > (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
> >
> > (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.
>
> (2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.
>
> (3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.
>
> (4) If an agreement is not approved by the court, the court may,
>
> > (a) determine the amount owing to the solicitor in respect of fees and disbursements;
> >
> > (b) direct a reference under the rules of court to determine the amount owing; or
> >
> > (c) direct that the amount owing be determined in any other manner.

[14] Mr Garland and class counsel initially entered into a retainer agreement that provided for a fee payable only in the event of success in the action and the calculation of the amount by applying a multiplier to a base fee as contemplated by section 33 of the CPA. After the minutes of settlement were executed in July, 2006, and approximately one week before the notice of this

motion was filed, the agreement was amended by the parties to provide for a fee of $11,082,500 (inclusive of disbursements, GST and the amount to be paid to the Class Proceedings Fund), minus the amount of the class representative's compensation as determined by the court. Such fee is obviously the same as that contemplated in the implementation order. I note that it includes the $825,000 that the defendant had agreed to pay – and had already paid - in satisfaction of the costs award made by the Supreme Court of Canada.

[15] As I have indicated, this motion was made by the representative plaintiff and class counsel jointly. Although the notice of motion requests approval of the settlement and of class counsel's fees, and not approval of the amended retainer agreement specifically, it includes section 32 of the CPA as one of the grounds for the motion. In my opinion, the mandatory requirements of section 32 (1) and that of a motion by the solicitor in section 32 (2) have been complied with. As the reference in section 32 (1) (b) to an estimate of the fee suggests, the legislative intention behind the section may have been directed primarily at retainer agreements made at the inception, or during the course of litigation - and not those made in circumstances such as these. However, I do not believe the words, or the policy, of the section require a restricted interpretation.

[16] I am, however, concerned by counsel's insistence that the binding effect of the settlement is conditional upon the approval of the fees referred to in the implementation order and subsequently inserted into the retainer agreement. This question was addressed at some length at the hearing of the motion and I had raised it previously with counsel at the time that approval of the notice of the hearing was being considered. In effect, the court has been presented with an ultimatum: approve the fees or the class gets nothing under the settlement. Independently of the *in terrorem* aspect of such an approach, and its tendency to interfere with a judicial exercise of the discretion under section 32, I continue to be surprised that, in insisting on such a condition, counsel would not recognise the inherent conflict between their own interests and those of the class their client seeks to represent. This is a matter that is quite extraneous to any settlement, or compromise, of the issues between the parties. The defendant's interest is not affected and, while it expressed concern about the maximum size of a possible fee, there was no suggestion that it was, or could reasonably be, concerned that the court might reduce it. The condition that would make the provision of any benefits to the class conditional on court approval of the fee requested can only benefit class counsel at the expense of the class. No other interests are engaged and the conflict of interest is, in my opinion, both apparent and unacceptable. In my judgment, it is an insurmountable obstacle to the court's approval of the settlement in its present form.

[17] Counsel's suggestion that the condition stands on the same footing as that which would deny a fee to counsel if the benefits to the class are not approved ignores the fact that the latter is not included for the benefit of class counsel. Its effect is that, when counsel were negotiating to obtain the maximum possible benefits for the class, their interests and those of the class were coincident and not in conflict. The inclusion of the extraneous condition relating to fee approval in "Minutes of Settlement" does not alter the fact that, when insisting on this, counsel were, in truth, negotiating with no-one else than themselves in two capacities: one personal and the other fiduciary.

[18] I do not accept that the authorities that emphasise the need for flexibility in the exercise of the court's powers under the CPA bear materially on this question. Similarly, while I believe counsel were undoubtedly correct in their submission that this case has unique features that may well justify an unusually large fee, I do not agree that such features have any bearing on the question under consideration. The fee sought by counsel may, or may not, be reasonable but I do not intend to consider the question if a decision that it is unreasonably high will deprive the class of any benefits under the settlement.

[19] I am not suggesting that the practice of having a motion for settlement approval followed by a separate motion to approve fees must always be followed. It is, in my opinion, more consistent with the structure of the CPA, but I see no compelling reason why the motions cannot be combined as long as the benefits to the class are not conditioned on the approval of counsel fees. In a case such as this where the fees are to be deducted from the settlement amount, I believe the court must, first, determine the fairness and reasonableness of the settlement amount as between the parties to the proceeding. It is only when such a determination has been made that the appropriate level of fees as between counsel and the plaintiff should be considered. The factors that should influence the court's determination of each of the questions are, of course, not identical.

[20] The facts of *Dabbs v. Sun Life Assurance Company of Canada* (1997), 35 O.R. (3d) 708 (G.D.) - on which class counsel relied - were, in my opinion, significantly different from those of this case. There, the court was considering a settlement agreement that provided for the defendant to pay class counsel's fees as determined by an arbitrator. The fees were to be over and above the amount provided for the benefit of the class. There was no cap on that amount and it would not be reduced, or affected, by whatever fees were awarded by the arbitrator. The provision for the fees was considered to be an essential term of the settlement. In finding that, in these circumstances, class counsel did not have a material conflict of interest when negotiating the provision for the payment of fees, Winkler J. emphasized:

> The payment of class counsel's fee is to be made by the defendant directly, is not from the same fund as the settlement moneys, and will not diminish the recovery of individual class members. (at page 715)

[21] The conflict in this case arises precisely because the fees are to be paid from the total settlement fund and will diminish the amount available for the benefit of the class. I might add that my opinion would be the same if the settlement simply provided for the defendant to pay a fixed, or capped, settlement amount of a specific sum, for a counsel fee of some other fixed amount and for the settlement as a whole to be conditional on the court's approval of the fee. As the provision for the counsel fee would discharge a liability that would otherwise be borne by the plaintiff and the class, the total settlement amount in such a case should, I believe, be the total of the two amounts and, as in this case, it would be reduced by the payment of the fee. Consistently with this analysis, any amount of the fee in excess of that approved by the court should augment the amount paid to, or applied for the benefit of, the class.

[22] Counsel referred to a number of cases in which settlements providing for different levels of fixed counsel fees have been approved. This approach can be justified and permitted as a matter of convenience – and as facilitating settlement in some circumstances - but there is nothing to indicate that, in any of such cases, counsel insisted on the condition I am concerned with. In my experience, whenever the question has been raised, counsel have invariably responded that the settlement would be amended if the court found that the fee was unreasonably high. That was certainly the case in *Rose v. Pettle,* [2006] O.J. No. 1612 (S.C.J.), in which there was some overlap with class counsel in this case. Counsel provided the same assurance to Nordheimer J. in *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 4022 (S.C.J.), at para 59.

[23] The CPA was not enacted for the financial benefit of the legal profession. Class counsel have all of the fiduciary obligations and responsibilities that arise from their role as legal representatives. These are not affected by recognition that the risks they assume, and the importance of their role in advancing the objectives of the legislation, may properly influence the level of the fees that will be approved.

[24] In the course of the hearing I raised the question whether the condition relating to the fees of class counsel could not be deleted in an exercise of the power to amend conferred on me as the successor to Mr Justice Winkler as case management judge for this proceeding. The power is contained in paragraph 15 which I have set out above. While it is, in its terms, qualified only by the exceptions in the second and third sentences, I believe it is evident from the submissions of counsel - and, in particular, from their insistence that approval of the settlement was conditional on approval of the fees - that it was not intended to permit the court to rewrite the settlement prior to its approval. Paragraph 15 is, itself, part of the settlement that the court is asked to approve as a package and I do not believe it was intended to be exercisable unless, and until, this is done. The context suggests to me that the paragraph is probably intended to deal with changes in circumstances and unforeseen events following court approval. On this interpretation, it would be entirely speculative to consider on this motion questions relating to the scope of the power and the circumstances in which it might be exercised.

[25] I regret class counsel's insistence on the condition requiring fee approval because, in my opinion – and subject only to a few relatively minor points of detail - the total benefits provided by the settlement represent a fair and reasonable compromise of the issues between the parties and it is in the interests of the class members that they should be approved. Although, by virtue of the two important decisions of the Supreme Court of Canada, the plaintiff has already achieved a considerable degree of success in the litigation - and, in particular, has succeeded in establishing issues relating to liability as well as in effecting the termination of the illegal practices to which he objected - there remain the difficult problems relating to the computation of damages. These are not confined to those that arise from the size of the class, the impracticability of calculating restitution amounts on an individual basis, and the uncertainty whether, at trial, an aggregate award would be considered appropriate. There are also a number of novel and potentially disputable issues relating to the computation of interest and the calculation of excessive charges in each case. The effect of the decision of the Supreme Court of Canada in *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249 - with respect to a possible obligation of the defendant to compensate class members

only for the amount in excess of 60 per cent per annum - would also need to be determined. The process of litigating these issues was likely to be protracted and the possibility of future appeals could not be excluded.

[26] Examinations for discovery on the computation of damages have not yet been conducted, and further productions will be required if the matter proceeds to trial, but, as I have indicated, a significant amount of time has already been expended - with the assistance of Mr Garland, actuaries and economists - in examining and analysing the billing records of the defendant. Different ranges of damages were provided by the experts retained on each side. In the end result, counsel concluded that, depending upon the manner in which the calculation issues were determined, the range of a potential aggregate recovery at trial was between nil and $74 million. In the absence of precedents that were directly in point, the nature, and extent, of the variables were such that counsel were unable to provide any firm opinion of an amount that would most likely be recovered at trial, or a more precise range within which it would fall. The case is unusual in that, if the proceeding is certified, the remaining litigation risks would, for the main part, relate to the issue of damages.

[27] No objections have been received from class members to the reasonableness of the settlement. It is quite possible that the behavioural modification that has been achieved is more important to many of them than restitution of relatively small illegal charges imposed by the defendant. The negotiations were conducted at arm's length between parties represented by competent counsel. Class counsel are experienced in class proceedings as well as in civil litigation generally and have represented the plaintiff with skill and tenacity throughout this long proceeding.

[28] The total settlement amount of $21.175 million was arrived at after the issues relating to damages had been fully canvassed at the mediation sessions and after a recommendation had been made by the mediator, Mr Justice Winkler. On the basis of the material filed – and the complexity and uncertainty attaching to the issues relating to damages - I am satisfied that it is reasonable and in the interests of the class that it should be approved, and that it is not necessary to delve deeply into the course of the negotiations between the parties and their counsel. On this question, and in the circumstances of this case, I believe I should give considerable deference to the recommendation of class counsel and the supporting affidavit sworn by one of their solicitors.

[29] I am satisfied that weight should also be attributed to Mr Garland's support of this aspect of the settlement. He is an experienced policy and statistical analyst who was described by Mr Dewart as a "social activist". He was responsible for initiating the proceeding, although his damages are estimated to be in the vicinity of only $100, and he has been a constant source of encouragement – that may be an understatement - and assistance to class counsel. He has been far more closely involved with the proceeding than is customary for representative parties. His concern about the terms of a *cy pres* distribution led him to take the unusual step of retaining separate counsel who, I was informed, represented him in his "personal capacity" towards the conclusion of the negotiations. He took an active role in negotiating the settlement amount and, according to his evidence, he succeeded in increasing it significantly from an amount previously

under consideration. Class counsel acknowledged the assistance he gave them in analysing the issues relating to damages.

[30] I am also satisfied that this is pre-eminently a case in which a *cy pres* distribution would be the appropriate method of providing benefits to the class. The class is too large and the settlement amount too small to make a distribution of even an equal amount to each class member a reasonable, and an economically viable, alternative. The distribution proposed in the minutes of settlement would require the settlement fund - net of the fees of class counsel and the payment to the Class Proceedings Fund - to be paid to the United Way of Greater Toronto ("United Way") in trust to be invested and the income applied to form part of its Winter Warmth Fund program and, by so doing, to assist needy customers of the defendant to pay their gas bills.

[31] I have no doubt that, in principle, this would be an acceptable *cy pres* distribution. Before approving it, however, I would need to have more information about the manner in which the program is administered, and is likely to be administered in the future as the income from the settlement funds becomes available. In this regard, I note that:

> (a) at present, the defendant makes annual contributions to the Winter Warmth Fund program of $300,000 a year and the settlement provides that it will continue to do this for either two years after it gives notice of its intention to reduce or eliminate such contributions, or, failing such notice, for five years;
>
> (b) income from the amount earned from the investment of the settlement funds that is in excess of the "needs" of the Winter Warmth Fund program for the year is to be distributed to the regional United Way organisations to be used for such charitable purposes as they see fit; and
>
> (c) in the event that the Winter Warmth Fund program ceases operation "all available funds" shall similarly be distributed to the regional United Way organisations to be used for general charitable purposes.

[32] In my opinion, the following matters require clarification, or attention:

> 1. How are the needs of the Winter Warmth Fund program in each year to be determined. In particular, is it anticipated that it is likely to expend the entire amount available after the existing level of contributions from the defendant, and any other contributors, is augmented by the annual income from the investment of the settlement funds?

> 2. If it is contemplated that there may well be a significant amount of surplus, why should this be applied to charitable purposes generally, and not *cy pres*?
>
> 3. Is it intended that the United Way will be entitled to cease operating the Winter Warmth Fund program while the contributions of the defendant are continuing? For example, will the continuing contributions be "available funds" if the decision is made to terminate the programme within two years?
>
> 4. Why, in the event of the termination of the Winter Warmth Fund program, should future income from the settlement fund be applied to charitable purposes generally, and not *cy pres?* A provision, for example, that such income is to be applied *cy pres* by the United Way - or, failing its agreement to do so, by some other charitable organisation - would preserve the link between the class and benefits from the settlement fund. It would also provide an incentive for the board of directors of the United Way to maintain the Winter Warmth Fund program. The selection of substituted *cy pres* objects - and, if necessary, another organization to distribute income in accordance with them - could be made by the Advisory Committee proposed in the minutes of settlement with the consent of the Public Guardian and Trustee, or failing such consent, with that of the court.

[33] As the above comments may indicate, the *cy pres* element of the provisions of the settlement appear to me to be rather fragile. I cannot judge, at present, to what extent those who have difficulty in paying gas bills - as distinct from the community at large - are likely to benefit from the annual income from investments made with the net settlement funds. General charitable purposes are, of course, extremely diverse and they include many that would have no specific connection with the class members, or the issues in this litigation. They would include, for example, educational purposes, the promotion of health, prevention of cruelty to animals and other purposes considered to be beneficial to the community at large.

[34] I have the same concern with respect to the possibility that the Winter Warmth Fund program might be terminated by a decision of the United Way within three years and, perhaps, earlier.

[35] Finally, the provision for notice of the settlement to be published once in The Globe and Mail is, in my opinion, inadequate. If the settlement is approved, members of the class will be entitled to opt out and, in view of the release it contains, the requirement of notice cannot be considered to be a mere formality.

[36] Subject to those comparatively minor matters and the condition relating to the level of class counsel's fees, the settlement is, in my judgment, deserving of approval pursuant to section

29 of the CPA and, if it was otherwise acceptable, I would certify the proceeding under the CPA. Whether or not the defendant might successfully oppose certification in the absence of a settlement, the statutory requirements would, I believe, be satisfied in the context, and for the purpose, of implementing the settlement.

[37] For the reasons I have given, I do not intend to consider the quantum of the fees claimed by counsel - or of the amount of compensation requested by Mr Garland which, it is proposed, would be paid out of the amount that would otherwise be approved as counsel fees. I will comment only that, in my view, counsel are entitled to a fee commensurate with their time and effort, and the substantial success achieved by them, in this difficult, lengthy and expensive proceeding. This case has, as they submitted, unique features that may properly be taken into account in approving their fees in the event that a settlement is approved. I accept, also, that, in that event, the contribution made by Mr Garland throughout the proceeding, as well as in negotiating the terms of the proposed settlement, makes this one of the exceptional cases in which he should receive compensation for his contribution to the success of the litigation.

[38] In the end result, I will defer my decision on the orders requested in the joint notice of motion for 30 days to permit counsel to consider the views I have expressed, and to inform me, within that time, if any amendments to the minutes of settlement have been made.

CULLITY J.

**DATE:** September 25, 2006