

Judicial Justices of the Peace and Judicial Independence in Canada

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Today, a variety of legal and political safeguards serve as strong barriers to improper influences on the judiciary in Canada. However, the application of the principle of judicial independence to judicial justices of the peace remains largely unexplored. The lack of comparative data on the situation of JJPs likely explains this gap in the literature.

To begin to fill this gap, this paper presents a pan-Canadian study of such justices in Canada and describes how judicial independence extends to them. It then raises questions about the current status and place of JJPs in light of the components of judicial independence defined in the recent decisions of the Supreme Court of Canada.

First, the analysis shows that all provinces and territories should establish independent compensation mechanisms to enhance the financial security of judicial justices of the peace. Second, the security of tenure of JJPs seems to comply broadly with the components of judicial independence, though changes could be brought in the years to come in order to improve the protection of the office and strengthen public confidence in the administration of justice.

Diverses garanties juridiques et politiques protègent aujourd'hui le système judiciaire canadien d'influences indues. Cependant, la manière dont le principe d'indépendance judiciaire s'applique aux juges de paix magistrats demeure presque complètement inexplorée. L'absence de données comparatives sur la situation des JPM explique sans doute cette insuffisance dans la documentation.

Pour combler ce déficit, les auteurs de cet article présentent une étude pancanadienne de ces juges au Canada et décrivent comment le principe d'indépendance judiciaire s'applique à leur fonction. Puis, ils soulèvent des questions quant à la situation actuelle des JPM compte tenu des éléments établis par les récentes décisions de la Cour suprême du Canada.

Premièrement, l'analyse mise de l'avant montre que toutes les provinces et tous les territoires devraient établir des mécanismes de rémunération indépendants afin d'améliorer la sécurité financière des JPM. Deuxièmement, l'immovibilité des JPM semble respecter, dans les grandes lignes, les éléments de l'indépendance judiciaire, bien que des améliorations soient souhaitables dans les années à venir pour assurer une meilleure protection et renforcer la confiance du public dans l'administration de la justice.

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“The Justice of the Peace is the very person who stands between the individual and the arbitrary exercise of power by the state or its officials. It is essential that an independent person be the one to determine whether process should issue, whether a search warrant should be granted, whether and on what terms an accused should be released on bail and so on. This is a fundamental principle [that] must be zealously preserved.”

- Mewett Report¹

Introduction

The adoption of the *Canadian Charter of Rights and Freedoms*² in 1982 enhanced the role of the judiciary and, by extension, the importance of the principle of judicial independence in Canada.³ Since then, the principle has been strengthened and refined by the respective contributions of legislation,⁴ case law,⁵ and doctrine.⁶ A variety of institutional and political safeguards also serve as strong barriers to improper influences on the judiciary.⁷

1 *Ell v Alberta*, 2003 SCC 35 at para 26, [2003] 1 SCR 857 [*Ell*], citing AW Mewett, *Report to the Attorney General of Ontario on the Office and Function of Justices of the Peace in Ontario* (1981) at 39 [Mewett Report].

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

3 Fabien Gélinas, “Judicial Independence in Canada: A Critical Overview” in Anja Seibert-Fohr, ed, *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region* (New York & Heidelberg: Springer, 2010) 567 at 567-68 [Gélinas, “Critical Overview”].

4 See *Judges Act*, RSC 1985, c J-1; *Federal Courts Act*, RSC 1985, c F-7.

5 See *Beauregard v Canada*, [1986] 2 SCR 56 [Beauregard]; *Conférence des Juges du Québec c Québec (Procureur Général)*, 2007 QCCS 2672; *Mackeigan v Hickman*, [1989] 2 SCR 796; *Mackin v New Brunswick (Minister of Finance)*, [2002] 1 SCR 405 [Mackin]; *Masters' Association Of Ontario v Ontario*, [2001] OJ No 1444 (QL) (Div Ct); *Moreau-Bérubé v New Brunswick*, [2002] 1 SCR 249; *Ontario Deputy Judges Assn v Ontario* (2006), 80 OR (3d) 481 (CA); *Ontario Federation of Justices of the Peace Assns v Ontario (AG)* (1999), 43 OR (3d) 541 (Div Ct); *Provincial Court Judges' Association (Manitoba) v Manitoba (Minister of Justice)*, [1998] 1 SCR 3; *R v Généreux*, [1992] 1 SCR 259 [Généreux]; *R v Lippé*, [1991] 2 SCR 114 [Lippé]; *Re Independence of The Provincial Court of British Columbia Justices of the Peace*, 2000 BCSC 1470; *Ruffo v Conseil De La Magistrature*, [1995] 4 SCR 267; *Re Therrien*, [2001] 2 SCR 3; *Valente v The Queen*, [1985] 2 SCR 673 [Valente].

6 See Lydia Brashear, “Judicial Independence: Often Cited, Rarely Understood” (2006) 15 J Contemporary Legal Issues 129; Steven B Burbank, “The Architecture of Judicial Independence” (1999) 72 S Cal L Rev 315; KD Ewing, “A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary” (2000) 38 Alta L Rev 708; Martin Friedland, “Judicial Independence and Accountability in Canada” (2001) 59:6 Advocate 859; Patricia Hughes, “Judicial Independence: Contemporary Pressures and Appropriate Responses” (2001) 80:1 Can Bar Rev 181; Lorne Neudorf, “Independence and the Public Process: Evolution or Erosion?” (2007) 70:1 Sask L Rev 53; Wayne Renke, *Invoking Independence: Judicial Independence as a No-Cut Wage Guarantee* (Edmonton: Centre for Constitutional Studies, University of Alberta, 1994); Peter Russell, “Constitutional Reform of the Canadian Judiciary” (1969) 7 Alta L Rev 103; Jacob Ziegel, *Canada's Tortuous (and Unfinished) Road towards a Credible System of Federal Judicial Appointments* (Toronto: Faculty of Law, University of Toronto, 2007).

7 Justice Ian Binnie, on behalf of the Supreme Court of Canada, “Judicial Independence in Canada” (Paper delivered at the 2nd Congress of the World Conference on Constitutional Justice, Rio de

The principle of judicial independence, moreover, now undoubtedly extends to all judges in the country and not just to superior court judges and to inferior court judges concerned with criminal law.⁸ However, the manner in which the concept applies to the courts — and particularly lower courts — has been much less discussed and analyzed, even after the Supreme Court of Canada's ruling in *Ell v Alberta*.⁹ This is extremely troublesome because a gap can develop between the principle of independence and its practical implementation.¹⁰

The pending case of *Conférence des juges de paix magistrats du Québec v Attorney General of Québec* might provide the highest court of the land an opportunity to make statements of broad national significance on the judicial independence of justices of the peace across the country, but it remains to be seen whether the Court will opt to do so in light of the narrow issues in the appeal.¹¹ One of the more far-reaching questions that the Court might answer is whether the principles of judicial independence guaranteed by the *Constitution Act, 1867* and section 11(d) of the *Canadian Charter of Rights and Freedoms* demand that a government have prior recourse to a remuneration commission before determining the initial salary of a newly created judicial office. Another has to do with the nature of the pension plan that must be provided to judicial officers in order to comply with the principles of judicial independence.¹² It appears unlikely, however, that the Court will discuss whether the judicial independence of judicial justices of the peace in *all* jurisdictions in Canada warrants constitutional protection, and, even more so, whether the situation of

Janeiro, 16-17 January 2011) at 2, online: Council of Europe <yasni.ca/ext.php?url=http%3A%2F%2Fwww.venice.coe.int%2FWCCJ%2FRio%2FPapers%2FWCCJ_papers_E.asp&name=Ian+Justice&cat=other&showads=1>.

8 *Reference Re Remuneration of Judges of the Provincial Court*, [1997] 3 SCR 3 [*Remuneration Reference*].

9 See Seibert-Fohr, *supra* note 3 (though the significance of judicial independence has materialized in international standard setting as a central aspect of the rule of law, the question of its implementation has largely been left unexplored). This situation appears to be the one that prevailed in Canada back in the 1990s: "Many senior justices [whom Professor Doob's team] interviewed, [who] gave lengthy and thoughtful comments on the issue of independence, and the decisions made by high courts in all of those cases, had never dealt fully with the independence issue. Some felt ... the high court judgments to be simple put-downs of justices as the 'lowest on the totem pole'" (Anthony N Doob, Patricia M Baranek & Susan M Addario, *Understanding Justices: A Study of Canadian Justices of the Peace* (Toronto: University of Toronto Centre of Criminology, 1991) at 241).

10 Matthew Flinders & Jim Buller, "Depoliticisation: Principles, Tactics and Tools" (2006) 1 *British Politics* 293 at 295.

11 This appeal to the Supreme Court focuses exclusively on the financial security aspect of judicial independence as applied to the reforms to the office of *juges de paix magistrats* in Québec: Docket number 36165 [*Conférence des juges de paix magistrats du Québec*]. This case is also further discussed at text accompanying notes 183-84.

12 *Conférence des juges de paix magistrats du Québec v Attorney General of Québec*, Docket number 36165, Memorandum of Argument of the Intervener, the Attorney General of Ontario, at para 5.

these justices satisfies other components of judicial independence such as security of tenure and administrative autonomy.

The application of the principle of judicial independence to judicial justices of the peace (JJPs)¹³ in Canada thus remains largely unexplored to this day. The lack of empirical data on the situation of such justices across the country likely explains the scarcity of academic research on JJPs.¹⁴ As many participants in the process for establishing the compensation of JJPs quickly realized, effectively comparing their powers is a major challenge. The Minister of Justice of Alberta indeed remarked in 2006 that their roles, responsibilities, and qualifications vary considerably from coast to coast,¹⁵ as do their levels and methods of compensation.¹⁶

To begin to fill this gap in the literature, this paper (1) presents a comparative study of judicial justices of the peace in Canada, (2) describes how judicial independence extends to such justices, and finally, (3) raises questions about their current status and place in light of the components of judicial independence identified by the Supreme Court of Canada. In that sense, the descriptive data presented in the first part of this paper is deployed, when relevant, in the latter two parts. Administrative autonomy is not assessed since administrative matters bearing directly on the exercise of JJPs' judicial function are managed by judges of the provincial courts rather than by the provincial executive — an arrangement that leaves limited cause for concern.

13 The authors use the label of “judicial justice of the peace” systematically throughout the paper to refer to the justices in Canada whose powers can affect people’s fundamental rights. See Part 1.b “Methodology of the Study.”

14 A 2011 study on JJPs referred to a “twenty-five-year absence of empirical work and aperture in the knowledge of these courts”, see Cory Robert Lepage, *Reformation of Justice of the Peace Courts: Case Studies in New York State and the Province of Ontario, Canada* (PhD Thesis, University of California Riverside, 2011) at 1, online: EScholarship <escholarship.org/uc/item/9627x29k#page-6>. Unsurprisingly, this situation is problematic: “Little empirical research on previous reform efforts for quasi-judicial officers exists among numerous legal opinions that generally either argue for the need of and continued use of these officers or for the abolition of quasi-judicial systems all together. This lack of research makes it difficult to assess the utility of the role that these officers play as well as to determine what types of reform efforts, if any, are needed” (*ibid* at vii).

15 *Alberta Justice Submission to the 2006 Alberta Justices of the Peace Compensation Commission* at para 38.

16 *Submissions of the Association of Presiding Justices of the Peace and the Association of the Sitting Justices of the Peace to the 2006 Alberta Justices of the Peace Compensation Commission* at para 22.

1. Comparative Study of JJPs

a. Origin and Evolution of the Office

Since the fourteenth century, the figure of judicial justice of the peace has played an important role in the English judicial tradition.¹⁷ In Canada, the role of JJPs was established when the English criminal law was introduced to the newly conquered colony by the *Royal Proclamation of 1763*.¹⁸ Governor Murray's instructions specifically mentioned the appointment of justices of the peace, and a significant number of JJPs eventually sat in the magistrate courts.¹⁹ Section 92(14) of the *Constitution Act, 1867* later conferred upon the provinces legislative competence over the administration of justice.²⁰ This power has been interpreted as allowing provinces full control over the appointment and regulation of JJPs because the duty of JJPs was defined specifically as "to aid in the administration of justice."²¹

The function of judicial justices of the peace has been redefined over the years. From the outset, JJPs were used in Canada "to divert problems of crime and social dysfunction out of the mainstream justice system and into the hands of communities for resolution and restoration."²² In many provinces, they eventually took on important responsibilities in criminal proceedings. As the point of entry to the criminal justice system, they had jurisdiction over bail hearings and the issuance of search warrants.²³

The increasing sensitivity to the rights of the accused in the criminal law process,²⁴ the protection of fundamental rights and liber-

17 1327, 1 Edw III, Stat 2, c 16. For recent studies on the history of justices of the peace, see e.g. Kevin Costello, "More Equitable than the Judgment of the Justices of the Peace: The King's Bench and the Poor Law 1630 - 1800" (2014) 35:1 J Leg Hist 3; Patrick Polden, "Justices of the Peace and Their Courts" in RH Helmholz & John H Baker, eds, *The Oxford History of the Laws of England* (Oxford: Oxford University Press, 2003-2012); Katherine Beaty Chiste, "The Justice of the Peace in History: Community and Restorative Justice" (2005) 68:1 Sask L Rev 153 at 155.

18 Ontario Justice Education Network, "A Brief History of the Justice of the Peace Bench" (28 June 2014) at 1, online: Ontario Justice Education Network <<http://ojen.ca/sites/ojen.ca/files/resources/A%20brief%20history%20of%20the%20JP%20bench.pdf>>.

19 Alfred Leroy Burt, *The Old Province of Quebec*, vol 1 (Toronto: McClelland & Stewart, 1968) at 81.

20 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(14), reprinted in RSC 1985, Appendix II, No 5.

21 *R v Bush* (1888), 15 OR 398 at 405-06 (QB).

22 Chiste, *supra* note 17 at 154.

23 *Ell*, *supra* note 1 at para 5.

24 See Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999): at 3 "In the late 1980s, the Supreme Court interpreted [accused's] rights so that they equalled and sometimes exceeded American due-process rights. *Miranda* warnings, the exclusionary rule, and warrant, disclosure, and speedy-trial requirements came north of the border. These changes created the impression, and, at times, the reality that

ties,²⁵ and the development of constitutional requirements for judicial independence²⁶ led many commissions to issue reports recommending changes. In response to these concerns, the provinces enacted significant reforms.²⁷ In the 1960s, the most important of these was the professionalization of a large part of the judiciary by the creation of the provincial courts.²⁸

Those changes, however, considerably heterogenized the landscape across the country. Thus, the terminology relating to JJPs and the categories of JJPs today vary significantly from one jurisdiction to another,²⁹ and as a result, the methodology of this study must, in turn, be discussed.

b. Methodology of the Study

This paper only considers “judicial” justices of the peace. This label is used since it best encompasses the justices in Canada whose rank is immediately below that of the judges of provincial courts and whose powers can affect individuals’ fundamental rights. As a result, administrative officers or civil servants without significant powers were left aside. The official title that each province and territory has chosen for its JJPs has been used in this study, whether it be “presiding justices of the peace,” “justices of the peace,” or “judicial justices of the peace.”

criminal justice system had turned into a due-process obstacle course in which defense lawyers and the Supreme Court blocked the efforts of police, prosecutors, and Parliament to find and convict the guilty”. For a discussion on the expansion of the rights of criminal suspects in the 1960s and the remaining flaws that need to be addressed, see Anthony G Amsterdam, “The Supreme Court and the Rights of Suspects in Criminal Cases” (1970) 45:4 NYUL Rev 785.

25 See e.g. Peter McCormick, *The End of the Charter Revolution: Looking Back from the New Normal* (Toronto: University of Toronto Press, 2014); James Stribopoulos & Benjamin L. Berger, *Unsettled Legacy: Thirty Years of Criminal Justice under the Charter*, Osgoode Hall Law School, Constitutional Cases Conference (Markham, Ont: LexisNexis, 2012).

26 See *inter alia* Peter McCormick, “New Questions about an Old Concept: The Supreme Court of Canada’s Judicial Independence Decisions” (2004) 37:4 Can J Political Science 839 [McCormick, “New Questions”]; Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, Canadian Judicial Council (Ottawa: Canada Communication Group, 1995); Luc Huppé, *Histoire des institutions judiciaires du Canada* (Montréal: Wilson & Lafleur, 2007).

27 See Royal Commission Inquiry into Civil Rights, *Report Number One*, vol 2 (1968), ch 38 (Commissioner: The Honourable James Chalmers McRuer); *Mewett Report*, *supra* note 1; JE Klinck, *Report of the Justice of the Peace Committee* (Alberta: Ministry of the Attorney General, 1986); Manitoba Law Reform Commission, *The Independence of Justices of the Peace and Magistrates*, Report No 75 (Winnipeg: Manitoba Law Reform Commission, 1991); Doob, Baranek & Addario, *supra* note 9.

28 Peter J McCormick, *Canada’s Courts* (Toronto: James Lorimer, 1994) at 25.

29 There is an important disparity in their titles both in Canada and in other common law countries: Lepage, *supra* note 14 at 1.

The study presents the jurisdictions in alphabetical order. Some provinces and territories, however, were excluded from the comparison. First, there are no “judicial” justices of the peace who carry out functions affecting the fundamental rights of the accused in Newfoundland and Labrador, New Brunswick, and Prince Edward Island. In those provinces, provincial court judges have taken over the relevant functions.³⁰ Second, there was not enough information about Nunavut to include it in the study.

As stated above, though the powers of JJPs are documented in part by the provincial and federal legislation and delegated legislation of each jurisdiction studied, the functions actually performed by JJPs depend, in many circumstances, on practices and directives that remain unwritten; and, even in those cases where a written basis does exist, it is not always accessible to the public. Therefore, the comparative study explores both the legislative provisions and the situation “on the ground.” Nevertheless, the study is a snapshot of a landscape that continues to change rapidly, and many jurisdictions are still in transition with regard to the development of the function and salaries of justices of the peace.

This paper presents data reported for each of the provinces and territories so as to allow for the comparison of situations pertinent to JJPs across several jurisdictions. The situation in each jurisdiction follows.³¹

30 *Submission of the Society of the Justices of the Peace in Alberta to the 2009 Justices of the Peace Compensation Commission* at para 125, online: Alberta Justice <justice.alberta.ca/programs_services/courts/Documents/Submission-JPSociety.pdf>.

31 The data used in this paper was originally collected by Fabien Gélinas for a study prepared at the request of the Conférence des juges de paix magistrats du Québec in the context of the *Rapport du Comité sur la rémunération des juges présidé par M. Alban D'Amours* (23 December 2010): “Présentation comparative de la situation des juges de paix magistrats” (30 September 2010) [unpublished, on file with Fabien Gélinas (fabien.gélinas@mcgill.ca)] [Gélinas, “2010 Report on JJPs”]. The data was updated in 2013 for the compensation commission: Fabien Gélinas, “Présentation comparative de la situation des juges de paix magistrats” (10 June 2013) [unpublished, on file with Fabien Gélinas (fabien.gélinas@mcgill.ca)] [Gélinas, “2013 Report on JJPs”]. Professor Gélinas established a formal questionnaire to be given to chief judges of the provincial and territorial courts. The questionnaire was sent out by the chief judge of the Québec court to the judge in charge of the judicial justices of the peace in each jurisdiction under study and returned to Professor Gélinas. This particular way of proceeding contributed greatly to the success of the data collection both in terms of the quantity and the quality of the answers received. Where legislative and regulatory foundations for the answers existed, they were subjected to an independent control by Professor Gélinas.

c. Situation in Each Jurisdiction

i. Alberta

Alberta has implemented numerous reforms to clarify the role of its justices of the peace. The amendments to the *Justice of the Peace Act* progressively eliminated the two categories of justices previously in existence — presiding and sitting — in favour of a unified type of justice of the peace.³²

As with judges of the provincial court, justices of the peace are appointed by the Lieutenant Governor in Council after the Judicial Council deems them to be qualified.³³ The Judicial Council requires that candidates be members of the bar and have five years of relevant experience. Justices of the peace are subject to a disciplinary process virtually identical to that in place for provincial court judges. A complaint is first investigated by the chief judge of the provincial court and then referred to the Judicial Council if found to be sufficiently serious.³⁴

Justices of the peace are appointed either on a full-time or part-time basis, for a fixed, non-renewable term of ten years.³⁵ They are under the control of the Office of the Chief Judge, which manages judicial assignments. This function has been delegated to the deputy chief judge who, in turn, has delegated scheduling to a trial coordinator, a Court Services employee who has dual reporting duties (to the Office of the Chief Judge and to Court Services).³⁶

Hearing offices are situated in Calgary and Edmonton, where a justice of the peace is always present to deal with in-person and remote appearances seven days a week and 24 hours a day. This arrangement reduces the issue of work having to be performed outside of regular office hours and eliminates the need for judges to maintain a home office. An independent commission establishes compensation levels of these justices.³⁷

Justices of the peace have the power to hear and to adjudicate trials concerning provincial and municipal offences, except for complaints involving a

32 *Justice of the Peace Act*, RSA 2000, c J-4, s 1 [*JPA Alberta*]. Before this reform, there were 21 presiding justices of the peace and 23 sitting justices of the peace in Alberta: Gélinas, “2013 Report on JJPs”, *supra* note 31 at Alberta Questionnaire.

33 *JPA Alberta*, *supra* note 32, s 4(1).

34 *Ibid*, s 9(1), (2).

35 *Ibid*, ss 7.1(1), 7.2(1).

36 Gélinas, “2010 Report on JJPs”, *supra* note 31 at Alberta Questionnaire.

37 See *Justices of the Peace 2009 Compensation Commission Regulation*, Alta Reg 111/2012; *Justices of the Peace 2013 Compensation Commission Regulation*, Alta Reg 34/2013.

death or a *Charter* issue. If the *Provincial Court Act* allows justices of the peace to hear and adjudicate civil proceedings by designation of the chief judge, this power has never been exercised. Justices of the peace can issue written decisions, but the practice is extremely rare.³⁸ Their decisions can be appealed to the Court of Queen's Bench, the superior court that has jurisdiction over criminal matters in the province.

In federal law matters, justices of the peace have important powers of arrest, detention, and investigation (search warrants and other avenues of investigation).³⁹ In practice, however, only a minority of justices of the peace exercise these powers.⁴⁰

ii. British Columbia

In British Columbia, the position of judicial justices of the peace is in transition.⁴¹ JJPs assigned under the old law were appointed during good behaviour until the age of retirement. They work full-time and must dedicate themselves exclusively to their judicial duties. Under the new law, part-time (or per diem) JJPs are appointed for a fixed, non-renewable term of ten years⁴² and are generally practicing lawyers who continue to practice law when not engaged in their judicial duties. They are, however, precluded from practicing criminal law or acting for or against her Majesty the Queen in any matter, by the *Provincial Court Act*.⁴³

The selection process is the same as that for provincial court judges: appointment by the Lieutenant Governor in Council upon recommendation of the Judicial Council.⁴⁴ As in Alberta, candidates must have at least five years of experience in practice at the bar, though in reality, most judicial justices of the peace have more than twenty years of experience.

Judicial justices of the peace have jurisdiction throughout the province. The few JJPs assigned to the Justice Centre in Burnaby conduct hearings on a remote basis either by telephone or video for the entire province. The chief judge of the provincial court is responsible for those justices and, with the

38 Gélinas, "2010 Report on JJPs", *supra* note 31 at Alberta Questionnaire.

39 *Justice of the Peace Regulation*, Alta Reg 6/1999, ss 3(1)-4(2).

40 Gélinas, "2010 Report on JJPs", *supra* note 31 at 10.

41 In 2013, there were 14 full-time judicial justices, 17 part-time (lawyer) judicial justices, and 6 *ad hoc* judicial justices: Fabien Gélinas, "2013 Report on JJPs", *supra* note 31 at British Columbia Questionnaire.

42 *Provincial Court Act*, RSBC 1996, c 379, s 30(1)(a) [*PCA British Columbia*].

43 Gélinas, "2013 Report on JJPs", *supra* note 31 at British Columbia Questionnaire.

44 *PCA British Columbia*, *supra* note 42, s 30.2(1).

help of a coordinator, manages assignments. JJPs are bound by a code of ethics specific to them and are subject to the disciplinary process set out in the *Provincial Court Act*.⁴⁵ They are not required to maintain a home office, but many justices assigned to the late-night (so-called graveyard) shift at the Justice Centre choose to sit predominantly from home. The JJPs assigned to the traffic division of the court work normal hours. An independent commission establishes compensation levels.⁴⁶

Judicial justices of the peace generally hear cases relating to provincial and municipal offences initiated by a certificate of offence. They do not preside over trials in which the defendant is liable to be sentenced to a term of imprisonment. They preside at payment hearings and can make payment orders of up to \$25,000. They can also hear certain cases relating to federal statutory offences. JJPs cannot hear *Criminal Code* matters or matters regarding the application of the *Charter*. They occasionally produce written decisions. Their decisions can be appealed directly to the superior court of the province.⁴⁷

In federal law matters, British Columbia judicial justices of the peace have considerable powers of arrest, detention, and investigation (search warrants and other avenues of investigation). However, these powers are mainly exercised by the JJPs who are members of the bar.⁴⁸

iii. Manitoba

In Manitoba, judicial justices of the peace are subject to a unique appointment process. A nominating committee smaller than that in charge of appointments to the provincial court establishes a list of recommended candidates. This committee is composed of the chief judge of the provincial court or designate, who acts as chair, and two other persons appointed by the minister: the executive director of judicial services and a member of the public in most cases. The committee must provide the minister with an unranked list of at least three and not more than six qualified candidates, from which the minister must choose.⁴⁹

JJPs have jurisdiction throughout Manitoba, and remote appearances are handled by telephone and video. They are under the control of the chief judge

⁴⁵ *Ibid.*, s 22.1.

⁴⁶ The Judicial Justices Compensation Commission is appointed every three years under section 5(3) of the *Judicial Compensation Act*, SBC 2003, c 59.

⁴⁷ Gélinas, "2010 Report on JJPs", *supra* note 31 at 12.

⁴⁸ *Ibid.*

⁴⁹ *Provincial Court Act*, CCSM c C275, s 42 [*PCA Manitoba*]. There cannot be more than 21 JJPs in Manitoba: *Justices of the Peace Regulation*, Man Reg 117/2006, s 2.

of the provincial court, but answer, in practice, to the judicial justice of the peace coordinator in charge of assignments.⁵⁰

The chief judge of the provincial court recently issued a code of ethics aiming to regulate JJPs. The disciplinary process established for JJPs is comparable to the one for judges of the provincial court. JJPs hold office during good behaviour and may not be removed except in accordance with the established disciplinary process.⁵¹ Like judges of the provincial court, they must dedicate themselves to their duties full-time.⁵²

Judicial justices of the peace are on-call 24 hours a day, 365 days a year, for emergencies. The scheduled rotation sometimes requires justices to be available at home. The salary of JJPs is a percentage of the one provided to provincial judges.⁵³ They are not considered civil servants and are entitled to social benefits provided for by law.⁵⁴ No independent compensation commission seems to have been established.

Generally, judicial justices of the peace in Manitoba do not hear cases relating to federal matters. They act as trial judges in provincial matters but normally refer the matter to the courts for sentencing. JJPs cannot impose prison sentences. They can occasionally consider *Charter* arguments, though this is usually done only in traffic court. Their decisions are rarely published. Appeals are generally made to the superior court of the province, the Court of Queen's Bench.⁵⁵

JJPs can issue arrest and search warrants in many cases, but they have limited investigative powers as the provincial court apparently plays the lead role in such matters.⁵⁶

iv. Northwest Territories

The regime in place in the Northwest Territories distinguishes between presiding justices of the peace and administrative justices of the peace. The presiding

50 Gélinas, "2010 Report on JJPs", *supra* note 31 at 12.

51 *PCA Manitoba*, *supra* note 49, s 8.1.

52 *Ibid*, s 45.

53 *Ibid*, s 48(1).

54 *Ibid*, s 48(2).

55 Gélinas, "2010 Report on JJPs", *supra* note 31.

56 *PCA Manitoba*, *supra* note 49, s 47.

justices of the peace have important criminal law powers in addition to the powers of administrative justices of the peace.⁵⁷

Justices of the peace are appointed by the Commissioner in Executive Council. Any person who is at least nineteen years old and has been a resident of the Northwest Territories for at least six months can be appointed. However, practicing lawyers and RCMP members cannot be justices of the peace.⁵⁸ In 2013, there was only one justice of the peace who was a lawyer, though she was not practicing law and was solely a justice of the peace. While the law provides that the Commissioner appoints justices of the peace, in practice the Commissioner only does so on the recommendation of the chief judge of the territorial court, who normally consults with community leaders.⁵⁹

Justices of the peace have jurisdiction throughout the territory and can handle remote appearances with the parties' consent. Justices of the peace are under the supervision of the chief judge of the territorial court and are assigned specific sittings by the justice of the peace administrator.⁶⁰

There is no specified code of ethics for justices of the peace. Complaints are referred to the chief judge, who can dismiss the complaint, reprimand the justice of the peace, suspend him or her for up to two weeks, or refer the matter to a review council. The council is composed of the chief judge of the territorial court, another *puisne* judge of the territorial court, a justice of the peace, and two representatives of the public. If the matter is put before the review council, an inquiry is held and a report is made to the chief judge and to the Commissioner in Executive Council. The council can impose sanctions or recommend that the appointment be revoked.⁶¹

Justices of the peace are appointed during good behaviour until the age of seventy-five. They can only be removed from office on the recommendation of the review council. Although the legislation does not exclude full-time appointments, all appointments are currently part-time, and there is no exclusivity requirement. Justices are occasionally required to be on-call⁶² but are not required to maintain a home office.

57 G  linas, "2010 Report on JJPs", *supra* note 31 at 17. In 2013, there were a total of 30 active presiding (judicial non-administrative) justices of the peace in the Northwest Territories: *ibid*, at Northwest Territories Questionnaire.

58 *Justices of the Peace Act*, RSNWT 1988, c J-3, s 2(1)-(4) [*JPA Northwest Territories*].

59 G  linas, "2010 Report on JJPs", *supra* note 31 at 17.

60 *JPA Northwest Territories*, *supra* note 58, s 2.05.

61 G  linas, "2010 Report on JJPs", *supra* note 31 at 18.

62 *JPA Northwest Territories*, *supra* note 58, s 2.01.

Presiding justices of the peace are paid on an hourly basis, with a maximum per day. They are paid when they attend a training seminar approved by the chief judge. Justices of the peace also receive an annual honorarium for their services.⁶³ There is no remuneration commission.⁶⁴

Of the presiding justices of the peace, only level-two and level-three justices have the power to accept guilty pleas and to impose sanctions for certain offences. Moreover, exclusively level-three presiding justices of the peace can sit on trials for federal and territorial summary conviction offences. The additional powers given to level-two and level-three presiding justices of the peace, however, are systematically limited by an assignment policy managed by the chief judge. The chief judge has not authorized justices of the peace to deal with summary conviction matters in which the maximum penalty includes imprisonment exceeding six months or a fine exceeding \$5,000.⁶⁵

Justices of the peace are also directed to refer any matter relating to the *Charter* to a judge of the territorial court. They can theoretically render written decisions but do not do so in practice, except for decisions on emergency protection applications, which require a written summary of the justice's reasons. Decisions of justices are subject to appeal to the superior court of the territory.⁶⁶

In federal matters, all presiding justices of the peace theoretically have considerable powers in matters relating to arrest, detention, and investigation (search warrants and other avenues of investigation). In practice, however, these powers are mostly exercised by judges of the territorial court, who have the same status and salary as a judge of a provincial court.⁶⁷

v. Nova Scotia

In Nova Scotia, justices of the peace are called "presiding justices of the peace." They are appointed by the Governor in Council, on the recommendation of the Minister of Justice. While no selection criteria or process is provided for by law, recruitment is carried out through the provincial court, and all of the justices of the peace are qualified lawyers. They are appointed during good behaviour until the age of seventy.⁶⁸ Although legislation provides for full-time or part-

63 *Ibid*, s 5.

64 *Remuneration and Allowances Regulations*, NWT Reg 056-98.

65 Gélinas, "2010 Report on JJPs", *supra* note 31 at Northwest Territories Questionnaire.

66 *Ibid* at 18.

67 *Ibid*.

68 *Justices of the Peace Act*, RSNS 1989, c 244, s 3 [*JPA Nova Scotia*].

time appointments, all presiding justices of the peace are currently appointed part-time.⁶⁹

Presiding justices of the peace have jurisdiction throughout the province and can deal with remote hearings. Depending on the nature of the cases treated, they are under the supervision and control of the chief judge of the provincial court, the chief judge of family court, or the chief justice of the superior court. The appropriate chief judge or chief justice is responsible for discipline and can form an *ad hoc* disciplinary committee, which can recommend to the Governor in Council that the appointment be revoked. There is no particular code of ethics for presiding justices of the peace. Except for four justices of the peace who have specific assignments, all justices of the peace rotate to cover evening, night, and weekend shifts.⁷⁰

Presiding justices of the peace are paid an hourly rate equivalent to a percentage of the salary of a provincial court judge (based on 219 eight-hour work days per year). No social benefits are provided other than occasional legal education days. These remuneration figures were established unilaterally by the government.⁷¹

By law, presiding justices of the peace have the power to deal with all matters prescribed to a justice of the peace by the *Criminal Code* and the *Summary Proceedings Act*. However, they generally do not preside over trials; only the justices in Sydney and Halifax hear matters relating to offences charged by summary offence tickets. Though presiding justices of the peace in Nova Scotia theoretically have the power to consider *Charter* arguments and render written decisions, they do not do so in practice. Their decisions can be appealed directly to the superior court.⁷²

Under federal law, Nova Scotia justices of the peace have basic powers in matters relating to arrest, detention, and investigation (search warrants and other avenues of investigation) in cases where a judge of the provincial court is not available.⁷³

69 G  linas, "2010 Report on JJPs", *supra* note 31 at 13. In 2013, there were 11 presiding justices of the peace in Nova Scotia: *ibid.*, at Nova Scotia Questionnaire.

70 *JPA Nova Scotia*, *supra* note 68, ss 8-10.

71 *Justices of the Peace Regulations*, NS Reg 51/2002.

72 G  linas, "2010 Report on JJPs", *supra* note 31 at 14.

73 *Ibid.*

vi. Ontario

Ontario's regime is in transition. Of all active justices of the peace, almost all are presiding justices of the peace and only a fraction of the justices are non-presiding.⁷⁴ The selection process for justices of the peace is set out in section 2.1 of the *Justices of the Peace Act*.⁷⁵ It is not the same as the selection process for provincial court judges, which is set out in section 43 of the *Courts of Justice Act*.⁷⁶ The justice of the peace process has seven regional committees, and the provincial court judge process has one provincial committee. Also, while the justice of the peace process classifies everyone who has applied, including individuals who are not lawyers, the process for judges results in a short-list of candidates who must have been members of the bar for at least 10 years.⁷⁷

Presiding justices of the peace are assigned to one of seven administrative regions, but they have jurisdiction over the whole province. They regularly preside over remote appearances. Presiding justices of the peace are under the control of the chief justice of the provincial court (the Ontario Court of Justice), who delegates this power to the associate chief justice, who serves as the coordinator of justices of the peace. He or she in turn delegates this responsibility to the regional senior judges, who assign specific duties to the justices of the peace. The disciplinary process set out in legislation provides for a Justices of the Peace Review Council that, after receiving a complaint, forms a disciplinary committee to investigate. The committee follows the ethical standards applicable to judges of the Ontario Court of Justice.⁷⁸

Presiding justices of the peace are appointed during good behaviour until the age of sixty-five and can continue in office until the age of seventy-five with the annual approval of the chief justice.⁷⁹ All appointments are now full-time.⁸⁰ Justices of the peace cannot engage in extra remunerative work without the approval of the Justices of the Peace Review Council.⁸¹

74 *Ibid.* In 2013, of 331 active justices of the peace, 324 were presiding and 7 were non-presiding: Gélinas, "2013 Report on JJPs", *supra* note 31 at Ontario Questionnaire.

75 *Justices of the Peace Act*, RSO 1990, c J.4, s 2.1 [*JPA Ontario*].

76 *Courts of Justice Act*, RSO 1990, c C.43, s 43.

77 *JPA Ontario*, s 8. See also Gélinas, "2010 Report on JJPs", *supra* note 31 at 15.

78 *Ibid.*

79 *JPA Ontario*, *supra* note 75, s 5.1(2).

80 *Ibid.*, s 2(3).

81 *Ibid.*, ss 8(2)(e), 19.

In Ontario, presiding justices of the peace currently receive social benefits, in addition to their annual salary, set out in regulation.⁸² They can receive three types of remuneration: full-time, part-time, or *per diem*. Salaries are determined by an independent remuneration commission.⁸³

Ontario presiding justices of the peace try provincial offences, and their decisions in such cases can be appealed to the Ontario Court of Justice. They also hear federal summary conviction offences initiated following the summary convictions procedure set out in part XXVII of the *Criminal Code*, and these decisions can be appealed directly to a judge of the superior court. No trial relating to an offence in the *Criminal Code* is assigned to a justice of the peace.⁸⁴

Justices of the peace have considerable powers in federal law cases in matters of arrest, detention, and investigation (search warrants and other avenues of investigation). These powers are exercised in practice by all justices of the peace.⁸⁵

vii. Québec

Like judges of the provincial court (the Court of Québec), judicial justices of the peace in Québec are appointed according to the procedure in place for selecting candidates for judicial appointments.⁸⁶ When there is a vacancy, an independent selection committee draws up a list of suitable candidates from which the government must choose. As is the case for judges of the provincial court, candidates must be members of the Québec Bar of a minimum of ten years' standing to be eligible.

Like judges of the Court of Québec, presiding justices of the peace hold office during good behaviour until the set retirement age of seventy.⁸⁷ Appointments are full-time and exclusive, and upon nomination, candidates must forgo their bar membership.⁸⁸

82 *Ibid*, s 21.1.

83 *Justices of the Peace Remuneration Commission*, O Reg 319/00.

84 Gélinas, "2010 Report on JJPs", *supra* note 31 at 15.

85 *Ibid*.

86 In 2010, there were 33 JJPs in Québec: Gélinas, "2010 Report on JJPs", *supra* note 31 at Québec Questionnaire.

87 *Loi sur les Tribunaux judiciaires*, RLRQ c. T-16, s 165 [*Loi sur les Tribunaux*].

88 *Ibid*, s 162.

Judicial justices of the peace have jurisdiction over the entire province and can be called upon to preside over hearings and exercise all their functions throughout the province.⁸⁹ They are under the authority of the chief judge of the Court of Québec. In practice, they are supervised by the associate chief judge coordinator of justices of the peace, who is in charge of organizing on-call shifts for court appearances and telewarrant services, which are offered 24 hours a day, 365 days a year.⁹⁰

JJPs follow the same code of ethics as judges of the Court of Québec. Any complaint about a failure to comply with the code of ethics is referred to the Judicial Council of Québec, which produces a report. The minister can then ask the Québec Court of Appeal to report; a JJP, like a judge of the Court of Québec, cannot be removed by the minister except upon recommendation by the Court of Appeal of Québec.⁹¹

Because they are required to be on-call outside of normal office hours, justices of the peace must maintain a home office where they can receive police officers, issue telewarrants, and preside over remote hearings.⁹²

Until the *Clair Committee Report* was implemented in 2013,⁹³ presiding justices of the peace appointed before the 2005 reform had received both a higher salary and a larger allowance for expenses related to their functions than those appointed after the reform.⁹⁴ Following the report, the salary of JJPs appointed after May 2005 was raised by 13.79% and will be henceforth indexed to the cost of living.⁹⁵ They also benefit from the same group insurance plans as judges of the Court of Québec.⁹⁶ Justices appointed following the reform (who represent the majority of the justices of the peace in Québec), are subject to the same group insurance and retirement plans as executive staff members of the public service.

All JJPs also receive an annual, tax-deductible allowance for maintaining a home office and funds for the necessary legal documentation. The Chief Justice

89 *Ibid*, s 172.

90 *Ibid*, s 169.

91 Gélinas, "2010 Report on JJPs", *supra* note 31 at 21.

92 *Ibid*.

93 Quebec, Justice Quebec, *Rapport du comité de la rémunération des juges* (October 2013).

94 *Décret concernant le traitement et conditions de travail des juges de paix magistrats*, RQ, c T-16, r 16.

95 Quebec, Justice Quebec, *Réponse du gouvernement au Rapport du comité de la rémunération des juges pour la période 2013-2016* (February 2013) at 24.

96 *Décret concernant les avantages sociaux des juges de la Cour du Québec*, 1994 GOQ 2, 3686.

of the Court of Québec has a total discretion for the holidays of JJPs and they are not subject to a maximum or a minimum.

Like their colleagues in other jurisdictions, judicial justices of the peace in Québec do not adjudicate *Criminal Code* offences. However, they do hear federal offence cases commenced under the summary convictions procedure in the *Criminal Code*. They sit in the Criminal and Penal Division of the Court of Québec and hear federal offence cases commenced under the Québec summary convictions procedure as well as provincial offences.⁹⁷

Justices of the peace can hear any argument relating to the *Charter*. In the Criminal and Penal Division, where they render their decisions in the name of the Court of Québec, justices of the peace can issue written decisions (which are then reported) but they do not have an obligation to do so. All their decisions may be subject to appeal before the Superior Court.⁹⁸

In criminal law, JJPs have far-ranging jurisdiction in matters of investigation, since they can issue general warrants as well as warrants for the taking of DNA samples. Those powers are given only to provincial courts or superior courts in other Canadian jurisdictions.⁹⁹ Concurrently with the Comité D'Amours, new legislative amendments have resulted in greater powers being conferred to JJPs. Having the power to try criminal proceedings, order imprisonment, and impose financial penalties up to \$5 million, the justices of the peace in Québec enjoy a different status in comparison with their colleagues from other provinces.¹⁰⁰

viii. Saskatchewan

Justices of the peace in the province of Saskatchewan are classified into two categories: regular justices, who handle a variety of processes such as issuing search warrants, conducting release or remand hearings, and swearing infor-

97 *Loi sur les Tribunaux*, *supra* note 87, Schedule V.

98 *Ibid.*

99 *Ibid.*

100 *Loi sur les Tribunaux*, *supra* note 87, schedule V, s 1.

The new powers are the following:

- General warrant (with the exception of video surveillance) under *Tax Administration Act*, CQLR, c A-6.002, ss 40.1.1, 40.12;
- Production order under *ibid.*, ss 40.1.3, 40.12;
- Authorization to release, to police, information contained in the tax record of a person connected to a criminal organization under *ibid.*, s 69.0.0.12.
- Search warrant to enable the designated veterinary surgeon, the inspector, or analyst to enter and seize an animal, product, or equipment connected to the commission of an offense in connection with the *Animal Health Protection Act*, CQLR, c P-42, ss 55.10, 55.14, 55.9.5.

mations; and senior justices who, in addition to these processes, conduct trials in provincial offence, by-law, and traffic safety cases.¹⁰¹

Moreover, two types of justices have a fixed-term appointment: the supervising justice of the peace, who is appointed for a five-year term, and the traffic safety court justices, who are appointed for a seven-year term. All other justices are appointed without a fixed term.

Some justice of the peace appointments in Saskatchewan are full-time and exclusive: the supervising justice of the peace, the assistant supervising justice of the peace, and traffic safety court justices. All other justices work on a part-time basis and may maintain any additional employment that is not a conflict of interest with their justice of the peace duties.¹⁰² Only the full-time justices of the peace receive social benefits, but all justices earn vacation benefits.¹⁰³ The first independent compensation commission took place in the fall of 2013, and the resulting report was released in January 2014.¹⁰⁴

Justices of the peace are appointed by the Lieutenant Governor in Council. No legal education or training is required, but justices who are lawyers can continue to practice except in criminal law cases and in cases involving the Crown. Candidates are selected on an *ad hoc* basis by the supervisory justice of the peace. The supervisory justice forms a panel that interviews candidates and then recommends the successful candidates to the Minister of Justice, who makes appointments following the recommendation.¹⁰⁵

Justices of the peace have jurisdiction throughout the province.¹⁰⁶ Only a select number of specially trained justices deal with remote appearances. The chief judge of the provincial court is responsible for justices of the peace but delegates most related tasks to the supervisory justice of the peace, who oversees assignments, scheduling, and operations on a province-wide basis.¹⁰⁷ Shifts for justices of the peace are assigned by duty roster.

101 In 2013, there were 148 justices in Saskatchewan who had authority to perform “judicial” functions: Gélinas, “2013 Report on JJPs”, *supra* note 31 at Saskatchewan Questionnaire.

102 *The Justices of the Peace Act*, 1988, SS 1988-89, c J-5.1, s 6(6) [*JPA Saskatchewan*].

103 *Justices of the Peace Regulations*, 1989, RRS c J-5.1 Reg 1, s 14 [*JPR Saskatchewan*].

104 *Report and Recommendation of the 2013 Saskatchewan Justice of the Peace Compensation Commission* (13 January 2014) (Chair: William FJ Wood), online: Saskatchewan Justices of the Peace Compensation Commission <jpcompensationcommission.ca/reports/2014-report-recommendations-2013-sk-jjustice-peace-compensation-commission.pdf>.

105 *JPA Saskatchewan*, *supra* note 102, s 3.

106 *Ibid*, s 4.

107 *Ibid*, s 13(1).

Complaints are currently referred to the chief judge of the provincial court, who can choose to appoint an investigation committee to prepare a report. The investigation committee or the chief judge can then direct the complaint to the Justices of the Peace Review Council, which can conduct a hearing. The council is comprised of two judges of the provincial court and a third person appointed by the Lieutenant Governor in Council. The Council can recommend that the appointment be cancelled or that other sanctions, including a reprimand, be imposed.¹⁰⁸

Justices of the peace are appointed until the fixed retirement age of seventy.¹⁰⁹ The failure to file the required returns over a period of one year can lead to the removal of a justice of the peace on the recommendation of the supervisory justice of the peace or of the chief judge to the Lieutenant Governor in Council. Otherwise, they cannot be removed except for misconduct — and only following a recommendation of the review council.¹¹⁰ Except for the full-time justices of the peace and the by-law justices of the peace who have offices, all others maintain home offices.¹¹¹

Justices of the peace in Saskatchewan do not have jurisdiction to adjudicate federal law matters. A limited number of justices hear cases for provincial summary conviction offences as well as matters of traffic safety. Some justices can also hear municipal by-law cases. None of the other justices preside over trials. Justices' decisions are given orally and are not published. Appeal can be made directly to the Court of Queen's Bench for Saskatchewan, the superior court for the province.¹¹²

Justices of the peace have considerable powers in applying the *Criminal Code* in matters relating to arrest, detention, and investigation (search warrants and other avenues of investigation).¹¹³ Most of the powers conferred on justices of the peace are exercised by all the justices and not just a select few.¹¹⁴

108 Gélinas, "2010 Report on JJPs", *supra* note 31 at 16.

109 *JPA Saskatchewan*, *supra* note 102, s 8.1(2).

110 *Ibid*, s 12.

111 Gélinas, "2010 Report on JJPs", *supra* note 31 at 16.

112 *Ibid*.

113 *JPR Saskatchewan*, *supra* note 103, s 11.

114 Gélinas, "2010 Report on JJPs", *supra* note 31 at 16.

ix. Yukon

Lastly, in the Yukon, there are three categories of justices of the peace: level-one administrative justices of the peace; level-two presiding justices of the peace; and level-three presiding justices of the peace.¹¹⁵

No legal education or training is necessary. Completed applications are sent to the territorial court, which reviews applications and submits a list to the Judicial Council. Some candidates must follow a training program. The minister of justice makes appointments from among the candidates recommended by the Judicial Council.¹¹⁶

Justices of the peace are under the control of the chief judge of the territorial court, who appoints a supervising judge to oversee them. Some justices have jurisdiction throughout the territory, while others are limited to a particular community.

There is no separate code of ethics for justices of the peace. Rather, the Canadian Judicial Council's Ethical Principles for Judges is currently used as the basis for training justices of the peace in ethics. Justices of the peace are subject to the same disciplinary process as judges of the territorial court, set out in part 5 of the *Territorial Court Act*.¹¹⁷

Justices of the peace in the Yukon are appointed during good behaviour until retirement and can only be removed following the same disciplinary process that is applicable to judges of the territorial court. Justices of the peace perform duties on an *ad hoc* basis and are paid by the hour. There is no rotation system; rather justices are on-call and are contacted when needed.¹¹⁸ Remuneration is determined by a judicial compensation commission.¹¹⁹

Only the full-time justices of the peace can hear trials. In federal matters, these justices of the peace can sometimes impose fines but do not hear cases other than provincial summary conviction offences. The maximum prison sen-

115 *Ibid* at 18. In 2013, there were a total of 37 justices of the peace appointed in the Yukon (10 level-one administrative justices of the peace; 13 level-two presiding justices of the peace; and 14 level-three presiding justices of the peace): Gélinas, "2013 Report on JJPs", *supra* note 31 at Yukon Questionnaire.

116 *Ibid*.

117 *Territorial Court Act*, RSY 2002, c 217, Part 5.

118 *Salaried Presiding Justice of the Peace Remuneration Implementation Order*, YOIC 2012/72.

119 2010 Judicial Compensation Commission, *2010 Yukon Judicial Compensation Commission Report* (5 December 2011), online: Yukon Government Department of Justice <justice.gov.yk.ca/pdf/2010_Yukon_JCC_Report.pdf>.

tence that they can impose is of three months, or of six months for a conditional sentence.

Justices of the peace cannot hear *Charter* arguments and do not render written decisions. Their decisions can be appealed directly to the superior court.¹²⁰ In federal matters, they have limited powers in relation to arrest, detention, and investigation. Moreover, in practice these powers are often exercised by judges of the territorial court, who have the same status and receive the same treatment as a judge of a provincial court.¹²¹

D. Conclusion

In her historical review, Katherine Beaty Chiste states that through the centuries the main contribution of judicial justices of the peace was “to the maintenance of public peace in their communities.”¹²² She also writes, however, that their role has continuously changed through time in response to local social necessity.¹²³ Those assertions show once again the necessity of comparative study of the situation of JJPs across the country. Exposing the scope of their powers is vital because it determines, according to the Supreme Court of Canada’s analysis, whether the principle of judicial independence applies to those justices. The principle of judicial independence and, most importantly, the two conditions upon which it extends to the office of JJPs are set out next.

2. Judicial Independence of JJPs

The first part of this paper compared and contrasted the particularities of the functions exercised by JJPs in the various jurisdictions of Canada, and put a great emphasis on empirical data related to the methods of appointment, the adjudicatory powers, and the tenure of JJPs. The data collected was informative in comparing the situation of JJPs in said jurisdictions. In this part, data previously introduced is deployed to determine whether the judicial independence of JJPs in *all* jurisdictions in Canada warrants constitutional protection.

In the last two decades, the Supreme Court of Canada had the opportunity to discuss extensively the principle of judicial independence. Judicial independence has a long and rich history. It has been part of the constitution

120 Gélinas, “2010 Report on JJPs”, *supra* note 31 at 19.

121 *Ibid.*

122 Chiste, *supra* note 17 at 157.

123 *Ibid* at 170.

of the United Kingdom since the *Act of Settlement of 1701*.¹²⁴ The preamble of the *Constitution Act, 1867* affirmed that the country was to have a constitution “similar in Principle to that of the United Kingdom.”¹²⁵ The rationales for judicial independence in a constitutional democracy are rooted, notably, in the need for a strong judiciary, which is also associated with the separation of powers and the rule of law.¹²⁶

It remains, however, to be determined if and how the principle of judicial independence applies to *all* JJPs in the country. This is because the Supreme Court has only had the opportunity to settle this question with respect to JJPs from a limited number of jurisdictions. The first judgment of considerable importance for JJPs is the *Remuneration Reference* in which Chief Justice Lamer characterized judicial independence as an unwritten constitutional principle.¹²⁷ Until then, judges who were not covered by sections 96 to 100 of the *Constitution Act, 1867* or section 11(d) of the *Charter* received a very limited protection.¹²⁸ The decision reframed how the Canadian constitutional picture was to be viewed: judicial independence was then revealed as an underlying principle that went beyond the explicit provisions of the Constitution and extended to all courts.¹²⁹ More specifically to the situation of JJPs, the Supreme Court held in *R v 974649 Ontario* that JJPs in Ontario do, in fact, enjoy judicial independence.¹³⁰ The Court also discussed the question in *Ell*, where it ruled that the principle of judicial independence extends to judicial justices of the peace in Alberta.¹³¹ In reaching these decisions, the Court relied on both

124 *Act of Settlement of 1701* (UK), 12 & 13 W & M, c-2. Unlike France and the United States, Canada does not have a constitution that was the result of a revolution, with the effect that Canada’s Constitution did not aim to produce what Professor Peter Russell refers to as a “comprehensive plan for an ideal system of government”, see (Peter H Russell, *The Judiciary in Canada: The Third Branch of Government* (Whitby, Ont: McGraw-Hill Ryerson, 1987) at 47.

125 *Constitution Act, 1867*, *supra* note 20, preamble. For a critique of this argument, see McCormick, “New Questions”, *supra* note 26.

126 Fabien Gélinas, “The Dual Rationale of Judicial Independence” in Alain Marciano, ed, *Constitutional Mythologies: New Perspectives on Controlling the State* (New York: Springer, 2011) at 135.

127 *Remuneration Reference*, *supra* note 8 at para 83.

128 *Alternative Models of Court Administration* (Ottawa: Canadian Judicial Council, 2006) at 42.

129 *Remuneration Reference*, *supra* note 8 at para 106.

130 *R v 974649 Ontario*, 2001 SCC 81 at para 90, [2001] 3 SCR 575. This is also the view of Professor Cameron: “[J]ustices of the peace [in Ontario] are members of the judiciary, and included as such in the scope of constitutional concept of judicial independence. If it seems obvious, any review of the Mewett report would show how pivotal a step it was to interpret the principle inclusively, thereby recognizing the judicial status of the justices and the need to protect their independence” (Jamie Cameron, “A Context of Justice: Ontario’s Justices of the Peace: From the Mewett Report to the Present,” Research Paper No 44/2013 (Toronto: Comparative Research in Law & Political Economy, Osgoode Hall Law School, 2013) at 29-30).

131 *Ell*, *supra* note 1 at paras 24-26.

the impact of JJPs on fundamental rights and the need for public confidence in the administration of justice.

Yet, these decisions only show that the justices in those *specific* jurisdictions must be independent, and, as seen above, the office of JJP varies a lot across the country. The issue of the guarantees of judicial independence enjoyed by all JJPs in Canada has also been given scant attention in the literature. This is problematic, since “[while] the role of the justice of the peace could be viewed as a sack holding all the other topics of concern, the issue of [judicial] independence is the drawstring which knots that sack up.”¹³²

This part of the paper inquires, following the reasoning of the Supreme Court, whether JJPs in Canada exercise judicial functions that relate to the factors upon which the principle of judicial independence is founded. The novel finding here is that, upon the comparative data collected, it appears that all JJPs should be protected. The analysis displayed is brief since it seems conclusive that JJPs must be independent. But, it is useful to stress why this is so in light of the financial burden that it puts on provinces and territories trying to manage public resources and ensure access to justice. The two factors that justify the extension of the principle to the office of JJPs — namely, the impact on the fundamental rights and freedoms, and the public confidence in the administration of justice — are considered below.

a. Impact on Fundamental Rights and Freedoms

i. Bail Hearings and Search Warrants

The impact of judicial justices of the peace on the fundamental rights and freedoms of the accused is of capital importance in the evaluation of the relative value of their office. Indeed, the scope of the powers actually exercised by JJPs in the judicial system is a factor on which the Supreme Court of Canada insisted in its analysis of the degree of judicial independence required by the Constitution.¹³³ JJPs in Canada have important powers regarding the criminal law process, as they are included in the definition of “justice” under section 2 of the *Criminal Code*.¹³⁴

This factor can be broken into sub-factors. In fact, two powers require justices to be independent in criminal cases. The first one is the jurisdiction over bail hearings. As described in *Ell*, orders on judicial interim release affect the

132 Doob, Baranek & Addario, *supra* note 9 at 229.

133 Gélinas, “2010 Report on JJPs”, *supra* note 31 at 7.

134 *Criminal Code*, RSC 1985, c C-46, s 2.

right to security of the person, protected by section 7 of the *Charter*, and the right not to be denied reasonable bail without just cause under section 11(e).¹³⁵ The decision to deprive an accused of his or her liberty should be conducted by an independent arbiter because, as explained by professor Martin L. Friedland, detention before trial “not only affects the mental, social, and physical life of the accused and his family, but also may have a substantial impact on the result of the trial itself.”¹³⁶

The second power that may require the independence of judicial justices of the peace is the authority to issue search warrants. The right to be free from unreasonable search and seizure is protected by section 8 of the *Charter*.¹³⁷ The considerable effect of search warrants on privacy justifies this safeguard, especially when one considers the violation of bodily integrity.¹³⁸ The Supreme Court ruled in *Baron* that the discretion exercised by judicial officers in the issuance of search warrants constitutionally requires them to be independent from the state and its agents.¹³⁹ Do JJPs currently exercise these powers in Canada?

ii. Extended Powers and Primary Role

A common denominator is needed to determine whether judicial justices of the peace in different provinces and territories normally have jurisdiction over bail hearings and the issuance of search warrants. The task of defining a common denominator, however, involves some challenges. In the present study, the emphasis is placed on the powers provided for in the *Criminal Code* and in certain federal laws that give rise to a criminal justice process. While federal law can serve as a useful common denominator, it is difficult to interpret the data schematically under this heading. The way in which federal law applies to the criminal law process varies from jurisdiction to jurisdiction, as the powers it confers often overlap with and depend on local practices. In spite of this difficulty, it is possible to provide an overall assessment of the scope of the powers of judicial justices of the peace in the criminal law process and to focus especially on concerns related to police investigations.

Table 1 distinguishes the jurisdictions in the following manner. Jurisdictions listed under 1) *Extended Powers* are those in which the powers exercised by

135 *Ell*, *supra* note 1 at para 24.

136 Martin L Friedland, *Detention before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (Toronto: University of Toronto Press, 1965) at 172.

137 *Charter*, *supra* note 2, s 8.

138 *Ell*, *supra* note 1 at para 25.

139 *Baron v Canada*, [1993] 1 SCR 416 at 439.

JJPs are wide-ranging. The findings are based on an overall assessment of the scope of the powers exercised by the justices in the criminal law process and their potential to affect the fundamental rights of the accused.¹⁴⁰ As discussed above, this factor can be divided into two sub-factors: 1.1) *Bail Hearings* and 1.2) *Search Warrants*. Also, jurisdictions listed under 2) *Primary Role* are those where JJPs play a lead role rather than a limited one in the exercise of those powers.

Table 1: Extended Powers and Primary Role of JJPs¹⁴¹

	Alberta (JP)	BC (JJP)	Man (JJP)	NWT (Pres JP)	NS (Pres JP)	Ontario (Pres JP)	Québec (Pres JP)	Sask (Pres JP)	Yukon (Pres JP)
1) Extended Powers	√	√	√	√	√	√	√	√	
1.1) Arrest & Bail	√	¹⁴²	√	¹⁴³	√	√	√	√	¹⁴⁴
1.2) Search Warrant	√	√	√	√	√	√	√	√	¹⁴⁵
2) Primary Role	√	√				√	√		

The study of extended powers shows that judicial justices of the peace in the majority of jurisdictions have wide-ranging powers in the criminal law process, at least in the sense outlined by the Supreme Court in *Ell*.¹⁴⁶ They can often adjudicate on bail hearings and issue search warrants.

¹⁴⁰ *Ell*, *supra* note 1 at para 24.

¹⁴¹ Gélinas, “2010 Report on JJPs”, *supra* note 31 at 28.

¹⁴² Bail hearings in British Columbia are conducted by JJPs only after hours, on weekends, and when provincial court justices are not available.

¹⁴³ Presiding justices of the peace can conduct bail hearings (except in relation to section 469 *Criminal Code* offences). However, in situations where a territorial court judge is available, they are not to deal with reverse-onus bail hearings.

¹⁴⁴ Only level-three presiding justices of the peace, if authorized by supervising or chief judge.

¹⁴⁵ Only level-three presiding justices of the peace, if authorized by supervising or chief judge.

¹⁴⁶ *Ell*, *supra* note 1 at paras 5, 24.

On the other hand, in certain jurisdictions, JJPs do not commonly exercise most of these powers in practice, except in the absence of a judge of the provincial court or of the territorial court.¹⁴⁷ In Nova Scotia, for example, the justices do not exercise their powers in criminal matters *when a judge is available*.¹⁴⁸ In other jurisdictions, a limited number of powers are conferred on JJPs, such that the provincial courts continue to carry on predominant functions in the investigation. In these jurisdictions, JJPs play a role that can be qualified as secondary.

All judicial justices of the peace across the country can nonetheless be said to perform crucial functions. The Court ruled in *Ell* that the justices in Alberta “served on the front line of the criminal justice process, and performed numerous judicial functions that significantly affected the rights and liberties of individuals,”¹⁴⁹ and the present data shows that the justices in all jurisdictions in Canada do so too, with the exception perhaps of the Yukon. In consequence, one of the two factors that are needed to extend requirements of judicial independence to the office of JJPs is met. If each factor is key, it seems that the occurrence of only one of them could be enough to require independence. However, the second factor of judicial independence, public confidence in the administration of justice, also tends to show that JJPs in Canada must comply with the principle.

b. Public Confidence in the Administration of Justice

i. Independent in Fact and Perception

Judicial independence requires the judiciary to be independent both in fact and perception because it must be valued for its purpose rather than for itself.¹⁵⁰ Indeed, the principle is necessary to uphold public confidence in the administration of justice; it is a factor on which the Supreme Court insisted in its analysis of the degree of judicial independence required by the Constitution.¹⁵¹ Richard E. McGarvie, a former judge of the Supreme Court of Victoria, explained this assertion when he stated that if “the formal power of the judiciary comes from the law, [i]n a modern democracy its real power comes from the respect and confidence of the community earned by the judges.”¹⁵² Thus, a ju-

147 This is generally the case in the territories.

148 *JPA Nova Scotia*, *supra* note 68, s 7.

149 *Ell*, *supra* note 1 at para 24.

150 *Ibid* at para 22.

151 *Lippé*, *supra* note 5, Lamer CJC.

152 Justice RE McGarvie, “The Foundations of Judicial Independence in a Modern Democracy” (1991) 1 J Jud Admin 3 at 7.

diciary that is biased or that appears biased cannot lay claim to the legitimacy essential to its role in society.¹⁵³

The test imposed by the Constitution relies on the perception of a “reasonable and informed person.”¹⁵⁴ The emphasis on public perception illustrates the importance of the role played by judicial justices of the peace as trial judges. Hence, the scope of adjudicatory powers, as well as the method of appointment and required qualifications of JJPs are two sub-factors and must be discussed.

The scope of adjudicatory powers helps to determine when JJPs must be independent “in fact.” The Supreme Court has made clear in *Ell* that JJPs should be independent when they exercise “judicial functions directly related to the enforcement of law in the court system.”¹⁵⁵ The reason for this is straightforward: if JJPs have important adjudicatory powers, *they will represent and symbolize to litigants the full power of the judiciary*. From the litigants’ point of view, the judge who presides over a trial is the incarnation of justice rendered by the sovereign, the only manifestation of such a power that a majority of citizens will typically witness.

Also, the method of appointment heavily influences the perception of independence — or lack thereof. For a long time, political influence in the appointment of judges undermined public confidence in the administration of justice,¹⁵⁶ and there is no reason to believe the situation was different for JJPs. Nonetheless, partisanship and political patronage have decreased since the 1980s.¹⁵⁷

One factor that contributed to reducing the perception of political influence on the appointment of JJPs was the imposition of appropriate qualification standards.¹⁵⁸ As a matter of fact, setting high standards for eligibility can improve the quality of legal decisions and reduce the reliance of officers on the

153 *Mackin*, *supra* note 5 at para 38, Gonthier J. See also Aharon Barak, “A Judge on Judging: The Role of the Supreme Court in a Democracy” (2002) 116 Harv L Rev 19 at 59.

154 *Ibid.*

155 *Ell*, *supra* note 1 at para 24.

156 *Ibid* at para 45.

157 Karen Eltis & Fabien Gélinas, “Judicial Independence and the Politics of Depoliticization” (21 March 2009) at 7, online <papers.ssrn.com/sol3/papers.cfm?abstract_id=1366242>. However, some think that “[t]he term ‘depoliticization’ is something of a misnomer and might more accurately be described as ‘arena shifting’”: Matthew Flinders & Jim Buller, “Depoliticization, Democracy and Arena-Shifting”, in Tom Christensen & Per Laegreid, eds, *Autonomy and Regulation: Coping with the Modern State* (Cheltenham: Edward Elgar, 2006) 53 at 54.

158 *Ell*, *supra* note 1 at para 46.

advice of others.¹⁵⁹ What are the scope of adjudicatory powers and the method of appointment of JJPs?

ii. Adjudicatory Powers and Method of Appointment

At this stage of the analysis, different denominators impose themselves to determine the scope of adjudicatory powers and the method of appointment of judicial justices of the peace. As concerns the scope of adjudicatory powers, the link established between the office of JJP and the function of judge was useful to determine if JJPs are likely to be perceived as forming part of the judicial order. The question is one of the ranges of adjudicatory powers exercised by JJPs. The categories presented in Table 2 are the following: 1.1) *Federal Statutory Offences under the Summary Convictions Procedure of the Criminal Code*, 1.2) *Federal Statutory Offences under Another Summary Conviction Procedure*, 1.3) *Provincial Statutory Offences in General*, and finally, 1.4) *Provincial Regulatory and Traffic Offences*. A tick-mark indicates that the power is entrusted by law and, in practice, is exercised collectively by JJPs in the majority of cases.

For the method of appointment, another strategy was adopted. Rather than looking at the range of JJPs' power, an independent basis of comparison was chosen. Here, it is the judges of the provincial and territorial courts. This allows for the presentation of the data collected from the different jurisdictions in a comparative table that illustrates the extent to which JJPs are treated similarly to judges of the relevant provincial court with respect to each indicator. The categories presented regarding appointment in Table 2 are the following: 2.1) *Selection Process*, 2.2) *Selection Criteria*, and 2.3) *Bar* (admission requirements).

First, the scope of adjudicatory powers indicates that, except for offences in the *Criminal Code* that are heard across Canada by the judges of the provincial and territorial courts, there are only two jurisdictions where judicial justices of the peace have become, in practice, the trial court by default to hear summary conviction offences. Those are Ontario and Québec.

This power is very important when one considers the potential for violation of fundamental human rights. Prison sentences of up to five years can be imposed for summary conviction offences under federal law and can exceed five years in cases of multiples offences. Considerable fines can also be imposed. In many cases, the law does not provide for a maximum. In a Québec tax case,

159 *Ibid* at para 48.

Table 2: Adjudicatory Powers and Method of Appointment of JJPs¹⁶⁰

	Alberta (JP)	BC (JJP)	Man (JJP)	NWT (Pres JP)	NS (Pres JP)	Ontario (Pres JP)	Québec (Pres JP)	Sask (Pres JP)	Yukon (Pres JP)
1.1) Federal Stat Offences: CC Summary Conviction Procedures						√	√		
1.2) Federal Stat Offences: ≠CC Summary Conviction Procedures						√	√		
1.3) General Provincial Stat Offences	√	√		√		√	√		¹⁶¹
1.4) Provincial Regulatory and Traffic Offences	√	√	√	√	√	√	√	√	¹⁶²
2.1) Selection Process	√	√				√	√		√
2.2) Selection Criteria							√		
2.3) Bar	√ ¹⁶³	√			¹⁶⁴		√		

a judicial justice of the peace imposed a fine of more than \$2.5 million.¹⁶⁵ In Ontario, the maximum fine that can be imposed under the *Environmental Protection Act* is \$10 million.¹⁶⁶

Although judicial justices of the peace in the other jurisdictions do not normally hear cases on summary conviction offences relative to federal laws, all

¹⁶⁰ Gélinas, "2010 Report on JJPs", *supra* note 31 at 23.

¹⁶¹ These functions are not exercised by justices of the peace in general but rather by the sole full-time justice of the peace appointed in the Yukon.

¹⁶² *Ibid.*

¹⁶³ The bar is not required by law, but rather is a policy of the Judicial Council.

¹⁶⁴ The bar is not required by law, but justices of the peace seem to all be qualified lawyers.

¹⁶⁵ Gélinas, "2010 Report on JJPs", *supra* note 31 at 26.

¹⁶⁶ *Ibid* at 27.

upper-level JJPs in Canada (such as presiding justices of the peace in jurisdictions that have different levels) have the power to hear and to adjudicate trials concerning provincial and municipal offences. The only notable exception is Nova Scotia, where JJPs do preside over trials, although in quite limited circumstances. Thus, a significant proportion of JJPs across the country represents to litigants the judiciary and performs adjudicatory functions that require full protection under the principle of judicial independence.

Second, the method of appointment demonstrates that many jurisdictions have adopted measures that place JJPs at the same level as judges in certain regards. However, when considering these indicators in light of the exclusive nature of their functions, no jurisdictions other than Québec and Ontario have established a selection and removal process for JJPs equivalent to that of judges of provincial courts for a conference of judges that work full-time and on an exclusive basis.¹⁶⁷ This coheres with the nature of the office in these provinces, as JJPs there generally try federal statutory offences. It is to be noted that in the last few years the other jurisdictions, such as Alberta and British Columbia, have progressively reformed the qualification standards in order to improve the independence of the appointment process. In sum, the method of appointment of JJPs illustrates the concern for, and the commitment toward, filling JJP positions with individuals that can be seen as independent.

In *Ell*, the Supreme Court dealt with the question of the independence of Alberta's justices of the peace and held that they have powers too wide to be in a situation where the state or its agent could influence their decisions. The comparative analysis of the impact on fundamental rights and freedoms, and of the public confidence in the administration of justice, tends to bolster the claim that this constitutional protection extends to all JJPs in Canada. When the Supreme Court was asked whether Alberta's JJPs require some *lesser* degree of judicial independence in the context of a remuneration commission years ago, it ruled that these justices did not,¹⁶⁸ and this comparative analysis has come to the conclusion that the same applied to JJPs in other jurisdictions. Since JJPs should be independent, the degree to which they currently have this protection deserves consideration.

167 *Ibid* at 24.

168 *Provincial Court Judges' Assn of New Brunswick v New Brunswick (Minister of Justice)*, 2005 SCC 44 [2005] 2 SCR 285.

3. Status and Place of JJPs

The status and place of judicial justices of the peace must be evaluated to determine if they enjoy the constitutional protection of judicial independence in practice. It is understood that all judges, however, do not need to be independent to the same extent or in the same way.¹⁶⁹ For example, the government is empowered to enact regulations regarding the status of JJPs that contrast with the status of judges of the provincial courts.¹⁷⁰

Nonetheless, the government must respect the basic components of judicial independence. The jurisprudence of the Supreme Court sets out three components: financial security, security of tenure, and administrative autonomy.¹⁷¹ In the present case, only the first two seem problematic. Thus, the focus should be on how those components are articulated and whether JJPs across the country comply with them. It must be noted, lastly, that both the individual and the institutional or collective dimension of those components are assessed.

a. Financial Security

i. *Protection from Financial Influence*

The *raison d'être* of the financial security component of judicial independence is to protect justices from the government's power to influence their decisions, either by lowering or raising their salaries.¹⁷² The essence of financial security, in Canada, "is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence."¹⁷³ This has been understood by the Supreme Court of Canada as requiring independent commissions for the process of fixing judicial salaries.¹⁷⁴

Also, this commission interposed between the judiciary and the executive must respect three requirements. It should be independent (appointments are made in a multilateral way), objective (reasons are given to justify recommendations), and effective (government needs to engage with the report it produces).¹⁷⁵

169 McCormick, "New Questions", *supra* note 26 at 846; *Généreux*, *supra* note 5.

170 Gisèle Côté-Harper, "L'état de droit et l'indépendance judiciaire" (1998) 11:2 RQDI 151 at 153.

171 *Valente*, *supra* note 5 at 687.

172 *Remuneration Reference*, *supra* note 8 at para 342.

173 *Valente*, *supra* note 5 at 704.

174 Binnie, *supra* note 7 at 7. See also Hon JJ Michel Robert, *L'indépendance judiciaire de Valente à aujourd'hui: les zones claires et les zones grises*, Volume 6 of Conference Albert-Mayrand Series, (Montréal: Thémis, 2003) at 26.

175 *Remuneration Reference*, *supra* note 8; McCormick, "New Questions", *supra* note 26 at 849.

Otherwise, courts will not be protected from the political interference of the government. The goal behind these requirements is to put emphasis on procedure in order to “depoliticize” the determination of judicial remuneration.¹⁷⁶

ii. Independent Compensation Commission

To characterize the status and place of judicial justices of the peace in the judicial system, data was collected on *Compensation Commissions*. Once again, the independent basis of comparison, to frame the comparison in Table 3, is the situation of judges of the provincial and territorial courts.

Table 3: Financial Security of JJPs¹⁷⁷

	Alberta (JP)	BC (JJP)	Man (JJP)	NWT (Pres JP)	NS (Pres JP)	Ontario (Pres JP)	Qu��bec (Pres JP)	Sask (Pres JP)	Yukon (Pres JP)
Compensation Commissions	��	��				��	��	��	��

The comparison between the different jurisdictions reveals that the compensation and benefits of JJPs in some jurisdictions have — unlike the remuneration of provincial judges — been determined without having recourse to an independent commission. Because compensation commissions must, most likely, be established regularly to make recommendations to the governments, the salary levels in those jurisdictions seemed to be decided in violation of constitutional requirements relative to the independence of the judiciary.

This view was shared by the Supreme Court of Nova Scotia in the recent case of *Nova Scotia Presiding Justices of the Peace Association*.¹⁷⁸ In 2011, the association of justices of the peace sued the Attorney General of the province, seeking a declaration that the current scheme for remunerating the justices was unconstitutional in that it failed to protect judicial independence. The Court, citing *Valente*,¹⁷⁹ *Beauregard*,¹⁸⁰ and the *Remuneration Reference*,¹⁸¹ agreed that a “special independent, effective and objective process”¹⁸² is necessary to address

176 Eltis & G  linas, *supra* note 157 at 7.
177 G  linas, “2010 Report on JJPs”, *supra* note 31 at 23.
178 *Nova Scotia Presiding Justices of the Peace Association v Nova Scotia (Attorney General)*, 2013 NSSC 40, 2013 NSSC 40(CanLII). [*NS Presiding Association*].
179 *Valente*, *supra* note 5.
180 *Beauregard*, *supra* note 5.
181 *Remuneration Reference*, *supra* note 8.
182 *NS Presiding Association*, *supra* note 175 at para 75.

remuneration of JJPs. As a result, the regulation for setting remuneration was unconstitutional.

Within the next few years, the question of whether or not there is a constitutional requirement to have an independent compensation commission to determine the salary of JJPs could be settled: the Supreme Court of Canada has again been given the opportunity to discuss this issue. In September 2014, the Court of Appeal of Québec rejected the constitutional challenge brought by the Québec Conference of Judicial Justices of the Peace against the Québec regulation fixing the JJPs' remuneration without the prior examination and recommendation of an independent commission. In a unanimous decision, Justice Dalphond explained that the recommendation by an independent committee was not constitutionally required in this case "since there was no modification of the working conditions of judges still in office but rather an abolition of the office JPEP [justices of the peace with expanded powers] that did not violate the right to security of tenure, followed by an appointment of the holders of that office to the new office of PJP [presiding justices of the peace]."¹⁸³ Leave to appeal to the Supreme Court was granted on June 6, 2015,¹⁸⁴ and it will be interesting to see whether the Court will seize this chance to settle the question of the necessity of independent compensation commission to set the salary of JJPs.

Another issue to consider is the timeline of compensation commissions. On the one hand, it seems that three-year exercises (the norm for provincial court judges), might impose a burden too stringent on governments in regard to the nature of JJPs' work; on the other hand, to unnecessarily delay the work of commissions could be problematic. For example, the proceedings of the Justices of the Peace 2009 Compensation Commission in Alberta began almost five years late.¹⁸⁵ The implementation of such a commission in that case may explain the delay, but it remains to be seen what recourse JJPs have in a situation where the government is not prompt in initiating the proceedings of the commission.

A further issue to consider is whether separate commissions are required to deal with the remuneration of JJPs. Would it be problematic if a province, for instance, established a system whereby the salary of JJPs was fixed as a percentage of the salary established by an independent commission for provincial

183 *Conférence des juges de paix magistrats du Québec c Québec (Procureur général)*, 2014 QCCA 1654 at para 108 (Unofficial English Translation).

184 *Conférence des juges de paix magistrats du Québec*, *supra* note 11.

185 *Justices of the Peace 2009 Compensation Commission Regulation*, Alta Reg 111/2012.

court judges? In fact, this could represent an astute method that may lighten the burden created by a separate commission system for JJPs. As long as the commissions established for provincial judges get to hear the stakeholders on the establishment of the percentage, and to make recommendations thereon, there is no reason to think such a system would run afoul of the constitutional requirement.

In sum, it appears that an independent commission must set the compensation and benefits of JJPs. Jurisdictions in which this is not the case should reconsider the way in which remuneration of JJPs is assessed.

b. Security of Tenure

i. Protection from Discretionary Removal

The objective of security of tenure is to protect justices from discretionary or arbitrary removal from office.¹⁸⁶ As outlined in *Valente*, the principle safeguards “tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.”¹⁸⁷ In a nutshell, it ensures that justices make their decisions according to the factual and legal matrix of the cases alone, and especially not out of fear of removal.¹⁸⁸

The situation of the tribunal determines the components of security of tenure that must be satisfied. The Court judged in *Ell*, for instance, that the said components are less rigorous for judicial justices of the peace than for provincial court judges, since the former have more limited duties and play a more limited role in upholding the Constitution.¹⁸⁹

However, it is difficult to assess which components of security of tenure each particular tribunal should enjoy. For example, at the international level, the preamble of the *Burgh House Principles on the Independence of the International Judiciary* states that the principles should apply as appropriate to judges *ad hoc*, judges *ad litem*, and part-time judges.¹⁹⁰ However, the applica-

186 *Valente*, *supra* note 5 at para 31.

187 *Ibid.*

188 “The security of tenure . . . is founded on the belief that a man cannot be relied upon to act rightly regardless of the personal consequences”: William Alexander Robson, *Justice and Administrative Law: A Study of the British Constitution*, 2nd ed (London, UK: Stevens, 1947) at 44.

189 *Ell*, *supra* note 1 at paras 31-32.

190 See Project on International Courts and Tribunals, *Burgh House Principles on the Independence of the International Judiciary* (2004), Preamble, online: Project on International Courts and Tribunals <pict-pcti.org/activities/Burgh%20House%20English.pdf>.

tion of the principles leaves much to be determined, as the meaning of “as appropriate” remains unclear.¹⁹¹

If international instruments shed only limited light on the issue, Canadian cases give more fruitful insights. In *C.U.P.E.*, the Supreme Court of Canada rejected the claim of reasonable apprehension of bias on the part of *ad hoc* arbitrators because it was generic, and because *ad hoc* interest arbitration of labour disputes had a successful history in Ontario.¹⁹² The Court also concluded in *Lippé* that “[t]he oath sworn by the [Québec municipal court] judges, the Code of ethics to which they are subject, and the restrictions set out in s. 608.1 of the *Cities and Towns Act* all combine to alleviate the apprehension of bias” of part-time judges who continue to practice law.¹⁹³ Those cases, which do not stand alone,¹⁹⁴ suggest that security of tenure for justices could be achieved with fixed

Table 4: Security of Tenure of JJPs¹⁹⁵

	Alberta (JP)	BC (JJP)	Man (JJP)	NWT (Pres JP)	NS (Pres JP)	Ontario (Pres JP)	Québec (Pres JP)	Sask (Pres JP)	Yukon (Pres JP)
1) Exclusivity (Full-time)	¹⁹⁶		√			√ ¹⁹⁷	√		
2) Per- manence	√ ¹⁹⁸	√ ¹⁹⁹	√	√	√	√	√	√ ²⁰⁰	√

191 Fabien Gélinas, “The Independence of International Arbitrators and Judges: Tampered With or Well Tempered?” (2011) 24:1 NY Intl L Rev 1 at 12.

192 *C.U.P.E. v Ontario (Minister of Labour)*, 2003 SCC 29 at paras 42-44, [2003] 1 SCR 539, Bastarache J; *ibid* at paras 191-93, Binnie J. See also Robin Creyke, *Tribunals in the Common Law World* (Sydney: The Federation Press, 2009) at 80.

193 *Lippé*, *supra* note 5 at 152.

194 See e.g. 2747-3174 *Québec Inc v Quebec (Régie des permis d'alcool)*, [1996] 3 SCR 919; *Bell Canada v Canadian Telephone Employees Association*, [2003] 1 SCR 884. A more recent Court of Appeal of Québec decision is along the same lines: *Association des juges administratifs de la Commission des lésions professionnelles c Québec (Procureur général)*, 2013 QCCA 1690 at para 71, [2013] RJQ 1593.

195 Gélinas, “2010 Report on JJPs”, *supra* note 31 at 23.

196 Justices of the peace in Alberta are appointed on either a full-time or part-time basis.

197 Some exceptions are provided on a case-by-case basis.

198 Justices of the peace in Alberta are appointed on either a full-time or part-time basis for a fixed non-renewable term of ten years.

199 JJPs assigned under the old law in British Columbia were appointed during good behaviour until the age of retirement. Under the new law, part-time JJPs are appointed for a fixed, ten-year, non-renewable term.

197 *Lippé*, *supra* note 5, Lamer CJC.

200 Justices of the peace in Saskatchewan may resign their office at any time but are required to retire at seventy: *JPA Saskatchewan*, *supra* note 102, s 8.

mandates, depending on the circumstances. The context in which JJPs exercise their functions is therefore relevant.

ii. Exclusivity and Permanence

Data was collected on the 1) *Exclusivity* and on the 2) *Permanence* of judicial justices of the peace in Canada. Again, the independent basis used to frame the comparison in Table 4 is the situation of judges of the provincial and territorial courts.

Looking at the permanence of judicial justices of the peace, many jurisdictions have adopted measures that place them, in certain regards, on the same footing as provincial or territorial judges. Others, such as Alberta and British Columbia, have opted for fixed, non-renewable terms of ten years. Though this system offers less stability and protection to JJPs in some ways, it is still a well-known method to ensure independence that is routinely used in the context of constitutional courts.²⁰¹ Furthermore, to hold the government to higher requirements would subject the “question of independence” to criticism, most likely about the absence of real consequences on the ground.²⁰²

However, a comparative inquiry into the exclusivity of JJPs shows that appointment in most jurisdictions, even during good behaviour, does not seem to include guarantees in terms of work hours. All provinces and territories, with the exception of Manitoba, Ontario, and Québec, give part-time duties to the majority of their JJPs. In British Columbia, for example, part-time judicial justices are only guaranteed a minimum number of forty working days per year.²⁰³

This situation raises a number of issues. First, the replacing of fee-for-service justice by duty roster, as was done in Saskatchewan, may not preserve JJPs from the influence of the executive. As explained in Professor Doob’s research, “a very busy — and cooperative — justice (who signs a lot of paper) will have a much better chance of convincing the coordinator that his or her percentage of

201 According to some, a fixed, long-term mandate without any possibility of re-election is an even most appropriate model for constitutional judges: Commission européenne pour la démocratie par le droit, *La composition des cours constitutionnelles* (Strasbourg: Conseil de l’Europe, 1997) at 21.

202 This point of view is alive and well, as some justices of the peace interviewed by Professor Doob’s team unexpectedly felt the “issue of judicial independence to be an important one in theoretical terms, but one which had almost no real significance in the day-to-day activities of most justices. Some took this position because they felt the combination of civil service employment and judicial appointments guaranteed justices tenure, except for the most flagrant abuses of discretion; others simply felt independence in the exercise of discretion to be a matter of personal integrity, regardless of anything else” (Doob, Baranek & Addario, *supra* note 9 at 242).

203 *PCA British Columbia*, *supra* note 42, s 30.2(4).

full-time should be increased than a justice who signs little paper, because he or she is not available or not so cooperative with the police.”²⁰⁴ Thus, a duty roster might look good in theory, but the day-to-day realities might keep justices dependent on police officers in certain situations.

Second, outside employment activities of justices can be problematic. Such activities by JJPs may bring about an appearance of bias in judicial proceedings, or even more troublesome, may interfere with their judicial duties.²⁰⁵ In that regard, the provinces of British Columbia and Saskatchewan preclude JJPs from engaging in activities that could potentially affect the court, but the comparative study seems to reveal gaps in other jurisdictions. In fact, codes of ethics are not sufficient if there is no strong policy on the matter. This is important, once again, because “we have the amplest proof from the history of the bench that an insecure judiciary tends inevitably to corruption.”²⁰⁶

The exclusivity and permanence of JJPs is a delicate issue; one on which the jurisprudence of the Supreme Court appears to be in part contradictory. In *Lippé*, Justice Lamer wrote that a system of part-time judges is not perfect, but he also stated that the Constitution does not assure a perfect system.²⁰⁷ He ruled that a reasonable apprehension of bias arises in many cases but also that the judicial oath and the code of ethics showed that the justices took independence seriously.²⁰⁸ The argument is that “judicial standards of independence must be moderated in order to facilitate the fair and expeditious adjudication of disputes about individual interests in the modern administrative state.”²⁰⁹

However, *Lippé* seems to be inconsistent with decisions that both preceded and followed it, that is, with *Valente* and *PEI Reference*. The *PEI Reference*’s stipulation that the adjustment of the income of judges and, given *Ell*, justices of the peace must be protected by independent structures does not appear to square entirely with the part-time status and variable arbitrarily workload and income of *certain* JJPs in *certain* jurisdictions (that is, mostly low-level justices in provinces and territories where work is more scarce). But, the lack of

204 Doob, Baranek & Addario, *supra* note 9 at 257.

205 Such concern is also felt at the international level: Ruth Mackenzie & Philippe Sands, “International Courts and Tribunals and the Independence of the International Judge” (2003) 44:1 Harv Intl LJ 271 at 282.

206 Harold Laski, “Procedure for Constructive Contempt in England” (1928) 41:8 Harv L Rev 1031 at 1031.

207 *Lippé*, *supra* note 5, Lamer CJ.

208 *Ibid.*

209 Gus Van Harten, “A Case for an International Investment Court” (Paper delivered at the Inaugural Conference, Geneva, 15-17 July 2008), Working Paper No 22/08, Society of International Economic Law at 25.

uniformity in the status and place of JJPs in Canada, and even within each jurisdiction, makes it difficult to assess whether the practice of variable annual income fails to meet the constitutional requirement across the country. This is particularly so given that part-time JJPs are often offered the opportunity to hold other positions, as long as these positions do not conflict with their duties. It must be remembered, finally, that the challenge of balancing the good of judicial independence with the good of access to justice requires compromises.

In the end, it is challenging to determine if the current status and place of judicial justices of the peace in the various Canadian jurisdictions comply with the components of judicial independence that the jurisprudence of the Supreme Court of Canada has established. As the case law currently stands, even if there is scope for improvement, it looks as though, broadly speaking, they do. It does seem clear, however, that all provinces and territories that do not already rely on commissions should establish independent mechanisms to determine the remuneration of JJPs.

Conclusion

Although the extent to which the principles of judicial independence apply to lower courts is of importance to the general population and the legal community in Canada, the application of judicial independence to judicial justices of the peace was left unexplored for too long in Canada. This paper has begun to fill this gap in the literature by presenting a comparative study of such justices in Canada. While the history and evolution of the office has shed light on the important role of JJPs in the English judicial tradition, a focus on each jurisdiction has shown that the situations of JJPs vary considerably from coast to coast.

In addition, the examination of the impact of JJPs on fundamental rights and public confidence in the administration of justice has demonstrated that judicial independence extends to judicial justices of the peace. Jurisprudence has developed along the same lines. The scope of powers exercised by JJPs in the criminal law process and the scope of adjudicatory powers of JJPs were central to the analysis.

The paper also raises questions about the current status and place of judicial justices of the peace in light of the components of judicial independence defined by the jurisprudence of the Supreme Court of Canada. It seems that many provinces and territories should establish compensation commissions to enhance the financial security of these justices. Nevertheless, the security of tenure of JJPs seems broadly to comply with the requirements set out by the Supreme Court.

As this paper illustrates, an inherent tension has surfaced between ensuring, on the one hand, that justices are not placed in a position where their own interest influences their decision making and, on the other hand, that government funding for the administration of justice is spent carefully. In other words, judicial independence²¹⁰ has to be balanced with access to justice.²¹¹

In sum, future improvements can be made to the constitutional protection of the office of JJPs and to strengthen public confidence in the administration of justice. This paper is presented as the foundation for a conceptual analysis of the office of JJP, based on the components put forward by the Supreme Court of Canada, in the hope that the paramount importance of JJPs and of academic research on their role and their judicial independence will no longer be disregarded.²¹²

210 A philosophical and theoretical analysis of judicial independence in Canada, going back to Hobbes, can be found in Lorne Neudorff, *Judicial Independence: The Judge as a Third Party to the Dispute* (LL.M. Thesis, Institute of Comparative Law, McGill University, 2008) [unpublished].

211 The connection between lay persons as justices and access to justice is obvious, but was made clear in the Russian implementation of a system of justices of the peace in that country: Kathryn Hendley, "Assessing the Role of the Justice-of-the-Peace Courts in the Russian Judicial System" (2012) 37:4 *Rev Cent & E Eur L* 377.

212 The role of JJPs and their judicial independence are intrinsically linked: "the solution to 'the independence question' appeared to be inextricably linked to the problem of defining an unambiguous judicial role for justices of the peace. In the view of many of the justices [in 1991], there could be no resolution of one without a clear statement of the other" (Doob, Baranek & Addario, *supra* note 9 at 242).