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Invoking Independence: Judicial Independence as a No-cut Wage Guarantee

WAYNE RENKE

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INVOKING INDEPENDENCE: JUDICIAL INDEPENDENCE AS A NO-CUT WAGE GUARANTEE

Wayne Renke*

Recent efforts to reduce the compensation of provincially-appointed judges have provoked an abundance of controversy. Provincial governments have maintained that judges, along with other public servants, should bear their share of cut-backs to the public sector payroll. Provincial Court judges have fiercely resisted these measures, claiming that they threaten the independence of the judiciary. In this *Points of View*, Wayne Renke examines the relation between judges and their compensation and concludes that Provincial Court judges' compensation may be decreased without denying the independence of the judiciary, provided that the decrease is not arbitrary and forms part of an overall public economic measure.

The article first addresses the notion of judicial independence and its presuppositions. Judicial independence, it is argued, has no social value by itself. Its importance stems from its contribution to the "the rule of law," the technology of conflict resolution which draws its value from our vision of the individual and common good. Judicial independence helps to preserve this good by ensuring judicial impartiality, that is, the ability of judges to transcend their biases and interpret the law in an objective manner. The author argues that the institutional autonomy required to maintain this impartiality is not threatened by plans to reduce the compensation of Provincial Court judges. A reasonable person would not perceive that judges' decisions would be influenced by coherent reductions in their compensation. The author concludes that the democratically elected representatives of the people should have some involvement in the setting of judicial compensation. While judicial compensation should not be subject to arbitrary interference, it should not exceed what taxpayers are capable of paying.

In an "Addendum," the author addresses the recent decision of the Alberta Court of Queen's Bench which found constitutionally invalid the Government of Alberta's roll-back in pay of Provincial Court Judges.

De récents efforts visant à réduire la rémunération des juges nommés par l'autorité provinciale suscitent une forte controverse. Les gouvernements des provinces soutiennent que les juges devraient accepter de partager les diminutions de traitement, au même titre que les autres employés de la Fonction publique. Les juges des cours provinciales résistent férocement à ces mesures en alléguant qu'elles menacent l'autonomie du corps judiciaire. Dans ce *Points de vue*, Wayne Renke examine les liens entre la profession et les honoraires de juge et conclut qu'une réduction de salaire n'entraînerait pas nécessairement une diminution d'autonomie, à condition toutefois que cette réduction ne soit pas arbitraire et qu'elle fasse partie d'une mesure d'économie publique généralisée.

L'article traite d'abord du principe d'indépendance judiciaire et de ce qu'il présuppose. L'auteur soutient que cette indépendance ne présente aucune valeur sociale inhérente. Son importance est due à sa contribution à la «règle de droit», la technique de résolution de conflit qui repose sur notre conception de l'intérêt individuel et commun. L'indépendance judiciaire contribue à préserver cet intérêt en assurant l'impartialité des juges, c'est-à-dire la capacité des juges à transcender leurs préjugés et à fournir une interprétation objective des lois. L'auteur affirme que l'autonomie institutionnelle nécessaire au maintien de cette impartialité n'est en rien menacée par les projets de réduction salariale. On ne pourrait raisonnablement concevoir que les décisions des juges soient influencées par la rationalisation de leur échelle salariale. L'auteur conclut que les représentants élus du peuple devraient participer dans une certaine mesure à l'établissement des honoraires des juges. Bien que cette rémunération ne doive pas faire l'objet d'interférences arbitraires, elle ne devrait pas non plus excéder ce que les contribuables sont en mesure de payer.

Dans un *Supplément*, l'auteur parle de la récente décision de la Cour du banc de la reine de l'Alberta, qui a déclaré l'invalidité constitutionnelle de la réduction de salaire que le gouvernement de l'Alberta avait imposée au juges des cours provinciales.

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Wayne Renke

When, in 1931, the National Economy Act empowered the Treasury to reduce the salaries of "servants of the Crown," and the Treasury proposed to include the judges under this designation, the judges felt bound to protest. They did so not on any selfish grounds, but simply because the proposal ignored, and threatened to reverse, their emancipation from executive control which had been given to them by the Act of Settlement.[1]

As a general observation, Canadian judges are Canadian citizens and must bear their fair share of the financial burden of administering the country.[2]

What is disconcerting about the current spate of actions by Provincial Court judges against their governments is the coupling of constitutional rhetoric with salary and benefit claims. One might be excused for being suspicious of suggestions that judicial independence entails immunity from salary and benefit cut-backs, especially when so many workers in both the public and private sectors face compensation reduction, if not job elimination. On the other hand, no accused brought before a Provincial Court judge would be pleased to learn that the judge's compensation was dependent on his or her effectiveness in enforcing a provincial government's penal philosophy. The relation of judges and their compensation seems paradoxical: judges should have financial security, yet they should not be exempt from the burdens of social life.

Some issues bearing on the relation between judges and compensation shall be worked out in cases now before the courts; commenting on those issues would be inappropriate (particularly as the cases involve contractual or fiduciary claims turning on peculiar facts, issues of the effects of specific legislation, or public law issues arising out of governmental

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1 H. G. Hanbury, *English Courts of Law*, 4th ed., by D. C. M. Yardley (Toronto: Oxford University Press, 1967) 128.

2 *The Queen* v. *Beauregard*, [1986] 2 S.C.R. 56, per Dickson C.J.C. at 76.

pronouncements). Nevertheless, the relation between Provincial Court judges and their compensation may be discussed on a general level. I shall review the notion of judicial independence and some of its presuppositions, the requirement of financial security for judges, and evaluate some arguments against decreasing judicial compensation. I shall attempt to show that the paradoxical implications of the relation between judges and compensation are only apparent. Provincial Court judges' compensation may be decreased without denying the independence of the judiciary, where the decrease is "a coherent part of an overall public economic measure."[3]

Judicial independence, by itself, has no social value. It draws its value from its contribution to the "rule of law," a technology of conflict resolution which in turn draws its value from our particular, more-or-less vague and more-or-less shared Canadian vision of the individual and common good.[4] I shall not venture reflections on the content of that common good, save to note that it includes notions of individual dignity and autonomy, and commitments to significant substantive equality. Insofar as Canadians may be judged to maintain a commitment to the common good, individuals and institutions may be considered to be involved in the joint enterprise of instantiating this common good, we are participants in a common project. At the root of the problem of judicial independence is a basic

[3] "Judicial salaries shall not be decreased during the judges' term of office, except as a coherent part of an overall public economic measure": *Universal Declaration of the Independence of Justice* (the Montreal Declaration), paragraph 2.21(c); quoted, with apparent approval, by Dickson C.J.C. in *Beauregard*, *supra* note 2 at 75. I do not claim that any provincial government's actions taken concerning the compensation of judges of their Provincial Courts are "coherent parts of an overall public economic measure." Indeed, paragraph 17 of the Statement of Claim filed by The Alberta Provincial Judges' Association and 69 Alberta Provincial Court judges on August 2, 1994 alleges that a 5% cut-back of their salaries was "not part of an overall scheme." For an overview of the judges' claims, see B. O'Ferrall, "Provincial Judges Sue Government" *The Law Society of Alberta Newsletter*, Vol. 19, No. 3 (July/August, 1994) 3; T. Barrett, "Judges file suit against province" *Edmonton Journal* (3 August 1994) A1.

[4] For a stimulating and convincing discussion of the role of the common good in the workings of the law, see R.A. Shiner, *Norm and Nature: The Movements of Legal Thought* (Oxford: Clarendon Press, 1992) 238-260. I shall not pursue here the complexities of the connection of the common good, the good of the individual, and the law.

article of constitutional faith: our common good is worth promoting, and each of us has a role in the promotion of that common good. That is our role as citizens.

We use the "rule of law" to regulate certain aspects of our common project. Schematically and simplistically, the "rule of law" involves the resolution of many significant disputes by the impartial application of authoritative general rules. The rule of law, in itself, is not a necessary or inevitable means of conflict resolution; we may be taken to have accepted that this type of conflict resolution mechanism — as opposed to mechanisms operative at other times and in other places — best protects and fosters the type of society we desire.[5]

The rule of law demands institutional instantiation. We have instantiated the rule of law by assigning to peculiarly trained persons — judges — the task of interpreting and applying rules and resolving conflicts under rules (to some extent, judges are even given the privilege of manufacturing rules). A difficulty with according judges (or anyone else) this role is that judges bring to the tasks of interpretation and application all of the inclinations, dispositions, purposes, and unconscious preferences that make up their personalities. Judges may expound and apply not "the law," but the law as they say it is. This difficulty has been explored in our day by deconstructionists and critical theorists, was explored several generations ago by the legal realists, and was explored by the sceptic Cratylus over a millennium ago.

We have not or have not yet accepted the sceptical and perhaps nihilistic conclusions of radical critics of legal interpretation. We confront scepticism with our system of positive law and administration of justice, which might be said to rest on three further articles of constitutional faith. First, we accept that legal rules have some sort of meaning independent of particular declarations of their meaning; the rules are not simply what judges say they are. If legal rules were only judicial

[5] "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law ...": preamble to the *Canadian Charter of Rights and Freedoms*.

inventions, the notion of rule by "laws" would evaporate. Second, we accept that judges are capable of overcoming prejudgments rooted in their class, cultural, and gender histories, and of rendering (relatively) fair, unimpeded decisions on the merits of cases. Unless self-overcoming is possible, turning legal interpretation and application over to judges would only give judicial prejudice free rein.[6] An acceptance of the possibility of judicial self-transcendence need not be blind or uncritical. We do take risks by assigning persons the role of judges; prejudice may sometimes overcome even good intentions.[7] We can learn, however, to identify species of bias that have passed for impartiality. Perfect impartiality may never be achieved, but partialities may be surpassed. Third, we accept that judges and other citizens,[8] despite their divergent histories, share some responses, some agreements in judgment, concerning the types of issues and circumstances that come before the courts. Judges must, to some extent, be able to speak for the public.[9] If citizens lost the sense that judges' determinations matched their own considered opinions, citizens could lose confidence

[6] Some Marxist writers, for example, consider judges not to have succeeded at self-overcoming: "[J]udges of the superior courts (and of the inferior courts as well ...) are by no means, and cannot be, independent of the multitude of influences, notably of class origin, education, class situation and professional tendency, which contribute as much to the formation of their view of the world as they do in the case of other men ... [J]udges cannot fail to be deeply affected by their view of the world, which in turn determines their attitude to the conflicts which occur in it. They may well see themselves as guided exclusively by values and concepts which soar far above mundane considerations of class and special interest. But in their concrete application, these concepts will nevertheless often exhibit a distinct and identifiable ideological bias ...:" R. Miliband, *The State in Capitalist Society: An Analysis of the Western System of Power* (New York: Quartet Books, 1970) 124, 126. See also Madame Justice Bertha Wilson, "Will Women Judges Really Make A Difference?" (1990) 28 *Osgoode Hall Law Journal* 507 at 509-511.

[7] See H. L. A. Hart, *The Concept of Law* (Toronto: Oxford University Press, 1961) 139.

[8] For example, members of a political community falling under the jurisdiction of the judicial, executive, and legislative branches of a State.

[9] The "reasonableness" standard, for example, presupposes that judges and members of the public, despite all their differences, may share the perspective of the "man in the Clapham omnibus," or better, the person on the subway or L.R.T. See L. Wittgenstein, *Philosophical Investigations*, trans. G. E. M. Anscombe (Oxford: Basil Blackwell, 1978) § 242.

in the courts, and might seek their justice elsewhere. The judiciary could appear as an occupying force, imposing its notions of right and wrong (backed up by executive force) in opposition to the views of dissenting citizens.

Given the rule of law and the institutional place of judges, "judicial impartiality" is necessary and valuable. By itself, judicial impartiality has no constitutional significance; it has significance as a practical condition for the actualization of the rule of law. If a dispute is to be governed by general rules, the rules must be impartially interpreted and applied.[10] Judicial impartiality is a condition for the existence of the rule of law, since if judges were not impartial, if they were guided by their biases, prejudgments, and preferences, they would not interpret or apply the law — they would interpret and apply themselves. Generally, "judicial impartiality" concerns the "state of mind" of the decision-maker; it connotes the absence of actual or perceived bias.[11] It is the legal reflection of our assumption that judges are capable of self-transcendence. The notion of judicial impartiality presupposes that self-transcendence is possible (ought implies can). The notion is used to fight off influences that might impair or endanger judicial self-transcendence.

[10] The idea of regulation by laws and the idea of impartiality are closely connected: "Indeed, it might be said that to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in different cases is the same general rule, without prejudice, interest, or caprice": Hart, *supra* note 7 at 156-157.

[11] *R.* v. *Généreux*, [1992] 1 S.C.R. 259 per Lamer C.J.C. at 283; *Valente* v. *The Queen*, [1985] 2 S.C.R. 673 per Le Dain J. at 685. In the *Lippé* case, the Supreme Court held that impartiality has both an individual and an institutional aspect. The "objective status" of a tribunal is relevant not only to the issue of judicial independence (as we shall see below), but to the issue of impartiality. A court may be independent and its judges impartial, but it may nevertheless be judged not to be impartial: "whether or not any particular judge harboured pre-conceived ideas or biases, if the system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met:" *R.* v. *Lippé*, [1991] 2 S.C.R. 114, per Lamer C.J.C. (minority concurring) at 140. One might be concerned that the notion of "institutional impartiality" muddles the distinction between independence and impartiality, and relies on an overly restrictive notion of judicial independence. Since the judicial compensation issue is traditionally fought in the rhetoric of judicial independence, I shall not pursue "institutional impartiality" further here.

well as a state of mind or attitude in the actual exercise of judicial functions, it is sound, I think, that the test for independence for purposes of s.11(d) of the Charter should be ... whether the tribunal may be reasonably perceived as independent.[18]

"The overall objective of guaranteeing judicial independence," Chief Justice Lamer has written, "is to ensure a reasonable perception of impartiality: judicial independence is but a 'means' to this 'end'."[19] The constitution does not set out a list of criteria for identifying judicial independence. Since independence must be gauged from the perspective of the reasonable person, the problem is to ascertain the circumstances in which a reasonable person (a citizen like other citizens, whose perspective is available to the judge) would conclude that a tribunal is independent. Mr. Justice Le Dain has ruled that the "reasonable perception" test of judicial independence is "a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence ..."[20] Mr. Justice Le Dain identified three main objective conditions for judicial independence — security of tenure, institutional (administrative) independence, and financial security.

Security of tenure is a readily comprehensible condition of judicial independence. If judges could be dismissed because their decisions offended the powerful, the judiciary (or at least those judges remaining on the bench) would neither be nor appear to be independent. Security of tenure is recognized by s.99 of the *Constitution Act, 1867*. Superior court judges hold office during good behaviour until age seventy-five, but are removable on address of the Senate and House of Commons. Statutes governing Provincial Court judges generally provide for

[18] *Supra* note 11 at 689. "The question," Chief Justice Lamer tells us, "is whether an informed and reasonable person would perceive the tribunal as independent": *Généreux*, *supra* note 11 at 286.

[19] *Lippé*, *supra* note 11 at 139.

[20] *Valente*, *supra* note 11 at 689.

removal before retirement age only for cause.[21] Institutional independence concerning administrative matters bearing on the judicial function is a somewhat less obvious condition of independence, but important nonetheless. Judges must have a significant measure of control over the daily activities of judging (e.g. the assignment of judges to cases, the sittings of the court, the drawing of court lists). If judges whose decisions were unpopular with the powerful were assigned only "safe" cases, or if they were forced to bear an unfair share of the division of judicial labour to compel them to retire, the judiciary would neither be nor be perceived to be independent.

The financial security condition is of greatest moment in the present context. This condition has two aspects. First, (it is said) judges must be afforded an adequate salary. Relatively high remuneration is, in part, a recruiting tool. Judicial compensation must be set at a level sufficiently high "to attract the best candidates to the bench."[22] This reflection might seem somewhat mercenary, but it does recognize practical realities. Becoming a judge may be a great honour and may hold the promise of much power, but unless a lawyer is independently wealthy or has the disposition of Socrates, he or she will not take the job unless it puts a sufficient quantity of bread on the table. One might complain that lawyers' standard of living expectations are too high. Lawyers, I suppose, are as willing to accept lower standards of living as other citizens. A high level of compensation (it is said) is also required to "reflect the

[21] See the *Provincial Court Judges Act (Alberta)*, ss. 6 and 11; *Valente*, *supra* note 11 at 696.

[22] *Report of the Canadian Bar Association Committee on The Independence of the Judiciary in Canada* (Ottawa: Canadian Bar Foundation, 1985) at 17; S. Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (New York: North-Holland Publishing, 1976) at 30; P. H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 149; Dickson C.J.C., *supra* note 13 at 15. Holdsworth expresses the position as follows: "a good thing is never cheap; and to pay sufficient to get a good thing is often the truest economy, for thereby expensive disasters are avoided. Our ancestors were fully aware of these facts, they realized the importance of getting the ablest lawyers on to the bench, and they paid the judges a remuneration sufficient to induce them to accept judicial office": Sir W. S. Holdsworth, "The Constitutional Position of the Judges" (1932) 48 *Law Quarterly Rev.* 25 at 33.

importance of the office of judge."[23] A connected claim is that a high level of salary is required to "preserve the mien" of the judicial office (i.e., judges must be put in a position to display a lifestyle commensurate with the high status of the judicial office).[24] One can concede that such claims have some practical merit. We do live in a material world, where value is frequently translated into dollar value. The judgment that judicial salaries must be relatively high to reflect the importance of the office might be considered to be realistic. If judicial pay were too low, judges might well get no respect. One might respond, though, that the level of judicial income does not determine the legal authority of judges; neither does it nor should it determine the appearance of legal authority. No doubt many of us can recall people we respected, who did not have large incomes. Respect is attracted by wisdom or prudence, not bank accounts. One might suggest that if judicial incomes were to depart too far from those of ordinary Canadians, judges could lose a measure of respect. Judges might be considered isolated from the perspective of ordinary, "reasonable" people. I shall pursue this issue no further here.[25]

Second, judicial compensation must not be subject to arbitrary interference.[26] Some interpret this aspect of financial security to serve, in part, as an inducement to lawyers to leave private practice; lawyers would be less inclined to become

[23] *Report*, *ibid.*; Shetreet, *ibid.* at 31.

[24] *Report*, *supra* note 22 at 18. Some notion of judges as "conspicuous consumers" seems to be afoot. While the issue of the level of judicial salaries may not be of overwhelming practical importance in Canada, it is an important issue in other countries. For example, Dieng writes that "in Benin, I met a judge who was very concerned with the low level of his salary. He said to me: 'Look, I am not even in a position to buy medicine for my child who has malaria, and think what I can do if somebody comes before me and enables me to save my child, I will certainly be tempted to accept what he offers me as a gift' (not to mention as a bribe). This illustrates how important a good salary is": Dieng, *supra* note 12 at 57.

[25] A danger of such populist meditations is that they may, on occasion, be motivated more by *ressentiment* than the desire for justice.

[26] *Valente*, *supra* note 7 at 704; *Beauregard*, *supra* note 2 at 74-75.

judges if their compensation could be arbitrarily lowered.[27] More importantly, this aspect of financial security prevents compensation from being used to control the judiciary. If a judge's compensation could be manipulated to determine the result of a particular case, if a judge could suffer a wage loss by defying the powerful, if the judiciary as a whole could be threatened with wage loss unless it conducted itself according to governmental dictates, the judiciary would neither be nor be perceived to be independent.

This aspect of the financial security condition brings us to the nub of the problem. Suppose that a provincial government is faced with financial difficulty. As part of a program to reduce government spending, the province proposes to lower by equivalent amounts the compensation of all persons paid through public funds. Provincial Court judges are to be included in this measure. The measure does not single out judges or subject them to compensation cuts dissimilar to those suffered by others in the public sector. The measure does not result in judges receiving "inadequate" compensation. Does the financial security condition of judicial independence entail that Provincial Court judges' compensation should never be decreased in such circumstances?

Statute does not manifestly settle the issue. Section 100 of the Constitution Act does provide that superior, district, and county court judges' salaries are to be "fixed and provided" by Parliament. Whatever "fixed and provided" might mean, s.100 does not apply to Provincial Court judges. Section 17 of the *Provincial Court Judges Act (Alberta)*, as an example of a statute governing Provincial Courts, simply provides for the fixing of judicial salaries and benefits by regulation. We are left to consider the issue on its merits.

The Canadian Bar Association Committee on the Independence of the Judiciary in Canada seems to have thought that judicial salaries should not be decreased. In its view, the only

[27] D. Fellman, "The Diminution of Judicial Salaries" (1938) 24 *Iowa Law Rev.* 89 at 98; *O'Malley* v. *Woodrough*, 307 U.S. 277, 83 L. Ed. 1289 (1939), per Butler J. (diss.) at 286 U.S., 1296 L. Ed.

corrected in the United States Constitution. Section 1 of Article II of the United States Constitution provides that federal judges are to "receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." "Publius" (Alexander Hamilton) commented in *The Federalist* No. 79 that "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support."[36]

While we might accept that the practices of Britain and the United States are worthy of respect and serious consideration, we might ask whether there are any better reasons for denying decreases in judicial compensation than the non-binding precedent of those nations' practices.

There are three main arguments in favour of a complete prohibition on lowering judicial compensation — (a) the argument from governmental malevolence, (b) the argument from financial interest, and (c) the argument from dignity of office.

The argument from governmental malevolence is that a reasonable person would perceive that while a particular proposed judicial compensation reduction might seem tolerable, permitting the reduction would result in the government taking control of judicial compensation to serve political ends. The Memorandum alludes to this argument:

> If the salaries of the judges can be reduced almost *sub silentio* by the methods recently employed, the independence of the judiciary is seriously impaired. It cannot be wise to expose judges of the High Court to the suggestion ... that if decisions are favourable to the Crown in revenue and other cases, their salaries may be raised and if unfavourable may be diminished.[37]

[36] A. Hamilton et al., *The Federalist*, revised ed. (New York: Colonial Press, 1901) at 435.

[37] Lederman, *supra* note 15 at 794.

The argument has the following steps: The State has a disposition to exploit the judiciary. If the State is permitted to decrease judicial compensation in one instance, it will later attempt to reduce judicial salaries further or increase judicial salaries, to serve its interests. If a decrease is allowed in one instance, a precedent shall be set, and the courts will not be able to resist the coming advances of the State. Ultimately, judicial independence will be lost, which is undesirable. Hence, no decrease in judicial salaries should be permitted.

This is not a compelling argument. The first claim, concerning the State's exploitative disposition, is, at least, unproven. The claim manifests as well a rather American distrust of the State.[38] In Canada, we have trusted the State to perform good works forbidden it in the United States.[39] We cannot be sure that a reasonable Canadian would perceive every governmental action as a colourable attempt to achieve executive or legislative tyranny. Moreover, the claim rests on a distrust of democracy. Members of the executive and legislature are elected. To some extent, they represent and are accountable to their electors. If judicial independence is a social good, one might expect that the elected representatives of the people would be disinclined to impair it. One might respond that between elections, elected officials are free from electoral constraints. Despite the lamentable tincture of truth in this response, elected representatives are not free from all political accountability for their actions between elections. Efforts to impair the judiciary would likely be met by denunciations by the political opposition and the press, and (perhaps) by popular demonstrations.[40]

[38] The claim seems a cousin of the claim made in the *Keegstra* case — rejected by the majority — that the governmental suppression of hate propaganda suggests that hate propaganda has an element of truth: the government can be counted on to do the wrong thing. See *R.* v. *Keegstra*, [1990] 3 S.C.R. 697, per McLachlin J. (diss.) at 853; per Dickson C.J.C. at 769.

[39] G. Grant, *Lament for a Nation: The Defeat of Canadian Nationalism* (Toronto: Carleton Library, 1970) at 71.

[40] P. W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Scarborough, Ontario: Carswell, 1992) at 166.

The second claim of the argument from governmental malevolence, concerning the setting of an undesirable precedent, begs the question of whether a distinction may be drawn between a small compensation cut motivated by concern for the public welfare and a compensation cut motivated by a desire to manipulate the judiciary. Why would the reasonable person not be able to distinguish the two different types of cuts? I suspect that the reasonable person would view the small cut in the public interest as having nothing to do with acts of adjudication. The small cut would not be a penalty inflicted for certain decisions; it would not be avoidable by rendering other decisions; the cut would occur, regardless of the results of cases. The cut would not single out the judiciary for fiscal punishment. After the cut, the judiciary would be in exactly the same position as it was in before the cut, save that it would receive lower compensation.

The second main argument against lowering judicial compensation is the argument from financial interest. This argument figures in American justifications of judicial immunity from wage reductions. The classic text is found in Publius' *Federalist* No. 79:

> In the general course of human nature a power over a man's subsistence amounts to a power over his will; and we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter.[41]

This is to say that if the State exercises control over judicial pay, judges (human nature being what it is) will bend their judgment to favour their paymaster's interests. This is the yankee trader view of human nature: judges have their price; they cannot resist working for it. This argument has a hard-headed, realistic flavour. It is a variation of the old adage that "he who pays the piper calls the tune."

[41] Hamilton, et al., *supra* note 36 at 435.

The financial interest argument is not always consistently applied, though. Judicial independence advocates are not often heard to oppose judicial pay raises. If the State, however, controls and provides raises, by the reasoning of the financial interest argument, the judiciary could not be independent.[42]

We seem not to accept the financial interest argument outside of the judicial context. The State controls (sometimes heavy-handedly) the compensation of other occupations involving significant discretion and requirements of objectivity, yet few claim that these occupations should never face compensation decreases. Consider, for example, police officers. Police officers make quasi-judicial determinations. They decide whether or not to investigate, and determine the modes of investigation; in Alberta, generally, they decide whether to lay charges and determine the charges to be laid; they may determine the mode of compelling the appearance of an accused before the court; they are entitled, in some cases, to permit pre-trial release; they may oppose or agree to judicial interim release. We expect the police to exercise their powers fairly, not to achieve pay-offs from political bosses. Crown Prosecutors are empowered to exercise greater discretion. They may decide which charges are to be proceeded with and which withdrawn or stayed; they may oppose or agree to judicial interim release; they determine whether, in the case of hybrid offences, to proceed summarily or by indictment; they may prefer indictments; they propose penalties to the Court or may enter into plea bargains with defence counsel — and all of this is done with an eye to the public interest.[43] Again, we expect Crown Prosecutors to conduct themselves fairly and honourably, without seeking merely financial advancement by doing the will of politicians. If the police and Crown Prosecutors can maintain independence, despite their lack of constitutionalized

[42] See *R.* v. *Lowther*, [1994] P.E.I.J. No. 98 (Action No. GSC - 13611) (P.E.I.S.C. Tri. Div.) per MacDonald C.J.T.D. at para. 32.

[43] "When engaged as a prosecutor the lawyer's prime duty is not to seek to convict, but to see that justice is done through a fair trial upon the merits. The prosecutor exercises a public function involving much discretion and power, and must act fairly and dispassionately": *The Canadian Bar Association Code of Professional Conduct*, Chap. VIII, commentary 7.

financial security, why should we believe that judges would somehow, because of a small drop in compensation, lose their objectivity?

The financial interest argument seems to make unpleasant assumptions about judicial character, which the reasonable person would not accept. The argument suggests that even though a small pay cut in the public interest may not directly affect adjudication, judges will be inclined to favour the government in an attempt to avoid further cuts or to obtain raises. I suspect that the reasonable person would consider instead that despite the pay cut, judges would do their jobs properly. Financial self-interest is important, but it is not the only human motivation. A Provincial Court judge takes a judicial oath on his or her appointment, swearing that he or she "will honestly and faithfully and to the best of [his or her] ability exercise the powers and duties" of a Provincial Court judge.[44] The reasonable person still believes, I hope, that commitments made under oath to carry out a job faithfully may override financial interest.

Nonetheless, a variation of the argument from financial interest swayed MacDonald C.J.T.D. in the recent *Lowther* case. Under legislation reducing P.E.I. public sector workers' compensation (including the compensation of Provincial Court judges), provision was made for, *inter alia*, negotiations respecting the achievement of the purposes of the legislation (pay cuts) through "reduction in pay, offsetting considerations, reduction in other benefits or any combination of them;" if negotiations resulted in agreements, the public sector group that made the agreement could be exempted from legislated reductions.[45] MacDonald C.J.T.D. did not hesitate to find that "it might be perceived that the government could use the provisions of ss. 12 and 13 to influence a judge."[46] "In fact,"

[44] *Oaths of Office Act (Alberta)*, s. 3. On the significance of the oath, see *Reference Re Justices of the Peace Act: Re Currie and Niagra Escarpment Commission* (1984) 14 D.L.R. (4th) 651 (Ont. C.A.), per MacKinnon A.C.J.O. at 662.

[45] *Public Sector Pay Reduction Act (P.E.I.)*, ss. 12 and 13.

[46] *Lowther, supra* note 42, para. 45.

he wrote, "the whole concept of judges having to negotiate with government is contrary to the principle of judicial independence."[47] While MacDonald C.J.T.D. did not hold that a cross-public sector compensation reduction would necessarily be perceived to impair judicial independence, he ruled that judges involved in negotiations with the government respecting the form of pay cuts would not be perceived as independent. MacDonald C.J.T.D. seems to have made the assumptions which I have suggested the reasonable person would not accept. The *Lowther* case has been appealed.

One might observe that Alberta Provincial Court judges have been negotiating with the Alberta government respecting their compensation since 1988.[48] At least until the Alberta Provincial Court judges brought their action, there seems to have been no indication of a reasonable perception that negotiation imperiled the ability of Alberta Provincial Court judges to apply the law.

A last aspect of the argument from financial interest is that if judges were spared compensation decreases affecting other public sector groups, a reasonable person might well conclude that the judges had engaged in some behind-the-scenes lobbying. The judges' exemption could be thought to be the result of secret deals, or secret commitments to favour the government. An exemption of judges from across-the-board pay cuts is as likely to generate suspicions concerning judicial independence as the reduction of judicial compensation in the context of general public sector reductions. In sum, the argument from financial interest founders.

The third main argument against lowering judicial compensation in the argument from dignity of office. This argument figures prominently in the Memorandum. The argument emphasizes the unique position of the English judge, the

[47] *Ibid.*, para. 48. MacDonald C.J.T.D. also found that "arbitrary decisions" might be made by the government respecting judges under Part II of the *Public Sector Pay Reduction Act*, since, in his view, that Part permitted the government to single judges out for pay cuts, or give judges deeper pay cuts than other public sector groups.

[48] See O'Ferrall, *supra* note 3.

"dignity and exceptional importance" of the judicial office, and the "respect felt by the people" for the judiciary. This "feeling," the Memorandum predicts, "will survive with difficulty if [the English judge's] salary can be reduced as if he were an ordinary salaried servant of the Crown."[49] The idea behind this passage seems to be that a compensation reduction parlously diminishes the prestige of the judiciary. It causes the judiciary to lose face. What would the reasonable person have to believe about judges for such a claim to be true?

A compensation decrease for judges would be remarkable only if judges were the sort of persons who do not receive pay decreases. Who does receive pay decreases? "Ordinary salaried servants" — ordinary working people. Judges are assumed to occupy a different position than ordinary workers, so far as compensation is concerned.

One might be inclined to dismiss this argument out of hand, as being nothing more than a reflection of a foreign, obsolete class system. This argument does have some force, though. The argument recognizes that the judiciary must be afforded some respect if it is to function. The court, one might say, must not only have authority, it must appear to have authority — that is, it must be treated with respect. If the court is not treated with respect, its authority may be practically denied. Thus, in court we bow, use formal phrases, refer to judges as "My Lord," "My Lady," or "Your Honour;" we wear black uniforms of ancient inspiration; we are moderate in our criticisms of the bench (conscious of the law of contempt). Whether our particular signs of respect are meet or excessive is debatable, but we behave as we do because we recognize and symbolize by our acts the importance of the judicial office.

Respect does not carry the argument far enough, however. A reasonable person would not elevate the judicial position into one of immunity from economic reality. The separation of adjudicative powers from other branches of government does not entail the material separation of judges from the public. A

[49] Lederman, *supra* note 15 at 794.

reasonable person would realize that judges, like other persons at work in the public sector, must be paid. They are paid through dollars extracted from taxpayers' pockets. The reasonable person would realize that judges, like other persons paid by tax revenues, must have their salaries set in some way. Since the money used to pay judges comes from the people, the elected representatives of the people should have some involvement in the setting of judicial compensation. Unless judges are willing to accept without debate the compensation packages offered by the people, judges must engage in some form of negotiation.[50]

The reasonable person would also realize that taxpayer resources are not infinite. Straightened economic circumstances may result in the public not being able to maintain the compensation levels of persons paid with tax dollars. While judicial compensation should not be subject to any arbitrary interference, judicial compensation should not exceed what taxpayers are capable of paying. The judiciary, the reasonable person should recall, has no inherent social worth. It draws its social value by its support of the rule of law, which in turn supports our common project of Canadian life. The judiciary demands our support because (and to the extent that) it supports the common good. Judges, moreover, are citizens. They should bear their fair share of the burdens of our common project. We should keep in mind that if judicial compensation is not cut, some other person or persons must bear increased burdens. A too-expensive judiciary does not promote but harms the common good. The remarks of Mr. Justice Frankfurter concerning the U.S. federal judiciary's tax liability are apposite:

> To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material

[50] This is true even if negotiation results in formulae that ever-after determine judicial compensation. Following the enactment of such formulae, judges would also have to be involved in negotiations to preserve the formulae in the face of changing circumstances.

burden of the government whose Constitution and laws they are charged with administering.[51]

The reasonable person would conclude that a decrease in the compensation of Provincial Court judges that is a coherent part of an overall public economic measure would not offend the independence of the judiciary.

ADDENDUM

On November 15, 1994 (after the submission of my paper for publication), Mr. Justice D. C. McDonald of the Court of Queen's Bench of Alberta handed down a judgment respecting the independence of the judges of the Provincial Court of Alberta. His reasons apply to three cases: *R.* v. *Campbell*, *R.* v. *Ekmecic*, and *R.* v. *Wickman*.[52] These cases were linked only by being Provincial Court trial matters. In each case, defence counsel raised, on various grounds, the question of whether judges of the Provincial Court of Alberta were independent under s. 11(d) of the *Charter*. The trials were adjourned, and applications were taken to the Court of Queen's Bench.[53] The applications were heard by McDonald J.

The defence won some battles but lost the war. Alberta Regulation 116/94 (providing for a 5% salary cut for Provincial Court judges) and certain provisions of the *Provincial Court Act (Alberta)* were declared invalid. Once these laws were declared to have no legal effect, however, no basis remained for a reasonable person to perceive the judiciary as not being independent. McDonald J. dismissed the defence applications.

[51] *O'Malley* v. *Woodrough*, *supra* note 27 at 279 US, 1292 L. Ed.

[52] Court of Queen's Bench of Alberta, Judicial District of Calgary, Action No. 9401 0606 C4 and 9401 0607 C5, and Judicial District of Edmonton, Action No. 9403 1375 C30101. The cases concerned, respectively, failure to attend court and possession of a prohibited weapon, assault, and impaired operation of a motor vehicle and operation of a motor vehicle while "over .08".

[53] Counsel for Campbell and Ekmecic brought applications for orders staying the charges; counsel for Wickman brought an application for orders in the nature of certiorari and prohibition and for certain declarations.

In the course of thorough and complex reasons for judgment, McDonald J. discussed many issues bearing on judicial independence, including the alleged constitutional requirement for a committee or formula to determine judicial salaries (denied);[54] the grounds for the removal of supernumerary judges (only on the same grounds as full-time judges);[55] the inclusion of non-judges in the Judicial Council or a committee of the Council for the hearing of disciplinary matters (constitutionally invalid);[56] the legislative provisions authorizing the Attorney General to designate days of sittings or the residence of judges (also invalid);[57] the effects of the Provincial Court judges' commencement of an action against the Province of Alberta (the Statement of Claim cannot found a reasonable perception of lack of judicial independence, given the declarations made by McDonald J.);[58] and the effects of certain remarks made by Premier Klein respecting a Provincial Court judge (the remarks do not constitute a basis for a reasonable perception of a lack of judicial independence).[59]

Three elements of McDonald J.'s judgment are particularly relevant to my argument — the findings concerning negotiation, the consitutional right to cost-of-living increases, and the nature of "overall economic measures" permitting compensation cuts.

McDonald J. concluded (as did I) that compensation negotiations between the government and the Provincial Court judges would not run afoul of s. 11(d) of the *Charter*: "My view is that a reasonable, well-informed, right-minded person would not regard such a process as one that would impair the independence of the court."[60] McDonald J. referred to the presumption that the integrity of Provincial Court judges would

[54] *Supra* note 52 at 111, 124-125.

[55] *Ibid.* at 145-147.

[56] *Ibid.* at 160-164.

[57] *Ibid.* at 169-178; 180-184.

[58] *Ibid.* at 209-220.

[59] *Ibid.* at 186-197.

[60] *Ibid.* at 121. Mr. Justice McDonald's conclusion is contrary to that reached by Chief Justice MacDonald in the *Lowther* case: *supra* note 42.

prevail; absent evidence of impropriety, no reasonable person would suspect judges of "bartering" their independence in negotiations.[61] Moreover, appellate judges "would soon become aware of any colourable use of judicial power and correct it."[62]

McDonald J. held that there is a constitutional obligation to increase judicial salaries to meet increases in the cost-of-living, for both federally-appointed and Provincial Court judges.[63] McDonald J. supported this position by arguments similar to those supporting the position that judicial salaries should not be cut. I suggest that the arguments adduced by McDonald J. are not sufficient.

McDonald J. pointed out that if the government or legislature were to fail to ensure that judicial salaries keep pace with the cost-of-living, judges and their families might experience difficulty in meeting their financial obligations. This difficulty could be acute for young judges, especially those with children.[64] In his view, without cost-of-living increases, judicial incentive would be sapped:

> The course of wisdom and sound policy points to the maintenance of judicial salaries at least in correspondence with increases in living costs. Judges who feel that they are unfairly treated are, even unconsciously, less likely than would otherwise be the case to respond unhesitatingly and vigorously to the dictates of heavy caseloads. They are likely to become, even unconsciously, more exposed to the physical and mental jadedness that can too easily occur from being overburdened by the workload.[65]

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61 *Ibid.*

62 *Ibid.*

63 *Ibid.* at 104-105.

64 *Ibid.* at 87-88.

65 *Ibid.* at 88. Unsympathetic elements in the media might take the quoted passage to embody a sort of work-to-rule sentiment: if cost-of-living increases are not established for judges, they might cease to do all that they have been doing.

McDonald J. quoted the following passage with approval: "If [the judge] is beset with tensions and worries over his [or her] personal problems, it is difficult to maintain a calm, impartial judicial attitude at all times."[66]

The reasonable person would not, I suggest, at least in the present circumstances, consider these reflections sufficient to compel the constitutionalization of cost-of-living increases for judges. One may grant the practical strength of the reflections. A judge who is worried about money may not perform his or her duties properly. McDonald J. indicated, however, that the pre-April 1994 annual Provincial Court judge salary was $108,226.[67] If the reasonable person draws an average salary, the reasonable person's salary would be less than $108,226 per year. The reasonable person could well be of the view that judicial compensation is not low enough to engender reasonable judicial economic concern.

A more significant difficulty with McDonald J.'s line of thought respecting "mental jadedness" is that it might lead beyond the rule of law. One of the presuppositions of the rule of law is the possibility of judicial self-transcendence. We expect our judges to be able to put aside their personal perspectives (at least to a significant extent), and judge according to the facts and law. McDonald J. suggests that judges are not able to overcome their economic interests. If that is so, how are judges able to resist the "unconscious" dispositions of class, race, or gender, or the effects of perceiving evidence subsequently found to be inadmissible? If judges are able to put aside improper influences, they should be able to put aside their economic concerns when judging a case.

I do concede that adequacy of salary is a part of judicial independence. If inflation continues and if judicial compensation were not to increase, judicial pay could become too low. That possibility, however, does not entail that cost-of-living

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66 Justice Lorna E. Lockwood, "An Independent Judiciary," in Winters, *Handbook for Judges* (American Judicature Society, 1975) 54; *ibid.* at 89.

67 *Ibid.* at 21.

increases need be instituted now. The Province has a constitutional obligation not to allow judicial salaries to fall so low that judicial impartiality and independence are threatened. Once the "low point" is reached, the Province has an obligation to block the further diminution of compensation. Vexing questions remain: How low is too low? Is $108,226 too low? The numbers should be fixed by negotiation, not speculation.

McDonald J. also argued that if judges' incomes are not protected against increases in the cost-of-living, "the prospect of a judicial appointment will lose its attractiveness to lawyers of great ability and first-class reputation."[68] This argument, as I noted above, has practical value. A strong bench protects the rule of law. One might say, though, that the current annual salary for Provincial Court judges is not so low that it will deter qualified counsel from seeking appointments. My understanding is that there is still significant competition for Provincial Court judge positions. Moreover, the transition from lawyer to judge does not entail only a decrease in compensation; it also entails an increase in authority. Part of the compensation for being a judge is having that job.

McDonald J. set out an argument based on the *Beauregard* case, in which federal legislation requiring superior court judges to contribute to their pension plans was upheld.[69] McDonald J. took *Beauregard* to stand for the propositions that "the salaries and pensions ... of federally-appointed judges cannot be diminished or reduced;" and that "there is a constitutional duty to increase judicial salaries to meet increases in the cost-of-living."[70] I shall assume that McDonald J.'s interpretations of *Beauregard* are correct. *Beauregard*, however, concerned superior court judges. To move to Provincial Court judges, McDonald J. turned to s. 11(d) of the *Charter*. McDonald J. made the reasonable claim that "I do not think that the interpretation of s. 11(d) of the *Charter* should leave it open to a reasonable, well-informed, right-minded person to perceive that

68 *Ibid.* at 89.

69 *Supra* note 2.

70 *Supra* note 52 at 68, 104.

a person charged with an offence, whose case would be tried in the Provincial Court, will be heard by a tribunal which is less independent than is a superior court."[71] McDonald J. then took the last step: "in my view s. 11(d) of the *Charter* mandates that the same standard be met in the case of Provincial Court judges, to whom, as a result, the state owes a duty to increase their salaries to meet increases in the cost-of-living."[72] McDonald J. referred to the stricture that s. 11(d) not be used to amend the judicature provisions of the constitution, and expressly confirmed that the procedure for determining Provincial Court judicial compensation need not be identical to superior court procedures.[73] McDonald J.'s view was that the recognition of an obligation to increase Provincial Court judicial salaries to meet the cost-of-living did not amount to an amendment of the judicature provisions of the constitution, and, while procedural variations between superior and Provincial Court financial security arrangments may be constitutionally tolerable, s. 11(d) requires that both superior and Provincial Court judges' salaries be increased to meet the cost-of-living.[74]

This argument presupposes the conclusions of McDonald J.'s prior arguments. That is, there must be grounds for holding that the independence of Provincial Court judges requires cost-of-living protection, other than the (assumed) fact that superior court judges have such protection. Variations between federal and provincial protections for financial security should be constitutionally permissible, if provincial variations do not offend the independence of the judiciary. McDonald J. has not demonstrated that, in the present circumstances, Provincial Court judges would not be perceived to be independent, had they no right to cost-of-living increases.

Despite McDonald J.'s finding of the constitutional obligation to ensure that Provincial Court judges' salaries be increased in proportion to the increase in the cost-of-living, McDonald J.

71 *Ibid.* at 104.

72 *Ibid.* at 104-105.

73 *Ibid.* at 97, 117.

74 *Ibid.* at 115-116.

did not find that a breach of this obligation was proved by the defence.[75]

McDonald J. did find that Alberta Regulation 116/94 violated s. 11(d) of the *Charter*.[76] McDonald J. also declared that "salaries payable from April 1, 1994 are restored to what they were previously."[77] These determinations turned on the issue of whether "an overall economic measure" is a measure that applies (only) to the entire public sector or to all residents of a jurisdiction.

Although McDonald J. held that a reduction in judicial salaries "corresponding to reductions in salaries for senior civil servants and elected officials" would not, by itself, be considered by the reasonable, informed person to affect judicial impartiality, McDonald J. claimed that

> the same informed person *could* reasonably perceive such a reduction of salary as a threat to an essential condition of judicial independence — "financial security". How else could an informed person regard such a reduction in salary? No other view of the matter could reasonably be taken, than that such a reduction violates the financial *security* of the judges — the certainty that they can order their lives in financial terms on the assumption that they will receive in the future salaries (and pensions) which are at least no less than those previously fixed.[78]

McDonald J. accepted that a compensation reduction forming part of "an overall economic measure" would not give grounds for concern under s. 11(d); but McDonald J. restricted the concept of "an overall economic measure" to an economic

75 *Ibid.* at 127.

76 *Ibid.* at 124.

77 *Ibid.*

78 *Ibid.* at 102-103 (emphasis in original).

measure applying to all citizens — not just public sector workers.[79]

McDonald J. is quite right that an economic measure applying to all citizens, such as an increase in the rate of income tax or the imposition of a provincial sales tax, would be less likely to impinge on judicial independence than a more specifically targeted measure, and would be constitutionally acceptable.[80] McDonald J. is also right that a governmental measure reducing the salary of only public sector workers "represents a governmental choice of means to achieve its fiscal objective which in effect discriminates between citizens of one class and another. It treats those whose incomes depend directly on the public purse differently from other citizens."[81] McDonald J.'s further inference is that this "discrimination" is not constitutionally permissible.[82]

Regrettably, McDonald J. did not explain why this further inference might be the case. Why should an across-the-board public sector compensation reduction, which happens to affect judicial compensation, be perceived as affecting judicial independence? McDonald J. pointed out that ordinary civil servants, who would also be affected by a public service compensation cut-back, do not have constitutional protections, but judges do.[83] This point, however, does not carry McDonald J. far enough. The issue is whether a compensation reduction affecting both ordinary civil servants and judges would be constitutionally improper; judges may have a different constitutional position than ordinary civil servants, but a reduction of judges' and ordinary civil servants' compensation together may nevertheless be constitutionally permissible. If McDonald J.'s position is that a compensation reduction is improper if judges receive the same treatment as constitutionally less-protected citizens, then even a general tax applying to

79 *Ibid.*

80 *Ibid.* at 110.

81 *Ibid.* at 107.

82 *Ibid.* at 108.

83 *Ibid.* at 107.

judges would be constitutionally improper, since the tax would apply to both judges and non-judges.

Financial security is an essential condition of judicial independence. It must not, however, be considered abstractly. It must be considered in relation to its purpose, which is, ultimately, to protect the judiciary from economic manipulation by the legislature or executive. Where economic measures apply equally to clerks, secretaries, managers, public sector workers of all grades and departments, as well as judges, how could judges be manipulated?[84]

A further connected problem that does not receive exhaustive analysis in McDonald J.'s decision is that of judicial raises. McDonald J. did not argue that if judges are to receive raises, all citizens must receive raises. But if decreases in judicial compensation are only constitutional if shared by all, why should increases in judicial compensation not be required to be shared by all? If discrimination in wage reductions is constitutionally unacceptable (giving rise to the appearance of impropriety), discrimination in wage increases should also be unacceptable.

The notion that judicial compensation cannot be directly lowered as part of a public sector compensation reduction seems to violate fiscal equity. McDonald J.'s reasons have the effect of imposing the burden of judicial compensation reductions on the public-at-large. Presumably, the burden imposed on those with lesser incomes would not be as substantial as the burden imposed on those with higher incomes; the government might mitigate a tax impact through tax credits or some other sort of return of taxed funds. Regardless, the salaries of ordinary citizens are not the source of the economic difficulty. The source is public spending. To make ordinary citizens bear the burden seems economically unfair. I do not suggest that fiscal objectives alone should permit interferences with the

[84] Of course, even manifestly non-manipulative actions may be manipulative, in all of the circumstances. A public measure may be a "colourable" attempt to manipulate the judiciary. The Provincial Court judges may expand on such issues in their litigation against the Province.

judiciary. My point is only that, in addition to the other difficulties I have suggested beset McDonald J.'s position, McDonald J.'s views have consequences that may seem, at least to some, unacceptable.

The Alberta Minister of Justice, the Honourable Brian J. Evans, has not yet indicated whether he will instruct the appeal of McDonald J.'s decision. Until a higher court rules otherwise, McDonald J.'s determinations, not my musings, are the law.