Chapter 6 : The Canadian Experience

6.01 In the Mason Report, there is the following comment on the Canadian system, particularly on its lack of an absolute constitutional prohibition of reduction in judicial remuneration –

> [T]he Canadian position is inconsistent with the widely accepted safeguard of an absolute prohibition against reduction for the protection of judicial independence in many jurisdictions.[1] ... [T]he Canadian view that, subject to prior recourse to an independent body, judicial salaries can be reduced unilaterally as part of an overall economic measure affecting the salaries of officials paid from public finds no support in the United States, the United Kingdom, Australia, New Zealand and Singapore where the prohibition against reduction of judicial remuneration is absolute.[2]

6.02 As discussed in chapter 3 of this report, it is highly doubtful whether there exists in the UK any absolute prohibition against reduction of judicial remuneration by Act of Parliament (as distinguished from reduction by the executive). The situations in the United States and Australia have also been discussed in chapters 4 and 5. The reason for the difference between the Canadian position and that in jurisdictions like the United States and Australia lies in the respective wording of their written constitutions. The Constitution of the USA (1787) and the Australian Constitution (the Commonwealth of Australia Constitution 1900) both contain express and unqualified provisions prohibiting the reduction of the remuneration of the federal judiciary. Since the issue was already settled by the written constitution, there has not been any need for the American and Australian courts to engage in any jurisprudential exploration of whether there are circumstances in which a (direct as distinguished from indirect) reduction of judicial remuneration may be justified and can be reconciled with the principle of judicial independence. Precisely because the Canadian Constitution (1867) does not provide for the issue in an unambiguous manner,[3] it has been left to the Canadian courts, particularly in the course of the 1980's and 1990's, to engage in systematic reflections on the relationship between judicial independence and financial security for judges, and to formulate principles in this regard that are defensible in the legal world of the late 20th century or 21st century. It is for this reason that the Canadian jurisprudence on judicial salaries is worth examining in this report.

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1 Mason Report, para 6.5.

2 Ibid, para 3.54.

3 Section 100 of the British North America Act 1867 (now known as the Constitution Act 1867) provides: "The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts ... shall be fixed and provided by the Parliament of Canada."

6.03 Before turning to the developments since the 1980's, an episode in Canadian legal history which finds parallels in Britain and Australia at the same historical moment may be mentioned. To quote from the report on judicial independence in Canada prepared for the Canadian Judicial Council by Professor Martin Friedland –[4]

> [After referring to the reduction of judicial salary in Britain pursuant to the National Economy Act 1931:] In Canada, the Bennett government in 1932 proposed a 10% reduction for civil service salaries, but they specifically exempted the judges. This caused a furor in the House of Commons, as members argued that judges should be made to bear some of the nation's hardship. Prime Minister Bennett referred to some of the arguments against a decrease made in England the previous year and said: "There are, however, other methods by which the matter may be dealt with." Several months later, the government imposed by legislation a 10% tax on judges for one year under the Income Tax Bill.[5]

6.04 A comprehensive statement of the currently applicable principles governing the adjustment of judicial determination in Canada is the Canadian Supreme Court's decision in *Reference re Remuneration of Judges*.[6] Since the discussion of this case is relatively brief in the Mason Report, more details will be provided here to throw light on how the Court approached the issues and its train of thought.

6.05 The questions which the Court tackled in this case included, among others, the following –[7]

> The first question is what kinds of salary reductions are consistent with judicial independence – only those which apply to all citizens equally, or also those which only apply to persons paid from the public purse, or those which just apply to judges. The second question is whether the same principles which apply to salary reductions also govern salary increases and salary freezes.

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4 Martin L Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Canadian Judicial Council, 1995), p 60.

5 [My own note:] See also W R Lederman, "The Independence of the Judiciary" (1956) 34 Canadian Bar Review 769 (part I) and 1139 (part II) at 1164, where he commented that this special taxing statute was probably *ultra vires* the Canadian Parliament because it imposed a discriminatory tax applicable only to judges. On the other hand, "A general income tax of ten per cent on all public salaries might have been valid to effect the total object, including the judicial salaries." (loc cit)

6 [1997] 3 SCR 3.

7 Ibid, para 5 of the judgment.

6.06 The case involved appeals from the courts of Prince Edward Island, Alberta and Manitoba. In all three provinces, the salaries of provincial judges had been reduced by legislation as part of an overall economic measure together with the salaries of all others paid from public funds. In Prince Edward Island and Alberta, unlike the case in some other provinces of Canada, there were at the time no independent commissions to make recommendations on judicial salaries. In Manitoba, a commission existed but was bypassed in the present case. In Alberta and Manitoba, the courts had struck down the reductions as they were not part of overall economic measures which affected all citizens (a general income tax would satisfy this test of affecting all citizens, but not a reduction of the salaries of all paid from public funds). In Prince Edward Island, the court below had upheld the reduction since it was part of an overall public economic measure applicable to all who held public office, did not remove the basic degree of financial security for judges, and was not an arbitrary interference with the judiciary in the sense that it was being enacted for an improper or colourable purpose, or that it discriminated against judges vis-à-vis other citizens.[8]

6.07 The Supreme Court of Canada approached this case as one raising the fundamental issue of what kind of financial security for judges is required by the principle of judicial independence, which the Court believed is guaranteed both by the express provisions of the Constitution[9] and by the "deeper set of unwritten understandings" [10] that underlie the Constitution. The Court reaffirmed the view it had expressed in *Valente v R*[11] that financial security is one of the core characteristics of judicial independence (the others being security of tenure and administrative independence).[12] It then explained that financial security, like the other core characteristics of judicial independence, has both an individual dimension and an institutional or collective dimension,[13] and the present case involved mainly this second dimension, which concerns "the proper constitutional relationship between the judiciary, the executive, and the legislature".[14]

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8 The tests of "enactment for an improper or colourable purpose" and "discriminatory treatment of judges vis-à-vis other citizens" were derived from the Canadian Supreme Court's decision in *Beauregard v Canada* [1986] 2 SCR 56.

9 Particularly ss. 96-100 of the Constitution Act 1867 and s. 11(d) of the Canadian Charter of Rights and Freedoms (s. 11(d) provides for the right of any person charged with an offence to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal).

10 para 89 of the judgment. The Court grounded these unwritten understandings in the preamble to the Constitution Act 1867, which states that the Canadian Constitution is similar in principle to that of the United Kingdom.

11 [1985] 2 SCR 673.

12 paras 114-117 of the judgment.

13 paras 118-122.

14 para 122.

6.08 Chief Justice Lamer then wrote –[15]

> Given the importance of the institutional or collective dimension of judicial independence generally, what is the institutional or collective dimension of financial security? To my mind, financial security for the courts as an institution has three components, which all flow from the constitutional imperative that, to the extent possible, the relationship between the judiciary and the other branches of government be depoliticized. ... this imperative demands that the courts both be free and appear to be free from political interference through economic manipulation by the other branches of government, and that they not become entangled in the politics of remuneration from the public purse.
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> I begin by stating these components in summary fashion.
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> First, as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective, and objective, for determining judicial remuneration, to avoid the possibility of, or the appearance of, political interference through economic manipulation. ...
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> Second, under no circumstances is it permissible for the judiciary – not only collectively through representative organizations, but also as individuals – to engage in negotiations over remuneration with the executive or representatives of the legislature. ...
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> Third, and finally, any reductions to judicial remuneration, including *de facto* reductions through the erosion of judicial salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge. ...

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[15] paras 131-137 of the judgment.

6.09 As regards the first of the three components above, the Court held that "Provinces are under a constitutional obligation to establish bodies which are independent, effective, and objective"[16] for the purpose of considering any reduction or increase to, or freeze in, judicial remuneration. "Any changes to or freezes in judicial remuneration made without prior recourse to the independent body are unconstitutional."[17] The Court held that such an independent body, which can be called a judicial compensation commission, should "be interposed between the judiciary and the other branches of government. The constitutional function of this body would be to depoliticize the process of determining changes to or freezes in judicial remuneration."[18] The body serves as "an institutional sieve between the judiciary and the other branches of government"[19] "which protects the courts from political interference through economic manipulation".[20] In particular, it serves "to prevent the setting or freezing of judicial remuneration from being used as a means to exert political pressure through the economic manipulation of the judiciary".[21] Moreover, "the mandatory involvement of an independent commission serves as a substitute for negotiations, because it provides a forum in which members of the judiciary can raise concerns about the level of their remuneration that might have otherwise been advanced at the bargaining table."[22]

6.10 The Court provided some guidelines regarding the establishment and operation of the judicial compensation commissions. First, the Court suggested that "it would be helpful" if the executive and the legislature "consulted the provincial judiciary prior to creating these bodies".[23] Secondly, the commissions must be independent.[24] Thus "the appointments [should] not be entirely controlled by any one of the branches of government. The commission should have members appointed by the judiciary, on the one hand, and the legislature and the executive, on the other."[25] The members should be given "some kind of security of tenure".[26] Thirdly, "in order to guard against the possibility that government inaction might lead to a reduction in judges' real salaries because of inflation, and that inaction could therefore be used as a means

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16 para 287 of the judgment.

17 Loc cit.

18 para 147. See also para 166.

19 para 185.

20 para 189.

21 para 170.

22 Loc cit.

23 para 167.

24 para 170.

25 para 172. The Court also said that "Although the independence of these commissions would be better served by ensuring that their membership stood apart from the three branches of government, as is the case in Ontario (Courts of Justice Act, Schedule, para 11), this is not required by the Constitution" (para 171).

26 para 171.

of economic manipulation",[27] the commission must convene every three to five years.[28] Fourthly, "the salary commissions must be objective", and "make recommendations on judges' remuneration by reference to objective criteria, not political expediencies".[29] Thus it would be desirable to include "in the enabling legislation or regulations a list of relevant factors to guide the commission's deliberations".[30] Fifthly, the Court recommended that the commissions should "receive and consider submissions from the judiciary, the executive, and the legislature".[31]

6.11 Sixthly, the Court stressed that the work of the commissions must be effective.[32] The Court referred to different possible ways of giving effect to the commissions' recommendations, examples of which could already be found in some Canadian provinces.[33] One is to make the recommendations binding. Another is the "negative resolution procedure", whereby the commission's report is laid before the legislature and its recommendations will be implemented unless the legislature by resolution votes to reject or amend them. Yet another way is the "affirmative resolution procedure", whereby the report is laid before the legislature but will not be implemented unless the legislature adopts its recommendations by resolution.

6.12 The Court held that the Constitution does not require that the commissions' recommendations be binding, "because decisions about the allocation of public resources are generally within the realm of the legislature, and through it, the executive".[34] However, to ensure that "the reports of the commission must have a meaningful effect on the determination of judicial salaries"[35] and that its recommendations "should not be set aside lightly",[36] the Court held that "if the executive or legislature chooses to depart from [the commission's] recommendations, it has to justify its decision according to a standard of simple rationality – if need be, in a court of law".[37] "An unjustified decision could potentially lead to a finding of unconstitutionality."[38]

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27 para 174 of the judgment.

28 Loc cit.

29 para 173.

30 Loc cit.

31 Loc cit.

32 para 174.

33 para 175.

34 para 176. However, the Court also said that the provincial legislatures may, if they so wish, establish a system whereby the commissions' recommendations are binding: loc cit.

35 para 175. See also para 178.

36 para 133.

37 para 287.

38 para 180.

6.13 How will a court review a decision to depart from the recommendations of the judicial compensation commission? The Chief Justice wrote –

> First, it [referring to the standard of justification used by the court] screens out decisions with respect to judicial remuneration which are based on purely political considerations, or which are enacted for discriminatory reasons. Changes to or freezes in remuneration can only be justified for reasons which relate to the public interest, broadly understood. Secondly, if judicial review is sought, a reviewing court must inquire into the reasonableness of the factual foundation of the claim made by the government ...[39]

> Although the test of justification – one of simple rationality – must be met by all measures which affect judicial remuneration and which depart from the recommendation of the salary commission, some will satisfy that test more easily than others, because they pose less of a danger of being used as a means of economic manipulation, and hence of political interference. *Across-the-board measures which affect substantially every person who is paid from the public purse, in my opinion, are prima facie rational. For example, an across-the-board reduction in salaries that includes judges will typically be designated to effectuate the government's overall fiscal priorities, and hence will usually be aimed at furthering some sort of larger public interest.* By contrast, a measure directed at judges alone may require a somewhat fuller explanation, precisely because it is directed at judges alone.[40] ... In my opinion, the risk of political interference through economic manipulation is clearly greater when judges are treated differently from other persons paid from the public purpose.[41]

6.14 Finally, it is noteworthy that the Court also made the following comments in explaining its rulings that it is not permissible for the judiciary to engage in negotiations over remuneration with the government and that judicial salaries may not fall below a minimum level (i.e. the second and third

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[39] para 183 of the judgment.

[40] para 184. Emphasis supplied.

[41] para 158.

components of the institutional dimension of the financial security for the judiciary mentioned above) –

> The purpose of the collective or institutional dimension of financial security is not to guarantee a mechanism for the setting of judicial salaries which is fair to the economic interests of judges. Its purpose is to protect an organ of the Constitution which in turn is charged with the responsibility of protecting that document and the fundamental values contained therein. If judges do not receive the level of remuneration that they would otherwise receive under a regime of salary negotiations, then this is a price that must be paid.[42] ...
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> ... the guarantee of a minimum acceptable level of judicial remuneration is not a device to shield the courts from the effects of deficit reduction. Nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times.[43]

6.15 Applying the jurisprudence it enunciated to the facts of the case, the Canadian Supreme Court overturned the salary reductions in the three provinces concerned because they were all enacted either in the absence of an independent judicial compensation commission or by bypassing the existing compensation commission. After the decision in *Reference re Remuneration of Judges*, judicial compensation commissions have been established in provinces which did not have them before, and a new Judicial Compensation and Benefits Commission has also been established at the federal level.[44] In *Mackin v New Brunswick*,[45] the Supreme Court extended the mandatory requirement of consideration by a judicial compensation commission to changes in the terms of service of judges other than those regarding salaries and pensions.[46]

6.16 Since *Reference re Remuneration of Judges* opened the door for judicial review of decisions of the legislature or executive that depart from the recommendations of judicial compensation commissions, several actions for such

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[42] para 190 of the judgment.

[43] para 196.

[44] See generally the Judges Act (R.S. 1985, c. J1), s. 26.

[45] (2002) 91 Canadian Rights Reporter (2d) 1.

[46] More precisely, the case concerned the abolition of the existing system of supernumerary judges in New Brunswick.

judicial review have actually been brought.[47] Judges had to hear cases brought by their own colleagues on the amount of judicial remuneration. Thus one commentator[48] doubts whether the Supreme Court's stated objective in *Reference re Remuneration* of depoliticizing the issue of determination of judicial remuneration has been achieved. Another commentator[49] argues that there is an inherent contradiction between the concepts of "simple rationality" (which in his view embodies the "process model" of judicial review) and "legitimate reasons" (which in his view embodies the "correctness model" of judicial review), both of which figure in the judicial review of decisions on judicial remuneration. It may also be doubted whether the Canadian Supreme Court in *Reference re Remuneration* has struck the right balance between the need to prevent "institutional encroachment" by the executive or legislature on judicial independence on the one hand and the opposite need to prevent "institutional self-dealing" by the judiciary (i.e. the judiciary furthering its own interests) on the other hand.[50]

6.17 Apart from the institution of judicial compensation commissions, several other features of the Canadian system of judicial remuneration are also noteworthy. The first is the technique of automatic annual adjustment of

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47 e.g. *Re British Columbia Legislative Assembly Resolution on Judicial Compensation* (1998) 160 DLR (4th) 477 (BCCA); *Alberta Provincial Judges' Association v Alberta* [1999] AJ No 47 (Alta QB) (QL); *Alberta Provincial Judges' Association v Alberta* (1999) 177 DLR (4th) 418 (Alta CA); *Re Ontario Federation of Justices of the Peace Association v Ontario (Attorney General)* (1999) 171 DLR (4th) 337 (Ont Div Ct); *Conference des Juges du Quebec v Quebec (Procureure General)* (2000) 196 DLR (4th) 533 (Qc CA); *Newfoundland Association of Provincial Court Judges v Newfoundland* [2000] NJ No 258 (Nfld CA) (QL); *Manitoba Provincial Judges Association v Manitoba (Minister of Justice)* (2001) 2002 DLR (4th) 698 (Man QB); *Newfoundland Association of Provincial Court Judges v Newfoundland* [2003] NJ No 196; 2003 NL.C. Lexis 335.

48 Robert G Richards, "Provincial Court Judges Decision: Case Comment" (1998) 61 Saskatchewan Law Review 575.

49 Tsvi Kahana, "The Constitution as a Collective Agreement: Remuneration of Provincial Court Judges in Canada" (2004) 29 Queen's Law Journal 445. The author points out that the Supreme Court in *Reference re Remuneration* intended to give the judicial compensation commissions the role of "effective consultants" – "their recommendations would not be binding on the government, but would not be as easily rejected as conventional recommendations" (pp 452-3). The recommendations "are not to be treated simply as recommendations but as something between recommendations and decisions" (p 471). The author's own view is that the "process model" of traditional administrative law should be applied where the decision on salaries does not involve any "singling out" of judges in the sense that they are discriminated against and treated differently as compared to other employees paid from the public purse. He also alluded to the "potential judicial bias embedded in judicial review of judicial salaries" (p 467). He concluded that "the invocation of judicial independence in order to gain better terms of employment for the judiciary is at the origin of the many problems I have described, and ... it is an inappropriate use of the Constitution as a 'collective agreement'." (p 482)

50 According to Adrian Vermeule, "The Constitutional Law of Official Compensation" (2002) 102 Columbia Law Review 501, "Because salaries for any given institution will be set either by that institution or by rival institutions (jointly or exclusively), constitutional design faces an unavoidable tradeoff between the risk of institutional self-dealing and the risk of institutional encroachment or aggrandizement." (p 503) "The problem of compensation in particular is that the aim of preventing conflicts of interest or official self-dealing trades off against the aim of preventing interbranch encroachments." (p 505)

judicial remuneration on the basis of changes in the cost of living or the average wage,[51] which exists side by side with the system of review of judicial remuneration every few years by an independent commission. The purpose of the automatic adjustment is "to enhance the independence of the judiciary by removing judicial compensation from the give-and-take of the political process".[52] Examples are provided by relevant provisions in the Judges Act,[53] which applies to federally appointed judges, and the Courts of Justice Act[54] of Ontario, which applies to the provincial court judges of Ontario.

6.18 According to the Judges Act,[55] the annual adjustment is based on the change in the "Industrial Aggregate" or a 7% rise, whichever is the less. The Industrial Aggregate is "the average weekly wages and salaries of the Industrial Aggregate in Canada for that year as published by Statistics Canada".[56] Since the average wage may rise or decline, it has been pointed out that "[i]n theory, the [judges'] salaries can go down as well as up".[57] However, the same is not true for provincial judges in Ontario. Under the Courts of Justice Act of Ontario,[58] there is also an automatic annual adjustment of judicial salaries on the basis of changes in the Industrial Aggregate subject to a maximum of a 7% pay rise for judges. However, it is also provided that in the event of a drop in the Industrial Aggregate, the judges' salaries will remain unchanged.[59] Although the law provides for automatic annual adjustments, there have been occasions on which the Government decided not to allow them and introduced counteracting legislative measures. Thus Professor Friedland wrote in 1995 –[60]

> The federal government did not roll back wages in the recent recession. Instead, it prevented the previously discussed automatic cost-of-living pay increases that are

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51 This technique has also been used in the USA and in Australia. The relevant practice in the USA has been mentioned in chapter 4 above. For the relevant practice in Australia, see George Winterton, *Judicial Remuneration in Australia* (Melbourne: Australian Institute of Judicial Administration, 1995), pp 26, 39-40.

52 Friedland (n 4 above), p 58 (quoting from the Senate proceedings).

53 R.S. 1985, c. J-1.

54 R.S.O. 1990, c. C.43.

55 s. 25.

56 s. 25(3)(b).

57 Friedland (n 4 above), p 57.

58 See paragraph 45 of the "Framework Agreement" between the Government and the Judges (represented by 3 judges' associations in the province) which forms part of the Act (see s. 51.13(3)) and is set out in its Schedule.

59 para 45(5). Paragraph 25(e) provides, as one of the criteria to be considered by the Provincial Judges' Remuneration Commission, that "the Government may not reduce the salaries, pensions or benefits of Judges, individually or collectively, without infringing the principle of judicial independence". It should be noted that unlike the case of the federal Judicial Compensation and Benefits Commission, the recommendations of the Provincial Judges' Remuneration Commission in Ontario have binding force: see the Framework Agreement, paras 2-3, 27-29.

60 Friedland (n 4 above), p 61. The footnotes in the original text are not included here.

> set out in the Judges Act. It was announced in 1992 that judges, like others paid out of government funds, would have a pay freeze for the years 1993 and 1994. This was subsequently extended for another two years to 1997. Chief Justice Lamer protested that the judges should have been consulted before the freeze was ordered. The judges threatened ... that they were considering legal action, but the threat was not acted upon, ...

Professor Friedland also pointed out that the provincial court judges in Ontario had agreed to a voluntary form of reduction in 1993.[61]

6.19 A second feature of the Canadian system that is noteworthy is the arrangement used in some provinces of "pegging salaries to external standards" –[62]

> New Brunswick informally links provincial court compensation to that of the highest level of deputy minister. Newfoundland links the pay to the salary of the Deputy Minister of Justice. Prince Edward Island had linked the salary to the average of those of all the other provincial benches, but recently changed it to match the average of the other Atlantic provinces' provincial benches. The federal government's latest Triennial Commission ... links salaries to the mid-range of the DM-3 [DM refers to Deputy Minister] category.[63] ... In 1875, when the Supreme Court of Canada was established, its judges were paid the same as cabinet ministers. Some link [of judicial salaries] with salaries of very senior civil servants is clear in Canada ... The real issue is what level of civil service should be used as a comparison. Should it be all deputy ministers? Or should it be the very top deputy ministers, that is, those in Canada at or above the midge-range of the DM-3 category, at present consisting of 14 deputy ministers?[64]

6.20 Thirdly, although it is a common practice in Canada to charge judicial salaries to the consolidated revenue fund so that they would not be subject to the annual appropriation vote of the legislature, this does not mean that *changes* in judicial salaries need not go before the legislature. This is because

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[61] Loc cit.

[62] Friedland (n 4 above), p 57.

[63] Ibid, p 57 (with footnotes omitted).

[64] Ibid, p 66 (with footnotes omitted).

the exact amounts of judicial salaries are usually set out in statutes,[65] which need to be amended by the legislature if the amounts are to be changed.[66] As regards the practice of charging judicial salaries to the consolidated fund, the Supreme Court of Canada has held that this practice, though "theoretically preferable",[67] is not an essential ingredient of the financial security for judges or of judicial independence. Le dain J, delivering giving the judgment of the Court, said –[68]

> Making judicial salaries a charge of the consolidated revenue fund instead of having to include them in annual appropriations is, I suppose, theoretically a measure of greater security, but practically it is impossible that the legislature would refuse to vote the annual appropriation in order to attempt to exercise some control or influence over a class of judges as a whole.

6.21 Fourthly, it may be noted that in Canada, provincial judges' associations are well-organised and are active in protecting the interests of judges in better remuneration and terms of service. They have also been involved in launching litigation on such issues, as is apparent from the content of this chapter. In Ontario, the Ontario Judges Association, Ontario Family Law Judges Association and Ontario Provincial Court (Civil Division) Judges Association have concluded a "Framework Agreement" with the Government, which is given legal force by and incorporated as part of the Courts of Justice Act –

> The purpose of this agreement is to establish a framework for the regulation of certain aspects of the relationship between the executive branch of the government and the Judges, including a binding process for the determination of Judges' compensation. It is intended that both the process of decision-making and the decisions made by the [Provincial Judges Remuneration] Commission shall contribute to securing and maintaining the independence of the Provincial Judges.[69]

6.22 Finally, it should be noted that the issue of "grandfather clauses" has come before the Canadian courts. For present purposes, such clauses may be understood as involving qualifications to new legislative provisions which change the terms of service of judges, the qualification being that the changes are

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[65] e.g. ss. 9-24 of the Judges Act as far as federally appointed judges are concerned.

[66] This point has been made in Kitty Lam, *Budgetary Arrangements for Overseas Judiciaries* (Hong Kong Legislative Council Secretariat, Research and Library Services Division, 20 November 2003), para 5.5.4 (available on the LegCo website, www.legco.gov.hk).

[67] *Valente v R* [1985] 2 SCR 673, at para 43.

[68] Loc cit.

[69] para 2 of the Framework Agreement as set out in the Schedule to the Courts of Justice Act (Ontario).

not applicable to existing judges, and are therefore only applicable to judges appointed after the change has been introduced. In *Beauregard v Canada*,[70] the relevant change was from a non-contributory retirement benefit for judges to a new system in which the judge had to make contributions to the retirement scheme. The new system was not applicable to judges appointed before the bill for the change was introduced. One of the plaintiff's argument was that the principle of equality before the law in the Canadian Charter of Rights[71] prohibited different treatment of judges for the purpose of their retirement benefits.[72] The Supreme Court of Canada held by a majority that such "grandfathering" of incumbent judges in order to protect their settled expectations was justified and was not unconstitutional.[73]

6.23 ***Summary of this chapter*** **:** The Canadian Constitution does not contain an express provision on the issue of reduction or non-reduction of judicial remuneration. During the Great Depression, an Act of Parliament was introduced in 1932 to reduce civil service pay, but the Act did not apply to judges. Under public pressure to extend the cut to the judiciary, the Government introduced, shortly after the Act was passed, a special Income Tax Act to levy an additional tax on judicial salaries for one year. In the 1990's, there was litigation on the issue of reduction of judicial remuneration in several Canadian provinces. The Supreme Court of Canada provided a comprehensive statement of the law on changes to judicial remuneration in *Reference re Remuneration of Judges*.[74] According to this decision, the guiding principle for the construction of a system for the determination of judicial determination is to ensure that the courts are free and are perceived to be free from political interference through economic manipulation by the executive or legislative branches of government, and that the process for the determination of judicial remuneration should be depoliticised. Thus a prominent role must be played in this regard by an independent judicial compensation commission, which should be interposed between, and serve as an institutional sieve between, the judiciary and the other branches of government. Any proposal to reduce, freeze or increase judicial remuneration must be considered by such a commission. The recommendations of the commission need not be made binding, but if the Government decides to depart from the recommendations, it must be prepared to publicly justify its decision, if necessary before a court of law. Since *Reference re Remuneration of Judges* was decided, cases involving judicial review of decisions on judicial remuneration have been litigated before the Canadian courts, with the applicants being successful in some cases. Some commentators doubt whether the original objective of "depoliticising" the issue of judicial remuneration has been achieved, or whether a proper balance has been struck in the Canadian system between the

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70 [1986] 2 SCR 56.

71 s. 1(b).

72 See para 59 of judgment of the majority of the Supreme Court of Canada.

73 Ibid, paras 69-71.

74 [1997] 3 SCR 3.

prevention of encroachment on judicial independence on the one hand and the avoidance of "institutional self-dealing" by the judiciary on the other hand. Other features of the Canadian system that are noteworthy include automatic cost-of-living adjustments to judicial salaries, the informal pegging of judicial salaries to those of senior civil servants or deputy ministers, charging judicial salaries to the consolidated revenue fund, the active role of provincial judges' associations, and the use of "grandfathering" arrangements regarding changes in the terms of service of judges.