KING'S BENCH FOR SASKATCHEWAN

Citation: **2023 SKKB 138**

Date: **2023 06 27**
Docket: QBG-SA-00958-2021
Judicial Centre: Saskatoon

IN THE MATTER OF A COMPLAINT FILED UNDER
THE SASKATCHEWAN HUMAN RIGHTS CODE, 2018

BETWEEN:

DWIGHT NEWMAN, K.C., Acting as Chief Commissioner of the Saskatchewan Human Rights Commission

Applicant

- and -

DANIEL McDONALD

Complainant

- and -

GOVERNMENT OF SASKATCHEWAN

Respondent

Docket: QBG-SA-00959-2021
Judicial Centre: Saskatoon

IN THE MATTER OF A COMPLAINT FILED UNDER
THE SASKATCHEWAN HUMAN RIGHTS CODE, 2018

AND BETWEEN:

DWIGHT NEWMAN, K.C., Acting as Chief Commissioner of the Saskatchewan Human Rights Commission

Applicant

- and -

LYNN EVANS

Complainant

- and -

GOVERNMENT OF SASKATCHEWAN

Respondent

Docket: QBG-SA-00960-2021
Judicial Centre: Saskatoon

IN THE MATTER OF A COMPLAINT FILED UNDER
THE SASKATCHEWAN HUMAN RIGHTS CODE, 2018

AND BETWEEN:

DWIGHT NEWMAN, K.C., Acting as Chief Commissioner of the Saskatchewan Human Rights Commission

Applicant

- and -

JAMES YOUNG

Complainant

- and -

GOVERNMENT OF SASKATCHEWAN

Respondent

Appearances:

Scott A. Newell and Adam R. North	for the applicant
Daniel McDonald	on his own behalf
Lynn Evans	on her own behalf
James Young	on his own behalf
Thomas Irvine, K.C., and Jeffrey G. Crawford	for the respondent

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JUDGMENT
June 27, 2023

CROOKS J.

BACKGROUND

[1] The complainants, Daniel McDonald, Lynn Evans and James Young

[complainants], are former justices of the peace [JPs] who were required to retire pursuant to s. 8(2) of *The Justices of the Peace Act, 1988*, RSS 1988-89, c J-5.1 [*JP Act*], which states:

> **8**(2) Every justice of the peace shall retire at the end of the month in which he or she attains the age of 70 years.

[2] Each filed a complaint with The Saskatchewan Human Rights Commission [Commission] alleging that imposing mandatory retirement discriminates based on age and is therefore contrary to the *Canadian Charter of Rights and Freedoms* and *The Saskatchewan Human Rights Code, 2018*, SS 2018, c S-24.2 [*Code*].

Mr. McDonald

[3] Mr. McDonald was appointed as a Presiding JP in and for the Province of Saskatchewan pursuant to an Order-in-Council dated August 15, 2001. He was redesignated to Senior Presiding JP in and for the Province of Saskatchewan pursuant to an Order-in-Council dated April 25, 2007.

[4] Mr. McDonald was compelled to retire from his position as a JP the month he attained the age of seventy years, being May 2017.

[5] On June 15, 2017, Mr. McDonald made a complaint to the Commission that on May 31, 2017, the Government violated ss. 9 and 16 of the *Code* on the basis of age.

Ms. Evans

[6] Ms. Evans was appointed a Presiding JP in and for the Province of Saskatchewan pursuant to an Order-in-Council dated May 2, 2007. She was redesignated to Senior Presiding JP pursuant to an Order-in-Council dated March 1, 2010.

[7] Ms. Evans was compelled to retire from her position as a JP in November 2017, being the month she turned 70 years old.

[8] On November 14, 2018, Ms. Evans made a complaint to the Commission in that on November 30, 2017, the Government violated s. 9 of the *Code* on the basis of age.

Mr. Young

[9] Mr. Young was appointed a Senior JP in and for the Province of Saskatchewan pursuant to an Order-in-Council dated June 27, 2012.

[10] Mr. Young was compelled to retire from his position as a JP at the end of the month upon which he attained the age of seventy years, being June 2019.

[11] On December 12, 2018, Mr. Young made a complaint to the Commission in that the Government violated s. 9 of the *Code* on the basis of age.

The Commission's Application

[12] On August 5, 2021, the applicant, the Commission, applied for a hearing pursuant to s. 34 of the *Code* in respect of each of these complaints. As the issues raised by each of the complainants were consistent across the applications, these matters were heard jointly.

[13] The remedy sought is as follows:

(a) an order declaring that s. 8(2) of the *JP Act* breaches s. 15 of the *Charter*;

(b) an order pursuant to s. 52 of the *Charter* declaring that s. 8(2) of the *JP Act* is of no force and effect;

(c) an order declaring that the exception under s. 2(2) of the *Code* is not available to the Government of Saskatchewan based on the application of s. 52 of the *Charter*;

(d) an order declaring that the Government of Saskatchewan has discriminated against the complainants on the basis of age under ss. 9 and/or 16 of the *Code*;

(e) an order pursuant to s. 39(1)(b) of the *Code* requiring the respondent to reinstate each of the complainants as a Justice of the Peace;

(f) reimbursement for lost salary and benefits pursuant to s. 39(1)(c) of the *Code*;

(g) compensation for the complainants under s. 40 of the *Code*; and

(h) costs against the respondent in favour of the complainants and the applicant.

ISSUES

[14] The provision being challenged is s. 8(2) of the *JP Act*, which states:

> **8**(2) Every justice of the peace shall retire at the end of the month in which he or she attains the age of 70 years.

[15] Prior to 1988, there was no provision relating to security of tenure nor any reference to a specific retirement age for JPs (*The Justices of the Peace Act*, RSS 1978, c J-5 (rep)). Section 6 of *The Justices of the Peace Amendment Act, 2010*, SS 2010, c 14, set the age of retirement for all JPs at 70 years. This mandatory retirement age is consistent with the security of tenure provided to Provincial Court judges [PCJs]. The retirement age of PCJs is prescribed under s. 13 of *The Provincial Court Act, 1998*, SS 1998, c P-30.11 [*PC Act 1998*] as 65 years or, with the approval of the Chief Judge,

70 years.

[16] It is the Commission's position that s. 8(2) of the *JP Act* breaches s. 15 of the *Charter* and is not justified under s. 1 of the *Charter*. The Commission also argues the mandatory retirement provision under s. 8(2) of the *JP Act* conflicts with the provisions in the *Code* respecting age.

[17] The Government takes the position that mandatory retirement is a component of judicial independence and infringes neither the *Code* nor the *Charter*. Further, the Government invites the court to determine that the *Code* does not apply to judicial tenure as it is not "employment" or an "occupation" as required for the application of the *Code*.

[18] In my view, the issue raised can be decided on the allegation that s. 8(2) breaches s. 15 of the *Charter*, which is the relief sought by the Commission. This decision should not be taken as an endorsement that the *Code* applies to judicial office holders.

[19] I would frame the issues as the following:

1. Does judicial independence apply to Justices of the Peace?
2. Does a mandatory retirement age for Justices of the Peace pursuant to s. 8(2) of the *JP Act* breach s. 15 of the *Charter*?
3. Is the infringement justified under s. 1 of the *Charter*?
4. Does a mandatory retirement age for Justices of the Peace conflict with the *Code*?

1. Does judicial independence apply to Justices of the Peace?

[20] The duties of JPs involve powers under federal, provincial and municipal

laws as well as through the common law. JPs have the authority to make decisions that impact the constitutional rights of individuals, including the right to life, liberty and security of the person; search and seizure; prohibition on arbitrary detention; rights upon arrest; and right to fair trial and bail, among others. The Supreme Court of Canada in *Ell v Alberta*, 2003 SCC 35, [2003] 1 SCR 857 [*Ell*], outlined the role and authority of JPs in the administration of justice in Canada:

> [4] Justices of the peace have played an important role in Canada's administration of justice since the adoption of the position from England in the 18th century. It has long been accepted that s. 92(14) of the *Constitution Act, 1867* confers upon the provinces full control over the appointment and regulation of these judicial officers. See *Reference re Adoption Act*, [1938] S.C.R. 398, *per* Duff C.J., at p. 406, citing *R. v. Bush* (1888), 15 O.R. 398 (Q.B.), at p. 405:
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> > The administration of justice could not be carried on in the Provinces effectually without the appointment of justices of the peace and police magistrates, and the conclusion seems to me to be irresistible that it was intended that the appointment of these and other officers, whose duty it should be to aid in the administration of justice, should be left in the hands of the Provincial Legislatures.
>
> [5] The powers and authority of justices of the peace have waxed and waned over time and across the country. In many provinces, they have come to occupy a critical role as the point of entry into the criminal justice system, with jurisdiction over bail hearings and the issuance of search warrants. ...

[21] In *Saskatchewan (Provincial Court, Chief Justice) v Saskatchewan (Human Rights Commission)*, 2003 SKQB 369, 230 DLR (4th) 493, Justice Ball commented on the application of the principle judicial independence to Justices of the Peace:

> [23] With certain qualifications, the duties of justices of the peace have been found by various courts to attract the principle of judicial independence. For example, in *Ell v. Alberta*, 2000 ABCA 248, [2001] 1 W.W.R. 606, at para. 52, the Alberta Court of Appeal relied upon an Ontario decision:
>
> > [52] In a recent decision, *Ontario Federation of Justices of the Peace Assns. v. Ontario* (1999), 171 D.L.R. (4th) 337 (Ont. Div. Ct.), the Ontario Court of Appeal discussed the importance of the judicial office

> of justice of the peace. Although I recognize that the jurisdiction of some of the Ontario justices of the peace may well exceed that of Alberta justices of the peace, I find the reasoning persuasive. Haley J.A., writing for the Court, stated at pp. 359-360:
>
> > The protection of the liberty of the person is of utmost importance in our society, whether that liberty is subject to be taken away at the high court level or at the level of the justice of the peace. It merits the unbiased deliberation of a person who is and who is perceived to be independent of any possible coercion, through economic manipulation or otherwise, on the part of the executive branch or the legislative branch of government.
> >
> > It is not necessary for the justice of the peace to have the same constitutional guarantees as those accorded to superior court judges. In that sense there is a spectrum in the extent of the guarantee of judicial independence required for different levels of judges. But one must consider how the functions allocated to different levels of judges affect the ordinary person in our society. Where that function involves an adjudication affecting the liberty of the person or other rights safeguarded by the Constitution, such as protection against unlawful search and seizure, there must be assurance that the person exercising that function is impartial, independent and unbiased.

[22] Judicial independence is a fundamental component of Canada's *Constitution Act, 1867* (UK), 30 & 31 Vict c 3 [*Constitution*]. In *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at para 115 [*Reference re PCJs*], Chief Justice Lamer reiterated that independence of the judiciary has three main components: (1) security of tenure; (2) financial security; and (3) administrative independence, which were originally identified in *Valente v The Queen*, [1985] 2 SCR 673 [*Valente*].

[23] Section 99 of the *Constitution* entrenches judicial security of tenure, coupled with a mandatory retirement age, for superior court judges. In *Valente* at pages 693-94, the Supreme Court held that the provisions for judicial tenure and compensation for superior court judges in the *Constitution* are regarded as "representing the highest degree of constitutional guarantee of security of tenure and security of salary and pension."

[24] In *Ell*, the Supreme Court of Canada canvassed whether the respondents, JPs in Alberta, are subject to the principle of judicial independence. At paragraphs 24 and 26, the Court confirmed the principle of judicial independence applies to the duties of JPs:

> [24] In light of these bases of judicial independence – impartiality in adjudication, preservation of our constitutional order, and public confidence in the administration of justice – it is clear that the principle extends its protection to the judicial office held by the respondents. Alberta's non-sitting justices of the peace exercised judicial functions directly related to the enforcement of law in the court system. They served on the front line of the criminal justice process, and performed numerous judicial functions that significantly affected the rights and liberties of individuals… The respondents were required to exercise significant judicial discretion in adjudicating on these matters.
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> …
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> [26] Each of the above judicial responsibilities makes clear that the respondents played an important role in assisting the provincial and superior courts in fulfilling the judiciary's constitutional mandate… It is obvious the respondents were constitutionally required to be independent in the exercise of their duties.

[25] It is well established that judicial independence applies to the position of a Justice of the Peace.

2. Does a mandatory retirement age for Justices of the Peace pursuant to s. 8(2) of the *JP Act* breach s. 15 of the *Charter*?

[26] The Commission suggests that the mandatory retirement age for JPs violates the *Charter* as it discriminates based on age. Their position is that this breach is not saved by s. 1 of the *Charter*. As the applicant, it is the Commission's burden to show, on a balance of probabilities, that a *Charter* violation has occurred.

[27] The analysis begins with the question of whether s. 8(2) of the *JP Act* breaches s. 15 of the *Charter*, which states:

> **15**(1) Every individual is equal before and under the law and has the

> right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[28] The framework for analysis under s. 15 has been refined over time. The Supreme Court of Canada recently confirmed the two-step approach to the s. 15 analysis in *R v Sharma*, 2022 SCC 39 at para 28 [*Sharma*], where the majority reiterated that the claimant is required to demonstrate that the impugned law or state action:

> (a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and
>
> (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

[29] The Government of Saskatchewan [Government] concedes that s. 8(2) draws a distinction based on age, which meets the first step of this s. 15 analysis. Accordingly, I will focus on the second leg of the test.

[30] At paragraphs 56 to 57 of *Sharma*, Brown and Rowe JJ. wrote for the majority:

> [56] To determine whether a distinction is discriminatory under the second step, courts should also consider the broader legislative context.
>
> [57] Such an approach is well-supported in our jurisprudence. In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, this Court held "[t]he comprehensive nature of the Act must be taken into account in considering the effect of excluding one ground from its protection" (para. 96). Similarly, in *Withler* [2011 SCC 12, [2011] 1 SCR 396], the analysis was said to entail consideration of "the full context of the claimant group's situation and the actual impact of the law on that situation" (para. 43). Where the impugned provision is part of a larger legislative scheme (as is often so), the Court explained, that broader scheme must be accounted for (para. 3), and the "ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis" (para. 38 (emphasis added)). In *Taypotat* [2015 SCC 30, [2015] 2 SCR 548],

> Abella J. harboured "serious doubts" that the impugned law imposed arbitrary disadvantage, particularly after considering the context of the relevant legislation "as a whole" (para. 28).

[31] In determining "whether a distinction is discriminatory under the second step, courts should consider the broader legislative context" (*Sharma*, para 56), which includes considerations of "the objects of the scheme, whether a policy is designed to benefit a number of different groups, the allocation of resources, particularly policy goals sought to be achieved, and whether the lines are drawn mindful to those factors" (*Sharma*, para 59, citations omitted). Several factors, such as arbitrariness, prejudice, and stereotyping may assist in considering whether a law has negative effects on a particular group (*Sharma*, para 53).

[32] The Commission contends that the impugned provision of the *JP Act* explicitly creates a distinction based on the ages of JPs, specifically, those over 70 years and those under 70 years. They suggest the impugned provision is blunt in its impact for persons situated similarly to the complainants as upon reaching age 70, one must stop acting as a JP by the end of the month. There is no opportunity to assess relevant skills or cognitive capacity. The Commission's position is that this perpetuates a long-held stereotype identified in *Gosselin v Québec (Attorney General)*, 2002 SCC 84 at para 32, [2002] 4 SCR 429, where "[c]oncerns about age-based discrimination typically relate to discrimination against people of advanced age who are presumed to lack abilities that they may in fact possess". The effect of s. 8(2) of the *JP Act* creates an adverse impact on JPs based solely on their age and, as such, the Commission asserts it is a breach of s. 15 of the *Charter*.

[33] The Government contends that this provision is not to reinforce, perpetuate or exacerbate a disadvantage but, rather, to protect the fundamental constitutional principle of judicial independence. In this case, the retirement provision embedded in s. 8(2) of the *JP Act* is part and parcel of how the *JP Act* provides for

judicial independence and, more specifically, is part of the guarantee of security of tenure. The mandatory retirement age is part of a broader scheme central to the protection of judicial independence and the provisions of the *JP Act* guarantee not only security of tenure (*JP Act*, ss 12 to 12.9) but also financial security (*JP Act*, ss. 10.1 to 10.8) and administrative independence (*JP Act*, s 13). Thus, the *JP Act* cannot be said to reinforce, perpetuate, or exacerbate disadvantage.

[34] The Government further notes that mandatory retirement ages for judicial office holders are prevalent in the Canadian judicial system. With respect to specifically JPs, nine out of twelve provinces and territories have JPs exercising judicial functions.

[35] I agree with the Commission that it is the discriminatory effect of the legislation, irrespective of the motives or intentions of the legislature, which is key to the court's analysis under s. 15. However, the analysis must take into account the principle of judicial independence with respect to JPs as reiterated in by the Court in *Mullaly v Nova Scotia (Attorney General)*, 2020 NSSC 26 [*Mullaly*].

[36] A number of cases from the Supreme Court of Canada provide guidance on the interpretation of s. 15 of the *Charter* as it relates to allegations of discrimination based on age. In *McKinney v University of Guelph*, [1990] 3 SCR 229 [*McKinney*], notwithstanding the majority's finding that the *Charter* did not apply to the University's mandatory retirement policy because it was not sufficiently tied to government functions, activities or delivery of services, the majority found that the age limits constituted a *prima facie* breach of the *Charter*. The majority in *Dickason v University of Alberta*, [1992] 2 SCR 1103 [*Dickason*], followed the majority's assessment of mandatory retirement as a breach of s. 15(1) of the *Charter* in *McKinney*.

[37] Courts from across Canada have applied this guidance specifically to the application of s. 15 of the *Charter* to a judicial office holder facing mandatory retirement at a given age.

[38] The Commission relies on *Assn. of Justices of the Peace of Ontario v Ontario (Attorney General)* (2008), 292 DLR (4th) 623 (Ont Sup Ct) [*Assn. of JPs of Ontario*], where the applicants, who were former JPs required to retire at age 70, asserted that the mandatory retirement under Ontario's *Justices of the Peace Act*, RSO 1990, c J.4, was discriminatory on the basis of age and breached s. 15 of the *Charter*. The Court concluded that the impugned provisions were not saved by s. 1 of the *Charter* and declared them invalid. As a result, as noted at paragraph 3, the violation was "remedied by 'reading in' the retirement provisions applicable to provincial court judges: retirement at 65 with continuation in office to 75, subject to the annual approval of the Chief Justice of the Ontario Court of Justice."

[39] However, the majority of cases have reached opposite conclusions since *Assn. of JPs of Ontario* was decided.

[40] In *Paquet c Québec (Procureure générale)*, 2010 QCCS 3185 [*Paquet*], Judge Paquet challenged a mandatory retirement provision in the *Act respecting municipal courts*, CQLR, c C-72.01, that required him to retire at age 70. He argued that mandatory retirement breaches s. 15 of the *Charter*. The motion was dismissed, and no breach was found. While there was an obvious distinction on the basis of age, that distinction was not discriminatory as judicial officers serve to a predetermined retirement date, set to promote judicial independence:

> [86] It is clear that section 39 of the Act creates a distinction between persons who are 70 and older and those who are younger, since the former cannot hold office as municipal judges. The differential treatment is based on an enumerated ground: age.
>
> [87] The differential treatment is not discriminatory, however, since it does not create a disadvantage by perpetuating prejudice or stereotyping. The comparator group to be used is judges of all jurisdictions. According to the evidence, mandatory retirement is, barring exception, the norm for persons holding judicial office. For federally appointed judges, the age is 75. For provincially appointed judges in Canada, the normal retirement age is 70.

> [88] The evidence submitted by the AGQ also shows that, in a number of democratic countries, the mandatory age of retirement for judges is, barring exception, 70 years old.
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> [89] The objective of such a provision is to promote judicial independence by setting a term to holding judicial office. Mandatory retirement ensures security of tenure until they reach a predetermined age. Mandatory retirement of judges is therefore not based on a stereotype or prejudice.[22]

The footnote at the end of paragraph 89 states:

> [22] This ensures true judicial independence, thereby ensuring that the judicial system is not subject to political or administrative supervision.

[41] Flowing from the analysis that both judges and JPs are subject to judicial independence, a similar conclusion was reached in *Clément c Québec (Procureur général)*, 2015 QCCS 2207 [*Clément*], which was summarized as follows in *Mullaly* at paras 49-52 and 54:

> [49] *Clément v. Canada*, 2015 QCCS 2207 was again a case involving the mandatory retirement of judicial office holders, in that case of judges of the municipal courts of Quebec. Again, their legislation provided for mandatory retirement at age 70 and, again, a challenge was brought to the law as being discriminatory and unconstitutional. The Court rejected the application. (I note that this case, in its official version, is written only in the French language. Counsel for the applicant has kindly provided me with an unofficial English version. I will quote from the case in English for the convenience of anglophone readers. I note that I have compared the official French version with the unofficial English translation and it is generally accurate; where it was not, I have amended.)
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> [50] The Court in *Clément* confirmed that the mere fact that a law differentiates on the basis of age, as the impugned law does, does not automatically mean that it breaches the *Charter*. It must also be shown, as the Supreme Court of Canada has repeatedly said, that the distinction has a discriminatory effect because it perpetuates prejudice or maintains a stereotype.
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> [51] After providing a comprehensive review of the principles of judicial independence, the Court concluded the following:
>
> > [156] However, the retirement age is at the very heart of the notion of "irremovability" (= security of tenure) without which judicial independence would be meaningless.

> [157] Security of tenure means that judges have the right to remain in office and cannot be disqualified or deprived of their office unless their state of health justifies early departure or their conduct renders them unfit to perform judicial duties. They may therefore not be transferred, suspended, dismissed or retired, nor may they be transferred in their status except in accordance with the law. Only this can establish the automatic, objective and neutral trigger for retirement.
>
> [158] Without it, a complex system of analysis should be developed for the retirement of judges on a case-by-case basis based on their abilities and ability to continue in their judicial office. However, the Supreme Court in *McKinney* and again in *Stoffman* [[1990] 3 SCR 483], already cited, concludes that skill and performance assessment systems can be humiliating, especially when applied to seasoned and experienced professionals, in addition to generating tension. Moreover, a capacity assessment system would need to be accompanied by appeal or review mechanisms, not to mention extraordinary remedies before the superior courts, with the result that judges who no longer have the skills to serve could continue to do so for a long time, thereby jeopardizing public confidence in the judicial system…
>
> [159] It should be added that the difficulties in applying such evaluation mechanisms would be all the greater since judges are neither civil servants nor employees of the State…
>
> [160] Seen in this light, the case of judges facing retirement differs fundamentally from that of hospital doctors or university professors since the public cannot invoke a constitutional right to benefit from independent and constitutionally impartial doctors or professors.

[52] And further:

> [166] In Canada, the trend is to eliminate the mandatory retirement age to allow citizens to choose when they stop working. But the Court considers the choice of 70 years to impose retirement on municipal judges cannot be equated with stereotyping or prejudice in the context of the need to protect judges from the possible arbitrariness of the executive branch, changes in the direction of the legislature or attacks from the media. There is no evidence before me that this choice presumes that after age 70, a person no longer has the intellectual capacity or physical strength to continue in his or her office. Section 39 of the CMA is not intended to separate judges 70 years of age and over from other judges and to treat them more poorly. The sole purpose of this legislative choice is to ensure the "irremovability" (= security if tenure) of judges. On the contrary, 70 years of age presumes that until at least that age, judges have all, with few exceptions, the strength to carry out their responsibilities.
>
> [167] On the other hand, following the plaintiffs' logic would inevitably lead to the abandonment of legislatively establishing an age limit for being a judge and replacing it with complex assessment mechanisms that are less likely to ensure security of tenure. To invoke the dignity of work as a reason for excluding the statutory retirement age ignores the problem of injury to the dignity of persons that would arise from periodic assessments of fitness to continue to perform

> judicial duties. In this case, the cure could be worse than the disease.
>
> ...
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> [54] The Court in *Clément* went on to consider the *Assn. of Justices of the Peace of Ontario* case and disagreed with it for a number of reasons (found at para. 236): *inter alia*, that it did not treat the "irremovability" of judges as a constitutional right created for the benefit of the public; that if the choice of retirement at age 70 was unconstitutional, the choice of retirement at 75 was no less so.

[42] The Government relies on *Mullaly*, which is similar to the case at bar. In *Mullaly*, the applicant was a part-time JP who was compelled to retire at age 70. The applicant asserted that the mandatory retirement from her position as presiding JP resulted in the arbitrary loss of her employment without any replacement for her lost income as her benefits did not include a pension. She commenced a claim under s. 15 of the *Charter* and asked the Court to set aside the mandatory retirement provision and reinstate her to her position.

[43] The Court rejected the *Charter* claim and found that a statutory retirement age for JPs is not discriminatory and does not infringe s. 15 of the *Charter*. The Court concluded that an end date for JPs cannot be discriminatory as the mandatory retirement age applies equally to all presiding JPs. As well, a fixed retirement age is a necessary component for guarantee of security of tenure under judicial independence.

[44] In *Mullaly*, Boudreau J. followed the logical analysis as set out in *Paquet* and *Clément* and set out a succinct summary of the rationale for and necessity of mandatory retirement for judicial office holders:

> [60] While it is obvious on its face that ss. 3(3) of the *Act* [akin to s. 8(2) of the *JP Act*] creates a distinction on the basis of age, it is also clear to me that this distinction does not create a disadvantage by perpetuating prejudice or stereotyping. That is not the law's purpose, nor is it its effect. The law was, and could only have been, enacted to address a specific issue, that of judicial independence and, in particular, the security of tenure of justices of the peace by way of a legislated "end date".

> [61] Once one accepts that an "end date" for all judicial office holders is mandatory, because of constitutional principles, that end date cannot possibly be discriminatory. It is not arbitrary, it does not perpetuate disadvantage, it does not stereotype. In the present case, it applies to all presiding JPs equally, as it must.
>
> [62] During oral submissions, counsel for the applicant disagreed that "security of tenure" had to include a necessary end date. The caselaw is clear that it does, and for very sound reasons. As noted very sensibly in *Clément*, if judicial office holders have no "end date", then the office becomes an office for life. Invariably there comes a day where any (or perhaps every) individual judicial office holder is deemed, by some, to have reached an age and state of physical and/or mental health where they are not performing optimally. How do we protect judicial independence at that point? What process could possibly be developed to deal with individual cases fairly, while protecting judicial independence/security of tenure and also ensuring public respect for the institution and the individual judge? Moreover, who would decide? Who would deal with the inevitable appeals or judicial reviews that would flow from these decisions?
>
> [63] It is entirely clear to me that a mandatory end date for judicial office holders is a vital and necessary part of the appointment. It provides an objective, impartial, and neutral time line.
>
> [64] It may be, of course, that any individual judicial office holder (such as the applicant) could have the health and stamina to sit longer, until 75, or even 80, or indefinitely. It is also possible, on the other side of the spectrum, that other individuals would not have the health or stamina to sit past 60 or 65. But such individual considerations are entirely beside the point. A neutral and impartial day must be chosen.
>
> [65] Again, once that principle is accepted, the analysis becomes very simple. The necessary end date (assuming that it is within a reasonable range, and applies to all) cannot be called discriminatory. It is simply one concrete result of the principle of judicial independence.

[45] The Court held that although the impugned provision creates a distinction based on age, the "distinction does not create a disadvantage by perpetuating prejudice or stereotyping" (*Mullaly*, para 60). The Court found that the mandatory retirement of judicial office holders is a constitutional principle and applied to all presiding JPs equally. Therefore, "it is not arbitrary, it does not perpetuate disadvantage, it does not stereotype" (*Mullaly*, para 61). The Court found that the mandatory retirement provision was designed to protect judicial independence through providing security of

tenure. The Court decided that there was no breach of s. 15 of the *Charter* and, if there was, it would be a reasonable limit under s. 1 of the *Charter*.

[46] The Commission submits that the decisions in *Paquet*, *Clément* and *Mullaly* are irreconcilable with the Supreme Court's decisions in *McKinney* and *Dickason* that state clearly that a legislated provision allowing for mandatory retirement is a *prima facie* breach of s. 15 of the *Charter*. However, I echo the view of Boudreau J. in *Mullaly* that the constitutional principle of judicial independence presents a "significant and qualitative difference" which distinguishes the within case from other decisions.

[47] Counsel for the Commission suggests the courts in *Clément* and *Mullaly* ignore the unintended discriminatory impact of the legislation. I disagree. In my view, the imposition of a mandatory retirement age for judicial office holders reflects the implementation and protection of a constitutional principle – judicial independence – and not a discriminatory practice. The decisions in *Paquet, Clément* and *Mullaly*, which found no breach of s. 15, focus on the motives and intentions of the legislature which, in my view, is what is required when the "broader legislative context" is considered, as discussed in *Sharma.*

[48] In my view, the legislated age for mandatory retirement of JPs is not a breach of s. 15 of the *Charter*. Mandatory retirement, in the context of judicial independence, does not reinforce, perpetuate or exacerbate disadvantage.

[49] Beyond finding no breach of the *Charter*, I am also persuaded by the Government's position that one protection under the *Charter* cannot be used to reduce the scope of other constitutional principles, such as judicial independence. They point to the decision of the Supreme Court of Canada in *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 SCR 1148 [*Reference re Bill 30*], which established this limitation on the scope of the *Charter*. In that case, the issue centered on the funding

of separate schools in Ontario, whose existence is constitutionally protected under s. 93 of the *Constitution Act, 1867*. Ultimately, the Supreme Court determined that the funding decision could not be challenged under other constitutional protections, such as equality or freedom of religion, because the funding was provided to implement the constitutional rights protected under s. 93.

[50] In *Reference re Bill 30*, Wilson J. stated for the majority at pages 1197-1198:

> … It was never intended, in my opinion, that the *Charter* could be used to invalidate other provisions of the Constitution, particularly a provision such as s. 93 which represented a fundamental part of the Confederation compromise. …

[51] A similar conclusion was reached in *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319, which considered the denial of a request for television cameras in the Nova Scotia House of Assembly. That request was denied and resulted in a challenge based on an infringement of freedom of expression under s. 2 of the *Charter*. The majority of the Supreme Court ruled in favour of the Speaker, confirming at page 373:

> It is a basic rule, not disputed in this case, that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution: *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148. So if the privilege to expel strangers from the legislative assembly is constitutional, it cannot be abrogated by the *Charter*, even if the *Charter* otherwise applies to the body making the ruling. …

[52] Not only is there no breach, but the principle of judicial independence cannot be diminished by the provisions of the *Charter*. It would seem incongruent for a mandatory retirement age to be appropriate for superior court judges and provincial court judges, yet discriminatory for JPs who enjoy many of the same responsibilities, benefits and protections by virtue of being a judicial office holder. Here, a distinction based on age is required to serve the constitutional principle of judicial independence.

3. Is the infringement justified under s. 1 of the *Charter*?

[53] In the alternative, should s. 8(2) of the *JP Act* constitute a breach of s. 15 of the *Charter*, I find that it is justified under s. 1 of the *Charter*, which reads:

> **1** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[54] The test to determine whether s. 1 of the *Charter* has been met was established by the Supreme Court of Canada in *R v Oakes*, [1986] 1 SCR 103 [*Oakes*]. To meet this test, the Government must establish:

1. The objective of the impugned provision is pressing and substantial;
2. The impairment of the right is proportional to the importance of that objective in that:
    (a) there is a rational connection between the impugned provision and its objective;
    (b) the impugned provision minimally impairs the *Charter* right or freedom at stake; and
    (c) the deleterious effect of the limit on the *Charter* right or freedom is outweighed by the salutary effect of the impugned provision.

[55] The objective of s. 8(2) of the *JP Act* is clearly pressing and substantial as it provides security of tenure for judicial office holders and promotes judicial independence. There is a rational connection between this objective and the challenged provision.

[56] The Commission does not dispute that the Government has identified a pressing and substantive objective, which is security of tenure as a necessary component of judicial independence. Further, the Commission agrees that the age-based distinction in s. 8(2) of the *JP Act* is rationally connected to this objective. Rather, the Commission's concerns focus on whether s. 8(2) "minimally impairs" the *Charter* right and whether that impairment is "proportional" to the objective of s. 8(2).

[57] In determining whether the impugned provision is minimally impairing, the standard is not perfection. While security of tenure is a pillar of judicial independence, that tenure does not need to be universally applied in all levels of court provided it reflects essential elements to ensure that tenure is secure against interference. As McLachlin J. (as she then was) stated in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199:

> [160] As the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement: see *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at pp. 1196-97; *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at pp. 1340-41; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, at pp. 1105-06. On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.

[58] The Supreme Court of Canada in *Canada (Attorney General) v JTI-Macdonald Corp.*, 2007 SCC 30 at paras 45-46, [2007] 2 SCR 610, provided further explanation on the need for proportionality:

> [45] The final question is whether there is proportionality between the *effects* of the measure that limits the right and the law's *objective*.

> This inquiry focuses on the practical impact of the law. What benefits will the measure yield in terms of the collective good sought to be achieved? How important is the limitation on the right? When one is weighed against the other, is the limitation justified?
>
> [46] Although cases are most often resolved on the issue of minimal impairment, the final inquiry into proportionality of effects is essential. It is the only place where the attainment of the objective may be weighed against the impact on the right. If rational connection and minimal impairment were to be met, and the analysis were to end there, the result might be to uphold a severe impairment on a right in the face of a less important objective.

[59] In *McKinney*, the Supreme Court of Canada upheld mandatory retirement for tenured professors under s. 1 of the *Charter*. In response to the suggestion that the mandatory retirement age should be set higher than 65, the Court commented at page 289:

> One final point may be mentioned. It may be argued that in these days, 65 is too young an age for mandatory retirement. At best, however, this is an exercise in "line drawing", and in *R. v. Edwards Books and Art Ltd.*, supra, at pp. 781-82, 800-801, this Court made it clear that this was an exercise in which courts should not lightly attempt to second-guess the legislature. While the aging process varies from person to person, the courts below found on the evidence that on average there is a decline in intellectual ability from the age of 60 onwards; see the reasons of Gray J. (1986), 57 O.R. (2d) 1, at pp. 40-41, and of the Court of Appeal (1987), 63 O.R. (2d) 1, at pp. 61-62. To raise the retirement age, then, might give rise to greater demands for demeaning tests for those between the ages of 60 and 65 as well as other shifts and adjustments to the organization of the workplace to which I have previously referred.

[60] Both parties called evidence on the impact of aging. Both Dr. Suparna Madan and Dr. Andrew Kirk testified to the effects of aging on cognitive function and intellectual ability.

[61] The Commission asserts that a number of alternatives to a mandatory retirement age could be implemented. For example, the Commission proposes that imposing a different (although admittedly arbitrary) retirement age of 75 would have a "lesser impact on affected individuals, in that it would allow them to work for five more

years." They also suggest other alternatives to mandatory retirement could be implemented, such as appointing JPs for a fixed term or assessing the abilities of JPs on an individual basis with safeguards to prevent manipulation of the testing process. In the Commission's view, this would increase confidence in the judicial system, rather than compromise it.

[62] The Commission relies on Dr. Suparna Madan's testimony. Dr. Madan is qualified to give expert opinion evidence on the effects of aging on cognitive function and intellectual ability, the factors affecting cognitive decline, methods of assessing presence and degree of cognitive decline, ability of older adults to work as they age and ability to participate in the workforce among different individuals experiencing cognitive decline. It is Dr. Madan's testimony that there is nothing "magical" about age 70. There is no reason, as a group, that people over the age of 70 would automatically not have the cognitive capacity to function as a JP. It is not unreasonable that JPs are tested or be given the option to be assessed on an individual basis around the necessity or timing of retirement.

[63] While the precise rate of decline varies between individuals, it was agreed by both experts that certain aspects of memory and cognitive functioning gradually decrease with healthy aging. Both experts also agreed it is a complex area to research and that it is based on broad observations as an individual's cognitive functioning may decline more slowly or rapidly.

[64] Given the expert opinions on cognitive capacity and intellectual ability in relation to aging, the Commission contends that the Government has failed to explain why individual assessment, a more accurate method to assess cognitive decline, is not viable; therefore, failing to demonstrate that the mandatory retirement is a *bona fide* occupational requirement.

[65] In my view, the Commission's suggestion engages precisely what the

court is cautioned against – line-drawing. The caution against "line-drawing" was recognized in *Mullaly*, where the court commented on the issue of minimal impairment:

> [84] As to the minimal impairment question, I acknowledge that a breach must be shown to impair the right as minimally as possible, in order to be saved by s. 1. In the context of the mandatory retirement of judicial office holders, however, this is a principle that is difficult to assess. What would be "less impairing" in this context? Would it be the choosing of another age (as found by the Court in *Assn. of Justices of the Peace of Ontario*)? Is that, in fact, less impairing, given that any age would arguably be as discriminatory as 70? Should the Court impose term limits as opposed to a retirement linked to age? Is that any better? Moreover, would any/all these solutions not run afoul of the caselaw that tells courts to avoid inappropriate judicial "line-drawing"?

[66] I am of the view that mandatory retirement at age 75 is no less arbitrary than at age 70. I echo the conclusions of Alain J. in *Paquet:*

> [107] The Court also finds that section 30 of the Act concerning the mandatory age of retirement of 70 for municipal court judges is valid. Even if it did create some form of discrimination, such discrimination would be justified by the type of position occupied and is perfectly acceptable in a free and democratic society.
>
> [108] Moreover, the suggestion made near the end of the hearing to set Mtre Paquet's retirement age at 75 would be just as discriminatory as setting it for 70. It is not up to the Court to arbitrarily set an age different from that determined by the legislature. [Emphasis in original]

[67] Further, the remaining alternatives proposed by the Commission would serve to compromise the principals of judicial independence by eroding security of tenure.

[68] To impose a shorter fixed term of service for a judicial office holder will, in my view, have the opposite effect as those seeking reappointment will need to satisfy and defer to the appointing body in order to continue in the office and may be influenced accordingly in their decision-making. Alternatively, those who are not eligible for reappointment will need to seek positions elsewhere which may result in their

termination of the term of service early or a period of unemployment in the interim. Either way, this carries a potential to compromise the security and independence of a judicial office holder.

[69] In the same way, to allow for ongoing medical assessments to assess capacity would open the doors to the potential for manipulation of or interference with the process and thereby compromise the entire purpose of this age restriction – security of tenure. It would also impose a potentially demeaning practice of having JPs prove their mental acuity. All this carries with it an increased risk of undermining the public's confidence in its justice system and deteriorating the judicial independence that is integral for judicial office holders.

[70] A mandatory retirement age, the constitutional requirement and an accepted limitation for other judicial office holders across Canada is minimally impairing and proportional. In the event there is a breach under s. 15, I find it is saved under s. 1 of the *Charter*.

4. Does a mandatory retirement age for Justices of the Peace conflict with the *Code*?

[71] As a preliminary issue on the applicability of the *Code*, s. 51 states:

> **51** The Crown is bound by this Act.

[72] In relation to this section, the Government raised in their brief of law a jurisdictional question suggesting the complaints are wrongly brought against the Government of Saskatchewan, which refers to "the Crown in right of Saskatchewan". The "Crown" in this case refers strictly to the executive branch of government, which is separate and apart from the legislative and the judicial branches (see Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 12, and *The Proceedings Against the Crown Act, 2019*, SS 2019, c P-27.01, ss 2 and 12). I note that both the Attorney General of Saskatchewan and the

Attorney General of Canada were served with a Notice of Constitutional Question and took no steps to remedy this. This application may well have been brought against the wrong party; however, both presented argument on the merits, and I have determined the application accordingly.

[73] As members of the judicial branch, JPs are not part of the executive branch. They do not have a relationship with the executive branch, and a complaint does not lie against the executive branch. As previously alluded to, JPs are granted security of tenure by virtue of being appointed by the Lieutenant Governor in Council, who cannot unilaterally cancel the appointment of a JP. Moreover, the Government does not directly control the remuneration of JP, nor do they assign tasks or supervise JPs. As such, there is an argument that the *Code* does not apply to members of the judiciary.

[74] There is a distinction between determining whether the *Code* applies in its entirety to judicial office holders and whether a mandatory retirement age for JPs is permitted by the *Code*. I intend to address the latter.

[75] The definition of "age" is set out in s. 2(1) of the *Code*:

> **2**(1) In this Act:
>
> **"age"** means any age of 18 years or more;
>
> ...

[76] However, as the Government notes, this definition must be read together with s. 2(2) of the *Code*, which states:

> **2**(2) Nothing in Part 3 prohibits a distinction on the basis of age if that distinction is permitted or required by any Act or regulation in force in Saskatchewan.

[77] The alleged discriminatory practice is contained in Part 3 of the *Code* as

this is where the two sections are located which are the basis for advancing these complaints through the Commission:

> **9** Every person and every class of persons has the right to engage in and carry on any occupation, business or enterprise under the law without discrimination on the basis of a prohibited ground.
>
> ...
>
> **16**(1) No employer shall refuse to employ, refuse to continue to employ or otherwise discriminate against a person or class of persons with respect to employment, or a term or condition of employment, on the basis of a prohibited ground.

[78] The Government's approach reflects similar considerations between JPs and PCJs. In my view, the focus of the *JP Act* is recognizing the function of JPs as judicial office holders and implementing those aspects which ensure judicial independence. From the evidence and the provisions of the *JP Act*, some of these elements include:

- Security of Tenure
  - The Lieutenant Governor in Council is authorized to appoint residents of Saskatchewan as JPs throughout the province (*JP Act*, s 4).
  - A JP may only be removed by the Lieutenant Governor in Council after following a complaint review process through the Justices of the Peace Review Council (*JP Act*, ss 12 to 12.8).
  - Mandatory retirement is set at a specific age, being age 70 (*JP Act*, s 8(2)).
  - The retirement age of 70 is consistent with that imposed for PCJs, which demonstrates consistency in legislative approach to the principle of judicial independence.

- Financial Security

  - In 2013, the Legislature amended the *JP Act* to create a commission to inquire into and make recommendations with respect to the annual salary of a JP, the method of calculating the *pro rata* portions of the annual salary, and the contributions to be made to the pension plan (*The Justices of the Peace Amendment Act, 2013*, SS 2013, c 12, s 10.3; see *JP Act*, ss 10.2 and 10.3). The Saskatchewan Justice of the Peace Compensation Commission met in 2013 and 2018 since its creation and will sit again in 2024.

  - Jan Turner, who was then the Assistant Deputy Minister of Courts with the Ministry of Justice, testified that the Ministry of Justice of Saskatchewan does not set compensation for JPs. Rather, adjustments to a JPs salary are tied directly to the salary of PCJs and based on the recommendations of the Saskatchewan Justice of the Peace Compensation Commission. PCJ salaries are determined by the Saskatchewan Provincial Court Commission, established under the *PC Act 1998*, which conducts an independent review of salaries for PCJs (*PC Act 1998*, ss 36-47). As the process to determine the JPs salary is independent, the Executive cannot interfere with the financial security of a JP in a manner that impacts their independence.

  - In her testimony, Ms. Turner mentioned that JPs are afforded additional benefits pursuant to the *JP Act*, including pension, leave and medical benefits, which also form part of a JPs compensation.

- Administrative Independence

  - Ms. Turner testified that the scheduling of JPs and assignment to

> hear specific matters is done entirely through the Supervising JP. This is consistent with s. 13 of the *JP Act*, which legislates that the duties and sittings of JPs are supervised by the Chief Justice of the Provincial Court, who may delegate this authority to the Supervising JP. As such, there is administrative independence for the office of JPs in their work schedules and assignments.

[79] The *Code* permits a distinction on the basis of age if that distinction is permitted or required by any Act or Regulation in force in Saskatchewan. There is a clear distinction required in ensuring that judicial office holders retain judicial independence. Part of that independence is providing security of tenure, which a mandatory retirement age serves to protect. This is not only permitted by the *JP Act* but required as a component of judicial independence.

[80] In my view, this is precisely the purpose of s. 2(2) in the *Code*, which allows the legislature to impose a distinction based on age where such a distinction is required by any Act or Regulation in force in Saskatchewan. The *JP Act* requires a distinction based on age to ensure the principle of judicial independence is protected. There is no conflict between the *Code* and the mandatory retirement age set for Justices of the Peace under the *JP Act*.

Conclusion

[81] The mandatory retirement age for JPs is a component of the independence of the judiciary. As a fixed retirement age cannot be manipulated in a discretionary or arbitrary manner, it is part of the guarantee of security of tenure.

[82] As such, JPs are not denied any benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

[83] A statutory retirement age for JPs provides a consistent, transparent and

objective end-point for their appointment. Rather than being based on discrimination as suggested by the Commission, this mandatory retirement age reflects the protections provided to ensure security of tenure, which is a feature of an independent judiciary.

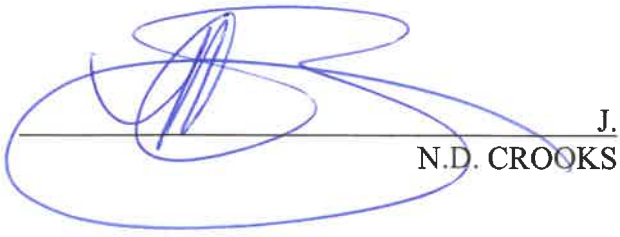
[84] The argument that judicial independence applies to JPs becomes more pronounced when security of tenure is combined with other provisions in the *JP Act* that provide for financial security and administrative independence.

[85] In my view, the mandatory retirement of judicial office holders is an integral component of judicial independence which applies to all courts. While there is a distinction between the precise age of mandatory retirement across the provinces, the standard is not perfection. In my view, a mandatory retirement age of 70 for JPs is proportional and demonstrates minimal impairment.

[86] Therefore, I find that s. 8(2) of the *JP Act* does not violate s. 15 of the *Charter*. Even if there were a breach, it is saved under s. 1 of the *Charter*. Further, this distinction based on age is permitted under the *Code*.

[87] The applications are dismissed in their entirety.

[88] The parties acknowledged that costs are only awarded under s. 36 of the *Code* where there has been "vexatious, frivolous or abusive conduct". In this case, neither party sought costs, and none are ordered.



J.
N.D. CROOKS