Date: October 9, 1997
Docket: CV 07082

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF SECTIONS 2 AND 3 OF THE *LEGAL QUESTIONS ACT* R.S.N.W.T. 1988, c. L-3

AND IN THE MATTER OF A REFERENCE BY THE MINISTER OF JUSTICE OF THE GOVERNMENT OF THE NORTHWEST TERRITORIES CONCERNING WHETHER SECTION 6(2) OF THE *TERRITORIAL COURT ACT* R.S.N.W.T. 1988, c T-2 IS CONSISTENT WITH SECTION 11(d) OF *THE CHARTER OF RIGHTS AND FREEDOMS* AND SECTION 52 OF *THE CONSTITUTION ACT 1982*

Opinion respecting the constitutional validity of term appointments of deputy judges of the Territorial Court.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Heard at Yellowknife , Northwest Territories
on September 3, 1997

Reasons filed: October 9, 1997

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REASONS FOR JUDGMENT

[1] On May 28, 1997, the Minister of Justice for the Northwest Territories referred to this court for hearing and consideration the following question:

> Is section 6(2) of the *Territorial Court Act*, R.S.N.W.T. 1988 c.T-2, of no force and effect, in whole or in part, on the grounds that it is inconsistent with the *Constitution Act* and in particular section 11(d) thereof?

[2] Section 6(2) authorizes the appointment of a "deputy territorial judge" for a fixed period of two years or less. The Minister takes the position that this provision is constitutionally valid. The Chief Judge of the Territorial Court, His Honour R.W. Halifax, sought and was granted intervenor status. He participated, through counsel, at the hearing and took positions contrary to those advanced by the Minister. Two other interested parties, the Territorial Court judges (other than the Chief Judge) and the Law Society of the Northwest Territories, appeared by counsel at the hearing but only to maintain watching briefs. They made no submissions and took no positions. The federal Department of Justice, even though it is the agency that prosecutes all criminal cases in this jurisdiction, declined to intervene in these proceedings.

Legislation & Practice:

[3] The Territorial Court is established by statute and is similar to what are known as "Provincial Courts" in the provinces. It is a territorially-created court composed of territorially-appointed judges. It is, as are the Provincial Courts, what is termed an "inferior court" in the sense that it has no inherent jurisdiction. Its jurisdiction is derived solely from statutes. Nevertheless, the Territorial Court, just like its southern counterparts, exercises a wide jurisdiction in criminal matters, young offender cases, family law matters including child welfare, and small claims and other civil claims. It is a well-known fact that the vast majority of all criminal cases are disposed of in the Territorial Court. The scope of the jurisdiction imposes grave responsibilities on the territorial court judges. They administer justice in a general sense involving both federal and territorial laws.

[4] The *Territorial Court Act* provides that the Commissioner, being the chief executive officer of the Government of the Northwest Territories, may appoint such qualified persons to be judges as the Commissioner considers necessary. Such judges hold office until the retirement age of 65 years. The Commissioner may remove a judge prior to retirement only for misbehaviour or for inability to perform his or her duties properly. This, however, can only be done after an initial investigation by the Judicial Council and then after an inquiry by a judge of a superior court. The Judicial Council is established to, among other things, investigate complaints respecting judges and to make recommendations to the Commissioner on candidates for appointment as judges. In these respects the legislation is unremarkable.

[5] What are remarkable are the Act's provisions respecting deputy judges of the Territorial Court. Section 6 provides for such appointments:

> 6. (1) The Commissioner may appoint such qualified persons to be deputy territorial judges as the Commissioner considers necessary for the due administration of justice in the Territories.
>
> (2) An appointment under subsection (1) shall have effect for a period of two years or for a shorter period as may be specified in the appointment, unless sooner revoked by the Commissioner on the written recommendation of the Chief Judge.
>
> (3) The Commissioner may reappoint a deputy territorial judge.
>
> (4) A deputy territorial judge has all the powers, duties and functions of a territorial judge appointed under subsection 4(2).

[6] The qualifications for a deputy judge are the same as for a "full" territorial judge: Canadian citizenship and at least three years' good standing at the bar of the Territories or another Canadian jurisdiction. The mandatory retirement age of 65 applies as well to deputy judges (presumably in case their appointments overlap their 65th birthday). Deputy judges exercise the same jurisdiction as full judges and I was told that they are, or would be, treated the same for remuneration purposes. But there the similarities end.

[7] As evident from a reading of subsection 6(2) above, the appointment of a deputy judge is for a fixed term of two years or less. The appointment may be revoked prior to the end of the term by the Commissioner. Similarly, the Commissioner may reappoint a deputy judge. There is no qualification on the exercise of the Commissioner's power of reappointment. The Judicial Council has no role in the appointment, revocation of appointment, or reappointment of deputy judges. The revocation power may be exercised without going through the investigation and inquiry stages required for the removal of full judges. The only stipulation in s.6(2) is that the revocation be on the written recommendation of the Chief Judge.

[8] There are other differences. A judge cannot carry on any other profession or business, but the sole restriction on a deputy judge is a prohibition against a partner or business associate appearing before that deputy judge: see s.9 of the Act. Finally, a full judge must reside in the Territories. A deputy judge need not do so.

[9] As part of the background for this reference, I was informed that, while there have been five full-time territorial judges, the Commissioner also appoints deputy judges, at the request of the Chief Judge, from time to time. All of these deputy judges hold appointments for a term of two years. All of the current deputy judges hold full-time appointments as provincial or superior court judges in other jurisdictions. They are assigned work on an as-needed and as-available basis usually of short duration. Up until 1994, the Commissioner also appointed lawyers from private practice in other jurisdictions as deputy judges. It was a condition of such appointments that the individual not practice law before any courts in the Territories. I was told that the practice of appointing lawyers ceased in 1994 due to concerns that such appointments may be in violation of s.11(d) of the *Charter of Rights* (although no steps have been taken to amend the Act to account for this concern).

[10] As additional history, I note with interest the provisions of the predecessor statute to the *Territorial Court Act*, that being the *Magistrate's Court Ordinance*, R.O.N.W.T. 1974, c. M-1. That statute also provided for the appointment of deputy magistrates who had all the powers of a full magistrate. A deputy magistrate was not required to reside

in the Territories. It is notable, however, that the Ordinance set no fixed term for a deputy's appointment and extended the same protections respecting tenure and removal to a deputy as enjoyed by a full magistrate. There was no distinction drawn in the Ordinance.

Background Facts:

[11] I was provided with an Agreed Statement of Facts which provides the background to this reference. The background facts were provided so as to place the legal question into a context of practical considerations.

[12] Up until January of this year, the Territorial Court bench consisted of five resident judges including the Chief Judge. At that time one of the judges retired. The Chief Judge and the Minister agree that the current work-load of the court is such that the appointment of a fifth judge is warranted. The apparent impediment to such an appointment is the impending division of the Northwest Territories.

[13] On April 1, 1999, the presently-constituted Northwest Territories will be divided so as to create the new territory of Nunavut. The new territory will have its own court system and judges. The Minister is concerned that with division there will be a decreased workload for the Territorial Court in what remains as the Northwest Territories and there will be less money available for the administration of justice generally. The Minister feels that it would be prudent to wait until after division to assess the workload and the necessary judicial complement. Hence the Minister suggests the appointment of a deputy judge for a fixed term of 2 years or less as opposed to a full judge for whom this territorial government would have obligations with respect to tenure and financial security after division.

[14] The Chief Judge disagrees with the Minister's projections with respect to future workload and, indeed, takes the position that the court has been under-staffed for several years resulting in significant burdens on the judges in terms of workload. It is the Chief Judge's position that the court requires the appointment of a full judge now and that requirement will continue after division.

[15] The parties acknowledge that arguments over workload are not germane to the legal issue as to constitutionally. A high workload does not by itself validate a court that is constitutionally invalid or incompetent.

[16] It is important, however, to also acknowledge that this is not a test of the constitutional validity of past practices. The Minister wishes to appoint a deputy judge to serve on a full-time basis but for a fixed term. That is significantly different from past and current practice where deputy judges, who now are all sitting judges in other jurisdictions, come to the Territories on a periodic or itinerant basis to sit for short periods of time. The government's proposal would, in effect, create two types of full-time judges, one with tenure until retirement, and the other, designated as a deputy judge, with a fixed term appointment.

Issues & Submissions:

[17] The question posed by this reference deals with the constitutionality of s.6(2) of the *Territorial Court Act* as a general proposition. The Minister and Chief Judge, however, agreed to divide the general question into four sub-issues which they framed as follows:

(A) Does the appointment of a sitting Judge from another jurisdiction as a full-time or part-time deputy judge under section 6(2) of the Act for a fixed term of two years or less violate section 11(d) of the *Canadian Charter of Rights and Freedoms*?

(B) Does the appointment of any other qualified person as a full-time or part-time deputy judge under section 6(2) of the Act for a fixed term of two years or less violate section 11(d) of the *Canadian Charter of Rights and Freedoms*?

(C) Does the appointment of a qualified lawyer from the resident practising Bar of the Northwest Territories as a full-time deputy judge under section 6(2) of the Act for a fixed term of two years or less violate section 11(d) of the *Canadian Charter of Rights and Freedoms*?

(D) Does the appointment of a qualified lawyer from the resident practising Bar of any other province or territory as a full-time or part-time deputy judge under section 6(2) of the Act for a fixed term of two years or less violate section 11(d) of the *Canadian Charter of Rights and Freedoms*?

[18] This division was done, I think, out of a recognition that the validity of the legislation may very well depend on the particular context in which the legislation is invoked. There may be different constitutional imperatives depending on whether the person to be appointed is a judge from another jurisdiction, a retired judge, or a practising lawyer.

[19] The questions listed above refer to both full-time or part-time deputy judges. The submissions made by counsel concentrated, however, on the prospect of a full-time deputy judge. The distinction is not that significant, however, since most of the

considerations are equally applicable to a full-time or a part-time deputy judge appointment.

[20] The arguments made to me centred on the question of tenure and how that question could affect the constitutional principles of independence and impartiality as they relate to the Territorial Court. I think it would be helpful, as an initial point, to repeat something said by Lamer C.J.C. in *R. v Généreux*, [1992] 1 S.C.R. 259, with respect to how these issues are to be examined. The good faith and integrity of the participants in the administration of justice, the practice or tradition, are insufficient to support independence on their own. That is not the test of constitutionality. As stated in *Généreux* (at page 304):

> I emphasize, however, that the independence of a tribunal is to be determined on the basis of the objective status of that tribunal. This objective status is revealed by an examination of the legislative provisions governing the tribunal's constitution and proceedings, irrespective of the actual good faith of the adjudicator. Practice or tradition, as mentioned by this Court in *Valente* (p.702), is not sufficient to support a finding of independence where the status of the tribunal itself does not support such a finding. (emphasis in original)

[21] The arguments also revolved around what was meant by the Supreme Court of Canada when, in *Valente v The Queen*, [1985] 2 S.C.R. 673, LeDain J., writing on behalf of the Court, after identifying security of tenure as one of the essential elements of judicial independence, wrote (at page 698) that the "essence of security of tenure...is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner" (emphasis added).

[22] The Minister takes the position that the appointment of a deputy judge for a fixed term is constitutionally permissible. In reliance on *Valente*, it is submitted that there is nothing objectionable per se about a fixed term appointment so long as there is protection from arbitrary executive action. In this regard counsel points to the safeguard, in s.6(2) of the Act, that an appointment can only be revoked on the written recommendation of the Chief Judge. It is argued that this provides the assurance that any revocation prior to the expiry of the term would be for legitimate court purposes. This was said to be a necessary incident to the Chief Judge's ability to administer and co-ordinate the work of the court from time to time.

[23] Counsel for the Minister also made reference to the provisions of the *Northwest Territories Act*, R.S.C. 1985, c. N-27, respecting the appointment of deputy judges of

this, the Supreme Court of the Northwest Territories. Subsection 35(2) of that Act provides that a deputy judge may be appointed "for any particular cause or for any specified period". I will discuss this provision later in these reasons. Counsel, however, relied on this as an example of the recognition by legislators of unique circumstances in the Northwest Territories. I am not sure what unique features counsel had in mind but I assume he meant the need to cover a large area with limited personnel, the need to travel extensively on court circuit, and the exigencies of dispensing justice in a territory encompassing many cultures and languages. In counsel's submission, the many practical problems in the north mean that, in the eyes of a reasonably informed observer, the independence and impartiality of the court would not be compromised by a temporary appointment whether of a judge, retired judge or practising lawyer.

[24] This argument respecting the unique aspect of the Territories can of course be turned around. It may be said that, since this is a small jurisdiction in terms of population, the judiciary's independence must be secured with even more safeguards because of the pervasive influence of government. This very point was made by Côté J.A. of the Northwest Territories Court of Appeal in *R v Doyle*, [1992] N.W.T.R. 81 (at page 94):

> The Northwest Territories are very different from the rest of Canada. But nothing in the argument or evidence here suggests that they have less need of judicial independence than Yukon or the provinces. Indeed Privy Council appeals over a century show that a small Bench in isolated areas may more easily become entangled with the views of their local government. This court can take judicial notice of the fact that government is a significant presence in Yellowknife, and no less elsewhere in the Northwest Territories. Hence the need for the strictest standards of judicial independence.

It seems to me that there is little point in debating the "uniqueness" of the Territories. The constitutional principles of judicial independence and impartiality apply equally throughout Canada.

[25] The Chief Judge takes the position that any appointment for a fixed term is objectionable, whether it be of a judge or a lawyer, within the terms of s. 6(2) of the Act as it now stands. That is due to what counsel refers to as the arbitrary executive power to revoke the appointment. This power is said to mean that the appointment of a deputy judge is "at pleasure" and any such appointment fails the most fundamental test of constitutionality. This is so even if the revocation can only be on the written recommendation of the Chief Judge. Counsel submits that tenure must be secure from <u>any</u> regulatory authority and presumably that includes the Chief Judge himself.

[26] Counsel for the Chief Judge acknowledges that it is at least arguable that the appointment for a fixed term of a sitting or supernumerary judge from another jurisdiction, with security of tenure by virtue of his or her appointment in that jurisdiction, may be constitutionally permissible. But, under no circumstances would the appointment of a practising lawyer be acceptable. In counsel's submission such a prospect raises an issue of "institutional impartiality" in that such an appointment would not be regarded as independent and impartial due to potential conflicts of interest and promotion of self-interest (including an interest in reappointment). As counsel put it, a very real problem is created by the public perception of a temporary judge thinking of what should be done in the short-term with a view to long-term gains.

[27] Because of the way the issues are presented, it is incumbent on me to cover numerous points. This will not assist in keeping these reasons brief. I want to approach this task by examining first the constitutional parameters of the principles of judicial independence and impartiality as applicable to the Territorial Court and then move on to examine questions relating to security of tenure, reappointment and revocation. After that I will look at other situations where fixed term appointments are contemplated. Finally, I will then attempt to analyze each of the four sub-issues outlined by counsel.

The Constitutional Framework:

[28] The primary question posed for consideration refers to the *Constitution Act* and specifically s.11(d) of the Charter. This wording is somewhat unfortunate for two reasons.

[29] First, s. 11(d) of the Charter guarantees judicial independence and impartiality to those persons accused of offences. It relates, in the context of the Territorial Court, solely to its criminal law jurisdiction:

> 11. Any person charged with an offence has the right...
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

By specifying s. 11(d), it could be said that the question overlooks the wide non-criminal jurisdiction of the court.

[30] Second, the specific judicature provisions of the constitution are those found in s. 99 (service during good behaviour) and s. 100 (the fixing and provision of salaries and pensions) of the *Constitution Act*, 1867. These provisions apply only to federally-appointed superior court judges. Several cases have made the point that these provisions represent the highest degree of constitutional guarantees of security of tenure and financial security and are not necessarily applicable to every adjudicative tribunal (including the provincial and territorial courts) in the same manner.

[31] It is indisputable that much of the litigation during the last 20 years, related to issues concerning the perceived independence or lack thereof of different types of courts and tribunals, emanates directly from a desire to apply to those other bodies the same constitutional standards as those enjoyed by the superior courts. To a great extent these arguments have been met with the response that one cannot apply the same conditions to all adjudicative bodies and that constitutional requirements have to be sensitive to the context in which the particular body acts: see, for example, *Valente* at pages 692-693 and *Généreux* at page 304.

[32] This contextual approach has led to significant concerns about differing standards of judicial independence. In The Independence of Provincial Court Judges: A Public Trust, a study prepared for the Canadian Association of Provincial Court Judges in 1996, Professors D.A. Schmeiser and W.H. McConnell wrote (at page 6):

> In Canadian jurisprudence, there cannot be two standards of judicial independence, one for federally-appointed judges and the other for provincially-appointed judges. Both perform the same function and the public deserves the same constitutional protection. The great majority of Canadians who come into contact with the justice system meet it in the guise of the various provincial courts. If these courts prove to be defective in their independence and impartiality, the whole system suffers.

[33] The constitutional parameters respecting provincial and territorial courts were, I suggest, expanded by the recent judgment of the Supreme Court of Canada in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island etc.*, [1997] S.C.J. No. 75, released on September 18, 1997 (subsequent to the oral argument in this case). That case addressed issues of institutional independence and financial security arising from certain developments in three different provinces.

[34] By its judgment, the Court extends the written and unwritten constitutional underpinnings of judicial independence to all courts. The decision on this point is well summarized in the headnote:

> Sections 96 to 100 of the *Constitution Act*, 1867, which only protect the independence of judges of the superior, district and county courts, and s. 11(d) of the Charter, which protects the independence of a wide range of courts and tribunals, including provincial courts, but only when they exercise jurisdiction in relation to offences, are not an exhaustive and definitive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act*, 1867 -- in particular its reference to "a Constitution similar in Principle to that of the United Kingdom" -- which is the true source of our commitment to this foundational principle. The preamble identifies the organizing principles of the *Constitution Act* 1867 and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text. The same approach applies to the protection of judicial independence. Judicial independence has now grown into a principle that extends to all courts, not just the superior courts of this country.

[35] In his reasons on behalf of the majority, Lamer C.J.C. held that the express provisions of the Constitution, such as s. 11(d) of the Charter, should be understood as "elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act*, 1867" (parag. 107). He then stated that the general principle of judicial independence is one that applies to all courts no matter what kind of cases they hear.

[36] This judgment, in my opinion, emphasizes the need to scrutinize with great care the legislative provisions affecting the Territorial Court to determine if they are compatible with the constitutionally recognized principles of judicial independence and impartiality. This analysis cannot, in my view, be restricted simply to the scope of s.11(d) of the Charter. I think as well that the parties did not intend to limit the scope of this inquiry. The parties want an opinion on the constitutional validity in general of the four schemes proposed by the Minister. That is the way the arguments were presented.

Independence and Impartiality:

[37] Prof. Peter Hogg, in his text, Constitutional Law of Canada (3rd ed., 1992), at section 7.1(c), writes that the independence of the judiciary is a value so deeply-rooted and so powerful in Canada and other common law democracies that there is little point in engaging in a fine analysis of the actual language of the provisions by which it is protected. I certainly need not go on at length about the societal value of judicial independence. A concise summary was provided by Strayer J. in *Gratton v Canadian Judicial Council*, [1994] 2 F.C. 769 (T.D.), at page 782:

> I will not indulge in another panegyric on judicial independence, its meaning and its importance. Authoritative expressions of its nature and role can be found elsewhere. Suffice it to say that independence of the judiciary is an essential part of the fabric of our free and democratic society. It is recognized and protected by the law and the conventions of the Constitution as well as by statute and common law. Its essential purpose is to enable judges to render decisions in accordance with their view of the law and the facts without concern for the consequences to themselves. This is necessary to assure the public, both in appearance and reality, that their cases will be decided, their laws will be interpreted, and their Constitution will be applied without fear or favour. The guarantee of judicial tenure free from improper interference is essential to judicial independence. But it is equally important to remember that protections for judicial tenure were "not created for the benefit of the judges, but for the benefit of the judged".

[38] Until relatively recently the concepts of independence and impartiality were regarded as inseparable. Recent jurisprudence has recast these concepts as separate and distinct values. They are nevertheless still linked together as attributes of each other. Independence is the necessary precondition to impartiality. It is the *sine qua non* for attaining the objective of impartiality. Hence there is a concern with the status, both individual and institutional, of the decision-maker. The decision-maker could be independent and yet not be impartial (on a specific case basis) but a decision-maker that is not independent cannot by definition be impartial (on an institutional basis).

[39] In *Valente* (at page 685), LeDain J. stated that impartiality "refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case" while the word independent "connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of the government, that rests on objective conditions or guarantees". And, he went on (at page 689), the test for both independence and impartiality is not just the objective status of the tribunal but also whether the tribunal can be reasonably perceived as independent and impartial:

> Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and the acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions

> or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.

[40] The test of “reasonable perception” is that formulated for apprehension of bias in *Committee for Justice and Liberty v National Energy Board*, [1978] 1 S.C.R. 369 (at page 394): “What would an informed person, viewing the matter realistically and practically | and having thought the matter through | conclude?”

[41] In *Valente* and subsequent cases, such as *R v Beauregard*, [1986] 2 S.C.R. 56, and *R v Lippé*, [1991] 2 S.C.R. 114, the Supreme Court of Canada developed four aspects to the constitutional imperatives of independence and impartiality:

> (1) "Individual independence", defined as the "complete liberty of individual judges to hear and decide the cases that come before them without interference from any outsider" (as per *Beauregard* at page 69). This individual independence component is reflected in part by such matters as security of tenure and financial security.
>
> (2) "Institutional independence", defined as "judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function" (as per *Valente* at page 712). The institutional independence of a court or tribunal is reflected in its institutional or administrative relationships to the executive and legislative branches of government as well as in such matters, as shown by the recent *Reference* case, as financial security on a collective basis.
>
> (3) "Individual impartiality", which connotes absence of bias, actual or perceived (as per *Valente* at page 685). This relates to the state of mind of the decision-maker on a case-by-case basis.
>
> (4) "Institutional impartiality" which, like institutional independence, will not be met if the objective conditions and structure of the system being examined create a reasonable apprehension of bias on an institutional level (as per *Lippé* at pages 140-141). This requirement is not satisfied merely by the lack of bias of any particular judge in any particular case.

All of these aspects come into play in some manner on this reference.

Security of Tenure:

[42] In *Valente*, LeDain J. identified three essential elements of judicial independence: (a) security of tenure; (b) financial security; and (c) institutional independence in the administration of the courts bearing on the exercise of the judicial function. As he noted (at page 694): "Security of tenure, because of the importance that has traditionally been attached to it, must be regarded as the first of the essential conditions of judicial independence..." He then laid down (at page 697) two basic requirements for security of tenure for provincial court judges: removal only for cause "related to the capacity to

perform judicial functions" and only after a "judicial inquiry at which the judge affected is given a full opportunity to be heard".

[43] Given these pronouncements, ones which have been repeatedly approved by the Supreme Court of Canada in subsequent cases, I think it is fair to say that both counsel recognized obvious defects in the legislation under examination here. It is worthwhile to examine once again the legislative provisions because, in my opinion, they create two different classes of judge (even though these judges have the same powers and duties).

[44] The *Territorial Court Act*, as previously noted, provides for the appointment of full-time, resident territorial judges who hold office until the retirement age of 65 years. Candidates for appointment are reviewed and recommendations are made to the Commissioner by the Judicial Council, a body composed of the senior judge of the Supreme Court, the Chief Judge, a representative of the Law Society and two other individuals appointed by the Minister of Justice. I am mindful of the fact that in 1992 the Court of Appeal, in the aforementioned *Doyle* case, outlined a number of deficiencies in the composition of the Council, deficiencies which have not yet been addressed by legislative changes notwithstanding the government's opportunity to do so. Nevertheless, the involvement of the Judicial Council provides some mitigation of any arbitrary exercise of the appointment power by the Commissioner.

[45] Section 6(1) of the Act, on the other hand, provides that the Commissioner may appoint deputy judges and, because s.31(1)(a) specifically excludes the appointment of deputy judges from Judicial Council review, it is a power that can be exercised unilaterally and arbitrarily.

[46] Issues relating to the appointment or reappointment of judges have not been directly addressed by the Supreme Court of Canada although there were some comments in *Valente* which may be helpful. One of the concerns in *Valente* was the post-retirement reappointment of Provincial Court judges in Ontario. The legislation originally provided that reappointment was at the discretion of the government. Prior to the hearing in the Supreme Court the legislation was amended to provide that reappointment was subject to the approval of the Chief Judge and a Judicial Council established for the court. LeDain J. commented (at pages 703-704) that this change in the law, "while creating a post-retirement status that is by no means ideal from the point of view of security of tenure", removed the principal objection to the reappointment process, that being the exercise of discretionary power by the executive.

[47] These issues have been the subject, however, of numerous commentaries. There is general agreement that, while the ultimate appointment power may rest with the executive, that power should be tempered by at least consultation with some independent body that has broader representation than just government: see, for example, Prof. M.L. Friedland's report for the Canadian Judicial Council, A Place Apart: Judicial Independence and Accountability in Canada (1995), at pages 233-268. This role, in the Northwest Territories, is played by the Judicial Council. Section 31 of the Act directs the Judicial Council to consider and recommend to the Commissioner candidates for appointment as territorial judges and as the Chief Judge. These recommendations are not binding on the Commissioner; they are advisory only. The Judicial Council, however, plays no role in the appointment or reappointment of deputy judges.

[48] The dangers of a completely unbridled appointment power in the executive were discussed by the Manitoba Law Reform Commission, The Independence of Provincial Judges (1989), at page 18:

> Unless the public is assured that judges are appointed by means of a consistent selection process with objective enunciated standards, it cannot entirely be blamed for cynically concluding that the process has more to do with politics than it does with merit. Where appointments are seen to be made behind closed doors, the perception will inevitably arise (however unjustly) that appointment to the Bench is a reward for political service. This in turn may precipitate the belief among both the public and the legal profession that Provincial Court judges, having attained their position as a result of the government's favour, are therefore obligated to that government, in a manner which might seriously undermine the independence of the judiciary. The effect on public confidence in the legal system could be corrosive.

Because of these dangers, most jurisdictions require the involvement of either a review body or a nominating committee in the appointment of judges.

[49] These dangers are equally present, if not more so, in the reappointment of deputy judges. Section 6(3) of the Act empowers the Commissioner to reappoint a deputy judge. There are no statutory criteria for the exercise of this power and no role to play for the Judicial Council. It seems to me that, if it can be said that there may be a perception that a judge appointed through some secret and arbitrary manner is beholden to the government, that perception would only be reinforced if the judge had to rely on the same arbitrary power for reappointment.

[50] In A Place Apart (noted above), Prof. Friedland comments on the perception problems associated with elevations, i.e., moving a judge to a higher level court or to a higher position such as Chief Judge. He makes the point that there is a blatant conflict of interest for any judge who is interested in such an elevation in trying to seem attractive to the government so as to be considered for it. He quotes an English judge (at page 255): "A judge who often found against the government, or in some other way displeased the executive, might find that promotion did not come his way." Prof. Friedland recommends that all elevations be subject to review by an independent committee. In my opinion, his concerns and comments are equally applicable to the reappointment of deputy judges.

[51] I note with interest that the Yukon *Territorial Court Act*, R.S.Y. 1986, c.169, which also has provision for deputy judges, requires the involvement of its Judicial Council in both the appointment and reappointment process:

> 7.(1) The Commissioner in Executive Council, on the recommendation of the judicial council, may appoint such judges as he considers necessary.
>
> (2) A deputy judge may be appointed for a term of not more than five years recommended by the judicial council, but a deputy judge is not eligible for reappointment after the expiration of his term except upon the recommendation of the judicial council.

It seems to me that subsection (2) sets out the minimum acceptable standard to meet.

[52] In my opinion, the unlimited discretion reposed in the executive to appoint or reappoint deputy judges is incompatible with the principles of independence, both individual and institutional, and leads to the perception of a lack of impartiality. It results in deputy judges being subject to a different legislative regime than full territorial judges. It therefore results in two classes of judges.

[53] This point takes on added significance because the arbitrary power to revoke the appointment of a deputy judge prior to the expiry of the term amounts to service at pleasure. And, in my opinion, that is constitutionally impermissible for any adjudicative body, but especially for a court that administers laws of general application.

[54] Subsection 6(2) provides that a deputy judge appointment is for a period of 2 years or less as specified in the appointment, but it may be revoked prior to the end of the fixed term by the Commissioner "on the written recommendation of the Chief Judge". Is this proviso a sufficient safeguard against arbitrary action? Does it, in the perception of the

reasonably informed objective observer, alleviate concerns about arbitrary interference with the independence of a deputy judge?

[55] The requirement for the written recommendation of the Chief Judge is there, in the submission of the Minister's counsel, as an assurance that the revocation of any appointment would be done only on a *bona fide* basis. I would like to think, as LeDain J. also said in *Valente* (at page 704), that senior judicial officers "may be reasonably perceived as likely to act exclusively out of consideration for the interests of the Court and the administration of justice generally". But it seems to me that, even if a chief judge acts for what he or she thinks are *bona fide* reasons, this unfettered power to recommend the revocation of a deputy judge's appointment is no less of an incursion into the security of tenure of those judges. And, it should be noted, in *Valente* LeDain J. was commenting on the involvement of the chief judge and a judicial council in the appointment and reappointment of retired judges, not their removal.

[56] In *Beauregard*, then Chief Justice Dickson noted that threats to individual independence can come from different sources (at page 69):

> ...the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them; no outsider - be it government, pressure group, individual or even another judge - should interfere in fact, or attempt to interfere, with the way a judge conducts his or her case and makes his or her decision. (emphasis added)

[57] In *Lippé*, current Chief Justice Lamer stated the concern more bluntly (at page 138):

> I would also include any person or body within the judiciary which has been granted some authority over other judges; for example, members of the court must enjoy judicial independence and be able to exercise their judgment free from pressure or influence from the Chief Justice. (emphasis added)

[58] It is not inconceivable that some future Chief Judge may have ulterior reasons to recommend revocation of a deputy judge's appointment. There are no limitations in the Act. In a situation where the deputy judge is actually serving on a full-time basis, albeit for a limited term, it is not inconceivable that the deputy judge may make subtle accommodations due to his perceived need to not offend the Chief Judge. If the appointment is revoked the judge is out of work. The perception of a deputy judge's impartiality can be harmed if it appears that, out of concern about a premature end to the

appointment or for future reappointment, the deputy judge harbours thoughts about how his or her decisions may be viewed by the executive of the government as well as by the Chief Judge.

[59] With respect to the removal of full territorial judges prior to retirement, the Act provides the necessary indicia of security of tenure as identified in *Valente*: removal only for cause and an opportunity for independent inquiry. The procedure is outlined in s.13 of the Act:

> 13.(1) The Commissioner may, by order, remove a territorial judge from office before his or her retirement date or the date when his or her appointment expires only for misbehaviour or for inability to perform his or her duties properly and if
>
> (a) the circumstances respecting the misbehaviour or inability are, on the recommendation of the Judicial Council, first inquired into; and
>
> (b) the territorial judge is given reasonable notice of the time and place for the inquiry and is afforded the opportunity, by himself or herself or his or her counsel, to be heard, to cross-examine the witnesses and to produce evidence on his or her own behalf.
>
> (2) For the purpose of making an inquiry under subsection (1), the Commissioner shall appoint a judge of any superior court.
>
> (3) A judge appointed under subsection (2) has all the powers of a Board appointed under the *Public Inquiries Act*.
>
> (4) A judge appointed under subsection (2) shall make an inquiry and report on the inquiry to the Commissioner.
>
> (5) The order and the report referred to in this section shall be laid before the Legislative Assembly if it is then in session or, if the Legislative Assembly is not in session, at the next session.
>
> (6) The procedure for removal of a territorial judge under this section does not apply to the revocation of an appointment of a deputy territorial judge.

[60] Counsel for the Minister argued that this removal process applies equally to a deputy judge except for the situation where the revocation power in s.6(2) is used. Assuming that counsel is correct, this means that if there was cause to remove a deputy

judge prior to the expiry of the term of his or her appointment, the Commissioner could invoke the process envisioned above, that is to say, an initial recommendation by the Judicial Council and a subsequent inquiry by a superior court judge. Why would that be done? What is the incentive in doing so when all that need be done is the written recommendation of the Chief Judge to revoke the appointment? There are no criteria established for exercise of the revocation power so presumably it could be invoked for cause or without cause (for example, as suggested by the Minister's counsel, for administrative efficiency).

[61] All of this reinforces my conclusion that the Act creates two classes of judges. One class, what I have referred to as full territorial judges, enjoy security of tenure while the other class, the deputy judges, serve at pleasure. This is exactly the situation that LeDain J. contemplated and disapproved in *Valente* (at pages 702-703):

> ...where...the legislature has expressly provided for two kinds of tenure | one under which a judge may be removed from office only for cause and the other under which a judge of the same court holds office during pleasure | I am of the opinion that the second class of tenure cannot reasonably be perceived as meeting the essential requirement of security of tenure for purposes of s.11(d) of the *Charter*. The reasonable perception is that the legislature has deliberately, in the case of one category of judges, reserved to the Executive the right to terminate the holding of office without the necessity of any particular justification and without any inhibition or restraint arising from perceived tradition. I am thus of the view that a judge...who held office during pleasure...could not be an independent tribunal within the meaning of s.11(d) of the *Charter*.

[62] The fact that the Chief Judge has a role to play in the revocation process, indeed a key role, is in my opinion no answer to this problem. If a Chief Judge recommends the revocation of an unpopular deputy judge, it could be perceived that the Chief Judge was merely an extension of the executive. I fail to see how one arbitrary power could validate another one. Granted one should be able to rely on the integrity of the Chief Judge. But that is not to say that all Chief Judges can be impervious to the demands of the executive, whether they be to control budgets or to influence decisions. This is especially worrisome when it is the Chief Judge who primarily has the role of representing the judiciary in day-to-day administrative matters and negotiating with the executive over financial and other matters. In my view a reasonable objective observer would not regard the involvement of the Chief Judge as a sufficient safeguard to the arbitrary revocation of a deputy judge's appointment.

[63] In *Ruffo v Conseil de la magistrature*, [1995] 4 S.C.R. 267, the Supreme Court characterized a chief judge as being only *primus inter pares* in the court. He or she enjoys no particular authority over other judges save an administrative one. This was recently reaffirmed by the Court in *Canada (Minister of Citizenship & Immigration) v Tobiass*, [1997] S.C.J. No. 82. In the case of deputy judges of the Territorial Court, however, it can be said that the Chief Judge possesses the discretionary power to initiate and effect their removal. This, in the eyes of a reasonable observer, can only be viewed as a significant encroachment on the independence of deputy judges.

[64] The provisions relating to the revocation of appointments should be struck out of the legislation. I refer specifically to the last clause in s.6(2) ("unless sooner revoked by the Commissioner on the written recommendation of the Chief Judge") and all of s.13(6). These have the effect of creating service at pleasure and therefore are incompatible with the constitutional guarantee of judicial independence. In my opinion, if challenged, these provisions would be held to be of no force or effect.

[65] I am fortified in this opinion by the judgment of my former colleague, de Weerdt J., in *Walton v Hebb*, [1984] N.W.T.R. 353 (S.C.). That case involved a challenge to the status of Justices of the Peace. The legislation in force at the time provided that Justices of the Peace were appointed for a term of three years at pleasure. De Weerdt J. held this to be in contravention of the constitutional guarantee of judicial independence and struck down the legislation. He held (at page 379) that Justices of the Peace should be regarded as having full security of tenure subject only to resignation or the process of the courts. In 1989, the legislature responded by amending the *Justices of the Peace Act*, R.S.N.W.T. 1988, c. J-3, to provide that Justices hold office until retirement at age 75 and their appointments can only be revoked after inquiry by an independent review council. It is therefore ironic, an irony not missed by the Chief Judge's counsel, that Justices of the Peace (who are for the most part part-time lay people performing limited functions) should be better positioned with respect to tenure than deputy judges of the Territorial Court. This disparity in the treatment of judicial officers should not be countenanced.

[66] Based on these considerations, I have concluded that the Act does not contain objective conditions or guarantees of independence for deputy judges. The tenure issues, specifically the discretionary powers of appointment, reappointment and revocation, serve to undermine not only the perceived individual independence and impartiality of any specific deputy judge but also the institutional independence and impartiality of the Territorial Court. I say this recognizing that, in some contexts, there may be sufficient

safeguards to overcome some of these problems. I will discuss that further when I analyze each of the four subsidiary questions posed by counsel.

Fixed Term Appointments:

[67] I noted previously that much of the argument presented to me addressed what LeDain J. meant by his reference to a "fixed term" in *Valente* (at page 698):

> The essence of security of tenure for purposes of s.11(d) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner. (emphasis added)

[68] There is no exploration of the concept of "fixed term" appointments in the jurisprudence save and except with reference to specialized situations.

[69] In *Généreux* (noted previously), the majority of the Supreme Court of Canada held that the appointment of a career officer as a military judge for a specific period of time does not violate the guarantee of judicial independence so long as there could be no interference by the executive (or the "chain of command") during that period. This case, in my view, is not very helpful. The Court recognized that a separate system of military law, working within the broader military structure, requires a distinct regime of service tribunals. The content of the constitutional guarantee of an independent and impartial tribunal may justifiably differ as between the military context and that of the civilian courts (see page 296). In my opinion the points articulated in *Généreux* are specific to the military justice system and of limited application to a court exercising criminal and civil jurisdiction for the public at large.

[70] In the case of *Régie des alcools et al v 2747-3174 Quebec Inc.*, [1996] 3 S.C.R. 919, the Court had occasion to consider security of tenure in the context of fixed term appointments to the Régie, a tribunal exercising quasi-judicial functions. The majority judgment concluded that the appointment of tribunal members to fixed terms of five years satisfies the tenure aspects of judicial independence and impartiality since sanctions were available for any arbitrary interference with the appointments. Gonthier J., on behalf of the majority, in saying that fixed-term appointments are acceptable in such a case, said that the requirements of independence, contextually analyzed, "do not require that all administrative adjudicators, like judges of courts of law, hold office for life" (page 964). Hence, I consider this case to be of little assistance on this reference.

[71] Counsel for the Minister submitted that the reference by LeDain J. to a "fixed term" necessarily implies an acceptance of the fact that there is nothing objectionable per se in such an appointment provided that the issues of non-interference and removal for cause are adequately addressed in the legislative scheme. Counsel for the Chief Judge argued, in essence, that a fixed term appointment must be considered in context. In his written submissions, counsel argued that the appointment of a deputy judge for a fixed term | one who does not hold judicial office in another Canadian jurisdiction | raises the reasonable perception that the appointee would decide cases in such a manner that might favourably influence his or her reappointment for a further term or perhaps for a full lifetime appointment. In counsel's words, the Supreme Court could not have intended such an obvious result by using the words "fixed term".

[72] I think it would be useful if I canvassed how term appointments are treated elsewhere and what, if anything, is said about the topic by people who have examined the point. I think so because of, first, the Chief Judge's position that all fixed term appointments, save perhaps those of judges with "lifetime" or "retirement" tenure in another jurisdiction, are unconstitutional and, second, the reference by the Minister's counsel to other statutes where fixed term appointments seem to be contemplated.

[73] It is interesting to note, as the Minister's counsel points out, that no province has provision for the appointment of a "deputy judge" to its provincial court. Only Yukon, as previously noted, contains such a position (but, as previously discussed, with some significant differences from the Northwest Territories legislation). Some provinces provide for the appointment, either on a part-time basis or a term basis, of judicial officers with limited jurisdiction (such as Justices of the Peace and small claims court judges). But as noted previously, Justices of the Peace in this jurisdiction are now appointed at good behaviour until retirement.

[74] Several provinces have fixed term appointments for retired or supernumerary judges (as does the *Territorial Court Act* in s.11). Some of these have been the subject of litigation.

[75] In *Re Fleming and the Queen* (1985), 24 C.C.C. (3d) 264 (Nfld. S.C.), the court considered certain provisions of the *Provincial Court Act* of Newfoundland. The Act, at the time, provided that a judge who has reached retirement age may be appointed a supernumerary judge and may be appointed, by the executive, to sit as a judge "for such period" or "for such special purposes" as the executive may specify. In addition, the executive had discretion to set such a judge's remuneration. In striking down these provisions, Goodridge J. termed such appointments as "contract judges" (at page 277):

> Section 24.1 permits the creation of a "contract judge", a person hired to adjudicate for a certain period of time or for a certain purpose and to be paid such remuneration as the Lieutenant-Governor in Council may see fit without reference to what remuneration may be payable either to unretired judges or to other supernumerary judges appointed to act.
>
> The section seems contrary to the concept of an independent judiciary. It is difficult to conceive how a "contract judge" could be regarded as independent.
>
> Holding office during good behaviour is the hallmark of independence. Anything less than that removes the independence and a person being tried by such a person is not being tried by an independent tribunal.

[76] In *Pellerin v Thérien* (1997), 148 D.L.R. (4th) 255 (Que. C.A.), the court was asked to consider the status of a retired judge who had been appointed for a specific term. The Quebec *Courts of Justice Act* provides that a retired judge of the Court of Quebec may be appointed, at the request of the chief judge, for a fixed term to carry out judicial functions that are assigned to him or her by the chief judge. It was argued that such an appointment constituted an unconstitutional second class of judge. The Court of Appeal upheld the validity of such an appointment because (i) the appointment, albeit for a fixed term, was during good behaviour so the judge could be removed only by the procedure established for the removal of all judges; (ii) the request for the appointment and the judicial assignments were within the purview of the chief judge; and, (iii) the financial benefits of the appointment were fixed by statute and no different than any other judge.

[77] Finally, in the recent case of *Craig v British Columbia*, [1997] B.C.J. No. 1417 (S.C.), the court reviewed certain similar provisions of the *Provincial Court Act* of British Columbia. Under challenge was an amendment that removed the right of a judge to elect supernumerary status. Instead it provided that where a judge retires, the government may reappoint him or her. Parrett J. held that the discretionary power of appointment given to the government had to be modified by the involvement of a non-government body such as a judicial council. In doing so he said (at paragraphs 96 and 97 of his judgment):

> There is nothing, in my view, inherently objectionable to part-time appointments or ad hoc appointments which can be used to alleviate workload pressures or unusual problems provided that safeguards are maintained to ensure institutional impartiality.

> Such safeguards would include the involvement of the Judicial Council in the selection of candidates for part time appointments.

[78] These cases dealt with the appointment of retired judges for specific terms. They have certain things in common. Appointments should have the involvement of some other body than merely being at the discretion of government and the appointment must be secure for the duration of the term. But no case addresses the appointment of non-judges to a full-time fixed term position. The case of *Lippé* (referenced previously) dealt with the appointment of lawyers to part-time municipal court judgeships and I will address it in detail later in these reasons.

[79] As I noted previously, the Minister's counsel made reference to the power of the federal government to appoint deputy judges of the Supreme Court of the Northwest Territories. The specific provision is s.35 of the *Northwest Territories Act*, R.S.C. 1985, c. N-27:

> 35.(1) The Governor in Council may appoint any person who is or has been a judge of a superior, county or district court of any of the provinces or a barrister or advocate of at least ten years standing at the bar of any province to be a deputy judge of the Court and fix his remuneration and allowances.
>
> (2) A deputy judge may be appointed pursuant to subsection (1) for any particular case or cases or for any specified period.
>
> (3) A deputy judge holds office during good behaviour, but is removable by the Governor General on address of the Senate and House of Commons.

A similar provision can be found in the federal statutes respecting Yukon and the soon-to-be territory of Nunavut.

[80] There have been for many years a large number of deputy Supreme Court judges who come to the Territories for short-term assignments on an as-needed basis. But all of these judges hold appointments that are not limited by a fixed term and I know of no such appointment ever having been made of someone who was not a permanent, supernumerary, or retired judge of another superior court.

[81] The legislative history seems to support the inference that it was always contemplated that deputy judges would be judges in their own right. In 1886, when the

Northwest Territories included what are now Alberta and Saskatchewan, the *Northwest Territories Act* provided for a Supreme Court bench of five full-time resident judges. There was no provision for deputy judges. In 1906, after the creation of those provinces, the Territories reverted to a system of stipendiary magistrates. These were primarily bureaucrats and police officers. No specific qualifications were required. The Act of 1906, however, also provided for a type of deputy judge. One had to be a judge in a province:

> 33. The Governor in Council may vest in any judge of any court of any province the power of hearing and determining, either in the first instance or on appeal, any civil or criminal proceeding arising within the Territories, and, in case of appeal, may prescribe the procedure in respect thereof.

This provision obviously dealt with a judge hearing a specific case, not a term appointment and not a non-judge. Our current system dates from 1955 when the predecessors to what are now the Supreme and Territorial Courts, both staffed with legally-trained resident judges, were established.

[82] The *Federal Court Act*, R.S.C. 1985, c. F-7, is the only other federal statute that I know of that provides for deputy judge appointments. Section 10 of that Act allows for the appointment of a judge of a superior court or one who has held office as such a judge to be appointed "in general terms or for particular periods or purposes". Such appointments must be at the request of the Chief Justice of the Federal Court and with the consent of the chief justice of the court of which the appointee is a member or the attorney-general of that province. Again I know of no history of making fixed term appointments. Prof. J.S. Ziegel, in his study "Federal Judicial Appointments in Canada", (1987) 37 Univ. of Toronto L.J. 1 (at page 21), notes that he was "not aware of the federal government ever having made untenured appointments to provincial superior courts or to federal courts". By that he meant anything other than "permanent" appointments serving during good behaviour.

[83] It seems to me that the question of the advisability of full-time temporary appointments to courts applying the general law is very much an open one. There is no history of it in Canada (except in the case of supernumerary or retired judges). Having said that, however, it also seems to me that the constitutionality of such an appointment will no doubt depend on the context.

[84] Generally speaking the temporary appointment of judges is one that has been disparaged in international circles. Prof. S. Shetreet, in "Judicial Independence: New

Conceptual Dimensions and Contemporary Challenges", in Shetreet & Deschênes, eds., Judicial Independence: The Contemporary Debate (1985), summarizes the generally prevailing attitude based on his analysis of the systems in many countries including Canada (at page 628):

> Another undesirable feature is general temporary appointment to a judicial post made in some countries, to different levels of the court system. Normally, members of the Bar are temporarily appointed as temporary judges. This can lead to a questioning of judicial impartiality by the public, since the motives for the appointment of such temporary judges may be influenced by political and other pressures and not from purely judicial interests. We find countries in which there is no objection to such temporary judgeships, especially in the lower courts and in the case of expert lay judges.
>
> In general, the power of temporary appointments is granted to the same authority as is responsible for appointing permanent judges. A variety of forms are used, limiting the duration of such an appointment or the grounds on which it can be made in the first place, a possibly safer form of limitation with regards to possible abuse. There are obviously countries which do not grant this power though some will appoint temporary judges for courts of specialized jurisdiction.
>
> It would appear that if temporary appointments are to be allowed, there must exist mechanisms such as a procedure of approval by a judicial council so as to ensure that temporary appointments are made only when they are vital for efficient judicial administration in almost emergency situations. International standards disapprove temporary appointments. The Montreal Declaration (§ 2.20) condemns them as inconsistent with judicial independence. The IBA Standards (§ 23(b) provide for only a restrained disapproval.

[85] The reasons for the international disapprobation of temporary appointments should be obvious. One of the main weapons in the arsenal of dictatorships is the maintenance of a charade of the rule of law by "stacking" the courts with people who can be expected to be compliant judges. Perhaps in Canada we have not given much thought to this question because of the "deep-rooted" nature of judicial independence in our society. It would be inconceivable that any government in Canada would attempt to control the courts in this manner.

[86] Several Canadian academics have, however, recommended the development of temporary or part-time appointments, both as a way of relieving work-load pressures and as a way of evaluating future candidates for permanent appointment. Both Prof. Ziegel,

in his study (at pages 19 to 22), and Prof. Friedland, in his report to the Canadian Judicial Council (at page 260), suggest the development of a part-time or temporary appointment system. But I note that Prof. Friedland adds the comment that "the system could require that politically sensitive matters not be given by the chief justices or chief judge to part-time judges". It seems to me that this is no different than creating a separate class of judge with respect to powers. What both of these authors acknowledge, however, is that not only are there serious questions regarding judicial independence in such schemes but also serious doubts about the ability of federal and provincial governments to constitutionally implement such schemes.

Specific Questions Posed:

[87] I will now address each of the four specific questions posed by counsel. Those questions are context-specific and so require separate analysis. There are some common features in my response, however, applicable to all of them.

[88] With respect to all four questions, I am making the following assumptions: (1) the appointment or any reappointment would have the involvement of the Judicial Council; (2) the position would be secure for the term of the appointment (hence no discretionary power to revoke the appointment before expiry of the term); (3) any revocation or removal must be for cause and subject to the same removal process as for full judges; and, (4) there would be no differentiation in the total remuneration available for deputy judges and full judges. Points (1), (2) and (3) merely represent what I regard as the minimally acceptable constitutional safeguards for all judges. Without them I would not consider any proposal to be constitutionally valid.

[89] Point (4) is an assumption based on the representations of counsel. I recognize that the Act includes deputy judges in its reference to the Commissioner enacting regulations respecting the remuneration of judges. As LeDain J. noted in *Valente* (at page 704), the essence of financial security for judges is that "the right to salary and pension be established by law and not be subject to arbitrary interference by the executive". He accepted a system whereby the remuneration is set by regulation although clearly it would be preferable to have it fixed by statute.

[90] **A. Does the appointment of a sitting Judge from another jurisdiction as a full-time or part-time deputy judge under section 6(2) of the Act for a fixed term of two years or less violate section 11(d) of the *Canadian Charter of Rights and Freedoms?***

[91] The Chief Judge's counsel concedes that it is at least arguable that the appointment of a sitting judge with security of tenure in that judge's home jurisdiction may not violate the constitutional guarantee of an independent and impartial tribunal. It is argued, however, that security of tenure in a visiting judge's home jurisdiction does not address his or her security of tenure in this jurisdiction. At issue is the protection of their judicial independence in the Northwest Territories.

[92] The concept of a "part-time" deputy judge who is a sitting judge in another jurisdiction is, to me, no different than what the situation is now: periodic assignments by non-resident full-time judges. The concept advanced on this reference, however, is that a sitting judge would take a leave of absence from their home jurisdiction for the term of their "full-time" deputy judge appointment in the Territories. At the end of the term the judge would return to his or her home jurisdiction.

[93] It seems to me that, with the safeguards provided by satisfaction of the four assumptions I noted previously, no reasonable and knowledgeable observer would perceive that the independence of such a deputy judge would be impaired. Nor do I consider the fact that it would be a term appointment objectionable provided that the judge does have security of tenure, as envisioned in *Valente*, in the home jurisdiction.

[94] The Minister's counsel suggests that, even if no changes are made to s.6(2) of the Act, there can be no perception of a lack of independence in a sitting judge serving on a deputy basis for a fixed term. After all, if the appointment is revoked prior to its expiry, the judge can return to the home jurisdiction. I disagree. The legislative changes that are implicit in my four assumptions relate to questions of institutional independence and impartiality. How those provisions may affect any specific deputy judge is irrelevant. It is the objective status that must conform to constitutional standards. Furthermore, without the changes I have suggested regarding the appointment, reappointment and revocation provisions of the current Act, the perception of the Territorial Court as an independent and impartial institution is compromised. Those present provisions create two classes of judges and that is impermissible, no matter who holds the position.

[95] Accordingly, provided the four assumptions I set out previously are satisfied, my opinion is that the term appointment of a deputy judge who is already a sitting judge in another jurisdiction would be constitutionally permissible. So, my answer to this first question is "no".

[96] **B. Does the appointment of any other qualified person as a full-time or part-time deputy judge under section 6(2) of the Act for a fixed term of two years or less violate section 11(d) of the *Canadian Charter of Rights and Freedoms?***

[97] In his written submissions, the Minister's counsel, when speaking of "any other qualified person", refers to an inactive lawyer, supernumerary judge or retired judge. I prefer to restrict my discussion of this issue to supernumerary or retired judges. The question of an inactive lawyer being appointed is to me no different than an active lawyer being appointed. In most jurisdictions there is very little a lawyer need do to move back and forth from the active and inactive categories. In my mind it is more logical to include inactive lawyers in the general category of lawyers for this reference.

[98] In the context of this discussion, a "retired" judge is just that: one who has reached the eligible age for retirement and no longer has judicial duties. Such a person may carry on any other profession. A "supernumerary" judge has different meanings. In some jurisdictions, a supernumerary judge is one who, through a combination of age and years of service, may elect supernumerary status: see, for example, section 29 of the *Judges Act*, R.S.C. 1985, c. J-1, in the case of superior court judges. These judges are, to all intents and purposes, "sitting judges" but with a diminished workload. Federally-appointed judges who go supernumerary, for example, are subject to the same restrictions on outside employment as regular judges: *Judges Act*, s.55. They are also usually subject to some mandatory retirement age or a fixed term when even this status must be vacated. In some jurisdictions, however, a "supernumerary" judge is simply one who has been appointed for a further term after reaching the mandatory retirement age. So, for my purposes, the question of a "retired" judge applies equally to this second type of "supernumerary" judge. Henceforth, when I use the term "supernumerary", I use it in reference to the first type I noted above.

[99] Considering the widespread practice in many Canadian jurisdictions of using supernumerary judges or retired judges for fixed term appointments, it is difficult to imagine a realistic perception problem. The *Territorial Court Act*, in s.11, specifically contemplates the appointment of retired judges, full and deputy, to fixed terms. It seems to me that s.6(2) would not apply at all to the appointment of a retired deputy judge in light of s.11. But I take "retired", in the context of s.11, to mean someone who is already the holder of a territorial appointment when he or she reaches retirement age. The issue, as I understand it however, is the appointment of a retired judge from another jurisdiction. Since that person has not yet attained the status of "deputy judge", s.11 would not apply. Then the appointment power under s.6 would have to be used.

[100] I think, in large part, that the reason why there is widespread acceptance of fixed term, even ad hoc, appointments of retired or supernumerary judges is because of their "image" as judges. The perception is that, after serving on the bench for the years it takes to reach the status of retired or supernumerary judge, such people have achieved, indeed absorbed, those qualities of detachment and integrity necessary to objectively adjudicate cases. In the case of supernumerary judges they are still sitting judges. In both situations one can assume there is a certain level of financial security implicit in the retired or supernumerary status. That does not mean that the tenure issues noted in my previously mentioned assumptions are irrelevant. Far from it. A retired judge, especially, may seek reappointment or be worried about a premature revocation of his or her appointment. Therefore the changes required by my assumptions are still very relevant. But the concern over reappointment, however, should be minimized considering the age factor and of course, since such appointees are over the statutory retirement age, there should be no pressure from any desire to obtain a permanent appointment.

[101] I am of the opinion that, if a retired or supernumerary judge were appointed to a full-time fixed term appointment, such an arrangement would be constitutionally valid provided that the changes contemplated by my four assumptions were made to the legislation. I am of a different opinion if a retired judge were appointed on a part-time basis, that is, sitting from time to time and being able to carry on other employment when not sitting. I do not include supernumerary judges because I am, for sake of this discussion, assuming that such judges are still subject to the same restrictions on outside activity as regular judges.

[102] With respect to the appointment of a retired judge on a part-time basis, whether for a fixed term or not, my opinion is that the statute is also defective in not setting out sufficient restrictions on such a judge's activities when not sitting as a judge. This concern applies equally to any deputy judge appointment were it to be on a part-time basis if the appointee does not already hold the "permanent" status of judge in some other jurisdiction.

[103] The *Territorial Court Act* imposes two different sets of restrictions. Full judges cannot carry on other work nor appear as counsel in the court. Deputy judges have no restrictions placed on them save the obligation to not let a partner or business associate of the judge appear before him or her. This different treatment is found in s.9 of the Act:

> 9. (1) No territorial judge, other than a deputy territorial judge, shall

> (a) carry on or practise a business, profession, trade or occupation without the express written authorization of the Commissioner, but shall devote his or her time solely to the performance of his or her duties as a territorial judge; or
>
> (b) act as an agent, solicitor or counsel in proceedings before a territorial judge or justice of the peace.
>
> (2) No deputy territorial judge shall permit a partner, articled clerk, employee or business associate of the deputy territorial judge to act as an agent, solicitor or counsel in any proceedings before him or her.

[104] I fail to understand the difference in treatment. If the contemplated appointment is on a full-time basis, albeit for a fixed term, then I fail to see why the deputy judge should be able to "moonlight" as a lawyer. If the appointment is on a part-time basis, then I think there is a serious perception problem with the appointee going into the same court one week as "lawyer" and the next week as "judge". I will discuss this point further when I discuss the prospect of a lawyer being appointed.

[105] I also note that the *Justices of the Peace Act*, in s.2(4), provides that "no justice of the peace shall practise law as a barrister and solicitor in the Territories". I think it is peculiar that part-time justices of the peace, with limited jurisdiction, cannot practice law while, at least by the present terms of the *Territorial Court Act*, a deputy judge, exercising all of the jurisdiction of that court, can practice law in the Territories. I can think of no rationale for this inconsistent treatment by the legislature.

[106] Therefore my conclusion on this question is that the appointment of a supernumerary or retired judge to a fixed-term as a deputy judge would be constitutionally valid provided that, in addition to my four assumptions, there was the additional restriction on practising law in the Territories if the appointment was made on a part-time basis.

[107] **C. Does the appointment of a qualified lawyer from the resident practicing Bar of the Northwest Territories as a full-time deputy judge under section 6(2) of the Act for a fixed term of two years or less violate section 11(d) of the *Canadian Charter of Rights and Freedoms*?**

[108] There is no doubt in my mind that, with the way the legislation is presently constituted, the appointment of a lawyer as a deputy judge would violate the constitutional principles of judicial independence and impartiality. This is primarily

because of the fact that at present such appointments are effectively at pleasure. These are the type of temporary or *ad hoc* appointments that international standards deplore. The more pertinent question is whether the appointment of a lawyer to a fixed term is constitutionally valid assuming that the changes I contemplate would be made to the *Territorial Court Act*.

[109] The leading case in this area is the previously-noted *Lippé* case out of the Supreme Court of Canada. That case addressed issues of independence and impartiality with respect to part-time municipal judges in Quebec who carry on the full-time practice of law. In that sense the question put to me is different because counsel have specified a full-time appointment, not part-time. The Minister's counsel submitted that the Minister would not make a part-time appointment in part because of the problems posed by continuing conflicts of interest. Nevertheless *Lippé* can offer a great deal of assistance in analyzing this particular scenario.

[110] In *Lippé* the Quebec legislation permitting practising lawyers to sit as part-time municipal judges was attacked, in the context of a municipal by-law prosecution, on the ground that this practice violated the accused's s.11(d) Charter right. It was not alleged that the municipal court judge hearing the case, or any particular municipal court judge, lacked independence and impartiality. The challenge was to the structure of the municipal court which permits part-time judges to continue to practise law.

[111] It was in *Lippé* that Lamer C.J.C. gave recognition to the concept of "institutional impartiality". He held that judicial independence or impartiality are not to be viewed as narrow concepts applicable only to the individual judge. These concepts must also be viewed in the context of the objective conditions of the court on a structural or institutional basis. The test for institutional impartiality is whether there would be a reasonable apprehension of bias in the mind of a fully informed person who is presumed to have knowledge of any safeguards that may be in place.

[112] Lamer C.J.C. set out a process for determining whether any particular occupation raises an apprehension of bias should a person from that occupation also hold a part-time judicial position. He did not have any difficulty with the concept of a part-time judge per se; in his opinion the fundamental question is whether the other occupation of the part-time judge is incompatible with the judicial position. He said (at pages 144-145):

> The fact that a judge is part-time does not in and of itself raise a reasonable apprehension of bias. However, the activities in which a judge engages during his or her time off may well give rise to such an apprehension. Indeed, there is nothing inherently

wrong with a judge also being a lawyer. In fact, legal education and certification are usually required and certainly desired for a judicial appointment. The allegations stem more from the fact that a part-time judge practises law part-time as well.

While the Canadian *Charter* does not prohibit part-time judges, it does guarantee that they will not engage in activities which are incompatible with their duties as a judge. In other words, there are a few professions that, if engaged in by these part-time judges, may raise an apprehension of bias on an institutional level.

The test for determining which occupations will raise a reasonable apprehension of a bias on an institutional level is as follows:

> Step One: Having regard for a number of factors including, but not limited to, the nature of the occupation and the parties who appear before this type of judge, will there be a reasonable apprehension of bias in the mind of a fully informed person in a substantial number of cases?
>
> Step Two: If the answer to that question is no, allegations of an apprehension of bias cannot be brought on an institutional level, but must be dealt with on a case-by-case basis.

However, if the answer to that question is yes, this occupation is *per se* incompatible with the function of a judge. At this point in the analysis, one must consider what safeguards are in place to minimize the prejudicial effects and whether they are sufficient to meet the guarantee of institutional impartiality under s.11(d) of the Canadian *Charter*. Again, the test is whether the court system will give rise to a reasonable apprehension of bias in the mind of a fully informed person in a substantial number of cases. It is important to remember that the fully informed person at this stage of the analysis must be presumed to have knowledge of any safeguards in place. If these safeguards have rectified the partiality problems in the substantial number of cases, the tribunal meets the requirements of institutional impartiality under s.11(d) of the Canadian *Charter*. Beyond that, if there is still a reasonable apprehension of bias in any given situation, that challenge must be brought on a case-by-case basis. (emphasis in original)

[113] Applying step one to the issue, Lamer C.J.C. held that the practice of law while also a part-time judge would give rise to a reasonable apprehension of bias in a substantial number of cases. He wrote (at page 145-146):

> A judge is expected to remain somewhat detached and objectively adjudicate each case on its merits. A lawyer, on the other hand, plays a more active, aggressive role, one

> which appears incompatible with the impartial state of mind required of a judge. To illustrate this general incompatibility, the respondents give a number of examples of conflicts of interest which could arise:
>
> (a) Part-time judges who are also practising law could be pressured by clients to make a particular decision on an issue.
>
> (b) An appearance of a conflict of interest could arise if a lawyer of the judge's firm or a lawyer involved in a deal with the judge's firm appeared before the judge.
>
> (c) If the judge's firm was pursuing a particular government contract, the judge may feel pressured to favour the government position in a decision.
>
> (d) Clients of the judge could be called to testify in a case before the judge.
>
> Based on such considerations, I find that the occupation of practising law gives rise to a reasonable apprehension of bias in a substantial number of cases and is therefore *per se* incompatible with the functions of a judge.

[114] Lamer C.J.C. then went on to consider what he regarded as the safeguards in place (the oath taken by judges, their judicial immunity, the fact that they are subject to Quebec's written Code of Ethics, and various specific restrictions and conflict-of-interest rules in legislation). He concluded that, with these safeguards, the system would not give rise to a reasonable apprehension of bias in the mind of a reasonable, well-informed person.

[115] It is important, in my opinion, to note a number of other salient facts. As Lamer C.J.C. noted (at page 151), 65% of the part-time judges live in a municipality other than the one in which they serve as a judge; 70% have their law offices in different municipalities; and 10% do not even have a private office. These facts are important because the part-time judges only have jurisdiction within the particular municipality for which they have been appointed.

[116] In addition, there are some important facets to the terms governing the appointment (these are taken from the Quebec Court of Appeal judgment in *Lippé* at (1991) 60 C.C.C. (3d) 34). The part-time municipal court judge is appointed "to hold office during good behaviour" until the retirement age of 70. It is not a term appointment. The part-time judge cannot be removed except in accordance with the procedure which applies to all Quebec judges. The part-time judge, who must have been

in practice at the Bar of Quebec for at least 10 years, is first subject to a selection procedure analogous to that for provincially appointed judges. All of these terms are significantly different than the current applicable provisions for deputy judges in the *Territorial Court Act*.

[117] It is because of these differences, and because of the particular facts noted in *Lippé*, that I distinguish, with respect, that case from this reference. The municipal court judges exercise a jurisdiction more restrictive than the territorial court judges and in a restricted territory. Territorial court judges exercise jurisdiction throughout the Territories. Deputy judges in the Territories are appointed for a term of two years or less. They may or may not be reappointed. This is not the same as Quebec municipal court judges who know they have their part-time judicial positions until retirement age. The perception of a lack of independence and impartiality due to the need to seek reappointment becomes stronger, and thus more of a reasonable apprehension, in the circumstance of a practicing lawyer being appointed a deputy judge.

[118] As I previously noted, s.9 of the Act draws another distinction between full territorial judges and deputy judges. Full judges cannot have outside employment while deputy judges can. The Minister's counsel informs me that it would be a term of the appointment of a full-time deputy judge that he or she not practice law. I take that for granted as a minimum safeguard. But, as I discussed previously, I see no reason why a full-time, or indeed a part-time, deputy judge should not, by statute, be subject to the same restrictions as a full-time regular judge.

[119] In any event, any discussion about statutory restrictions on other employment misses the point. This sub-issue raises directly the question as to whether a temporary appointment of a practising lawyer as a deputy judge can ever be valid no matter what safeguards are in place (for example, the four assumptions I set out earlier).

[120] In *Lippé*, the Court held that the practise of law was incompatible with being a part-time judge but, both by statute and by practice, there were sufficient safeguards to alleviate any perception of a lack of institutional independence and impartiality. Here, in a similar way, I conclude that the practise of law is incompatible with being a temporary judge. I differ however in my assessment of the perception issue.

[121] I go back to some fundamental precepts of judicial independence. I quote again from Prof. Shetreet's article (at page 599):

> Independence of the judiciary implies not only that a judge should be free from executive or legislative encroachment and from political pressures and entanglements but also that he should be removed from financial or business entanglement likely to affect or rather to seem to affect him in the exercise of his judicial functions.

And, I quote Prof. Friedland again (at page 53):

> We do not want judges put in a position of temptation, hoping to get some possible financial advantage if they favour one side or the other. Nor do we want the public to contemplate this as a possibility.

[122] What are the temptations for a temporary deputy judge? In addition to the conflicts of interest noted in *Lippé*, I can add the following:

(a) The judge, even though by my assumption has security of tenure for the term of the appointment, may adjudicate cases in a certain way to favourably influence the government to renew the appointment or to make a permanent appointment (or perhaps to obtain some other job with the government).

(b) The judge may decide cases in a certain way knowing that it may help him or her in litigating similar cases when he or she returns to practice.

(c) The judge may decide certain cases in a certain way so as to bolster his or her personal reputation (either with potential future clients or in the media).

These examples may be speculative, but I do not think one can confidently say that the perception is that these things could never happen.

[123] With respect to point (a) above, the Minister's counsel submits that there is no reasonable possibility of a deputy judge currying favour with the territorial government because of the small number of cases involving the territorial government going before the court. Unlike the provinces, the federal government handles all criminal prosecutions in the Territories (although I note that there is a protocol which would enable the prosecution of a particular offense under a territorial statute to be handled by the territorial government). I do not think the number of cases that the territorial government is directly involved in is the benchmark. It is enough if there are any.

[124] The Minister's submission also ignores the influence and control the government can exert on the courts indirectly. There are unfortunately numerous examples from other jurisdictions. The recent *Reference* case from the Supreme Court of Canada dealt with some of them: unilateral action by government in closing the courts on some days to save money on staff salaries (such a move by the Manitoba government was found

to violate the administrative independence of the Manitoba Provincial Court) and designating sitting days for the Court (such a provision in Alberta was also held to violate the administrative independence of the Court). In addition, because so much of the Territorial Court's work is done on circuit, the government could effectively limit or curtail such circuits by budgetary controls. Should some deputy judge meekly comply with such administrative interference and thereby risk the perception that he or she is not independent? Or should that judge express disapproval of such actions and risk offending the powers that control his or her tenure? These are untenable choices. How likely they are in reality depends in large part on one's interpretation of recent events (such as those dealt with in the *Reference* case). They are certainly not wholly fanciful. More important, though, the perception of same is quite reasonable.

[125] One should not underestimate how concerns over administrative matters could compel judges to make difficult choices. These are not mere operational issues but go to the root of the role of the courts in a democratic society. Sir Gerard Brennan, Chief Justice of Australia, made the following comment in a recent speech at the opening of the 30th Australian Legal Convention:

> The Courts cannot trim their judicial functions. They are bound to hear and determine cases brought within their jurisdiction. If they were constrained to cancel sittings or to decline to hear the cases that they are bound to entertain, the rule of law would be immediately imperilled. This would not be merely a problem of increasing the back-log; it would be a problem of failing to provide the dispute-resolving mechanism that is the precondition of the rule of law.

[126] With respect to points (b) and (c) above, I do not think they need much elaboration. One of the arguments against temporary or short-term judgeships is that a judicial position should not be seen as merely a stepping stone to some more lucrative position. One should not be able to use the judicial role as a means of material self-aggrandizement. That is exactly what one could be tempted to do by a temporary appointment knowing that it is merely temporary.

[127] The image and influence of a former judge should also not be underestimated (even if the person was only a judge for a relatively short time). That is why all law societies have rules controlling the return to practice of former judges. The Law Society of the Northwest Territories provides in its Rules as follows:

> 75. (1) A member who is appointed as a judge of the Supreme Court of Canada, the Federal Court of Canada, the Supreme Court, the Territorial Court or a superior, district,

> county, provincial or territorial court of any other province or the Yukon Territory automatically ceases to be a member on such appointment.
>
> (2) When a former judge referred to in subsection (1) re-applies for membership in the Society, he or she shall not appear in a court in the Territories without first obtaining the approval of the Executive.

It is at least arguable that this Rule applies to deputy judges as well.

[128] The Canadian Bar Association's Code of Professional Conduct, adopted by the Law Society of the Northwest Territories in 1989, identifies the perception problems in one of its commentaries (at pages 81 and 82):

> A judge who returns to practice after retiring or resigning from the bench should not (without the approval of the governing body) appear as a lawyer before the court of which the former judge was a member or before courts of inferior jurisdiction thereto in the province where the judge exercised judicial functions. If in a given case the former judge should be in a preferred position by reason of having held judicial office, the administration of justice would suffer; if the reverse were true, the client might suffer. (emphasis added)

[129] Whatever the judge does, there could always be the reasonable perception that a temporary judge has other long-term interests than merely adjudicating cases. And, in my opinion, such a perception undermines public confidence in the administration of justice.

[130] Previously I mentioned that some commentators, such as Professors Ziegel and Friedland, have suggested the development in Canada of some type of temporary or part-time judicial appointment system. The advantages contemplated are reduction of workload pressures and evaluation of likely candidates for permanent appointment. The example they hold up is that of England where practising barristers are appointed to part-time or temporary appointments as recorders, deputy circuit judges, and even deputy High Court Judges. To hold one of these positions is now widely viewed as a necessary stepping stone to a permanent appointment.

[131] The situation was described by Professors D.B. Casson and L.R. Scott in their survey of the judiciary in Great Britain, in Shetreet & Deschênes, eds., Judicial Independence: The Contemporary Debate, at pages 147-148:

> In England, the arrangements for appointing part-time or temporary judges are not normally seen as incompatible with judicial independence. However, concern has been expressed at what is seen as an over-reliance by the Lord Chancellor on such appointments as it has been said that this facility is used for the purpose of restricting the number of full-time judicial positions. Most people concede that pressure of judicial business makes these appointments necessary. The number of full-time judges, that would be required if part-time and temporary appointments could not be made, is considerable. The contribution made by the part-time and temporary judges is significant and it could be argued that their availability in fact helps to protect the full-time judges from criticism.

[132] In my opinion, there are a number of significant differences between the English and Canadian situations. The English tradition of making judicial appointments only from a select circle of eminent barristers means that there is much more of a collegial nature to the judge-barrister relationship. (Of course this could lead to the perception, one apparently common in England, that judges are appointed from a small elite with similar class backgrounds.) The division of the profession, whereby a solicitor acts as an intermediary between client and advocate, means that barristers have much less of a client-oriented practice than Canadian practitioners. The tradition of barristers taking briefs on different sides in different cases can result in the development of a more refined sense of autonomy and objectivity, qualities sought in judges. Furthermore, as even Prof. Friedland points out (at page 247 of his report), there is less opportunity for political considerations to play a role in the appointment process. Judicial appointments are made by the Queen on the advice of the Lord Chancellor. The Lord Chancellor, while a member of the cabinet, is normally a leader of the Bar. But, the Lord Chancellor also sits atop a hierarchical judiciary as the country's senior judge. Therefore there is the expectation that the Lord Chancellor is less interested in political concerns than are other politicians and this would be reflected in the quality of judicial appointments.

[133] In Canada we have a fused profession that puts service to the client ahead of practically all other concerns. There is much less of a chance for the practising lawyer to develop the sense of detachment and objectivity essential to the judicial function. We have a different history, different circumstances in terms of geography and population, and different constitutional arrangements (as required by the federal nature of our country). I do not think one can simply assume that the English model could be transplanted here in the late twentieth century.

[134] On a final point, one made by the Chief Judge's counsel, the relatively small size of the Northwest Territories bar is another factor that could impede the development of the necessary detachment for a temporary judge. This was a point made by Rothman

J.A. in his concurring opinion at the Quebec Court of Appeal level in the *Lippé* case (at page 39):

> Municipal Court judges have jurisdiction to hear and determine numerous penal and some criminal cases which can seriously affect the rights and even the freedom of those compelled to appear before them. Society has the right to expect that they be free from any appearance of partiality or conflict. In today's world, I think this is a difficult standard for a judge to meet if he or she is practising law, serving the interests of clients, winning cases and losing cases, and making the compromises necessary to settle cases with other members of the Bar, by day, while exercising judicial functions at night. It is particularly difficult, in my view, in smaller communities.

I think these comments apply with equal force to a practising lawyer, who is appointed for a fixed term albeit as a full-time judge, who then is expected to return to practice.

[135] Based on all of these considerations, I am of the opinion that the appointment of a practising lawyer to a fixed term deputy judge position would not satisfy the constitutional demands of independence and impartiality. Such a judge would not be seen to be free from the pressures of government and business, pressures that would be seen as affecting that judge in the exercise of his or her judicial functions. In my opinion, the reasonable, well-informed observer would apprehend a lack of institutional impartiality in such an arrangement. I therefore answer this question as "yes".

[136] **D. Does the appointment of a qualified lawyer from the resident practising Bar of any other province or territory as a full-time or part-time deputy judge under section 6(2) of the Act for a fixed term of two years or less violate section 11(d) of the *Canadian Charter of Rights and Freedoms*?**

[137] On this final question I am asked to consider the appointment of a lawyer practising in another jurisdiction. Obviously, from the perspective of potential conflicts of interest, the appointment of a non-resident lawyer should be more acceptable than that of one resident in the Territories. The Chief Judge's counsel, however, argues that the distinction between a resident and a non-resident lawyer is a distinction without a difference. I agree.

[138] I fail to see how my analysis of a full-time fixed term appointment of a resident lawyer, discussed in the previous section, would differ just because the appointee is a non-resident lawyer. The growth of interprovincial practices has made such distinctions more apparent than real. I can take note of the fact that the 1997-98 list of practitioners,

issued by the Law Society of the Northwest Territories, lists as members eligible to practice law in the Northwest Territories, 127 lawyers resident in the Territories and 156 non-resident. I also note, for example, that there are in Yellowknife two branch offices of firms based in other parts of Canada.

[139] With respect to part-time appointments, my views about the constitutional defects of full-time appointments should apply with equal force, if not more so. The territorial government also recognized the danger of appointing practising lawyers as part-time deputy judges when it ceased the practice in 1994. In addition, the concerns I expressed about restrictions on practice in the context of retired judges apply with equal force here as well as my comments about the anomalous situation of Justices of the Peace being prohibited to practice law while deputy judges are not so prohibited.

[140] So, even if my four assumptions are satisfied, and even if the restrictions in s.9 of the Act were the same for deputy judges as for permanent judges, my answer to this question is also "yes".

Costs:

[141] At the conclusion of the hearing before me counsel also made submissions on the question of costs. The Chief Judge had given advance notice that he would be seeking full reimbursement for his costs for this reference.

[142] The Minister's counsel acknowledges that I have jurisdiction to award costs even though the *Legal Questions Act* contains no provision for it. He submits that an award of costs may be appropriate but only on a party-and-party basis.

[143] The Minister's position would in effect apply a general litigation practice to this reference. I do not consider this case to be litigation in the normal sense of that word. The Minister and Chief Judge are not adverse litigants. It is not a matter of winning and losing. The Minister has quite appropriately sought the opinion of this court before, perhaps, embarking on a course of action that could later be challenged. The Minister knew that the Chief Judge had concerns about the position taken by the Minister. The Chief Judge intervened in this reference so as to advance alternative arguments to those advanced by the Minister. The issues on this reference touch directly the fundamentally important considerations of the independence and impartiality of the Territorial Court. As submitted by his counsel, the Chief Judge had an obligation to intervene in the interests of the judiciary and in the public interest for the orderly administration of justice. No one else did so.

[144] In my opinion the Chief Judge did a public service by his intervention. For these reasons I have concluded that the government should pay in full the reasonable solicitor-and-client costs of the Chief Judge. Those costs should include allowance for the fact that the Chief Judge's counsel is from out of the jurisdiction. In my view it was completely reasonable for the Chief Judge to retain counsel who does not appear regularly in the Territorial Court.

Conclusions:

[145] These lengthy reasons come down to the following conclusions.

[146] First, the present s.6(2) of the *Territorial Court Act* is, because of the inclusion of a discretionary power to revoke an appointment prior to the expiry of its term, constitutionally defective. So, on that basis, I would answer the primary question posed on this reference as "yes"; s.6(2) is not valid legislation.

[147] If, however, changes are made to the legislation as contemplated in my four assumptions, then there is nothing constitutionally objectionable in essence to fixed term appointments of deputy judges. Those changes are (i) the involvement of the Judicial Council in the appointment and reappointment process; (ii) repeal of the revocation clause in s.6(2); (iii) the application to deputy judges of the same removal process as for full judges; and (iv) no differentiation in remuneration as between deputy and full judges.

[148] With the four changes I set out, the issue comes down to the type of appointee. The changes to the legislation I propose deal with institutional concerns relating to the objective status of deputy judges. The type of appointee raises primarily perception concerns.

[149] In my opinion, the appointment of a sitting, supernumerary or retired judge from another jurisdiction to a full-time fixed term deputy judge position would be constitutionally valid. If the appointment were to be on a part-time basis, so that the appointee (such as a retired judge) could carry on another profession, then the legislation should also provide for the same restrictions on outside employment as for permanent territorial judges. Finally, the appointment of a lawyer, practising or inactive, resident or non-resident, would not meet the constitutional imperatives of independence and impartiality. These reasons constitute my opinion certified to the Minister.

[150] I thank both counsel for their helpful submissions.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 9th day of October, 1997

Counsel for the Minister of Justice
of the Northwest Territories: E. D. Johnson, Q.C.

Counsel for the Chief Judge
of the Territorial Court: C. D. Evans, Q.C.

CV 07082

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

IN THE MATTER OF SECTIONS 2 AND 3 OF THE *LEGAL QUESTIONS ACT* R.S.N.W.T. 1988, c. L-3

AND IN THE MATTER OF A REFERENCE BY THE MINISTER OF JUSTICE OF THE GOVERNMENT OF THE NORTHWEST TERRITORIES CONCERNING WHETHER SECTION 6(2) OF THE *TERRITORIAL COURT ACT* R.S.N.W.T. 1988, c T-2 IS CONSISTENT WITH SECTION 11(d) OF *THE CHARTER OF RIGHTS AND FREEDOMS* AND SECTION 52 OF *THE CONSTITUTION ACT 1982*

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE J. Z. VERTES