ALBERTA PROVINCIAL JUDGES' ASSOCIATION v. *ALBERTA*: TRUST AND RATIONALITY

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I. INTRODUCTION

On 20 July 1999, the Alberta Court of Appeal issued its decision in *Alberta Provincial Judges' Association* v. *Alberta*.[1] The case centered on the Alberta provincial government's rejection of virtually all of its judicial compensation commission's recommendations as to the remuneration of Alberta provincial court judges. The main issue to be decided was whether the reasons provided by the government for rejecting the commission's recommendations were sufficient. The Court unanimously held that the government's reasons did not satisfy the standard laid down by the Supreme Court of Canada in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*.[2] According to the Court of Appeal, the government's reasons were so fundamentally illogical and irrational that they could barely be called "reasons" at all and they could not, therefore, provide a legal basis for departing from the commission's findings. Rather than allow the government a second opportunity to review the commission's findings, the Court affirmed the lower court's order that the commission's recommendations be implemented immediately. It is the purpose of this comment to convince that the Court's interpretation of "rational reasons" is a severe one that reflects the Court's distrust of provincial motives.

II. THE SIGNIFICANCE OF THE DECISION

The decision of the Alberta Court of Appeal is significant insofar as it represents the first test of the 1997 *P.E.I. Reference*. There, the Supreme Court held that, although the salaries of provincial court judges could be raised, frozen, or lowered by the provincial government, these salaries must meet a minimum threshold. In order to determine what that threshold is, without turning the subject of judges' salaries into a matter of political fencing (and thereby eroding the public perception of provincial court judges as independent and impartial), each province is constitutionally required to create a judicial compensation commission (hereinafter JCC) to make that determination.[3] The province may impose a salary that is inconsistent with the JCC's recommendations, but this departure must be accompanied by a set of "rational reasons" for doing so; the province may be forced to justify its actions in court.

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1 (1999), 177 D.L.R. (4th) 418 (Alta. C.A.) [hereinafter *Alberta Judges Case*].

2 [1997] 3 S.C.R. 3, 150 D.L.R. (4th) 577 (*sub nom. Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island* [hereinafter *P.E.I. Reference*].

3 See J.S. Ziegel, "The Supreme Court Radicalizes Judicial Compensation" (1998) 9 *Constitutional Forum* 31 at 34, for the argument that JCCs do not make the salary negotiation process demonstrably less political, and that there is no hard evidence to support the claim that the "quality of justice" is lacking given the absence of a JCC scheme.

In the *Alberta Judges Case*, the Court of Appeal was required to decide what kind of reasons would suffice to allow a province to depart from the recommendations of its JCC. Thus, the Court had to define "rational reasons." Moreover, if the province's reasons could not satisfy that test, the Court would then need to decide how the province's action should be remedied; that is, should the matter be remitted back to the province for a second look, or should the Court make an order to resolve the issue immediately?

III. ON REASONS AND REASONING

A reason justifies a conclusion[4] or a course of action, and occurs exclusively within the context of a dialogue (though this dialogue may be more or less hypothetical, as when one gives reasons to oneself for taking a particular position on a given matter[5]). Professor Beardsley describes the fundamental link between a reason and the argument in which it appears in the following terms:

> [A]n argument is a discourse that contains at least two statements, one of which is asserted to be a reason for the other. To believe a statement because you think that it follows logically from another statement is to make an inference. And making inferences is what is meant by "*reasoning*": to reason is just to take one statement as a reason for another. It takes at least *two* statements to make an argument, but most of the reasoning we do is much more complicated.[6]

A reason is never "idle." If a statement functions as a reason, then it is always *doing* something, namely, *persuading* one to adopt an inference. It may, therefore, be judged by its persuasiveness. A "good" reason must be both clear and linear.[7] If the reason cannot be understood, or if its relationship to the urged conclusion is ambiguous, it will have failed to persuade and will, therefore, be a "bad" reason (or no reason).[8] The clarity of a reason lies, in part, in the completeness of its enunciation of the "truths" upon which it relies; the significance of factual or normative propositions, to the conclusion, will be more apparent as the universe in which these propositions are situated is more fully developed. As Professor Beardsley notes, however, clarity also requires linearity:

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4 This conclusion may be factual or normative, that is, it may support the inference that a given state of affairs exists or that a given state of affairs ought to be the case. This need not be an especially hard and fast distinction to those who would subsume the normative world into the factual, *i.e.* those who would argue that certain normative "truths" simply exist in the world irrespective of whether there is a person to believe or assert those truths.

5 Indeed, some have claimed that the duty to give reasons "encourages a high standard of decision-making and consistency of decisions," as if reasoning split the subject into two parts, one supervising the other. See Annual Report of the Council of Tribunals 1981-2 (H.C. 64) at para. 3.37, cited by G. Richardson, "The Duty to Give Reasons: Potential and Practice" [1986] *Public Law* 437 at 445.

6 M.C. Beardsley, *Practical Logic* (New Jersey: Prentice-Hall, 1950) at 9 [emphasis in original].

7 *Ibid.* at xii-xiii.

8 Plainly, I am presuming the object of persuasion to be a critical thinker who will look "behind" mere appeals to emotion.

> [T]he sequence in which statements are set forth has a lot to do with the clarity of an argument. It determines the degree to which one can readily grasp the point and the relation of everything else to that point.[9]

Simply reciting every fact and assumption upon which one relies cannot guarantee clarity. The "linear" quality of a reason lies in its steady progression, from known truths, "to its goal in an orderly and accurate way, [moving] step by step, each step being connected with what has gone before."[10]

Thus, every reason has, internal to itself, constraints upon the form in which it may appear. Yet the rigour with which one judges the clarity and linearity of a reason, or chain of reasoning, may vary depending upon the circumstances. The object of persuasion may compensate for "gaps" in the chain of inferences, or "holes" in the background assumptions provided in the reasons, by augmenting the reasons with his or her own understanding of the factual and normative world. For instance, suppose Mary says to John, "It is cloudy outside. You should bring an umbrella." It is unnecessary for Mary to provide many of the background facts and values that would link her reason to the urged inference. She is not required to say that when it is cloudy outside, there is a substantial chance that it will rain; that rain will cause a person without an umbrella to get wet, but will not cause a person with an umbrella to get wet; or that it is better to be dry than wet. These premises — if the world in which Mary is attempting to persuade John resembles our own — will be understood as implicit in Mary's reasoning. There is, therefore, no need to judge Mary's argument according to a rigorous standard. The need for clarity and linearity in one's chain of reasoning is inversely proportionate to the extent to which the factual and normative propositions upon which one relies, and the implications thereof, are readily understood by both actors in the dialogue. Extra-logical considerations may also affect the level of scrutiny directed at one's reasoning. An argument may be judged more harshly where the stakes of the argument increase. John may not care whether or not he takes his umbrella, and so Mary's "burden of proof" will be considerably lessened. Furthermore, there may be some benefit to be derived from "turning the other cheek" and deferring to another's reasons even where they lack some measure of persuasive force.

The role of extra-logical considerations is especially clear in administrative law doctrine. The reasoning of a labour board will be granted far more deference than will that of a human rights commission.[11] In *CAIMAW* v. *Paccar of Canada*,[12] the Supreme Court explained its deference to labour board decisions. Labour boards are

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9 Beardsley, *supra* note 6 at 23.

10 *Ibid.* at xii.

11 *Canada (Attorney General)* v. *Mossop*, [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658. See also *Zurich Insurance Co.* v. *Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, 93 D.L.R. (4th) 346; *Ross* v. *New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, 133 D.L.R. (4th) 1; *Gould* v. *Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, 133 D.L.R. (4th) 449.

12 *CAIMAW* v. *Paccar of Canada*, [1989] 2 S.C.R. 983, 62 D.L.R. (4th) 437, 6 W.W.R. 673 [hereinafter *CAIMAW*]. See also *United Brotherhood of Carpenters and Joiners of America, Local 579* v. *Bradco Construction*, [1993] 2 S.C.R. 316, 102 D.L.R. (4th) 402; *Royal Oak Mines* v. *Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369, 133 D.L.R. (4th) 129.

charged with the task of achieving certain industrial ends; this requires a detailed understanding of the industrial environment. A reviewing court will not be in a position to understand or appreciate the underlying factual premises in a labour board's reasoning. A court, if guided solely by an interest in ensuring persuasive reasons, could demand clarification where the labour board's reasons rely upon factual premises that are neither obvious to the Court, nor proven. Given too the need for efficiency in administrative matters, and the fact that labour boards, as a rule, do not engage in constitutional or quasi-constitutional analyses, the Court held that labour boards should be accorded wide deference even when their reasons fail to persuade a reviewing court. As La Forest J. notes in *CAIMAW*, "[t]he courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it."[13] As long as the reasons of the labour board have the essential indicia of an argument, the reviewing court will not extensively inquire into the *de facto* persuasiveness of that argument: "[t]he emphasis should be not so much on what result the tribunal arrived at, but on how the tribunal arrived at that result."[14]

This argument does not apply to human rights commission decisions for various reasons. First, human rights decisions rely upon factual predicates that are equally available to a reviewing court. A court is therefore able to examine the reasons of a human rights tribunal, and determine whether such reasons are adequate. Moreover, if the factual background of a human rights decision was not immediately understood by a reviewing court, the quasi-constitutional status of the decision would entitle the court to demand clarification, such that in-depth scrutiny would then be possible. Likewise, in s. 1 analyses, the government's reasons for infringing upon constitutionally protected rights are subject to "searching analysis of the relationship between ends and means"[15] simply because of the constitutional stakes. It is not enough, in such cases, that the government's reasoning be rational; the objective itself is subject to review in order to determine whether an infringement upon constitutional rights *could* be justified by the reasons provided. Furthermore, even if the objective is important enough that it is capable of justifying some measure of limitation of the constitutional right in question, the means by which the constitutional right is infringed must also be examined to determine whether the objective has been given a wider justificatory scope than it is entitled.[16]

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[13] *CAIMAW*, *ibid.* at para. 19.

[14] *Ibid.*

[15] *P.E.I. Reference*, *supra* note 2 at para. 183.

[16] See *R.* v. *Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200. Thus, there is a sliding scale of s. 1 analysis, inasmuch as there will be some circumstances where the importance of the governmental objective plainly has the capacity to justify extensive constitutional infringements, *i.e.* where the State's objective is to further values from the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. See *Edwards Books & Art* v. *R.* (1986), 35 D.L.R. (4th) 1 at 49 (S.C.C.) [hereinafter *Edwards Books*]; *Irwin Toy Ltd.* v. *Quebec (Attorney-General)* [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 at 622-23, [hereinafter *Irwin Toy*]; *Edmonton Journal* v. *Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, [1990] 1 W.W.R. 577 at 586-87 [hereinafter *Edmonton Journal*]; *Rocket* v. *Royal College of Dental Surgeons* [1990] 2 S.C.R. 232, 71 D.L.R. (4th) 68 [hereinafter *Rocket*]; *Canadian Broadcasting Corp.* v. *New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385 [hereinafter *Canadian Broadcasting*]; *R.* v. *Lucas*, [1998] 1 S.C.R. 439, 14 C.R. (5th) 237 at

It is possible, then, to identify two poles in a continuum of judicial review: a review of the reasoning process to determine whether there are reasons at all, and a more substantive review of the actual persuasiveness of the reasons. In the *P.E.I. Reference*, Lamer C.J.C. established that the former standard of review is the appropriate measure of a province's reasons to reject JCC recommendations. This does not, however, answer the question of what standard will be applied to the determination of whether a reason exists. It seems plain that, on a particularly harsh analysis of Mary's "reason" for why John should take an umbrella, no reason was given at all, because Mary failed to provide enough background assumptions and facts to demonstrate the significance of her "reason" to the urged inference. Suppose John is from another planet. He has no idea that a cloudy day signifies the onset of rain; that rain will cause him, absent an umbrella, to get wet; that being dry is better than being wet. Mary has failed to persuade John because they do not share an understanding of the implications of a cloudy day, and so Mary bears a greater practical burden to communicate her reasons fully and articulately.[17] Whether or not a province's reasons "count" as reasons, then, may depend upon the extent to which the province and a reviewing court are "on the same page."[18] If the perspective of the province is sufficiently divorced from that of the reviewing court, the province will face a level of scrutiny approaching, without reaching, the substantive review characteristic of s. 1 analyses.

IV. ISSUES RAISED BY THE *P.E.I. REFERENCE*

The *P.E.I. Reference* established that the JCC must be independent, objective, and effective. In order to satisfy the objectivity component of this test, Lamer C.J.C. explained, the JCC's recommendations cannot be based upon "political expediencies."[19] What types of reasons constitute considerations of political expedience? This is unclear; Lamer C.J.C. did, however, provide examples of factors which will *not* be considered as flowing from political expedience. These include "the cost of living, the need to ensure the judges' salaries remain adequate, as well as the need to attract excellent candidates to the judiciary."[20] Note that *all* of these illustrative factors are those that provincial court judges would presumably cite were they permitted to negotiate their salary with the government. As Ziegel points out, it seems odd to think that a provincial legislature would not be entitled to direct a JCC, in its enabling legislation or regulations, to consider such things as "the general state of the provincial and federal economy and ... the salaries paid to other senior officials in the public sector."[21] If one presumes that such considerations are indeed

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para. 34 [hereinafter *Lucas*].

17 Even this example presumes the capacity, on the part of Mary and John, to engage in a dialogue with each other. If John and Mary were incapable of even understanding each other, the concept of a "reason" would not arise, because there could be no dialogue in which to situate that reason. At best, Mary and John would be talking past each other, neither one capable of persuading the other of anything.

18 It follows that, where the object of persuasion is simply incapable of understanding certain reasons, those reasons will be effectively invalidated.

19 *P.E.I. Reference*, *supra* note 2 at para. 173.

20 *Ibid.*

21 Ziegel, *supra* note 3 at 35.

constitutionally permissible, one encounters a further problem. Are all factors to be weighted equally? What kind of factors *cannot* figure into a JCC's deliberations, *i.e.* what factors *do* constitute considerations of political expedience? Can some factors trump certain others?[22]

These questions are of singular importance because they relate to the government's ability to reject the recommendations of a JCC. If a JCC is not permitted to take certain factors into consideration, or if certain factors "trump" others, then this must affect a provincial government's ability to depart from the JCC's recommendations. It would be absurd if a provincial government could cite, as a reason to depart from a JCC's recommendations, its failure to take factor A into consideration, if factor A represents an unconstitutional consideration. Likewise, the government could not overrule a JCC's recommendations by appealing to factor B, if factor B must be trumped by whatever other factors were brought to bear by the JCC. Thus, the manner in which one interprets the objectivity standard required of JCCs must ultimately have monumental impact upon a provincial government's role in determining the salary of provincial court judges.[23] Broadly interpreted, "political expediencies" could be read to include any consideration important to the provincial government; in that event, the *P.E.I. Reference* has resolved the constitutional problems attached to outright negotiations between provincial judges' associations and provincial governments by effectively removing the provincial government from the bargaining table from the outset.

There is reason to believe that the Supreme Court never intended such a broad definition of "political expediencies." In the *P.E.I. Reference*, Lamer C.J.C. held that the standard of justification required of provincial governments where they opt to depart from the recommendations of a JCC, "is one of simple rationality."[24] This standard is supposed to be lower than that required under s. 1 of the *Charter*.

> The standard of justification here, by contrast, is one of simple rationality. It requires that the government articulate a *legitimate reason* for why it has chosen to depart from the recommendation of the commission, and if applicable, why it has chosen to treat judges differently from other persons paid from the public purse. *A reviewing court does not engage in a searching analysis of the relationship between ends and means, which is the hallmark of a s. 1 analysis.*[25]

A lesser standard is appropriate because there ought not to be a presumption that the JCC's determination of the minimum threshold of provincial judges' salary is in fact the *constitutional* minimum. If the government can demonstrate that the JCC has arrived at its conclusions through improper considerations, then the government is not

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22 *Ibid.*

23 The effectiveness requirement is such that the provincial government could not manoeuvre around whatever problems emerged through a broad reading of the term "political expedience." The government cannot change judicial remuneration without first receiving, and responding to, the JCC's recommendations. Nor could the JCC's enabling legislation or regulations be such that the commission would table a report only rarely; it must meet at regular intervals. See *P.E.I. Reference*, *supra* note 2 at paras. 174-88; Ziegel, *ibid.* at 35-36.

24 *P.E.I. Reference*, *ibid.* at para. 183.

25 *Ibid.* [emphasis added].

attempting to limit a constitutional right; rather, it, like the JCC, is attempting to define the constitutional right. That they disagree does not necessarily mean that the government seeks to restrict the independence and impartiality of provincial court judges; it may mean only that the government, having conducted its own inquiry, has reached a different conclusion regarding the level of salary constitutionally required. The effect of a broad definition of "political expediency," though, would be to undercut the relative parity between the JCC and the provincial government. As the bases for disputing JCC recommendations decrease in number, so too does the power of the provinces to challenge the recommendations of JCCs. It therefore becomes harder for provinces to find a rational reason to depart from JCC findings. Furthermore, Lamer C.J.C. held that a provincial government *could* justify changing or freezing judges' remuneration where doing so is in the public interest; "public interest," he states, should be "broadly understood."[26] Since the terms "public expediency" and "public interest" cannot logically co-exist in the same semantic space (at least for the purposes of the *P.E.I. Reference*), it follows that a "broadly understood" conception of "public interest" must entail a relatively narrow definition of "political expediency."

The above excerpt from the *P.E.I. Reference*, however, raises other interesting questions. Lamer C.J.C. suggests that, in determining whether the province has issued a "legitimate reason," the Court need not "engage in a searching analysis of the relationship between ends and means."[27] Does the Chief Justice mean to suggest that a legitimate reason need not feature such a connection? Surely not, for then the province would be entitled to reject the recommendations of a JCC for virtually *any* reason. The passage *must* mean that a reviewing court need not concern itself with whether the province's policy considerations, which formed the basis for its rejection of JCC findings, could *only* be facilitated through its rejection thereof. That is, the court need not explore whether the province could further its policy ends in some way other than by changing or freezing provincial court judges' salaries. In that case, though, it would seem that Lamer C.J.C. has *a priori* severely diminished the effectiveness of JCCs, because provinces could depart from their recommendations as long as they found *some* policy end rationally connected to the reduction or freezing of judges' salary. Thus, *any* economic policy could justify a province's action. Fortunately, such a conclusion would be mistaken. The extent to which a province must explain its departure from the recommendations of a JCC, depends upon the context of that departure. As Lamer C.J.C. states in the *P.E.I. Reference*:

> Although the test of justification — one of simple rationality — must be met by all measures which affect judicial remuneration and which depart from the recommendation of the salary commission, some will satisfy that test more easily than others, because they pose less of a danger of being used as a means of economic manipulation, and hence of political interference. Across-the-board measures which affect substantially every person who is paid from the public purse, in my opinion, are *prima facie* rational. For example, an across-the-board reduction in salaries that includes judges will typically be designed to effectuate the government's overall fiscal priorities, and hence will usually be aimed

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[26] *Ibid.*

[27] *Ibid.*

> at furthering some sort of larger public interest. By contrast, a measure directed at judges alone may require a somewhat fuller explanation, precisely because it is directed at judges alone.[28]

Thus, where a province decides to change or freeze the salary of provincial court judges alone,[29] it will not be sufficient for the province to argue that the manipulation of salaries generally supports some economic policy. Rather, the province must show that the manipulation of *judges'* salaries *specifically* furthers that end. As the *Alberta Judges Case* demonstrates, it will be extremely difficult for a province to succeed with such an argument. (Indeed, it is difficult even to conceive of a situation where the manipulation of *judges'* salaries alone will have some uniquely beneficial result for the province.) It will be pointed out below that the *Alberta Judges Case* demands a high calibre of reasons from the province; this complicates the already high standard of justification required, such that there is only a remote chance of meeting it.

Côté J.A., writing for a unanimous Court, makes clear that, while the Court will not interpret "political expediency" in an overly broad fashion, it *will* require that, whatever the province's reasons for objecting to a JCC's recommendation, the province must present those reasons in a highly logical and careful manner. In the absence of a syllogistic form, a reviewing court is entitled to presume that the province's reasons, however grounded in a legitimate public interest, reflect only political convenience. Thus, any reason not expressed within the constraints of formal logic, however intuitively valid, will be ignored in favour of the JCC's findings. Alberta may be witnessing an employment boom for philosophy graduates.

V. WHAT IS THE PROVINCE'S ROLE?

Côté J.A. began his analysis with some preliminary findings. First, although counsel for Alberta correctly argued that the standard of justification is "a fairly lax test," it does not follow that "all prose tendered by a government as 'reasons to reject' will meet the test."[30] Quite the contrary, Côté J.A. continued, the term "rational reasons" clearly suggests that the government is *somewhat* constrained in its authority to reject JCC recommendations. The qualifier "rational," if not the duty to provide reasons in the first place, imposes a burden upon the provincial government to give a certain *kind* of reason for rejecting JCC recommendations:

> A duty to give rational reasons cannot impose a lower standard than a duty to give reasons. I am not sure whether something which is not rational can be a reason; but something which is not a reason cannot be a rational reason.[31]

The reasons must be rational because the government has no special power to establish the constitutional minimum of judicial compensation. Absent some rational basis for

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28 *Ibid.* at para. 184.

29 This was the scenario in the *Alberta Judges Case.*

30 *Alberta Judges Case, supra* note 1 at paras. 32-33.

31 *Ibid.* at para. 34.

complaint, the provincial government has no basis to involve itself directly in the process of fixing levels of judges' remuneration:

> The government contends that it is the only entity which sets, or can constitutionally set, judges' compensation. It contends that the independent Commission is an advisory body and nothing more.[32]
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> I disagree fundamentally, and cannot reconcile that argument with either the words used by the *P.E.I. Reference* judgment, or with the constitutional principle of judicial independence. I repeat that the salary Commission must be effective. Unless the government rejects the Commission's conclusions with rational reasons, the conclusions bind the government.[33]

The province's role, in the judicial remuneration process, is to safeguard the fairness of the JCC's decision-making by (a) presenting it with relevant considerations prior to the JCC's deliberations, and (b) contesting the JCC's findings, after the fact, where those findings clearly stray beyond what is required by the *Charter*. As a safeguard only, the province does not have the power to second-guess the recommendations of the JCC unless the province can show that the JCC erred in the rendering of these recommendations such that it effectively lost its constitutional jurisdiction. If, however, the province cannot demonstrate that the JCC's recommendations are *unreasonable*, as opposed to demonstrating that its own proposals are reasonable, then the province is constitutionally bound to give force to the JCC's recommendations. Any benefit of the doubt concerning the factual basis for either the JCC's recommendations or the province's reasons to reject, must be given to the JCC. As Côté J.A. notes:

> What is more, there are circumstances where a Commission and a government might independently reach different salary figures, yet the government could not honestly and legitimately refuse to follow the Commission's conclusion.... That degree of precision of calculation might be impossible.[34]
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> Another example might arise where there are two or more equally reasonable solutions to some problem.... It is entirely possible that either solution would be equally *reasonable*, and that an honest government could not reject the Commission's solution just because the government had thought of the alternative idea instead.[35]
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> The *P.E.I. Reference* judgment says that the government must follow the Commission's conclusion unless there is a legitimate rational reason to reject it. In my respectful view, *it is not enough to say "I won't follow your idea because I have an idea just as good"*. The reason to reject must be an alternative which is *better* for some reason.[36]

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32 *Ibid.* at para. 35.

33 *Ibid.* at para. 36. Côté J.A. rejects the argument that the mere fact that the government could falsify reasons, substituting disingenous "public interest" reasons for what are really "political expediency" arguments, means that the province is the *de facto* constitutional authority, as opposed to the JCC. He suggests that the Court must presume that the province will obey the constitution. *Ibid.* at para. 37.

34 *Ibid.* at para. 38.

35 *Ibid.* at para. 39 [emphasis added].

36 *Ibid.* at para. 40 [emphasis added].

Ultimately then, the province is little more than a safeguard to prevent the JCC from having a constitutional monopoly over the process of fixing provincial judges' salaries. The recommendations of the JCC will be presumed correct, but with the proviso that the province will have 90 days to conduct an examination for unreasonable findings. This is in keeping with the Court's later ruling that the *P.E.I. Reference* demands not only *de facto* independence of judges, but *institutional* independence as well.[37]

VI. "SIMPLE" LOGIC AS THE MINIMUM STANDARD

Côté J.A.'s analysis of Alberta's reasons for rejecting its JCC's recommendations focused upon their rationality (or lack thereof). The axiom, from which the remainder of Côté J.A.'s decision flows, is that "[a] ground which the government advances for rejecting the Commission's conclusion cannot be a rational reason, still less a legitimate one, if it consists of a simple error in logic."[38] Basic, "simple" canons of logical reasoning are *prima facie* evident in *all* rational decision-making. Drawing upon this central theme, the Court proceeded to catalogue various logical fallacies, filing Alberta's reasons where appropriate. These fallacies include:

(a) "double counting," mere assertions, unsupported figures and unsound premises;[39]
(b) comparison of non-equivalents;[40] and
(c) *non sequiturs*, irrelevant considerations, and unconstitutional considerations.[41]

The errors cited by Côté J.A. may, in turn, be broken into two categories: errors of soundness and errors of validity. Errors of soundness arise where one's conclusions depend upon a certain state of affairs that does not exist. Errors of validity arise where one's conclusions could not logically flow even if the factual pre-conditions are present.[42] If Côté J.A. was concerned only with pure logic, questions of soundness would be irrelevant; a logically valid argument need only be true *in the event* that all of its premises are true.[43] Pure formal logic deals only with hypothetical situations. Such an analysis, of course, would be entirely inappropriate as a means of resolving matters of public policy and principle, and would run afoul of Lamer C.J.C.'s requirement that the province establish the factual underpinnings for its reasons. Côté J.A. is concerned with *truth-functional* logical reasoning, and so the soundness of the province's reasons is germane to his analysis.

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37 *Ibid.* at paras. 42-46.
38 *Ibid.* at para. 47.
39 All were treated, in the judgment, as distinct categories of logical error. *Ibid.* at paras. 48-50, 57-60, 61-66, 76-82, 83-88.
40 *Ibid.* at paras. 51-56.
41 All were treated, in the judgment, as distinct categories of logical error. *Ibid.* at paras. 67-75, 89-90.
42 R. Jeffrey, *Formal Logic: Its Scope and Limits*, 2d ed. (Toronto: McGraw-Hill, 1981) at 5.
43 *Ibid.* at 1.

A. ERRORS OF SOUNDNESS

In the *P.E.I. Reference*, Lamer C.J.C. noted that the reviewing court is entitled, if not obliged, to check the factual foundations of the province's reasons to reject; the province's reasons cannot satisfy the rationality test if they are premised upon falsities.[44] This would appear, on its face, to be an easy hurdle for the province to overcome; as long as the underlying premises of the province's reasons are not wrong, the province can at least satisfy the soundness component of the rationality test. Côté J.A.'s analysis does not leave the matter there, however. He cites a number of cases as support for the proposition that a duty to give reasons entails a positive duty to explain, adequately and intelligibly, the factual premises for the reason:

> Indeed there is ample binding authority to that effect, applying statutes which require a tribunal to give written "reasons". "My reasons are that I think so", is no reason at all. The present duty to give "rational reasons" cannot be a laxer standard than a duty to give reasons. What are not reasons cannot be rational reasons. The authorities say that if there is a duty to give reasons, that duty calls for more than mere conclusions.[45]

Thus, the province cannot elude accountability, on the soundness aspect of the test, by offering no factual support whatsoever for its reasons. The province must state the facts upon which it relies. This will be the case for both primary and secondary facts. Primary facts are the foundational factual premises upon which rests the entirety of the argument that (hopefully) follows. Secondary facts are also factual premises, but premises themselves inferred from more foundational (primary) facts. Secondary facts occupy a more intermediate step in the chain of reasoning than do primary facts.[46]

In the *Alberta Judges Case*, the province justified its rejection of the JCC recommendations, in part, by suggesting that certain fiscal realities warrant consideration and that, taking these realities into account, the salary of provincial court judges should be diminished by x amount of dollars. Such an assertion, by itself, is no reason at all. First, it lacks any primary facts to support the claim that the fiscal realities in question warrant consideration, that the factual background of the province's financial situation is such that this situation simply must be considered,[47] and that they have attached to them the dollar value cited. In this sense, the province's reasoning is too thin, necessitating further factual premises. Second, the province has not said that the JCC failed to take these facts into consideration or that the JCC's recommendations

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44 *P.E.I. Reference*, *supra* note 2 at para. 183.

45 *Provincial Judges Case*, *supra* note 1 at para. 63.

46 See A.L. Goodhart, "Appeals on Questions of Fact" [1955] 71 L.Q. Rev. 402 at 404-406.

47 Of course, the question of when something must be considered is a normative one. As stated below, the failure to specify the underlying values that are assumed by the province in its reasons represents a logical problem of the is-ought variety. This is particularly true inasmuch as the province is expected to work within the normative framework implicit in constitutionalism, and any apparent discrepancy between the province's background assumptions and those of the reviewing court will require explanation if the province is to demonstrate that its reasons are valid. This requirement that the province situate its reasons within the normative framework of constitutionalism will be further explored below.

have failed to incorporate the dollar value attached to those considerations. The province's "reason" lacks significance, absent some mention of whether the JCC has already considered the financial state of the province. Moreover, just stating those premises will not suffice. Since the province's reasons must have some factual basis, it follows that, unless the government can prove that the JCC "missed something" or gave a factor insufficient weight, the government will be presumed to have engaged in "double counting," *i.e.* that the province is asking the court to give a factor twice the consideration that it deserves.

B. ERRORS OF VALIDITY

1. *NON SEQUITURS* AND THE IS-OUGHT PROBLEM

All arguments that feature errors of validity are, in some sense, *non sequiturs* insofar as their factual predicates may be true without leading to the conclusion pressed by the argument in question. The danger of the *non sequitur* is especially potent when attempting to draw normative claims from factual truths alone; philosophers commonly refer to this danger as the "is-ought problem".[48] Broadly, the is-ought problem is the position that one cannot logically infer normative claims from facts, that the truth of some state of affairs says nothing about what makes a state of affairs good.[49] Normative claims can be made only against a background of values and assumptions regarding the nature of the good.[50] While Côté J.A. did not explicitly refer to the is-ought problem, two of his examples of *non sequiturs* plainly fall into that trap:

> The government recites hardships which civil servants endured in past years, and then states that the judges in the future should therefore not be immune from hardship (para. 1(a) sentence 4). That appears (with respect) to be a complete *non sequitur*. Our court heard and read nothing in argument to clarify it, nor add any other element to the syllogism. If the implication is that the judges did not undergo an actual salary reduction in the past and therefore they should suffer hardship in the future,

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[48] See also G.E. Moore's discussion of the "naturalistic fallacy." G.E. Moore, *Principia Ethica* (Cambridge: Cambridge University Press, 1951) at 37-58, 110-41.

[49] See R.M. Hare, *The Language of Morals* (Oxford: Clarendon Press, 1952); P.H. Nowell-Smith, *Ethics* (London: Penguin, 1954).

[50] See H.R. Searle, "How to derive 'ought' from 'is'" in W.D. Hudson, ed., *The Is/Ought Question* (London: MacMillan, 1969) at 121-34, where Professor Searle engages in the task of showing how an "is" statement may be unpacked to reveal a series of cultural and normative assumptions, and thereby support an "ought" statement. I take, as an implication of his argument, that, where the normative assumptions underpinning a factual statement are not obvious or readily apparent, "ought" can be derived from "is" only where these normative assumptions are provided by the reasoner. R.M. Hare would object to Searle's methods, finding the morality derived therefrom to be terribly impoverished, *i.e.* what kind of "ought" can arise from contingent cultural forces attached to a ragbag assortment of disconnected actions with no common thread running through them. See R.M. Hare, *Moral Thinking: Its Levels, Method and Point* (Oxford: Clarendon Press, 1981) at 65-86; R.M. Hare, "The promising game" in W.D. Hudson, ed., *The Is/Ought Question*, *ibid.* at 144-56. Within the legal sphere, however, it is not clear that anything more than Searle's thin model is required.

> that appears to me just as much a *non sequitur*. That is important, for the government's grounds to reject, state or hint that proposition more than once.[51]
>
> The government also states in its grounds for rejection that it has a favourable financial position (para. 1(b) sentence 1). That is undoubtedly true, especially in comparison with other governments. Alberta is enjoying very large surpluses, and expects to pay off its net debt entirely within a few years, even earlier than planned. (See its written argument presented to the Commission.) But that is not a reason to cut back on the conclusions of the Commission; if anything, it is the contrary. At best that would be a *non sequitur*.[52]

The province must rely upon some factual predicates in its reasons, but it must not presume that such facts are, without more, up to the task of justifying the province's reasons. If it wants to make a normative claim, it must not only explain the facts which allow that claim to stand, but also explain the assumptions (*i.e.* X is better than Y) that are implicit in the transition from the factual basis to the normative conclusion. As will be suggested below, whatever assumptions are relied upon must be consistent with the current state of Canadian law, the rule of law generally, and the Canadian constitution.

2. IMPROPER ANALOGY

It is trite to suggest that a comparison, subject to logical scrutiny, can only be drawn between two like points of reference. Two things with nothing in common cannot say anything about each other. Professor Beardsley describes an analogy thus:

> [T]here are two different kinds of characteristics, or respects in which things may be compared. They may be compared in terms of *qualities*: for example, they may be hot, noisy, or angry. Or, they may be compared in terms of *relationships*. Any thing, considered as a *whole*, consists of parts that are arranged in certain ways, and this arrangement, or organization, of the parts is a web of relationships that each part has to the other parts. Now, if we compare, say, a brick building with a *papier-mâché* model of it, we can't make the comparison in terms of the qualities of the parts. For the parts are made of different materials. But we can make the comparison in terms of the relationships *between* the parts. For if the model is a good one, the positions of the floors and windows and doors, for example, will be related to each other in exactly the same way as in the building itself.[53]
>
> The notion of relationship is what marks an analogy. An analogy is simply a rather extensive closed simile in which the comparison is in terms of relationships.[54]

An analogue's constitutive components must relate to one another in a manner similar to those of the main referent. No analogy is perfect; the relationships between a thing's constitutive parts will never exactly resemble those of another thing's parts.[55] For this

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51 *Alberta Judges Case*, *supra* note 1 at para. 58.

52 *Ibid.* at para. 59.

53 Beardsley, *supra* note 6 at 105-106 [emphasis in original].

54 *Ibid.* at 106.

55 *Ibid.* at 106-107.

reason, the usefulness of an analogy is always suspect.[56] The province is therefore barred from disputing the recommendations of the JCC through reference to facts that are, on their face, not analogous to the situation of Canadian provincial court judges at the present time. More than this, however, the province must positively establish the viability of the analogy, and the extent to which it is useful. As Côté J.A. states:

> Of course it is proper and useful for the government to make comparisons between the compensation which the Commission recommends and other things which should be analogous. But a comparison must compare things on an equivalent basis. For example, one could not simply compare the nominal amounts of American and Canadian salaries, without adjusting for the fact that American and Canadian dollars have different exchange values and different purchasing powers.[57]

If a province refers to other states of affairs, when attempting to show that the JCC has erred in its determinations, the province must make a case that this other state of affairs shares some common ground with Canadian provincial court judges at the present time. The province must be prepared to support, with evidence, the argument that these states of affairs are, on a pertinent level, comparable. Such similarity will not be presumed.

3. FAILING TO RECOGNIZE THE TERMS OF THE DEBATE

It must not be forgotten either that the key contextual aspect to the judicial remuneration issue in Alberta is its status as a *constitutional* issue. The JCC process was deemed constitutionally required in the first place because of an over-arching need to ensure the institutional independence of provincial court judges. The necessity of attracting the "best and the brightest" to the bench, as well as the need to insulate judicial remuneration from provincial politics, are aspects of this concern for judicial independence. Were it not for these concerns, the province would have no duty to give reasons. It follows that these concerns must be implicitly or explicitly acknowledged in the province's reasons, insofar as they in part determine the standard by which provincial reasons will be judged. The province's reasons represent the answer to a question: why depart from the recommendations of the JCC, *given the overriding concern for judicial independence*? The normative presuppositions that are inherent in constitutionalism must be reflected in the province's reasons. A reason that adopts, either implicitly or explicitly, a normative position that is incompatible with Canada's constitutional framework is *prima facie* disqualified as a valid reason. Because a reason can only emerge within the context of a dialogue, it follows that the consideration of irrelevant factors, on the part of the province, signifies something more than an error of logic; it signifies a failure to achieve even the base conditions of logic, that is, acknowledgement of a common dialogue.

> Clearly a ground given to reject the Commission's conclusion must be germane in order to constitute a rational reason. Indeed, taking into account matters irrelevant in law would obviously be error of law

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[56] *Ibid.* at 107.

[57] *Alberta Judges Case*, *supra* note 1 at para. 51.

> on the face of the record. That some judges had red hair, would be a classic example of an obviously irrelevant and improper reason.[58]
>
> Indeed, one of the criteria for "reasons" is that they demonstrate that relevant matters were considered and that irrelevant ones were disregarded.[59]

That some judges have red hair *could* be a valid answer, given a particular *question*. The problem, for the province, is that the question it answers is not that which was asked! The province erred in failing to buy into the very conditions of the debate in which it entered through the provision of reasons. From the point of view of the province, its reasons may be valid, because it has altered — or perhaps misread - the terms of the debate.[60] From the point of view of the constitution, the Court and the JCC, however, the province's reasons are utterly incompatible with the debate as it has been structured. This is a meta-logical, rather than a logical, difficulty, insofar as there is fundamental disagreement as to the kind of premises and conclusions that could, if proven, constitute rational reasons.[61] However it is characterized, if the province's reasons are to satisfy the rationality requirement, they must conform to the precepts of the rule of law and to the constitution.[62] The province must reach a reason that is rational *from the perspective of the constitution.*

It follows from the above that, where the province directs the JCC to "weigh or not weigh some factor, and the Commission then proceeds to do what the government asked it to do, and says that it has done so," the province cannot rely on the JCC's (non-)consideration of that factor as a basis for rejecting the JCC's recommendations.[63] In such a case, the province would purport to lay the ground rules for the JCC's deliberation, and then, after the fact, operate under an entirely different set of rules. Again, the province has effectively removed itself from the terms of the debate understood by the other participants therein.

VII. ONUS OF PROOF

The Crown argued before the Court of Appeal that the burden of proof lies with the judges' association, and not with the province, *i.e.* that the association must prove that the Crown's reasons are *inadequate*, that its reasons *do not* meet the test of rationality. In response, Côté J.A. concluded that, given the failure of the province to provide reasons that accord with "simple logic," the issue of onus is moot:

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58 *Ibid.* at para. 67.

59 *Ibid.* at para. 68.

60 Practically speaking, of course, I may be overstating the matter. Certainly, it seems likely that the agents of the Attorney General believed that they were handling the problem as the Supreme Court directed in the *P.E.I. Reference*. It is open to question whether Côté J.A., by utterly dismissing alternative interpretations of the province's burden, in fact did justice to the province's approach.

61 I am prepared to concede that this problem could be construed not as an error of validity but rather as a particularly radical error of soundness.

62 *Alberta Judges Case*, *supra* note 1 at paras. 70, 72, 89.

63 *Ibid.* at paras. 94-96.

> [O]nus of proof only matters where there is no evidence whatever on a topic, or where the evidence is evenly balanced.
>
> In the present case, the government rejected all the Commission's conclusions (with one non-controversial exception). The government gave a number of grounds for their rejection, and I have concluded that none of those grounds amounts to rational reasons, let alone legitimate ones. Most fail that test for more than one reason.
>
> There is nothing evenly balanced here. With respect, I am not left in doubt on any of these topics. Therefore, onus becomes academic.[64]

What is intriguing about Côté J.A.'s opinion is that it leads to the curious result that, even though the burden of proof hypothetically rests with the judges' association, the province is left with the difficult task of showing, in its *defense*, that it has accounted for all of the facts upon which it relies, that its reasons represent a seamless web of truth-functional logic. The judges' association needs only to show that the province has *not* included some normative or factual premise without which the otherwise coherent reasons disintegrate into arbitrary political posturing. It is the submission of this comment that the requirement that the province's reasons display the rigour of even simple logical analysis may lead to a situation where the province's limited role as a safeguard is jeopardized. The Court of Appeal's judgment may lead down a path at the end of which the province is cut out of the constitutional picture altogether.[65]

VIII. REMEDY AND THE SPECTER OF PROVINCIAL DECEPTION

The Court found that none of the province's reasons for departing from the JCC's recommendations satisfied the test laid down in the *P.E.I. Reference*. The Court barely disguised its dissatisfaction:

> The government accepted the Commission's conclusions as to supernumerary judges. It basically rejected all the rest. All the government's grounds adduced for rejection fail to meet the test of rational reasons. Many are not even reasons, let alone rational ones, still less legitimate ones. Most are infected with several flaws. None of the grounds tendered survives this examination...[66]

Because all of the province's reasons are inadequate, the Court did not need to address the problem of how to decide a case where only *some* of the province's reasons are legitimate. Côté J.A. hints that, in such a hypothetical case, the outcome *could* depend upon the ratio of good reasons to bad reasons:

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64 *Ibid.* at paras. 102-104.

65 This is not to say that the requirement of logic is itself a threat. Indeed, it is true enough to suggest that an absence of logic in constitutional matters may be properly perceived as a greater threat than a requirement of "too much logic." The possible ground for complaint, in the *Alberta Judges Case*, lies not in its requirement of rationality — which, after all, was already prescribed by the Supreme Court — but rather in its emphasis upon logical *form*.

66 *Alberta Judges Case*, *supra* note 1 at para. 105.

> Therefore I need not consider today what would be the situation if some government grounds fell and some stood. (*Maybe if most of the government's stated grounds were bad in law, and only a few withstood scrutiny, it might be different from a case where most of the government's reasons stood, and only a few were struck down.*)[67]

Why this should be so is unclear, in part because the category of difference of which Côté J.A. speaks is itself unclear. Perhaps his point is that the disposition of the case depends substantially upon the specter of provincial deception, *i.e.* the breadth of concern, in a given case, that the province's reasons (even where they are good in law) are not the province's true reasons, but rather are no more than an excuse to depart from JCC recommendations. The argument could be made that, where the majority of the province's reasons are bad in law, one may draw the conclusion that even those reasons that would, by themselves, satisfy the rationality test are somehow "tainted" by the insufficient grounds. The Court *may* be entitled to conclude that the province's reasons, when taken as a whole, are irrational, though the province has inadvertently stumbled upon some valid reasons *despite itself*. Where a majority of the reasons are irrational, the Court may find that the province did not engage in a rational discourse with the JCC's findings, but that the province simply grabbed, higgledy-piggledy, whatever half-formed and unsupported reasons were at arm's length, and that no genuine deliberation or analysis was performed by the province. In that case, it would be wrong to allow the province to benefit from such a random argument, by deciding in its favour merely because the province happened to stumble upon one valid argument.

The Court refers to this specter of provincial deception a number of times in the judgment,[68] but particularly where the Court decides what remedy should be ordered. The lower court ordered the provincial government to immediately implement the JCC's recommendations, without giving the government further opportunity to review the recommendations, and develop rational reasons, if available, to reject them. On appeal, this order was affirmed. The Court first made the point that the province, though it acts, in a sense, as a constitutional safeguard, cannot be equated with an "independent neutral tribunal."[69] It is an interested party in the proceedings, one that will not hear representations from the judges' association (indeed, it is constitutionally forbidden from doing so). Thus, the province bears none of the traditional indicia of a tribunal. That a tribunal will often be given an opportunity to reconsider its disposition of a matter, where its reasons are deemed faulty, is therefore of no significance in the instant case.[70] The Court also notes that even if the province could be properly construed as a tribunal, it would be untenable to send the matter back, because it would be reconsidered by the "tribunal" as it was originally constituted:

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67 *Ibid.* at para. 107 [emphasis added].

68 *Ibid.* at para. 37.

69 *Ibid.* at para. 110.

70 *Ibid.* at paras. 109-10.

> And in the second place, where a court holds that a tribunal got the matter wrong, it usually sends the matter back to a *different* member or panel to rehear the second time.... Again, with argument, and maybe fresh evidence. That is impossible here. There is only one Cabinet.[71]

The undercurrent to these points, of course, is that it would compromise the facial independence of the provincial court to allow the province to reconsider its reasons, and thereby give it an opportunity to draft false grounds for rejecting the JCC recommendations. As Côté J.A. observes, to allow the province an opportunity to reconsider the JCC findings would present risks not offset by any discernible benefit. What would be the point in allowing the province "a second shot" when the object of its consideration has in no way changed? The Court cannot act under the assumption that the original reasons to depart were drafted in anything but good faith:

> The judgment in the *P.E.I. Reference*, *supra*, implies repeatedly that a government which rejects the conclusions of a compensation Commission must do so frankly and sincerely. In other words, the government must state its true reasons. Articulating a reason why the government has rejected, means giving the real reason. It does not mean alleging some other plausible reason which would not on its face violate any of the relevant legal tests.[72]

> In this case, none of the grounds advanced by the government to reject the Commission survives judicial scrutiny. The government gave its grounds knowing the rules set by the *P.E.I. Reference*. We must conclude that it followed those rules and gave full, frank and sincere reasons. So what legitimate object would be served by sending the matter back to the government to try again?[73]

Moreover, Côté J.A. suggests that the province's original reasons, those which were bad in law, must "taint" any new grounds for dispute *even those that are legitimate on their face*. As argued above, the specter would be raised that the government had "just happened" to hit upon a valid reason, and that the reason was not the product of genuine analysis. The new reasons must inevitably fail as well; there is no point, then, in allowing reconsideration.[74] Finally, even if some benefit could be derived from allowing reconsideration, the risk of provincial deception is so great (not in the sense that it is likely, but in the sense that the price of such deception would be constitutionally significant) that such a benefit must be grossly outweighed.[75] In fact, one cannot even say that provincial deception would be unlikely. Commenting upon the turbulent history of provincial court salary adjudication, Côté J.A. had this to say:

> The *P.E.I. Reference* judgment says that the Commission process is to be effective, but one must bear in mind the history of this litigation in Alberta and other provinces.... It is not an edifying spectacle. The *P.E.I. Reference* judgment was written with knowledge of that history, and should be read in its light.[76]

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71 *Ibid.* at para. 111 [emphasis in original].
72 *Ibid.* at para. 113.
73 *Ibid.* at para. 114.
74 *Ibid.* at para. 115.
75 *Ibid.* at paras. 116-19.
76 *Ibid.* at para. 125.

> The best that can be said of some provincial governments is that they have given this topic low priority and have let the matter drift for years. Worse might be suggested.[77]

It is submitted that this fundamental distrust of the province's motives may, ultimately, be the source of the Court's requirement that the province fully articulate its reasons for rejecting JCC recommendations. Given the history of "bad blood" between the province and the judiciary, it was impossible for Côté J.A. to assume that the judiciary and the province are "on the same page," that they truly understand one another. There always remains the fear that the province is withholding its true reasons, and so the rationality of its expressed reasons must be firmly established; a missing premise could indicate a failure to take seriously the constitutional issues at stake. The *Alberta Judges' Case* may, henceforth, stand for the proposition that a reason can only arise in a climate of trust and sensitivity.

Years of provincial stonewalling on the issue of judicial compensation may have come back to haunt the Alberta cabinet. The Court's judgment is, to use the words of one commentator, "scathing."[78] It virtually *seethes* with distrust of the province's reasons. If Côté J.A. is correct, then it *ought* to be so distrustful, because it, and the Supreme Court reference that preceded it, emerged out of a bitter, decade-long dispute between two branches of government. It now seems clear that the province's role in the determination of provincial judges' salary will be a minimal one, reduced to pointing out only the most patent of errors. If the province wants to interfere with the recommendations of the JCC, it must spell out its reasons with transparent logic and evidence.

And it must get it right the first time.

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[77] *Ibid.* at para. 126.

[78] Ziegel, "Guilty of being too greedy" *The Globe and Mail* (16 February 2000) at A12.