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Commission de réforme du droit

THE INDEPENDENCE OF JUSTICES OF THE PEACE AND MAGISTRATES

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CHAPTER 1

INTRODUCTION

A. THE PROJECT

In August 1988, the Manitoba Law Reform Commission was asked by the Hon. James C. McCrae, Attorney General of Manitoba, to examine the impartiality and independence of all provincially-appointed judicial officers.

Due to the size of the project and time and resource constraints faced by the Commission, the decision was made to report initially on these issues as they related to provincial judges, deferring examination of the status of magistrates and justices of the peace to a subsequent report. As a result, in the summer of 1989, the Commission issued its Report entitled *The Independence of Provincial Judges*.[1]

The present Report completes the deferred portion of the Commission's undertaking. It examines the present status of magistrates and justices of the peace in Manitoba, provides a comparative analysis of those offices and relevant legislation in other jurisdictions, identifies present and potential problems and provides recommendations for reform.

B. THE ISSUE

1. Background

Courts in Canada face increasing scrutiny and criticism of their actions as part of a generally heightened public awareness of the judicial system. Media reports of court decisions and reactions to those decisions have contributed to this new awareness, as have reports of judicial inquiries into system failures in several provinces and the complaints of interest groups, individuals and the practising bar.

While judges have long been required to bring an independent and disinterested mind to their deliberations, the advent of the *Canadian Charter of Rights and Freedoms* has increased expectations placed on the judicial system by particularizing individual legal and equality rights and providing specific means of redress where those rights have been infringed. Judicial decision makers are now, more than ever, expected to discharge their duties in an independent, impartial and even enlightened manner, free of attitudinal biases which might have gone unnoticed a few short years ago.

Because an individual denied bail by a justice of the peace is no less detained in custody than one whose bail is denied by a provincial judge, logic dictates that requirements of independence and impartiality would attach to the function of the judicial officer or the decision being made, rather than to any title of office. The emphasis on function and process within the legal rights sections of the *Canadian Charter of Rights and Freedoms* also supports that view. Section 7 prohibits any deprivation of liberty except in accordance with the principles of

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[1]Manitoba Law Reform Commission, *The Independence of Provincial Judges* (1989, Report #72).

"fundamental justice" and section 11(d) of the *Charter* presumes the innocence of an accused until a finding of guilt by an independent and impartial tribunal.

Thus, those requirements of independence, impartiality and/or fundamental justice will extend to magistrates and justices of the peace in Manitoba, at least when their decisions affect another's liberty or security of the person or determine guilt or innocence.

Alleged failure to meet these expectations has given rise to legal challenges in several provinces, including Manitoba. Citing a reasonable apprehension of bias, the Saskatchewan Court of Appeal has declared a search warrant invalid for having been issued by a justice of the peace who happened to work under the direct supervision of a member of the police force who requested the warrant.[2] Similarly, a Manitoba court has held that a justice of the peace employed by the police lacked sufficient independence to issue process respecting informations sworn by the police.[3]

This Report examines the various duties and functions of Manitoba magistrates and justices of the peace in order to determine in which instances a requirement for independence and impartiality will attach. Various factors which may be used to assess the independence and impartiality of judicial officers are also considered, including the appointment process, conditions of tenure, qualifications, remuneration, evaluation, discipline, direction and civil liability.

2. Other Jurisdictions

Questions about the role and office of justice of the peace are neither new nor exclusive to Manitoba. They have given rise to studies and reform initiatives in several jurisdictions. In Ontario, a detailed examination of the office of justice of the peace has been undertaken on more than one occasion during the past 25 years, beginning with the report of the 1968 McRuer Royal Commission.[4] That report recommended training initiatives and expressed concerns about the number of inactive justices of the peace and the practice of payment on a "fee" or piece-work basis.

Later, in 1973, the Ontario Law Reform Commission reiterated the call to discontinue "fee" payments.[5] That report not only recommended appointment of full-time non-civil servant justices of the peace and the expansion of educational and training programmes, but also the establishment of a Justices of the Peace Council to consider appointments and receive and investigate complaints.

Additional recommendations for reform were made by Alan Mewett in the early 1980's, following yet another review of the office which was undertaken at the request of the Attorney General of Ontario.[6]

Most recently, Professor Anthony Doob of the Centre of Criminology, University of Toronto, kindly allowed us to see pre-publication drafts of a forthcoming paper based on extensive interviews with justices of the peace in several provinces.[7] We are most grateful for

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[2]*R.* v. *Baylis* (1988), 65 C.R. (3d) 62 (Sask. C.A.).

[3]*R.* v. *Dorion*, Man. Prov. Ct., unreported, February 27, 1989, Giesbrecht P.C.J.

[4]Ontario (J.C. McRuer), *Royal Commission Inquiry into Civil Rights*, Report No. 1, vol. 2 (1968) 513-525.

[5]Ontario Law Reform Commission, *Report on the Administration of Ontario Courts, Part II* (1973) 18-19.

[6]A.W. Mewett, *The Office and Function of Justices of the Peace in Ontario* (1982).

[7]A.N. Doob, P.M. Baranek and S.M. Addario, *Understanding Justices: A Study of Canadian Justices of the Peace* (draft) (1991).

his assistance and cooperation. These and similar works from various other jurisdictions are examined in some detail in this Report, as is recent legislative activity in the area.

3. Origins of the Issue

The *Canadian Charter of Rights and Freedoms* and our common law traditions of natural justice and fairness demand independence and impartiality from decision makers. However, these requirements may not be met because of the personal circumstances or behaviour of the individual decision maker, such as the appearance of interest or bias or the denial of a party's right to be heard. Impartiality may also be threatened by the administrative framework within which that justice of the peace works. The very existence of a close association between the police and a justice of the peace may be perceived as indicative of an institutional bias in favour of the state and that perception may be reinforced where that particular judicial officer is also a civil servant employed in the administration of the courts.

The justice of the peace or magistrate occupies a unique position in our judicial system, involving more direct and informal contact with police and the public than is required of other judicial officers. Historically, the office evolved from the 12th century "Custodes Pacis, Keepers of the Peace",[8] who were primarily charged with policing and maintaining order for the King. Eventually, they were given the power to hear and determine charges and their policing duties were taken over by local constables. However, some duties still assigned to these officers under our present day *Criminal Code*, such as receiving informations and issuing process, go more toward enforcement and apprehension than adjudication and they continue to necessitate a close working relationship with the police.

Nevertheless, the justice of the peace is obliged to defend the privacy and liberty of individual citizens from unwarranted interference by the state, as represented by those same police. Because of that obligation, it is absolutely essential that justices of the peace maintain not only their independence, but also the appearance of independence, if public confidence in our judicial system is to be preserved.

Throughout this Report, comparisons are made with legislative schemes and practices affecting justices of the peace and other like judicial officers in the United Kingdom and other Canadian jurisdictions. However, the Commission recognizes that Manitoba's unique geographic, social and economic circumstances must be taken into account when formulating suggestions for reform, in recognition of the need to provide all Manitobans with reasonably accessible and efficient services while avoiding disparities in the quality of justice dispensed.

C. ACKNOWLEDGMENTS

In most jurisdictions, including Manitoba, the governing legislation does not reveal the specific powers actually exercised by justices of the peace and magistrates, nor does it dictate the selection process, the conditions under which they work, the level of training and qualifications they possess, nor their place in the administrative framework of the judicial system as a whole. However, information of that nature is necessary to make accurate appraisal of the need for independence and impartiality and to determine whether the need is met.

It is for that reason that the Commission is particularly indebted to the many Manitoba magistrates and justices of the peace who assisted us by responding to the mail survey which we undertook to obtain the necessary data. Those responses provided valuable information about their work and working conditions along with commentary and insights not otherwise obtainable.

[8] B. Osborne, *Justices of the Peace 1361-1848* (1960) 3-5.

The Commission also gratefully acknowledges the cooperation and assistance received from Chief Judge Kris Stefanson and Marvin Bruce, Assistant Deputy Minister, Courts, in clarifying the everyday role of magistrates and justices of the peace in the administration of justice and providing the information required to carry out the survey.

Special thanks are also owed to a number of individuals who provided information about practices in other jurisdictions, including Leslie Baker, Law Officer to the Chief Judge of the Provincial Court in British Columbia, Anatole Sywak, Coordinator Designate of justices of the peace in Ontario and Neil McLean, Supervising Justice of the Peace in Saskatchewan.

D. ORGANIZATION OF THE REPORT

The early part of our Report sets out necessary background information. We begin in Chapter 2 with a discussion of the origins and development of the offices of magistrate and justice of the peace. Chapter 3 details the jurisdiction which these judicial officers are now empowered to exercise and Chapter 4 examines these powers in the context of the constitutional and common law requirements of independence and impartiality. In Chapter 5, we present a "snapshot" of Manitoba's magistrates and justices of the peace: who they are; where and how they work; what they do. The information contained in the Chapter is based on the survey referred to earlier.

The balance of the Report applies this legal and factual background to specific issues and sets out our recommendations for reform. Chapter 6 deals with tenure and appointment, Chapter 7 deals with remuneration and Chapter 8 deals with discipline and removal from office. Chapter 9 addresses transitional and miscellaneous matters. Chapter 10 contains a re-statement of our recommendations.

Finally, Appendix A sets out a draft Justices of the Peace Act which is intended to show how our proposals might be implemented. Appendix B sets out statistical tables of some of the results of our survey of Manitoba's justices of the peace and magistrates.

CHAPTER 2

HISTORICAL BACKGROUND

A. THE TERMINOLOGY

'Justice of the Peace' is a very old term dating back to 14th century England when justices of the peace were first appointed to enforce the law in the English countryside.[1] Their powers evolved over the years to include the trial of offences and sentencing and the term 'justice of the peace' today refers to judicial officers of limited or inferior jurisdiction.

'Magistrate' is a more generic term, used to describe persons possessing either judicial or executive powers. The term is broad enough to include the office of the President of the United States (sometimes referred to as the Chief Magistrate), as well as any inferior or subordinate judicial officer. The term 'Magistrate' first came to be applied to justices of the peace in early eighteenth century England when courts presided over by justices of the peace eventually became known as 'Magistrates' Courts'.[2]

Although these two terms may be virtually interchangeable in other jurisdictions, in Manitoba they denote two distinct offices with different legislative histories and, until the creation of the Provincial Court in 1972, substantively different statutory jurisdictions.

Presently, Manitoba magistrates and justices of the peace are designated one or the other by the Order in Council effecting their appointment. Although a review of existing legislation reveals only minor differences between the statutory powers granted the two offices, administrative practice apparently results in significant differences in the jurisdiction actually exercised by each.

In Manitoba, then, these terms are meaningful and a short review of the relevant history of both offices is necessary in order to understand the situation as it exists today. There are also areas of controversy currently affecting magistrates and justices of the peace which have their roots in the early British history of the office. A review of that history will identify some of those problems and may also suggest some solutions.

B. ENGLISH HISTORY

1. The Origins of the Offices

Modern-day justices of the peace can trace their origins as far back as the latter part of the 12th century when Richard I issued a proclamation instructing certain knights to summon local males and take their oath to obey the law and assist in the pursuit of criminals. These knights

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[1] F. Milton, *The English Magistracy* (1967) 4.

[2] *Id.*, at 2.

were also empowered to try suspected criminals who would otherwise have been held in prison to await trial by the King's judges.[3]

In 1327, Edward III established the practice of assigning laymen 'of the best reputation' as *Custodes Pacis* or 'Keepers of the Peace',[4] with authority to arrest and detain criminals.[5] These 'keepers' also had authority to hear and determine felony matters as they arose, without waiting for the Assize trials.[6] Their powers were greatly expanded in 1349 when the first of *The Statutes of Labourers* gave them authority to determine commodity prices, wage rates and places of work, as a means of coping with labour shortages brought about by the Black Death.

1360 brought the first comprehensive Act respecting justices of the peace, entitled *What Sort of Persons shall be Justices of Peace; and what Authority they shall have.*[7] There being no clear distinction between policing functions and the courts,[8] the first justices of the peace were directed to "pursue, arrest, take and chastise" offenders and to "hear and determine . . . all manner of felonies and trespasses done in the same county".[9] After the Courts of Quarter Sessions were established in 1362, the criminal jurisdiction of justices of the peace was principally confined to those Courts. Individual justices of the peace investigated complaints and took security for appearance at Quarter Sessions where virtually all criminal matters were heard by a jury upon indictment.[10]

As their criminal jurisdiction was rapidly expanded by ever increasing numbers of statutory offences, justices of the peace began hearing matters in their own homes, especially when intervening crises such as the Wars of the Roses and the Civil War made it impossible to assemble at Quarter Sessions. By the end of the 16th century, legislation had conferred the power of summary judgment on those meetings, called Petty Sessions,[11] and they eventually gained the status of a court through the *Petty Sessions Act* of 1849.[12] Most matters were heard by two or more justices of the peace, one of whom was usually legally trained.[13]

In addition to police and judicial matters, justices of the peace were responsible for constructing and maintaining highways, bridges and jails (including the raising of sufficient funds to do so). They were also responsible for recruiting the militia[14] and, by 1552, for the licensing of public houses (pubs).[15] Justices of the peace were also given significant regulatory responsibilities during times of crisis. In 1587, when the nation was faced with the threat of famine caused by successive crop failures, justices of the peace were required to take inventory

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[3]*Supra* n. 1, at 3.

[4]B. Osborne, *Justices of the Peace 1361-1848* (1960) 27.

[5]*Supra* n. 1, at 4.

[6]T. Skyrme, *The Changing Image of the Magistracy* (1979) 2.

[7]*Supra* n. 1, at 4.

[8]*Supra* n. 1, at 8.

[9]34 Edward III, c. 1.

[10]*Supra* n. 4, at 5-6.

[11]*Supra* n. 6, at 5.

[12]*Supra* n. 6, at 5.

[13]*Supra* n. 4, at 31.

[14]*Supra* n. 1, at 10.

[15]*Supra* n. 4, at 12.

of the corn available in their home parish, to allocate a ration for each family, and to see that any excess commodity was moved to market for sale at the regulated price. For several centuries, virtually all the power and responsibility involved in administering local government fell to these justices of the peace who were appointed by the Crown and answerable directly to the Privy Council.

By the 19th century, the unprecedented rate of population growth accompanying industrialization had greatly multiplied the demands placed upon local government, especially in the areas of health and public order.[16] At the same time, widespread corruption of the office had reputedly developed among the 'borough' justices, some of whom had come to regard fines and fees as a source of personal income.[17] These urban justices of the peace derived their authority from the borough charter which provided for appointment by virtue of the office held and usually included the mayor and several aldermen. This resulted in an urban bench which was perceived to be out of touch with the local community, self-serving, inefficient and corrupt.[18]

In response to a Royal Commission's findings of administrative inefficiency and widespread loss of confidence in the integrity of the magistracy, the *Municipal Reform Act* of 1835 severed the office of magistrate or justice from municipal office and provided for the appointment of urban justices of the peace by the Lord Chancellor. The only exception was the mayor who remained *ex officio* justice of the peace and chairman of the bench. At the same time, the appointment of a justices' clerk with specific qualifications became mandatory and all administrative matters became the responsibility of elected town councils (with the exception of a few quasi-judicial matters, such as licensing).[19]

Justices of the peace in rural areas retained those local administrative powers for another half century, until 1888, when that jurisdiction was removed to County Councils by the *Local Government Act* (again, with the exception of the licensing of public houses, which responsibility was retained).[20]

Although the separation of the administrative from the judicial functions had removed much of the justices' civil powers, the establishment of the Courts of Petty Sessions in 1849 signalled a greatly expanded summary jurisdiction and resulted in the vast majority of criminal matters being heard in that Court. They were soon given new civil jurisdiction under the *Matrimonial Causes Act* of 1878 and, in 1908, passage of the *Children Act, 1908* resulted in juvenile offenders also being tried summarily by justices of the peace.[21]

The jurisdiction of these unpaid, part-time lay justices of the peace continued and flourished through to the present century. By 1977, 98% of all criminal cases in England were disposed of in Petty Sessions by some 23,483 justices of the peace then on the active list and 52 stipendiary magistrates (of whom 41 were located in London).[22]

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[16]E. Moir, *The Justice of the Peace* (1969) 173.

[17]J.P. Eddy, *Justice of the Peace* (1963) 38.

[18]*Supra* n. 16, at 167-180.

[19]*Supra* n. 16, at 178-179.

[20]*Supra* n. 6, at 4.

[21]*Supra* n. 6, at 5.

[22]*Supra* n. 6, at 5 and 16-17.

2. Stipendiary Magistrates

The professional or stipendiary magistrate, as that office is known today, had its origins in the 18th century London 'Court Justice' who was appointed from the ranks of existing justices of the peace to hear only criminal matters. There was a large component of police work included in the duties of the Court Justice, until the formation of a new police force in 1829 resulted in those duties being taken over by commissioners of police headquartered at Scotland Yard. The Court Justice was paid partly by fees until 1792, when legislation formalizing these courts allowed 24 such magistrates at seven 'Police Offices' to be paid 400 pounds annually.[23]

While there had been initial opposition to a professional or paid magistracy, those objections gradually abated and regular and substantial pay increases were authorized in order to attract well qualified candidates. By 1839, the Police Offices had become 'Police Courts' and the office of Chief Metropolitan Magistrate was officially established. In 1825, all but four of these stipendiaries were legally trained[24] and, by 1949, stipendiary magistrates were required to be Barristers or Solicitors with 7 years' standing.[25]

Although there was some early dispute as to the jurisdiction exercisable by these magistrates, that controversy had dissipated by the late 1960's when justices of the peace and stipendiary or metropolitan magistrates shared an integrated jurisdiction in a number of courts, often sitting together to determine certain matters.[26]

3. Qualifications of Office

The early justices of the peace were drawn from the ranks of the privileged: particularly, members of the landed gentry. While the first precursors to the office were knights appointed by the King, the Keepers of the Peace who followed were merely required to be "good men and lawful" and "of the best reputation". The Act of 1361 required the appointment of "one lord and with him three or four of the most worthy" in each county as justice of the peace.[27] Formal property qualifications of 20 pounds a year from lands and tenements were imposed in 1439 to guard against abuse of the office for gain or "necessity".[28]

Justices of the peace were usually leaders in their own counties and often included the most influential men of the day. Many of those who met to try offenders and administer local matters at Quarter Sessions also sat as Members of Parliament. Half of the members of the Elizabethan House of Commons were named in Commissions of the Peace.[29] It was also common practice to include at least some high officers of state or members of the royal household in each of the county commissions, many of whom did not actively serve on the bench; there appears to have been a tradition of honorary appointment even in those early days.

Limiting appointments to the relatively wealthy resulted in early justices of the peace being better educated than the average citizen. A survey of 85 resident justices of the peace in

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[23] *Supra* n. 1, at 29.

[24] *Supra* n. 1, at 32.

[25] *Supra* n. 1, at 35.

[26] *Supra* n. 1, at 38.

[27] *Supra* n. 1, at 4.

[28] *Supra* n. 4, at 27.

[29] *Supra* n. 6, at 3.

Somerset from 1613 to 1625 revealed that 35 had attended university, 24 of those attaining a degree. Furthermore, 42 had attended one of the Inns of Court and 9 had been called to the bar.[30]

Influential clergy were also often named in the commissions, except for a brief period during the Civil War when those in holy orders were disqualified from occupying any civil office. The Civil War caused another, if temporary, change in the composition of those named in the Commissions of the Peace when a number of royalists were removed and replaced by supporters of Parliament. As a consequence, peers, baronets and knights were displaced by lawyers, merchants and tradesmen,[31] although that trend was apparently reversed after the Restoration in 1660.[32]

The office of justice of the peace came under increasing attack in the years following the Restoration when successive governments adopted the practice of removing those justices of the peace seen to be politically unsuitable, in order to replace them with others more supportive.[33] This practice, along with the previously mentioned appointments by operation of Borough Charter, opened up the office to more diverse candidates and ended the monopoly of the gentry in the larger towns. However, a general decline in the esteem of the office and of the system as a whole apparently followed. Many of the new town justices were of a humbler background, without independent means of support. Because no wages were paid, many looked to their fees to make their living, thus ending the long-standing practice of allocating fines and fees to charity. Once the retention of those sums began, the temptation to encourage business was present and corruption and oppression were reputedly commonplace, especially on the Middlesex Bench which held most of the metropolitan area within its jurisdiction.[34]

In part because of the great influence exercised over new appointments by those already named in Commissions, the monopoly enjoyed by the gentry in the counties was not seriously threatened until the abolition of property qualifications in 1906.[35]

In 1911, a Royal Commission on the Selection of Justices of the Peace found that the public interest required the appointment of justices of the peace who were more representative of the general population. In keeping with that policy, the disqualification of women was removed in 1919. A compulsory retirement age of 75 was introduced in 1949 and reduced to 70 in 1968. That move resulted in a significantly lower average age of justices of the peace on the active list.[36] Although lay persons continued to be appointed, compulsory training for new justices of the peace was in place by 1966 and legally-trained clerks were present on every bench to provide legal advice to the lay justices of the peace and to assist in the everyday administration of the courts.

4. Remuneration

When the number of justices of the peace appointed in each county was increased from four to six in 1388, the legislation provided for payment of four shillings a day (16 times a

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[30]*Supra* n. 4, at 86.

[31]*Supra* n. 4, at 110.

[32]*Supra* n. 4, at 127.

[33]*Supra* n. 1, at 14.

[34]*Supra* n. 1, at 14-17.

[35]*Supra* n. 1, at 18.

[36]*Supra* n. 6, at 17.

labourer's daily wage), for a maximum of 12 days a year. Lords were made ineligible for this payment two years later, when the appointment quota was raised to eight per county. Although more justices of the peace were appointed as the workload grew, the maximum number of paid justices of the peace remained at eight and the practice of paying the eight most senior commoners was adopted.[37]

The payment remained at four shillings for long enough that it came to represent a very nominal amount and was eventually discontinued in many counties or was allocated for administrative use or to charity, until formally abolished in 1854.[38] So long as justices of the peace were required to have substantial property holdings, the lack of remuneration was theoretically unlikely to impose a hardship and, even though the practice of non-payment continued after the abolition of property qualifications, appointments apparently continued to be very much sought after.[39]

It seems likely that this long tradition of voluntary service by justices of the peace must have contributed to the exclusion of certain classes of persons from the office, especially wage earners. However, strong opposition to remuneration for service continued and, in 1949, a proposal to pay compensation for loss of earnings was defeated in Parliament.

C. MANITOBA HISTORY

1. Pre-Confederation

While the office of justice of the peace came to the colonies as an integral part of the English legal system, the early presence of the Hudson's Bay Company was a complicating factor in the establishment of that system in Manitoba.

In addition to rights to the "sole trade and commerce"[40] of the area known as Rupert's Land, including the lands, minerals and fisheries contained therein, the Hudson's Bay Company Charter of 1670 also granted complete governmental and judicial power. The Charter enabled the Company to appoint local Governors and Councils with power to adjudicate civil and criminal matters according to the laws of England. Where such officers had not been appointed, offenders could be tried by the Governor and Council in another location, or returned to England for that purpose.[41] The Charter also authorized the Governor and Council to assemble and to make and enforce laws for the good government of the Company, so long as the laws and penalties imposed were reasonable and not repugnant to the laws of England.[42]

For the first hundred years of the Company Charter, virtually all non-native inhabitants of Rupert's Land were employees of the Hudson's Bay Company and the primarily commercial interests of the Company were adequately served by the Charter. The maintenance of public order was neither difficult nor complicated, in part because there was no attempt to regulate the aboriginal population unless their actions affected Company employees or property.[43] With the

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[37]*Supra* n. 1, at 6.

[38]*Supra* n. 1, at 6.

[39]*Supra* n. 16, at 188.

[40]The Charter is reproduced in E.H. Oliver, *The Canadian North-West, Its Early Development and Legislative Records* (1914) 135.

[41]*Id.*, at 151.

[42]*Id.*, at 145.

[43]D. Gibson and L. Gibson, *Substantial Justice* (1972) 2.

arrival of settlers and rival fur traders, the judicial system provided by the Charter became less effective. Territorial disputes arose between the Hudson's Bay Company and the North West Company, and the jurisdiction of that system came under attack.

In 1803, the British Parliament passed an Act extending the jurisdiction of the Courts of Upper and Lower Canada to the trial of offences committed within the Indian Territories and authorizing the appointment of justices of the peace in those same Territories by the Governor of Lower Canada.[44] The Hudson's Bay Company was of the view that the provisions of its Charter exempted Rupert's Land from the ambit of the Act. Although the Earl of Selkirk had obtained a legal opinion confirming that view, he arranged for the first leader of the Red River Colony to be appointed a magistrate for the Indian Territories, pursuant to the 1803 legislation. This was in addition to his appointment as Governor of the Hudson's Bay Company, which conferred all the legislative and judicial powers granted under the Company Charter.[45]

The Act of 1803 gave justices of the peace appointed to the Indian Territories the power to commit suspects to be conveyed to Lower Canada for trial. The reputed abuse of this power to effect the removal of troublesome persons from the colony for long periods only added to the animosity between the two rival trading companies. In response to escalating conflict, a Royal Commission was established and all the commissions of justices of the peace for the Indian Territories were withdrawn.[46]

Although the report of the Royal Commission culminated in a series of criminal trials in Upper and Lower Canada, the scope of judicial powers granted the Governor and Council under the Hudson's Bay Charter remained uncertain[47] and, in 1821, the British Parliament finally enacted a statute aimed at relieving that uncertainty.[48] That legislation confirmed the applicability of the earlier statute to land included in the Hudson's Bay Company Charter and gave the courts of Upper Canada jurisdiction over civil and criminal matters arising in the Territory. The Act also empowered the Crown to appoint justices of the peace for the Territories and to establish courts of record with jurisdiction over non-capital criminal matters and civil claims under 200 pounds, but it did not abrogate the Charter powers of the Governor and Council of the Hudson's Bay Company.[49]

Because hostilities between the North West and Hudson's Bay Companies ended in negotiated settlement, the British found it unnecessary to appoint courts or judges. Instead, the Governor and Council of Assiniboia continued to be responsible for the administration of justice (including the appointment of justices of the peace) in the Red River Colony, by authority derived from the Hudson's Bay Charter.[50]

After the Selkirk estate's interests in Assiniboia were conveyed back to the Hudson's Bay Company in 1835 and the need for a more formal judicial system became apparent, the colony was divided into four judicial districts. Each district had its own magistrate or justice of the peace who sat in quarterly Petty Sessions to deal with minor criminal charges and civil claims of

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[44] 43 Geo. III, c. 138.

[45] *Supra* n. 43, at 6.

[46] *Supra* n. 43, at 13.

[47] *Supra* n. 43, at 16.

[48] 1 & 2 Geo. IV, c. 66.

[49] 1 & 2 Geo. IV, c. 66, s. 14.

[50] *Supra* n. 40, at 219 n. 2 and 221 n. 1.

less than forty shillings. More serious cases and appeals from Petty Sessions were dealt with by a quarterly General Court consisting of the Governor and Council of Assiniboia.[51]

Two years later, the judicial districts were reduced to three, each having two justices of the peace. All Petty Sessions were then required to take place before at least three magistrates and the composition of the General Court was changed to include the Governor and at least four magistrates.[52] The early justices of the peace were also members of the Council so that the same individuals had responsibility for legislative as well as judicial duties.

Aside from minor alterations to the composition of the courts and their jurisdictional limits, the framework for the administration of justice in the colony remained virtually unchanged until the creation of the province of Manitoba in 1870. Magistrates appointed by the Council continued to be responsible for a large share of the judicial duties in the colony, in addition to other matters such as the administration of public works expenditures approved by the local Council.[53]

In 1867, the *British North America Act*[54] paved the way for the admission of Rupert's Land and the North-western Territory into the Dominion of Canada. The *Rupert's Land Act* of 1868[55] preserved the jurisdiction of the then existing courts, officers, magistrates and justices of the peace until such time as the Parliament of Canada established laws and courts as necessary for the "Peace, Order and Good Government" of subjects.[56] Nevertheless, there was a period of several months in the winter and spring of 1870, during the Provisional Government established by Louis Riel, when the jurisdiction and authority of the existing court system was seriously questioned and a reorganization was proposed.[57] Following the September arrival of the first Lieutenant Governor of the new province created by the *Manitoba Act*,[58] the existing courts of Assiniboia were continued, but with newly appointed justices of the peace named by the Executive Council.[59]

2. The New Province

Section 92(14) of *The British North America Act, 1867* had empowered the provinces to appoint justices of the peace as part of their jurisdiction over the administration of justice.[60] In 1871, the Manitoba Legislature granted the Lieutenant Governor in Council authority to appoint justices of the peace and police magistrates[61] and, in 1875, the Legislature particularized the requirements of office.[62] Sheriffs and coroners, as well as practising barristers and solicitors,

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[51]*Supra* n. 40, at 270.

[52]*Supra* n. 40, at 280.

[53]*Supra* n. 40, at 457-460.

[54]30 & 31 Vict., c. 3, s. 146.

[55]31 & 32 Vict., c. 105.

[56]31 & 32 Vict., c. 105, s. 5.

[57]*Supra* n. 43, at 60.

[58]33 Vict. c. 3.

[59]*Supra* n. 43, at 69.

[60]Although this may appear self-evident, the point has been disputed: see *Re Rex* v. *Isbell* (1928), 50 C.C.C. 81 (Ont. S.C.).

[61]*An Act Authorizing the Appointment of Magistrates and Coroners*, 34 Vict., c. 9.

[62]*An Act Respecting the Qualifications of Justices of the Peace*, 38 Vict., c. 9.

were initially disqualified from holding office as justice of the peace and appointees were required to hold property of a certain value and to take an oath to that effect.

In 1876, *An Act Respecting the Appointment of Police Magistrates and Other Officers*[63] authorized the appointment of police magistrates in various areas of the province and imposed territorial restrictions on their jurisdiction. The Act granted magistrates the power of two or more justices of the peace, provided for payment of a salary and required the annual filing of returns to the Provincial Secretary. The jurisdiction of the mayor and aldermen of the City of Winnipeg as *ex officio* justices of the peace was limited to the trial of offences against city by-laws.[64]

By 1879, the Legislature had specified fees and costs which could be collected by justices of the peace, as well as penalties for charging more or failing to make semi-annual returns.[65] By 1887,[66] quarterly returns were required and continued refusal to file could result in removal.

In 1891, a new *Act Respecting Police Magistrates and Justices of the Peace*[67] consolidated provisions affecting those officers which had been contained in earlier Acts and provided for appointment by commission (with new commissions automatically revoking or cancelling all former commissions).

In 1897, amendments were made for the protection of magistrates and justices of the peace from civil suit when acting under *ultra vires* statutes.[68]

The Act underwent extensive revision in 1936[69] and the provision that police magistrates held office "at pleasure" was removed (though this provision remained in *The Manitoba Interpretation Act*[70]). The same Act removed the disqualification of barristers and solicitors from the office of justice of the peace, but not of sheriffs and coroners who continued to be disqualified unless the Lieutenant Governor in Council considered the appointment to be "necessary in the public interest".[71] The provision that a new commission cancelled a former commission was deleted and the new Act granted authority to deal with matters relating to municipal by-laws, *The Small Debts Recovery Act* (after appointment as provided by that Act) and any other Act which specifically granted jurisdiction to a justice of the peace. This Act also provided for remuneration of justices of the peace and specified when fees and expenses were payable by the municipality and when they were payable by the province. Both magistrates and justices of the peace were required to take an oath of office and of allegiance and to file returns with the Inspector of Legal Offices. For the first time, provision was made to furnish security in lieu of an interest in land.

In 1954, amendments to the Act allowed for appointment of police magistrates under *The Civil Service Act* or by the Lieutenant Governor in Council.[72] Amendments made in 1955

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[63] *An Act Respecting the Appointment of Police Magistrates and Other Officers*, 39 Vict., c. 4.

[64] *An Act to Incorporate the City of Winnipeg*, 37 Vict., c. 7, as am. 38 Vict., c. 50, ss. 114 and 115.

[65] *An Act respecting fees of Justices of the Peace and their duties; and indemnity to jurors and criminal witnesses*, 42 Vict., c. 5.

[66] *An Act to amend Chapter 51 of the Consolidated Statutes of Manitoba*, 50 Vict., c. 15.

[67] *The Manitoba Magistrates Act*, R.S.M. 1892, c. 93.

[68] *An Act to Amend the Manitoba Magistrates Act*, 60 Vict., c. 15.

[69] *The Manitoba Magistrates Act*, S.M. 1936-7, c. 26.

[70] *The Manitoba Interpretation Act*, R.S.M. 1913 and Cons. Am. 1924, c. 105, ss. 14(1) and 37.

[71] *The Manitoba Magistrates Act*, S.M. 1936-7, c. 26, s. 7.

[72] *The Magistrates Act*, R.S.M. 1954, c. 150, s. 2.

allowed the Lieutenant Governor in Council to grant magistrates the jurisdiction conferred by Part XVI of the *Criminal Code*.[73] In 1967, magistrates were given the same power to preserve order in court as that exercised by the Court of Queen's Bench and the office of Chief Magistrate was created, with supervisory power over sittings and assignments of magistrates and justices of the peace.[74]

By 1970, the Act had become *An Act Respecting Magistrates and Justices of the Peace* and all references to 'police magistrates' had become simply 'magistrates'. A year later, *The Provincial Judges Act* repealed *The Magistrates' Act* and provided for the appointment of legally-trained magistrates in good standing with the Law Society and eligible to practise.[75] These persons would now be called 'provincial judges'. Full-time members of the bench would hold office during good behaviour and a Judicial Council was established to hear and adjudicate complaints or allegations relating to these judges.

That Act continued to provide for the appointment of full or part-time magistrates and justices of the peace who could be appointed under the *The Civil Service Act* or paid as prescribed by the Lieutenant Governor in Council. Both magistrates and justices of the peace were required to furnish a performance bond in lieu of property or other security, and both were required to take oaths of office and allegiance. Territorial limitations were removed and magistrates retained the power to preserve order in their court.

The office of Chief Magistrate was replaced by the office of Chief Judge with supervisory powers over provincial judges, magistrates and justices of the peace and responsibility for assignment of duties and other administrative matters. The disqualification of coroners and sheriffs was removed. The protection for those acting under *ultra vires* statutes was repealed but actions against a judge, magistrate or justice of the peace for acts done in the execution of their duty were limited to circumstances where the act was done "maliciously and without reasonable and probable cause".

The Provincial Judges Act was subsequently replaced by *The Provincial Court Act*,[76] which sets out the powers and responsibilities of magistrates and justices of the peace in Part V. Initially, section 42(2) allowed the Lieutenant Governor in Council to grant the jurisdiction then conferred on magistrates under Part XVI of the *Criminal Code*.[77] That provision was subsequently amended to disallow specifically the exercise of Part XVI jurisdiction by magistrates.[78] However, section 42(3) allowed every magistrate to act "as and in the capacity of, a judge of the Provincial Court for such purposes as the Chief Judge may determine" and this provision remains today.[79]

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[73]*An Act to amend the Magistrates Act*, S.M. 1955, c. 42, s. 1.

[74]*An Act to amend the Magistrates Act*, S.M. 1967, c. 35, ss. 2 and 3.

[75]*The Provincial Judges Act*, S.M. 1972, c. 61.

[76]*The Provincial Court Act*, S.M. 1982-83-84, c. 52.

[77]This included trial of offences within the absolute jurisdiction of magistrates, as enumerated in s. 483, as well as trial of (most) indictable offences with consent of the accused.

[78]*The Statute Law Amendment Act (1986)*, S.M. 1986-87, c. 19, s. 11.

[79]*The Provincial Court Act*, C.C.S.M. c. C275, s. 42(3).

CHAPTER 3

JURISDICTION

The previous Chapter examined the evolving jurisdiction of both magistrates and justices of the peace under *The Provincial Court Act* and its precursors.

In order to ascertain accurately the full scope of jurisdiction presently enjoyed by magistrates and justices of the peace in Manitoba, one must look to Part V of *The Provincial Court Act* for the basic grant of authority and to those additional federal and provincial legislative enactments which further define their powers. Furthermore, as we shall see, there is a significant gap between the jurisdiction which magistrates and justices of the peace may exercise and the jurisdiction which they actually do exercise.

A. *THE PROVINCIAL COURT ACT*

1. Appointment and Remuneration

Appointment to either office is by the Lieutenant Governor in Council (that is, the provincial Cabinet), may be full-time or part-time, and jurisdiction extends throughout the province.[1] Magistrates and justices of the peace may be paid a fee, salary or other remuneration prescribed by the Lieutenant Governor in Council or they may be appointed civil servants, with remuneration and expenses as provided in *The Civil Service Act*.[2] Both must furnish security for the performance of their duties, as prescribed by the Lieutenant Governor in Council.[3] Both are required to take an oath or affirmation of allegiance, as provided by *The Civil Service Act*, and an oath or affirmation of office, similar to that taken by judges of the Provincial Court.[4] It is an offence for justices of the peace or magistrates to act after termination of their appointment or before furnishing security and taking the required oaths.[5] Fines and fees collected are required to be remitted to the Minister of Finance or other lawful payee[6] and there are penalties imposed for failure to remit.[7] There is currently no mechanism contained within the Act to effect removal of a magistrate or justice of the peace from office.[8]

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[1] *The Provincial Court Act*, C.C.S.M. c. C275, s. 40.

[2] *The Provincial Court Act*, C.C.S.M. c. C275, s. 41.

[3] *The Provincial Court Act*, C.C.S.M. c. C275, s. 44. Apparently, such security is generally not prescribed.

[4] *The Provincial Court Act*, C.C.S.M. c. C275, s. 45.

[5] *The Provincial Court Act*, C.C.S.M. c. C275, s. 46.

[6] *The Provincial Court Act*, C.C.S.M. c. C275, s. 52.

[7] *The Provincial Court Act*, C.C.S.M. c. C275, s. 54.

[8] Although *The Interpretation Act*, C.C.S.M. c. I80, ss. 17 and 18(1) suggest that these appointments are held at pleasure and may be revoked by the Lieutenant Governor in Council.

2. Authority

Justices of the peace have the power to determine matters relating to municipal by-laws as well as any federal or provincial Act which specifically provides that a justice of the peace may "hear, try, determine and adjudge prosecutions, charges, matters and proceedings in cases that arise" under such Act.[9]

Magistrates are given all the powers of "a magistrate or two or more justices of the peace sitting and acting together under any law or statute in force in Manitoba",[10] with the proviso that magistrates may not exercise the jurisdiction granted under Part XVI of the *Criminal Code*.[11] However, a magistrate may act "as and in the capacity of a judge of the Provincial Court for such purposes as the Chief Judge may determine."[12] Magistrates, like provincial judges, have the power to preserve order in their courts,[13] are entitled to expenses and allowances according to Civil Service guidelines[14] and are prohibited from engaging in "partisan political activities".[15]

Both magistrates and justices of the peace are protected from liability for any act done in the execution of their duties, unless done "maliciously and without reasonable and probable cause".[16]

Because the grant of jurisdiction to magistrates and justices of the peace under *The Provincial Court Act* is by way of reference to other provincial Acts, federal Acts and municipal by-laws, the full scope of their powers and responsibilities can only be determined by examination of those other enactments.

B. *CRIMINAL CODE*

By virtue of their inclusion in the definition of 'justice' contained in the *Criminal Code*,[17] justices of the peace are empowered by that Act to receive informations,[18] to confirm or cancel a promise to appear, appearance notice or recognizance[19] and to issue a subpoena,[20] summons,

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[9]*The Provincial Court Act*, C.C.S.M. c. C275, s. 43.

[10]*The Provincial Court Act*, C.C.S.M. c. C275, s. 42(1).

[11]*The Provincial Court Act*, C.C.S.M. c. C275, s. 42(2). This is presumably intended to exclude the power to adjudicate 'exclusive jurisdiction' offences and other indictable matters, upon election, which power was formerly granted by Part XVI of the *Criminal Code*. However, the recent revision of the *Criminal Code* has now placed these powers in Part XIX. Unfortunately, *The Provincial Court Act* has not been amended to reflect this change.

[12]*The Provincial Court Act*, C.C.S.M. c. C275, s. 42(3).

[13]*The Provincial Court Act*, C.C.S.M. c. C275, s. 47.

[14]*The Provincial Court Act*, C.C.S.M. c. C275, s. 48.

[15]*The Provincial Court Act*, C.C.S.M. c. C275, s. 50.

[16]*The Provincial Court Act*, C.C.S.M. c. C275, s. 49.

[17]*Criminal Code*, R.S.C. 1985, c. C-46, s. 2.

[18]*Criminal Code*, R.S.C. 1985, c. C-46, s. 504.

[19]*Criminal Code*, R.S.C. 1985, c. C-46, s. 508.

[20]*Criminal Code*, R.S.C. 1985, c. C-46, s. 698.

arrest warrant,[21] warrant to obtain blood samples[22] or a search warrant.[23] In addition, a justice of the peace may grant judicial interim release (bail),[24] conduct preliminary inquiries[25] and adjudicate summary conviction matters.[26] The *Criminal Code* also grants justices the power to require an individual to enter into a recognizance to keep the peace (a peace bond).[27]

The jurisdiction of magistrates under the *Criminal Code* has undergone some changes in the recent past. Before 1985, they had all the powers given to justices of the peace, because of their inclusion in the definition of 'justice'.[28] They also had the same power to preserve order as exercised by a superior court of criminal jurisdiction[29] and the authority to hear applications for firearms prohibitions. Part XVI of the *Code* had also given them exclusive jurisdiction over certain indictable offences[30] and the power to adjudicate others upon election of the accused.[31] Part XVI defined 'magistrate' as a person appointed under the law of a province who was "specially authorized by the terms of his appointment" to exercise the jurisdiction conferred by that Part.[32] Since 1955, Manitoba legislation had empowered the Lieutenant Governor in Council to confer that Part XVI jurisdiction by the terms of appointment, but it had not been the practice to do so, and 1986 amendments to that section of *The Provincial Court Act* specifically disallowed the exercise of that jurisdiction by magistrates.[33]

In 1985, references to 'magistrate' were deleted from the *Criminal Code*, so that the term is no longer defined in the *Code* and the definition of 'justice' no longer includes magistrate. Provisions which had previously granted authority to magistrates now refer to Provincial Court judges. This conferred no new jurisdiction on Provincial Court judges, since they had previously been included in the general definition of magistrate,[34] but it did cast some doubt on the role remaining to provincially-appointed magistrates under the *Criminal Code*.

That uncertainty gave rise to a legal challenge to the jurisdiction of Manitoba magistrates to receive informations alleging *Criminal Code* offences. The Manitoba Court of Appeal relied on the *Criminal Code* definition of "provincial court judge" to conclude that Manitoba magistrates do possess that authority.[35]

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[21]*Criminal Code*, R.S.C. 1985, c. C-46, s. 507.

[22]*Criminal Code*, R.S.C. 1985, c. C-46, s. 256, as am. R.S.C. 1985, c. 27 (1st Supp.), s. 36.

[23]*Criminal Code*, R.S.C. 1985, c. C-46, s. 487.

[24]*Criminal Code*, R.S.C. 1985, c. C-46, s. 515.

[25]*Criminal Code*, R.S.C. 1985, c. C-46, s. 536.

[26]*Criminal Code*, R.S.C. 1985, c. C-46, ss. 785 and 798.

[27]*Criminal Code*, R.S.C. 1985, c. C-46, s. 810.

[28]*Criminal Code*, R.S.C. 1970, c. C-34, s. 2.

[29]*Criminal Code*, R.S.C. 1970, c. C-34, s. 440.

[30]*Criminal Code*, R.S.C. 1970, c. C-34, s. 483.

[31]*Criminal Code*, R.S.C. 1970, c. C-34, s. 484.

[32]*Criminal Code*, R.S.C. 1970, c. C-34, s. 482.

[33]*The Statute Law Amendment Act (1986)*, S.M. 1986-87, c. 19, s. 11.

[34]*Criminal Code*, R.S.C. 1970, c. C-34, s. 2.

[35]*R.* v. *Liske* (1988), 56 Man. R. (2d) 157 (C.A.).

> 'provincial court judge' means a person appointed or authorized to act by or pursuant to an Act of the legislature of a province, by whatever title he may be designated, who has the power and authority of two or more justices of the peace and includes his lawful deputy;[36]

The Court held that persons appointed as magistrate in Manitoba pursuant to *The Provincial Court Act* are included within the meaning of "provincial court judge" in the *Criminal Code*[37] and thereby entitled to perform the functions of a justice of the peace (since 'justice' is defined in the *Criminal Code* as including a provincial court judge). Of course, this interpretation will only affect matters arising under the *Criminal Code*.

Although the decision results in potentially greater *Criminal Code* jurisdiction for Manitoba magistrates, most of that is obviated by section 42(2) of *The Provincial Court Act* which removes jurisdiction under Part XVI of the *Code*.[38] Removing those powers from magistrates leaves few remaining differences between their jurisdiction and that of justices of the peace under the *Criminal Code*.[39]

C. OTHER PROVINCIAL LEGISLATION

1. *The Interpretation Act*

The Interpretation Act and *The Summary Convictions Act* both define justice as including a "justice of the peace" and "a magistrate and a provincial judge".[40] Thus, any powers granted a justice under various provincial Acts will also extend to magistrates.

2. *The Summary Convictions Act*

Because *The Interpretation Act* does not include justice of the peace in the definition of magistrate, that Act will not authorize action by a justice of the peace where the provincial statute refers only to magistrates.[41] However, section 6(1) of *The Summary Convictions Act* authorizes the recovery of a fine and/or the enforcement of imprisonment prescribed for the contravention of any Act of the Legislature, by-law of a municipality, or regulation, "on summary conviction before a justice".

This may empower a justice of the peace to dispose of any offence relating to provincial Acts or municipal by-laws, even though the particular enactment refers only to magistrates. However, it would not confer jurisdiction to order some other special relief or penalty, such as

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[36]*Criminal Code*, R.S.C. 1985, c. C-46, s. 2, as am. S.C. 1985, c. 19, s. 2(7).

[37]*The Provincial Court Act*, R.S.M. 1987, c. C275, s. 42(1), grants magistrates "all the powers and authority vested in a magistrate or two or more justices of the peace sitting and acting together under any law or statute in force in Manitoba."

[38]As we have previously indicated, this should now refer to Part XIX of the *Criminal Code*; however, *The Provincial Court Act* has yet to receive the needed amendments.

[39]One of the remaining distinctions is the power to preserve order in court which is granted provincial court judges (and magistrates) by s. 484 of the *Criminal Code* but not justices of the peace. Another is the jurisdiction to hear applications for orders prohibiting the possession of firearms granted by s. 100.

[40]*The Interpretation Act*, C.C.S.M. c. I80, s. 22(1); *The Summary Convictions Act*, C.C.S.M. c. S230, s. 1.

[41]Examples of provincial enactments which specify action by a magistrate include: *The Health Services Insurance Act*, C.C.S.M. c. H35, s. 44; *The Planning Act*, C.C.S.M. c. P80, s. 81(3); *The Construction Industry Wages Act*, C.C.S.M. c. C190, s. 18(1); *The Natural Products Marketing Act*, C.C.S.M. c. N20, s. 37(4); *The Taxicab Act*, C.C.S.M. c. T10, ss. 4 and 21; *The Gasoline Tax Act* C.C.S.M. c. G40, s. 30; *The Dental Association Act*, C.C.S.M. c. D30, s. 37; *The Retail Sales Tax Act*, C.C.S.M. c. R130, s. 24; *The Highway Traffic Act*, C.C.S.M. c. H60, ss. 151 and 267.

the power to appoint an agent with authority to inspect records,[42] where the provincial Act specifically empowers only magistrates.

D. SPECIAL DESIGNATIONS

In addition to the statutory authority granted all magistrates and justices of the peace, by virtue of their respective appointments, there are more specific grants of authority which are sometimes made to individual judicial officers which allow them to exercise a particular jurisdiction not otherwise theirs.

As previously mentioned, *The Provincial Court Act* authorizes a magistrate to exercise the powers of a provincial judge "for such purposes as the Chief Judge may determine".[43] Presumably, the powers granted could extend to any legislation where a provincial judge might act, although this option is not often exercised by the Chief Judge.

The Highway Traffic Act[44] authorizes a justice, designated by the Chief Judge, to hear and determine applications for the return of impounded motor vehicles operated by suspended drivers and a number of these designations have been made.

The *Young Offenders Act*[45] defines youth court judge as "a person appointed to be a judge of a youth court" and there have been legally-trained magistrate hearing officers in Manitoba so appointed, empowering them to deal with *Young Offenders Act* matters.

E. OTHER FEDERAL LEGISLATION

As mentioned previously, the *Criminal Code* grants magistrates and justices of the peace jurisdiction over offences declared by an Act of Parliament to be punishable on summary conviction. This power may be granted specifically by the legislation or it will arise when the enactment does not expressly grant jurisdiction to any person or class of persons.[46]

F. COMMON LAW POWER OF PREVENTIVE JUSTICE

In addition to the previously mentioned *Criminal Code* jurisdiction to order a defendant to enter into a recognizance to keep the peace and be of good behaviour, there is evidence that the justices of the peace statute of 1360[47] and/or the common law continue to provide a residual jurisdiction to grant virtually the same remedy in somewhat wider circumstances.

Prior to ordering a peace bond, under section 810(3)(a) of the *Criminal Code*, a justice must find a reasonable fear on the part of the complainant of injury to one's person or family or

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[42]Power granted a magistrate by *The Pharmaceutical Act*, C.C.S.M. c. P60, s. 32(4). Other such special powers include the power to order the payment of wages due under *The Payment of Wages Act*, C.C.S.M. c. P31, s. 17(3) and *The Employment Standards Act*, C.C.S.M. c. E110, s. 15(3), or the cancellation of a driver's license under *The Taxicab Act*, C.C.S.M. c. T10, s. 4.

[43]*The Provincial Court Act*, C.C.S.M. c. C275, s. 42(3).

[44]*The Highway Traffic Act*, C.C.S.M. c. H60, s. 242.1(4).

[45]*Young Offenders Act*, R.S.C. 1985, c. Y-1, s. 2.

[46]*The Criminal Code*, R.S.C. 1985, c. C-46, s. 785. As a result, magistrates and justices of the peace are authorized and obliged to deal with certain matters arising under the *Food and Drugs Act*, the *Narcotic Control Act*, the *Aeronautics Act*, the *Income Tax Act*, the *Unemployment Insurance Act*, the *Migratory Birds Convention Act*, to name a few.

[47]*What Sort of Persons shall be Justices of Peace; and what Authority they shall have*, 34 Edward III, c. 1.

damage to property. In contrast, acts considered "likely to cause a breach of the peace"[48] or those "tending towards a breach of the public peace"[49] have been held sufficient grounds to exercise the common law power. Although the law is not settled in Manitoba, this common law jurisdiction has been found in Ontario, British Columbia and Alberta[50] and the Supreme Court of Canada has said that the *Criminal Code* provision does not interfere with the use of that jurisdiction.[51]

The Law Reform Commission of Saskatchewan has expressed the view that the preventive justice provisions of the 1360 Act probably lie in concurrent federal and provincial jurisdiction and would only be abolished if repealed by both governments.[52]

G. JURISDICTION ACTUALLY EXERCISED

Although extensive judicial powers are granted justices of the peace under the federal and provincial statutes reviewed above, in fact, many of these powers are never actually exercised by them. The intention in Manitoba seems to be that justices of the peace exercise mostly a process function and will not usually be called upon to adjudicate summary conviction matters, consider bail applications or issue search warrants. Those functions are carried out by some magistrates, but not all. Aside from a handful of magistrates who have been designated as 'hearing officers' and who routinely preside at trials, prohibition hearings and the like, many magistrates in Manitoba exercise a narrower jurisdiction than that granted under statute. Their official activities are more likely confined to sentencing, hearing bail applications and issuing process. For the most part, these reductions in the authority actually exercised by justices of the peace and magistrates have been accomplished through directives from court administrators setting out powers which may not be exercised and, more recently, letters from the Chief Judge setting out those powers which the individual may exercise.[53]

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[48]*R.* v. *Poffenroth*, [1942] 2 W.W.R. 362 at 365 (Alta. Pol. Ct.).

[49]*Mackenzie* v. *Martin*, [1954] 3 D.L.R. 417 at 418 (S.C.C.).

[50]*Re Regina and Shaben* (1972), 8 C.C.C. (2d) 422 (Ont. H.C.); *R.* v. *Chohan* (1968), 64 W.W.R. 708 (B.C.S.C.); *R.* v. *Poffenroth*, *supra* n. 48.

[51]*Supra* n. 49, at 425.

[52]Law Reform Commission of Saskatchewan, *The Status of English Law in Saskatchewan* (1990) 199-200.

[53]Interview with Chief Judge K. Stefanson, May 6, 1991.

CHAPTER 4

INDEPENDENCE: HOW AND WHEN?

Although not every task performed by a magistrate or justice of the peace will necessitate an impartial and independent mind on the part of the judicial officer, failure to meet the standard, when it is required, has been held to vitiate the action. This Chapter reviews the legislation and jurisprudence which together dictate the requirements of independence and impartiality and suggest the circumstances under which they will attach.

A. LEGAL REQUIREMENTS

1. Common Law

Common law requirements of natural justice have long been imposed upon courts and tribunals engaged in judicial or quasi-judicial activities. In addition to certain procedural safeguards, judicial decision makers must bring a neutral or impartial mind, free of any bias, to their deliberations.[1] That impartiality may be threatened in two ways: a direct interest or stake in the outcome will almost always disqualify the tribunal[2] and circumstances or conduct of the decision maker which give rise to a reasonable apprehension of bias may also leave a decision vulnerable to review.[3]

Of course, the quality or nature of the decision has been the threshold question when considering the application of these principles; the most obviously 'judicial' activities will attract the full gamut of natural justice protections, while more 'administrative' tasks may not.[4]

The jurisdiction to review the actions of magistrates and justices of the peace rests with the superior courts and the various remedies which may be sought include prohibition to prevent the decision maker from proceeding or certiorari to quash a decision already made.

2. *Canadian Charter of Rights and Freedoms*

Basic common law natural justice principles are reflected in the 'Legal Rights' contained in the *Canadian Charter of Rights and Freedoms*.[5] Those rights dictate a standard for decision

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[1]*Frome United Breweries Co.* v. *Bath J.J.*, [1926] A.C. 586 (H.L.).

[2]*Dimes* v. *Grand Junction Canal Proprietors* (1852), 3 H.L. Cas. 759; 10 E.R. 301.

[3]*Committee for Justice and Liberty* v. *National Energy Board* (1978), 68 D.L.R. (3d) 716 (S.C.C.).

[4]Although they may well impose a duty to act fairly; see *Martineau* v. *Matsqui Institution Disciplinary Board* (1979), 30 N.R. 119 (S.C.C.).

[5]*Canadian Charter of Rights and Freedoms*, ss. 7 to 14.

makers, especially in the criminal law context, and provide specific remedies for parties aggrieved by a failure to meet the standard set.[6]

The *Canadian Charter of Rights and Freedoms* prohibits the deprivation of "life, liberty and security of the person" except "in accordance with the principles of fundamental justice", protects against "unreasonable search and seizure" and entitles an accused to a fair and public hearing by an "independent and impartial tribunal" prior to a finding of guilt.[7] Those three sections of the *Canadian Charter of Rights and Freedoms* have been used by various courts to define and impose standards of decision-making for inferior judicial officers acting in the course of their duties.[8]

The independence and impartiality guaranteed by the *Charter* have been held to be two separate and distinct values or requirements. While impartiality may be defined as the absence of actual or perceived bias, the requirement of independence further refines and articulates those long-established natural justice principles. In the leading case, *Valente* v. *The Queen*, the Supreme Court characterized that independence as reflective of a "status or relationship to others, particularly to the Executive Branch of government, that rests on objective conditions or guarantees."[9] That status must be objectively assessed, with reference to the applicable legislative framework, in order to ascertain whether the tribunal may reasonably be perceived as independent. This test is "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."[10]

This statutory requirement of an independent and impartial judiciary is not new to Canada; it was part of the *Canadian Bill of Rights*,[11] years before inclusion in the *Canadian Charter of Rights and Freedoms*. However, the standards of judicial independence and impartiality are more than legal requirements. Over time, those values have become fundamental to public confidence in our judicial system, a system very much dependent upon the respect and acceptance of society for its effective operation. This need to foster public confidence is an additional important factor to be considered when defining any standard of independence to be imposed upon Manitoba magistrates and justices of the peace.

B. INDEPENDENCE

Although the decision of the Supreme Court in *Valente* examined the status of a judge of the Ontario Provincial Court when adjudicating a *Highway Traffic Act* charge, the objective conditions required of a provincial judge should be no less essential to the independence of a justice of the peace or magistrate when performing a similar function. Indeed, it can be argued that the Court established the tests for independence with these other judicial officers in mind, having said:

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[6]Section 24 expressly authorizes the courts to tailor remedies "appropriate and just in the circumstances", including the exclusion of evidence where admission "would bring the administration of justice into disrepute". Section 52 further provides that laws inconsistent with the provisions of the *Canadian Charter of Rights and Freedoms* are, to the extent of the inconsistency, "of no force and effect".

[7]*Canadian Charter of Rights and Freedoms*, ss. 7, 8 and 11(d), respectively.

[8]While less apparent on the face of s. 8, lack of independence on the part of a judicial officer issuing a search warrant has led to characterization of the resulting search as "unreasonable", see: *R.* v. *Magee*, [1988] 3 W.W.R. 169 (Alta. Q.B.) and *R.* v. *Baylis* (1988), 65 C.R. (3d) 62 (Sask. C.A.).

[9]*Valente* v. *The Queen* (1985), 24 D.L.R. (4th) 161 at 170 (S.C.C.). Examples of those kinds of guarantees are seen in the provisions of the *Constitution Act, 1867*, ss. 99 and 100, relating to tenure, retirement and salaries of superior court judges.

[10]*Id.*, at 172-173.

[11]*Canadian Bill of Rights*, R.S.C. 1970, Appendix III, s. 2(f).

> It would not be feasible, however, to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s. 11(d) of the Charter, *which may have to be applied to a variety of tribunals.*[12]

Appellate courts have specifically considered the independence of justices of the peace, but the issue has yet to be considered by the Supreme Court. Accordingly, *Valente* remains the primary source for general principles.[13]

The Supreme Court, in *Valente*, noted an increasing concern about judicial independence (because of the *Canadian Charter of Rights and Freedoms*) and a general movement toward more ideal conditions. However, the Court declined to impose a standard of uniform provisions on all tribunals, such as those protecting superior court judges in sections 99 and 100 of the *Constitution Act, 1867*.[14]. Rather, the "essential conditions" of judicial independence were held to be the more appropriate criteria and the Court identified three of these and provided tests or indicators for their presence.

Security of tenure was identified by the Supreme Court as the first essential condition of judicial independence. Minimally, that protection must allow removal from the bench only for cause related to the ability to perform judicial duties, and then only after an independent review where the judge affected is given a full opportunity to be heard.[15] Tenure must be secure against discretionary or arbitrary influence by the appointing authority and it may be for a fixed term or specific task or until an age of retirement. The Court found that post-retirement appointment at pleasure did not meet the essential requirement of security of tenure but a subsequ©nt amendment which gave the Chief Judge or the Judicial Council the final decision was found to be in compliance with the section 11(d) requirements.[16]

Prior to the Supreme Court's decision in *Valente*, the Ontario Court of Appeal considered the issue of security of tenure for justices of the peace in *Re Currie and Niagara Escarpment Commission*, having regard to the legislative scheme for appointment and removal, the actual administrative practice regarding removal and the oath of office taken by new justices of the peace.[17] At that time, the Ontario legislation provided for the hearing of complaints by a Justices of the Peace Review Council, but a hearing was not mandatory for removal from office.[18] The Court was of the opinion that the availability of the review procedure, the tradition of judicial independence and the oath of office taken by justices of the peace, together, sufficiently qualified the right to appointment at pleasure so that their independence was unimpaired.[19] Of course, the

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[12]*Supra* n. 9, at 175 [emphasis added].

[13]The Supreme Court did uphold two decisions of the Québec Court of Appeal, which found that civil servant status did not deprive justices of the peace of the independence and impartiality required by the *Canadian Charter of Rights and Freedoms*. However, both decisions rested on the appellants' failure to challenge existing legislation and lack of evidence to establish a breach of s. 7 rights: *R.* v. *Lavigne* (1989), 99 N.R. 66 (S.C.C.); *Watier* v. *Dupont* (1989), 99 N.R. 143 (S.C.C.). See also *Lefebvre* v. *Gauthier*, [1989] R.L. 279 (Que. C.A.) (leave to appeal to the Supreme Court of Canada refused (1989), 103 N.R. 317 (S.C.C.)) in which a justice of the peace was held to be an independent and impartial tribunal; this followed a line of Québec cases founded on *Valois* v. *Universal Spa Ltée*, [1987] R.J.Q. 296 (C.A.).

[14]*Supra* n. 9, at 176.

[15]*Supra* n. 9, at 179. While the Court noted a number of other desirable conditions such as removal only on address of the Legislature, these were not seen as essential to judicial independence.

[16]Although considered "by no means ideal": *supra* n. 9, at 184.

[17]*Re Currie and Niagara Escarpment Commission* (1984), 14 D.L.R. (4th) 651 (Ont. C.A.).

[18]*Justices of the Peace Act*, R.S.O. 1980 c. 227, s. 8.

[19]Just prior to the Court of Appeal decision, the legislation was amended to allow removal from office only after investigation by the Justices of the Peace Review Council: *Justices of the Peace Amendment Act, 1984*, S.O. 1984, c. 8, s. 3.

Court did not have the benefit of the Supreme Court's later finding that tradition, reinforced by public opinion, was not sufficient to safeguard the judicial independence of provincial judges.[20]

Financial security was cited in *Valente* v. *The Queen* as the second essential condition of judicial independence and it was defined as including "security of salary or other remuneration, and, where appropriate, security of pension". That security means salary and pension will be established by law and not subject to arbitrary interference by the Executive in a way that might affect independence. Pensions, where applicable, must be payable as of right and not dependent upon the favour of the Executive. In Ontario, at that time, salaries of Provincial Court judges were fixed by regulation of the Lieutenant Governor in Council, pursuant to legislation. The right to pension was the same as that provided for members of the public service (although special provisions were subsequently made for provincial judges' pensions). While salaries fixed by the Legislature and constituting a charge on the consolidated fund might be "theoretically preferable", those conditions were not essential to the financial security required for independence under section 11(d) and the existing situation in Ontario was held to be adequate.[21]

In the *Currie* case, the Ontario Court of Appeal also considered the question of salaries and whether a threat to independence could arise from the fact that justices of the peace were dependent upon the Executive for salary increments. In Ontario, pay scales for full-time salaried justices of the peace were set by regulation with increments granted by the Deputy Attorney General, acting upon the recommendation of the Chief or Senior Provincial Court Judge who conducted the justices' annual review. Citing those facts as evidence that the salary level of an individual justice of the peace was not controlled by the Ministry of the Attorney General, the Court held that the method of remuneration and increments for full-time salaried justices of the peace did not give rise to a reasonable apprehension of lack of independence.

However, non-salaried justices of the peace were paid fees for receiving and swearing informations, considering process and search warrant requests and the like, as well as an hourly rate for hearings assigned by the Provincial Court judge. The Court did express concerns about fee-for-service remuneration of these justices of the peace prior to amendments instituting a duty roster system which was intended to prevent economic pressure on judicial officers who might attract more business if they were perceived by the police as more cooperative.

Institutional independence "of the tribunal with respect to matters of administration bearing directly upon the exercise of its judicial function" was cited as the third essential condition of judicial independence. Those administrative matters were held to include assignment of judges, sittings of the court and court lists, allocation of courtrooms and direction of court staff. While control by the judiciary over certain discretionary benefits such as leaves of absence might be desirable, the exercise of that control by the Executive was not viewed as a serious threat to either the institutional independence of the court or the independence of individual judges within the meaning of the *Charter*.

In the *Currie* case, the Ontario Court of Appeal considered the legislative provision which required directions from the Chief Provincial Judge or a designate before a justice of the peace could exercise powers and duties conferred on holders of the office.[22] The Court rejected the argument that the practice of limiting powers otherwise conferred by federal and provincial legislation through the assignment of a particular "classification" violated principles of judicial independence. So long as the independence of the judge giving the direction was accepted, the

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[20] *Supra* n. 9, at 183.

[21] *Supra* n. 9, at 186.

[22] *Justices of the Peace Act*, R.S.O. 1980, c. 227, s. 6.

officer's independence or freedom from "actual or perceived influence or pressure of the Executive or from the parties to the proceeding" was not compromised.[23] In reaching that conclusion, the Court placed considerable emphasis on the fact that there was no requirement for justices of the peace to be legally trained and indicated that "the situation would be very different" if the individual giving the direction was "susceptible to political and executive pressure or direction".[24]

C. IMPARTIALITY

Much of the recent jurisprudence respecting the *Charter* requirement of an independent and impartial tribunal has focussed on the first standard imposed by that section, namely the independence of the judiciary, which requires freedom from possible interference by government. However, the Supreme Court has very recently expanded upon the nature and extent of the second requirement (impartiality), in the context of its application to inferior court judges in the Municipal Courts of Québec.

In *R.* v. *Lippé*,[25] the Supreme Court characterized independence from the executive and legislative branches of government as a cornerstone or necessary prerequisite of judicial impartiality, but not its only component. More significantly, when discussing the additional tests for partiality or bias, the Court did not confine its examination to the assessment of individual judges on a case-by-case basis. Rather, the Supreme Court allowed that "there may also exist a reasonable apprehension of bias on an institutional or structural level", so that the objective status of the tribunal may be as relevant to impartiality as it is to independence.[26]

As an example, the Court held that there were a few professions which, if engaged in by part-time judges, might raise a reasonable apprehension of bias on an institutional level: because of the large potential for conflicts of interest arising out of loyalties to clients and law firms, the practice of law by part-time Municipal Court judges in Québec was identified as one of those professions.

However, even though the practice of law was described as "per se incompatible with the function of a judge",[27] the Court found that various safeguards which had been implemented to address the issue had sufficiently alleviated the apprehension of bias initially raised. Included among statutory safeguards described were an oath of office, judicial immunity, a disciplinary process, and specific obligations imposed to avoid possible conflicts of interest.[28] The judges in question were also subject to a code of ethics which addressed the issue of conflicting interests.

Although the Supreme Court's findings are obviously based on the specific facts of this case, the *Lippé* decision provides a means to attack the impartiality of judicial officers engaged in other occupations or professions which might also be perceived as incompatible with the judicial function.

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[23]*Supra* n. 17, at 668.

[24]*Supra* n. 17, at 669.

[25]*R.* v. *Lippé*, S.C.C., unreported, June 6, 1991.

[26]*Id.*, at 26.

[27]*Supra* n. 25, at 32.

[28]*Supra* n. 17, at 35-41.

D. DUTIES AND FUNCTIONS OF MAGISTRATES AND JUSTICES OF THE PEACE

When, if ever, are Manitoba magistrates and justices of the peace likely to be held to the foregoing standards of independence and impartiality? The answer to that question lies in a review of the legislation and jurisprudence concerning the different kinds of activities within the jurisdiction of those officers in Manitoba.

In *Wigglesworth* v. *The Queen*, the Supreme Court held that the kind of offences contemplated by section 11(d) of the *Charter* would encompass, at minimum, all prosecutions for criminal offences under the *Criminal Code* and for quasi-criminal offences under provincial legislation, including those with "relatively minor" consequences.[29] Somewhat less clear is the precise point in such proceedings where persons charged will be granted the protection of section 11(d) or what protection might be afforded by the *Charter* to those not charged with an offence but otherwise subject to the jurisdiction of the courts.

We know that the following are among the powers granted magistrates and/or justices of the peace in Manitoba:

1) adjudicating offences to determine guilt or innocence, applications for firearms prohibition, requests for orders for recognizance to keep the peace, etc.;

2) sentencing after adjudication or upon a plea;

3) considering applications for judicial interim release (bail), search warrants, warrants to obtain blood samples, etc.;

4) issuing process documents such as warrants to arrest, summons or subpoena, confirming or cancelling appearance notices, promises to appear or recognizance;

5) remands in custody, offence notice guilty pleas, default convictions;

6) receiving informations, administering oaths and/or affidavits.

Various courts have been asked to classify certain of these activities as judicial or quasi-judicial in nature (usually in the context of judicial review, since purely administrative tasks not involving the exercise of discretion were generally not thought to be subject to the rules of natural justice). Of course, that kind of classification alone will not determine whether independence and impartiality are required.[30] As we have seen, the role of magistrates and justices of the peace performing these various functions must also be examined for compliance with the relevant sections of the *Canadian Charter of Rights and Freedoms*, bearing in mind the nature of the activity and its practical effect or consequences.

1. Adjudication

The most obviously 'judicial' authority granted to Manitoba justices of the peace and magistrates is the adjudication of offences. The conflicting interests of the accused and the state

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[29]*Wigglesworth* v. *The Queen* (1987), 37 C.C.C. (3d) 385 at 400 (S.C.C.).

[30]The drawbacks of imposing such classifications are referred to in *Martineau* v. *Matsqui Institution Disciplinary Board*, *supra* n. 4, at 149.

and the potential social, economic and penal consequences of the decision suggest that this activity would require a high level of independence. Moreover, section 11(d) of the *Canadian Charter of Rights and Freedoms* explicitly imposes such a standard prior to a finding of guilt. It is clear from *Valente*[31] and *Wigglesworth*[32] that the impartiality and independence requirements of section 11(d) extend to the trial of provincial as well as *Criminal Code* offences. It is also evident from the *Currie* case that those requirements extend to trial before a justice of the peace, as well as a provincial judge.[33]

Adjudicating applications for firearms prohibition orders also involves the exercise of a highly discretionary power, sufficiently judge-like in appearance as to suggest the imposition of natural justice requirements (even though the absence of charges or penal consequences would suggest that formal section 11(d) requirements would not apply). The *Criminal Code* requires the tribunal to hear relevant evidence from both sides and to grant an order only if satisfied that there are reasonable grounds to believe that possession of firearms is not desirable "in the interests of the safety" of the person who is the subject of the order or of any other person.[34] While such an order is not a finding of guilt and need not be accompanied by a charge or conviction, the process does require weighing the interests of the individual against the interests of the community and may result in removal of a privilege otherwise available.

Requests for orders for recognizance to keep the peace place a similar burden upon the tribunal involved. Conflicting evidence must often be considered and the credibility of witnesses assessed in order to determine the reasonableness of the applicant's fears of personal injury or damage to property.[35] While an order of this nature, again, does not constitute a conviction, conditions "desirable for securing the good conduct of the defendant" may be imposed and failure or refusal to enter into any recognizance ordered can result in penal consequences.

There is little doubt that both of the foregoing scenarios constitute judicial activities which will attract natural justice protections, although section 11(d) requirements would not likely apply where there is no criminal charge pending.[36] However, even in the absence of charges, judicial acts have been held to necessitate independence and impartiality on the part of a decision maker.[37]

2. Sentencing

Considering the judicial nature of the task involved in sentencing, whether following conviction or a plea of guilty, it appears self-evident that the decision maker should be impartial and independent.[38] Society's interest in deterrence must be balanced with the often conflicting purpose of rehabilitation of the offender, all the while taking into account mitigating or aggravating circumstances which would call for a lesser or greater sentence. Sentencing

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[31]*Supra* n. 9.

[32]*Supra* n. 29.

[33]*Supra* n. 17.

[34]*Criminal Code*, R.S.C. 1985, c. C-46, s. 100(4).

[35]*Criminal Code*, R.S.C. 1985, c. C-46, s. 810.

[36]A factor cited in one case to support the finding that the act of receiving an information does not attract s. 11(d) impartiality and independence requirements: *R.* v. *Dorion*, unreported, February 27, 1989, Giesbrecht P.C.J.

[37]As when called upon to consider an application for search warrant, although the Court did say that the requirement might not be the same as that expressed in *Valente*: *R.* v. *Magee*, *supra* n. 8, at 176.

[38]Except, perhaps, where discretion is removed by penalties prescribed in regulations to *The Summary Convictions Act*, C.C.S.M. c. S230.

decisions, today, seem particularly vulnerable to public scrutiny and criticism. Thus, the credibility of the sentencing tribunal must be above reproach and a firm perception of the independence and impartiality of the tribunal is essential to that credibility.

3. Judicial Interim Release (Bail)/Search Warrants

Generally speaking, the *Criminal Code* requires that an accused be released unless a justice is satisfied that detention is necessary "in the public interest" or "for the protection or safety of the public" or to ensure attendance in court.[39] The guaranteed rights of accused persons "not to be denied reasonable bail without just cause"[40] and "to be presumed innocent until proven guilty according to law . . . by an independent and impartial tribunal"[41] reinforce the high premium society places on the liberty of individuals, liberty which will not ordinarily be denied before a finding of guilt.[42] The exercise of discretion involved in considering release, the effect of the decision on the liberty of the accused and the impact on the community are factors which together comprise a judicial act of significant potential consequence. That kind of activity suggests the need for impartiality and independence on the part of the tribunal involved.

Of necessity, search warrant applications are considered in camera and *ex parte*, that is, with no notice to parties affected and no right of representation. The discretionary nature of the decision is apparent from an examination of the relevant legislative provisions.[43] Because of the judicial nature of this process and the impact on individual rights, it is reasonable to expect that impartiality and independence would be required of a judicial officer authorizing a search warrant.[44]

Furthermore, section 8 of the *Canadian Charter of Rights and Freedoms* guarantees "the right to be secure against unreasonable search and seizure". This protection requires an objective assessment of the conflicting interests of the individual and the state to ensure that the minimum standards of "reasonable and probable grounds" are established before a search warrant is authorized.[45] It is now settled that this prior authorization must be by someone "able to assess the evidence as to whether this standard has been met, in an entirely neutral and impartial manner." While not required to be a judge, that person must be "capable of acting judicially".[46]

It comes as no surprise then that the requirement of a neutral, impartial and independent tribunal has been specifically held to apply to a justice of the peace considering a search warrant application.[47] In light of the above, one would also expect that a justice considering an

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[39]*Criminal Code*, R.S.C. 1985, c. C-46, s. 515(10).

[40]*Canadian Charter of Rights and Freedoms*, s. 11(e).

[41]*Canadian Charter of Rights and Freedoms*, s. 11(d).

[42]Pending criminal charges may well trigger s. 11(d) requirements of independence and impartiality for a judicial officer considering such a release application. See: *R.* v. *Dorion*, *supra* n. 36.

[43]A justice must be satisfied of 'reasonable grounds to believe' that there is something in the place which is related to the commission of an offence or which would provide evidence of an offence or is intended to be used in the commission of an offence and the basis for that belief must be information provided on oath: *Criminal Code*, R.S.C. 1985, c. C-46, s. 487.

[44]That a justice issuing a search warrant acts judicially is well settled: *N.S. (A.G.)* v. *MacIntyre*, [1982] 1 S.C.R. 175.

[45]*Hunter* v. *Southam* (1985), 11 D.L.R. (4th) 641 at 659 (S.C.C.).

[46]*Id.*, at 654.

[47]*R.* v. *Magee*, *supra* n. 8.

application for a warrant to obtain blood samples[48] would be held to at least as high a degree of independence and impartiality.

4. Issuing Process

The act of issuing an arrest warrant, summons or subpoena may not seem particularly judicial in nature, while confirming an appearance notice, promise to appear or recognizance may look even less so. However, all of those activities require the exercise of some discretion on the part of the judicial officer and the potential effects on the liberty of the accused are obvious.

Various provisions of the *Criminal Code* allow arrest without warrant by police officers. The police are then empowered to release a suspect after issuing an appearance notice or taking a promise to appear or recognizance to ensure attendance in court. An information respecting the alleged offence is then sworn before a justice. Where the justice "considers that a case for doing so is made out", he or she must confirm the promise to appear, appearance notice or recognizance or cancel that document and issue a summons or warrant for arrest in lieu thereof.[49] Where the justice "considers that a case is not made out", the appearance notice, promise to appear or recognizance must be cancelled and the accused must be notified forthwith.[50] If an appearance notice or promise to appear is not confirmed by a justice, it bears no legal authority to compel the appearance of the accused.

Where a person has not been arrested, but is accused by information laid before a justice, the justice, "where he considers that a case for so doing is made out", compels the attendance of the accused by issuing a summons or warrant for arrest.[51] Absent reasonable grounds to believe that arrest is necessary "in the public interest", a summons is to be issued.[52]

The language of the *Criminal Code* requires the exercise of discretion in a manner which, again, reflects the often competing interests of society and those of the individual accused. In either case, the justice must first determine that a case has been made out, in order to justify issuing or confirming any process. Assuming that is established, a decision must follow on the appropriate method of compelling the appearance of the accused before the court. In the Manitoba case of *R.* v. *Dorion*, issuing process has been held to be a judicial act for which sections 11(d) and 7 of the *Canadian Charter of Rights and Freedoms* impose the requirement of an independent and impartial tribunal.[53]

The situation regarding subpoenas is less obvious. A justice or Provincial Court judge may issue a subpoena requiring an individual to attend "where a person is likely to give material evidence"[54] in a proceeding to which the *Criminal Code* applies. In *R.* v. *Dorion*, the requirement of independence and impartiality was held to extend to matters outside a trial, but the application of section 11(d) was confined to a situation where a person was charged with an offence. Such an interpretation would exclude witnesses who have been subpoenaed to give evidence.

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[48]*Criminal Code*, R.S.C. 1985, c. C-46, s. 256, as am. R.S.C. 1985, c. 27 (1st Supp.), s. 36, provides for such warrants, where persons are unable to consent.

[49]*Criminal Code*, R.S.C. 1985, c. C-46, s. 508(1)(b), as am. R.S.C. 1985, c. 27 (1st Supp.), s. 80.

[50]*Criminal Code*, R.S.C. 1985, c. C-46, s. 508(1)(c).

[51]*Criminal Code*, R.S.C. 1985, c. C-46, s. 507(1)(b).

[52]*Criminal Code*, R.S.C. 1985, c. C-46, s. 507(4).

[53]*R.* v. *Dorion*, *supra* n. 36.

[54]*Criminal Code*, R.S.C. 1985, c. C-46, s. 698.

A magistrate issuing a subpoena has been held to have "some responsibility and some discretion to determine whether the person sought to be subpoenaed is likely to give material evidence", although the Court in that case declined to oblige a judicial officer to make such an inquiry prior to issuing the subpoena.[55] However, in *Foley* v. *Gares*, the same Court subsequently upheld the quashing of subpoenas issued by a justice of the peace who took no steps to satisfy himself that the witnesses were likely to give material evidence, on the ground that a justice has "discretion in the matter of issuing the subpoena and he should exercise it judiciously if not judicially".[56]

The events which may flow from the issuing of a subpoena provide more compelling reasons for requiring independence and impartiality of the tribunal involved, since courts may issue a warrant for the arrest of a witness who has failed to attend in response to a subpoena. Section 7 of the *Canadian Charter of Rights and Freedoms* allows such a deprivation of liberty only in accordance with the principles of "fundamental justice", suggesting additional support for the requirement of an independent, impartial tribunal to consider the question of subpoenas.

5. Remand in Custody/Offence Notice Guilty Plea/Default Convictions

A discretionary burden, not unlike that imposed by bail applications, may be placed upon a judicial officer considering an application to remand an accused in custody and the British Columbia Supreme Court has found that sections 7 and 9 of the *Canadian Charter of Rights and Freedoms* apply to the actions of a justice of the peace in such a proceeding.[57] More significantly, because charges are pending, the reasoning in *R.* v. *Magee* and *R.* v. *Dorion* suggests that section 11(d) requirements of independence and impartiality also apply.

At first glance, processing offence notice guilty pleas and entering default convictions appear to be mechanical exercises on the part of the judicial officer. However, the legislation suggests that those activities involve elements of discretion. For example, a justice must be "satisfied" of the existence of specific circumstances before entering a default conviction and, in the absence of those circumstances, is required to quash proceedings.[58] A justice may also substitute a lesser fine in lieu of the statutory penalty, following a guilty plea with explanation of extenuating circumstances.[59]

6. Receiving Informations

By contrast, the act of receiving an information does not appear to require independence or impartiality on the part of the individual justice before whom the complaint is laid. The language of the relevant section of the *Criminal Code* does not imply any discretion on the part of the justice to refuse to receive an information.[60] In addition, there is ample jurisprudence to

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[55]*Re Regina and McConnell* (1977), 35 C.C.C (2d) 435 at 438 (Sask. C.A.).

[56]*Foley* v. *Gares* (1989), 53 C.C.C. (3d) 83 at 88 (Sask. C.A.).

[57]*R.* v. *P. (E.K.) and B. (T.P.)* (1989), 72 C.R. (3d) 182 at 192 (B.C.S.C.). Failing to offer the accused the opportunity to have counsel present at the hearing and entertaining representations from the police, in the absence of the accused, were held to amount to denial of fundamental justice and arbitrary detention, contrary to ss. 7 and 9 of the *Canadian Charter of Rights and Freedoms*.

[58]*The Summary Convictions Act*, C.C.S.M. c. S230, ss. 17(8) and (9).

[59]*The Summary Convictions Act*, C.C.S.M. c. S230, s, 14(4).

[60]*Criminal Code*, R.S.C. 1985, c. C-46, s. 504 provides that a justice "shall" receive an information upon receipt of certain allegations.

the effect that the act of receiving an information is purely administrative or ministerial in nature.[61] Based on that premise and a finding that a party is "charged with an offence" only after the receiving of an information, the Court in *R.* v. *Dorion* held that there was no need to inquire whether a justice receiving an information constituted an independent and impartial tribunal within the meaning of section 11(d) of the *Canadian Charter of Rights and Freedoms*.[62]

Similarly, there is no indication that a justice of the peace or magistrate must be either independent or impartial when administering an oath or affirmation, swearing affidavits or taking statutory declarations. A standard form of oath, declaration or affirmation is actually set out in *The Manitoba Evidence Act*,[63] which also authorizes the performance of those functions by numerous other classes or groups, including commissioners for oaths, notaries public, barristers, various officers of municipalities, and members of the R.C.M.P. In addition, every court or officer of a court may administer an oath or affirmation to a witness called to give evidence before the court. The wide variety of persons authorized to perform those tasks and their disparate qualifications further militate against any suggestion of a judicial component to the tasks and any consequential requirement for independence and impartiality on the part of the judicial officer involved.

E. JURISDICTION NOT EXERCISED

A final issue respecting the independence and impartiality of magistrates and justices of the peace arises from the powers which they possess but which they do not exercise. As we have previously indicated, magistrates and justices of the peace were formerly subject to directives from court administrators not to exercise certain of their powers. More recently, they have been subject to letters from the Chief Judge specifying the powers which they could exercise (and impliedly indicating the powers which they should not exercise). Other provinces constrain the powers of their inferior judicial officers in a similar fashion or have legislatively created several categories of justices of the peace, each with a specific range of permitted powers.[64] These practices raise an important question concerning the issue of independence: where jurisdiction is limited by administrative directive, will the tribunal meet the test of independence required under administrative law principles and the *Canadian Charter of Rights and Freedoms*?

It is not the practice to limit the exercise of statutory powers granted provincial judges, other than by the necessary scheduling of sittings or dockets. Indeed, the fact that the judiciary exercised control over those kinds of administrative matters that bear directly on the exercise of the judicial function was seen as essential to the institutional independence required of an Ontario provincial judge adjudicating a *Highway Traffic Act* offence.[65]

In his report on Ontario justices of the peace, Professor Allan Mewett expressed the view that the functions of justices of the peace should not be administratively directed but, rather, should be set out in the Order in Council appointment.[66] Furthermore, he recommended disallowing any change to such a directive, except after due process, in order to avoid any

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[61]See *Casey* v. *Automobiles Renault Canada Ltd.*, [1965] S.C.R. 607 and a number of other cases referred to in *R.* v. *Dorion*, *supra* n. 36.

[62]*R.* v. *Dorion*, *supra* n. 36.

[63]*The Manitoba Evidence Act*, C.C.S.M. c. E150, ss. 15(1), 16(2), 61 and 64(2).

[64]Ontario: *Justices of the Peace Act, 1989*, S.O. 1989 c. 46; Saskatchewan: *The Justices of the Peace Act, 1988*, S.S. 1988-89, c. J-5.1; British Columbia: *Justice Reform Statutes Amendment Act, 1989*, S.B.C. 1989, c. 30, ss. 40-45 (as yet unproclaimed).

[65]*Supra* n. 9.

[66]A.W. Mewett, *The Office and Function of Justices of the Peace in Ontario* (1982) 66.

appearance of pressure or influence. These and other recommendations by Professor Mewett were subsequently incorporated into Ontario legislation.[67]

The use of administrative directives to limit functions of justices of the peace has been considered by the Ontario Court of Appeal and held to be acceptable.[68] However, at that time, the Ontario Act authorized a justice of the peace to exercise statutory powers only "when so directed" by the Chief Judge or a provincial judge designate.[69] Citing the fact that our legislation contains no such provision, the practice of limiting powers by letter of direction from court administrative staff has been characterized as an administrative interference in the judicial function of a Manitoba justice of the peace.[70]

One might even question the competence of the province to restrict by statute the jurisdiction given judicial officers under federal laws, like the *Criminal Code*. Professor Mewett expressed concern over this issue in his report and suggested possible amendments to the wording of the appointments or to the definition of "justice" in the *Criminal Code* which might avoid potential difficulties.[71] The issue was raised in the Ontario Court of Appeal in the *Currie* case[72] and rejected with little comment except to say that there was "little merit" in the point and to note that the matter had not been raised in the Court below, nor had notice of the issue been given to either provincial or federal Attorneys General.[73] Although the case was a reference on constitutional questions, the facts involved an offence under a provincial statute and so it would seem that the issue of the province infringing on federal legislative powers was not squarely before the court. The issue was dealt with more directly in a recent decision of the Québec Court of Appeal in which it was held that, in the absence of a definition in the *Criminal Code*, a provincial government is free to define the term.[74]

F. CONCLUSION

This Chapter has reviewed the tests for independence and impartiality developed by the courts and the circumstances in which they have been imposed.

From that review, it appears that magistrates and justices of the peace will be held to the standard of independence and impartiality established by section 11(d) of the *Charter* when adjudicating offences, considering bail or search warrant applications, issuing process or imposing sentence. Pending charges may impose the same standards on those judicial officers when remanding prisoners in custody, processing offence notice pleas, or entering default convictions. Finally, the judicial nature of the decision to be made in applications for firearms prohibition or peace bonds will almost certainly attract natural justice requirements of impartiality and we have seen that independence has been characterized as a component of

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[67] *Justices of the Peace Act, 1989*, S.O. 1989, c. 46.

[68] *Re Currie and Niagara Escarpment Commission*, *supra* n. 17. It should be noted that the Court in that case did not have the benefit of the Supreme Court's reasoning in *Valente*.

[69] *Justices of the Peace Act*, R. S. O. 1980. c. 227, s. 6 (1).

[70] *R.* v. *Dorion*, *supra* n. 36.

[71] E.g., appointments reciting "for what purposes" an individual is a justice of the peace or, even simpler, a *Criminal Code* definition of justice as a "justice of the peace when acting in accordance with the powers and duties conferred or imposed upon him.": *supra* n. 66, at 10.

[72] *Supra* n. 17, at 669.

[73] The court appears not to have considered older authorities which suggest the other view: see *Re R.* v. *Isbell* (1928), 50 C.C.C. 81 (Ont. S. C.) and *In Re Henry Vancini* (1904), 34 S.C.R. 621.

[74] *Lefebvre* v. *Gauthier*, *supra* n. 13.

judicial impartiality.[75] Even if independence and impartiality are not legally required of magistrates and justices of the peace engaged in some of the foregoing activities, public confidence in our judicial system may well depend upon the existence and perception of those qualities on the part of these judicial officers acting in their official capacity.

This Report will next consider to what extent Manitoba magistrates and justices of the peace actually perform those, and other, functions.

[75] *Supra* n. 25, at 36.

CHAPTER 5

THE OFFICERS

A. INTRODUCTION

Previous Chapters have examined the history of the offices of magistrate and justice of the peace in Manitoba, as well as the jurisdiction presently conferred upon them by various statutes. However, full exposition of their present role within the justice system required a closer look at the functions of these officers and the context in which they work. To that end, a mail-out survey of all 261 Manitoba magistrates and justices of the peace was undertaken by the Commission in February 1990.[1]

1. Who They Are

At the time our empirical research began, there were 182 magistrates and 79 justices of the peace in Manitoba (a total of 261).[2] Those officers were grouped by the Department of Justice into three administrative categories.

Non-staff or "fee" magistrates/justices were the largest group (124). Other than a monthly retainer of $75, they receive no regular salary or remuneration but are paid a fee for the performance of certain specific tasks.[3] As might be expected, they tended to be located in rural areas.[4]

Justice Department staff were the next largest group (117). They are provincial civil servants who exercise their jurisdiction in the course of employment. They occupy many different positions within the courts system, with varying levels of authority and remuneration, and the exercise of judicial powers may be only a small part of their working day. These magistrates and justices of the peace hold various civil service titles including court clerk, registrar, hearing officer, accounting clerk, administrative officer, and administrative secretary. Members of this group were most likely to be found in Winnipeg or in other large communities.[5]

Finally, there were 20 **Other** officers who fell outside the first two categories. Eighteen of these were employees of some federal, provincial or municipal government department or agency who had been appointed justice of the peace to enable them to carry out specific tasks as

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[1]We gratefully acknowledge the assistance of Prof. Rick Linden, Department of Sociology, University of Manitoba, who, after its completion, reviewed the results of our survey and its methodology and made valuable suggestions respecting their manner of presentation in this Report.

[2]Memorandum from M. Bruce, Assistant Deputy Minister, Courts, January 31, 1990.

[3]The fee is prescribed by the Lieutenant Governor in Council pursuant to the *The Provincial Court Act*, s. 41. The monthly retainer and $4 fee are set out in the Order in Council appointing the officer.

[4]Less than 20% of this group had a mailing address in Winnipeg or another community with a population of 5000 or more.

[5]Over 90% had a mailing address in Winnipeg or another community with a population of 5000 or more.

part of their employment. Among these were federal and provincial corrections staff who were appointed so that they could remand prisoners in custody or read a riot proclamation, police department staff who issued warrants for unpaid parking tickets, and municipal government employees who accepted parking ticket pleas. The remaining two were described as bail magistrates on contract with the Department of Justice. They were also located in larger centres.[6]

The focus of the survey was to gather general background information on magistrates and justices of the peace in the Province of Manitoba, as well as data concerning the nature of their judicial activities.

2. Research Design

The sample included all 261 magistrates and justices of the peace holding office in Manitoba as of February 1, 1990.[7]

Survey questionnaires were mailed on February 5, 1990, with the request that the completed questionnaire be returned by February 19, 1990. The survey was preceded by a letter from the office of the Chief Judge of the Provincial Court explaining the reasons for the survey and requesting the cooperation of all magistrates and justices of the peace.

Of the 261 magistrates and justices of the peace surveyed, 179 (69%) responded. The information contained in this report was gathered from 174 of those 179 responses.[8] Incomplete responses from 5 non-staff were not included in the results since those respondents had relinquished their appointment or had characterized themselves as inactive. Response rates for the 3 administrative categories were very similar: 66% of those in the Justice Department staff responded to the questionnaire, as did 71% of non-staff officers and 70% of those in the remaining or 'other' category.[9]

Magistrates and justices of the peace were questioned on the following variables:

- nature of appointment (magistrate or justice of the peace)
- age at appointment
- year of appointment
- sex
- restrictions on powers, if any, and how advised
- time spent on duties
- frequency of various functions performed
- location of residence and length of time in community
- geographic work location
- usual worksites
- availability of reference materials
- frequency of assistance sought from named sources
- sources of legal opinions or procedural or penalty advice
- languages spoken
- level of formal education

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[6]All 20 had a mailing address in Winnipeg or another community with a population of 5000 or more.

[7]Names and addresses were supplied by the Courts Division, Department of Justice.

[8]72% of Manitoba's magistrates and 59% of our justices of the peace.

[9]Seventy-seven of 117 Justice Department staff responded, as did 88 of 124 non-staff and 14 of the 'other' 20.

Suggestions were also solicited regarding the advisability of additional training and on-going support in carrying out duties.

The similarity in statutory jurisdiction of magistrates and justices of the peace results in an overlap of their activities, so that functions carried out by individuals cannot be predicted by their titles. A majority of both magistrates and justices of the peace also reported engaging in activities of a highly discretionary or judicial nature.[10] For those reasons, no distinction has been made in this Report between magistrates and justices of the peace and data collected from both are presented together for the purposes of analysis.

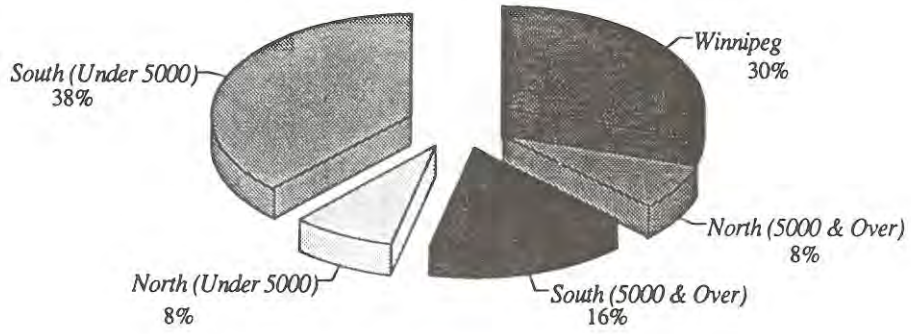
The information contained in this Report has been divided under four headings. The first includes information about respondents' personal circumstances such as their location in the province, their age, sex and educational background. The second contains details about the work actually performed by Manitoba magistrates and justices of the peace, while the third relates to their work environment, including the amount of time spent on official duties, their common worksites, and the availability and use of resources. The fourth section reports on some of the specific comments and suggestions also solicited in the survey. This Chapter summarizes the relevant results; additional information may be found in the statistical tables in Appendix B.

B. BACKGROUND

1. Location of Magistrates and Justices of the Peace

5.1

Geographic Location
Where Duties Performed



[10]Adjudicating summary conviction (or other) matters, sentencing, and considering bail and search warrant applications were among the more 'judicial' tasks reported by respondents. Ninety percent of magistrates and 44% of justices of the peace said they performed at least one of those functions. The proportions increased to 98% of magistrates and 76% of justices of the peace when issuing 'process' was added to the list of tasks.

Respondents were asked to indicate, separately, where they worked and where they lived. Locations outside Winnipeg were grouped by the population of the community (less than 5000 people/5000 or more), as well as by their relationship to the 53rd parallel (north/south). Winnipeg comprised a separate, fifth, grouping.

Manitoba magistrates and justices of the peace were fairly evenly distributed between more heavily populated work locations and those less so (Fig. 5.1). A little over half (54%) worked in Winnipeg or some other community with a population of 5000 or more while the remaining 46% worked in less populated locations.[11] Respondents were less evenly distributed between north and south. However, given Manitoba's population distribution, it is not surprising that only 16% work in communities located north of the 53rd parallel.[12] (see Appendix B, Table 1)

As one might expect, a very similar distribution was noted between communities of residence. (see Appendix B, Table 2) When respondents were asked how long they had lived in those communities, 90% said they had been there ten or more years while 50% had been there at least thirty. (see Appendix B, Table 3)

2. Age

The average age of all Manitoba magistrates and justices of the peace was 49. Those working in Winnipeg were younger than those in other locations. The average age of those working in Winnipeg was 41, while the average age of those in other large communities with populations of 5000 or more was 44 (northern) and 48 (southern). The average age of officers in communities with populations under 5000 was older still, at 51 (northern) and 57 (southern). (see Appendix B, Tables 4.1 and 4.2)

The overall average age of these same officers at the time of appointment was 40.[13] Again, the average age was lowest in Winnipeg and highest in smaller communities. The average age at the time of appointment was 34 for those working in Winnipeg and 36 and 41, respectively, for those working in northern and southern communities with populations of 5000 or more. The average age at the time of appointment was highest amongst those working in communities with populations under 5000 (43 in the north and 45 in the south). (see Appendix B, Tables 5.1 and 5.2)

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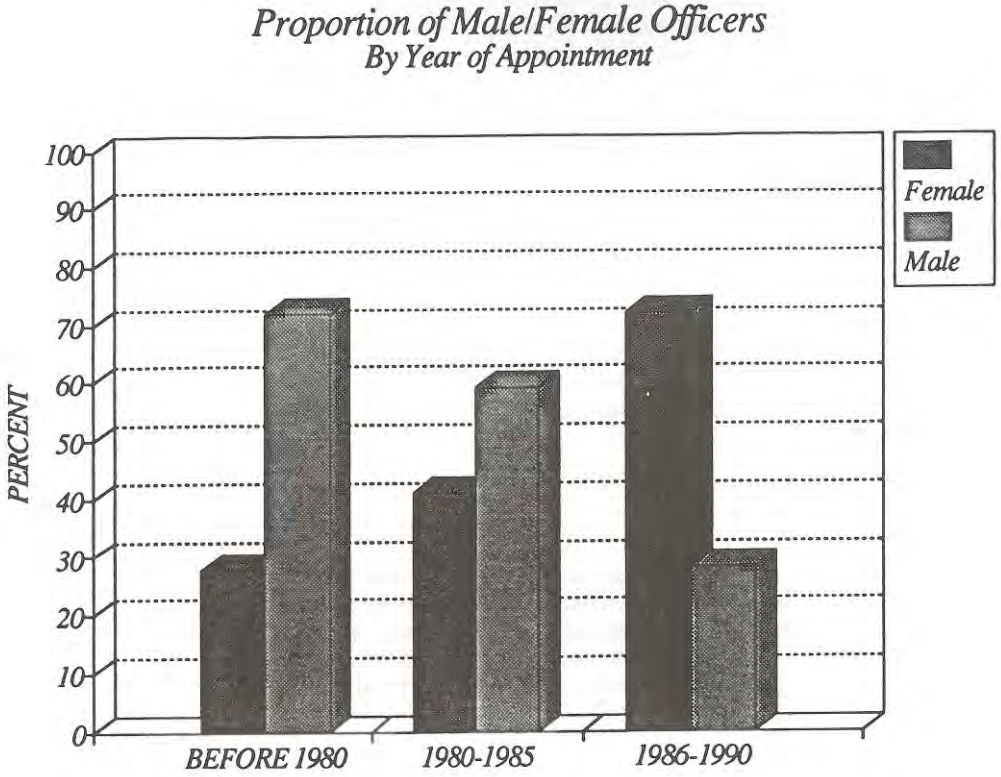
[11]Workplace was scored by the first location specified where there were more than one. Consequently, 12 respondents were counted among those working in larger centres, although they also reported attending smaller circuit locations as part of their duties.

[12]Statistics Canada's 1986 census data showed less than 7% of the population of Manitoba lived north of the 53rd parallel.

[13]The youngest reported age at appointment was 22 while the oldest was 77.

3. Gender

5.2



While a majority (56%) of magistrates and justices of the peace were male, appointment patterns have been changing and proportionately more female respondents were appointed in recent years. Seventy-two percent of those officers appointed before 1980 were male, while the reverse was true for appointments after 1985; 72% were female (Fig. 5.2). (see Appendix B, Table 6)

Men were more likely than women to be appointed after age 45 and to hold office as magistrate rather than justice of the peace. Forty-five percent of male respondents were over 45 years of age at the time of their appointment, compared to only 17% of women. Only 66% of female officers were magistrates compared to 82% of their male counterparts. (see Appendix B, Table 7)

Gender distribution varied by the size of the community in which the officers worked: the larger the community, the greater the proportion of female officers. While women held 72% of

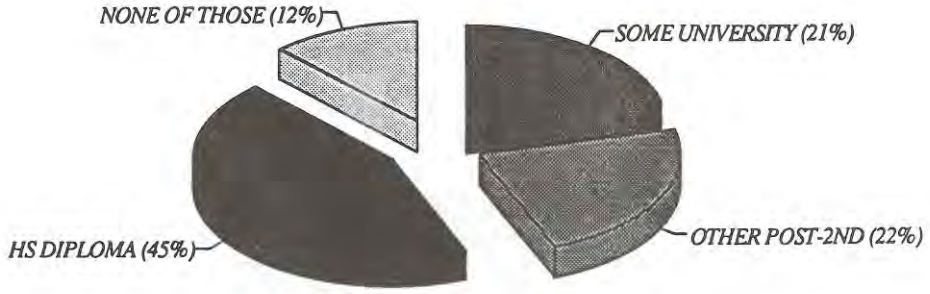
Winnipeg positions, that proportion dropped to 56% in other communities with populations of 5000 or more (north and south combined). Only 18% of those working in smaller communities (north and south combined) were women. (see Appendix B, Table 8)

The fact that 89% of respondents from those smaller communities were appointed before 1986 may provide some explanation for the lower percentage of women. Although the overall proportion of female appointees increased to 72% for the period 1986 to 1990 (Fig. 5.2), that would have had little impact in smaller communities which saw only 11% of their officers appointed during that time period, compared to 34% of officers working in the remaining locations.

4. Education

5.3

Educational Background of Magistrates and Justices



Manitoba magistrates and justices of the peace had varying levels of education (Fig. 5.3). Forty-three percent reported at least some university or other post-secondary preparation, while 45% indicated a high school diploma was their highest level achieved.[14] Twelve percent had less than a high school diploma (and no post-secondary education). (see Appendix B, Table 9)

Those more recently appointed were most likely to be educated beyond high school. Only 35% of those appointed before 1980 reported some university or other post-secondary education, compared to 41% of those appointed from 1980 to 1985 and 56% of those appointed after 1985. However, there was no appreciable decrease, over that same period, in the proportion who lacked a high school diploma. That group made up 15% of those appointed before 1980, 10% of those appointed from 1980 to 1985 and 13% of those appointed after 1985.

[14]"Other post-secondary" includes business or commercial college courses, trade apprenticeships, R.C.M.P. or police college training, etc.

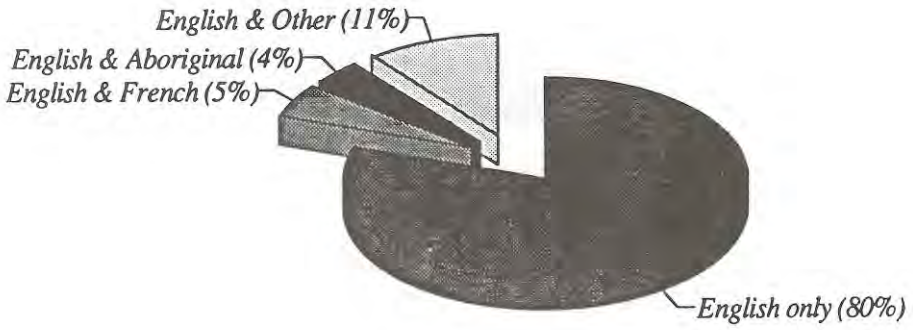
Less populated locations tended to have the largest proportion of officers with little formal education. (see Appendix B, Table 10) Twenty percent of those in communities with populations under 5000 (north and south combined) lacked a high school diploma, compared to only 6% of those working in Winnipeg and 5% of those in remaining communities with populations of 5000 or more. Winnipeg and southern communities with populations under 5000 had the largest proportion of officers (27%) with at least some university education.

Twenty-five percent of men had some university education, compared to 15% of women, but 32% of women had some other post-secondary education, compared to only 16% of men. Thus, 6% more women were educated beyond high school. Almost the same proportion of men and women had a high school education (43% and 45%) but men were twice as likely to lack a high school diploma (16% compared to only 8% of women). The fact that a greater proportion of women had been appointed recently provides some explanation for that result, since we know that recent appointees were better educated.[15] The age difference between men and women is another factor to consider since 28% of those over 45 at the time of appointment were without a high school diploma, compared to only 5% of younger appointees. As noted earlier, proportionately more male respondents fell into the older age group (44% compared to only 17% of women), thus increasing their chances of lacking a high school diploma.

5. Languages Spoken

5.4

Languages Used by Officers
In Performance of Duties



When asked about languages in which they were able to function, 80% of judicial officers said they carried out their duties in English only, while the remaining 20% were able to work in at least one additional language (Fig. 5.4). Five percent could function in French and 4% in an aboriginal language.[16] The remaining 11% were able to work in one or more other languages, including Ukrainian, German, Polish and Icelandic. (see Appendix B, Table 11)

[15]Seventy-two percent of respondents appointed after 1985 were female: see Fig. 5.2.

[16]All of those officers who were able to function in an aboriginal language worked in northern communities.

C. FUNCTIONS OF MANITOBA MAGISTRATES AND JUSTICES OF THE PEACE

1. Nature of Tasks Performed

When asked about the specific kinds of work that they did in the course of their duties as magistrate or justice of the peace, respondents reported engaging in a broad range of activities. Those activities included administering oaths, receiving informations, issuing process and hearing applications for judicial interim release (bail) and for search warrants. Some were also responsible for adjudicating and sentencing on summary conviction offences or for adjudicating other contested matters such as firearms prohibitions or peace bonds. Some respondents also reported remanding prisoners, exercising provincial summary jurisdiction (offence notice guilty pleas/default convictions) and setting hearing dates and documenting court orders and proceedings, as well as performing a variety of other activities related to office administration.[17]

A large proportion of respondents reported performing a multiplicity of tasks in the course of their work as judicial officers. Sixty-eight percent included five or more of the above tasks among their duties while only a very small percentage (6%) of the sample reported doing one kind of task exclusively.[18] (see Appendix B, Table 12)

Administering oaths (93%), issuing process[19] (91%) and receiving informations (80%) were the three activities most likely to be included among those performed by respondents. A large proportion also included judicial or highly discretionary tasks among their duties. Sixty-nine percent said they issued search warrants and slightly more than half (53%) reported conducting bail hearings. Sixty-five percent of respondents reported sentencing after guilty pleas and a third (33%) said they adjudicated summary conviction matters. Another 5% said they adjudicated other contested matters. (see Appendix B, Tables 13.1-13.11)

Ninety-two percent of respondents said their duties included such discretionary or judicial activities as issuing process, hearing bail or search warrant applications, sentencing, or adjudicating summary conviction (or other) matters.

The same high proportion (92%) of magistrates and justices of the peace employed by the provincial Department of Justice said their duties included at least one of those activities. They also carried out specific judicial tasks in proportions similar to those of the entire sample: 63% issued search warrants, 60% conducted bail hearings, 68% sentenced, and 43% adjudicated summary conviction matters.

2. Restriction on Functions

As previously indicated, policy directives have been issued by the Department of Justice which restrict the functions of magistrates and justices of the peace, over and above those statutory limits to jurisdiction previously discussed in Chapter 3. For example, the *Justices of the Peace and Magistrates Procedures and Training Manual* issued under the authority of the Chief Judge advises that officers are not to hear contested matters. Furthermore, while they may take guilty pleas to provincial (summary) offences, consent of the Crown attorney is required

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[17]Such as supervising others or responding to requests for information.

[18]Of those ten officers, 9 held appointment as justice of the peace, 9 worked in Winnipeg, and 8 spent less than 15 minutes per day on judicial officer duties. Four said their duties were confined to administering oaths, affidavits or other sworn documents, while another four issued some form of process documents like subpoenas or arrest warrants.

[19]Includes confirming/cancelling an appearance notice, promise to appear, or recognizance or issuing a summons, subpoena, or warrant (including *Mental Health Act* and *Public Health Act* warrants).

before accepting a plea on *Criminal Code* summary matters. Magistrates and justices of the peace are also directed to have a guilty plea withdrawn and to remand the matter to a provincial judge if they are of the opinion that a term of incarceration is indicated.[20] Those three restrictions in particular were mentioned by several respondents when asked about the existence and nature of any restrictions on their powers.

Twenty magistrates also referred to themselves as a "Limited Jurisdiction Magistrate" or as having "limited jurisdiction". While Orders in Council effecting appointments actually used this terminology at one time, there appears to be no statutory basis for the term nor any real consensus as to the nature of any limitations it might actually impose.[21]

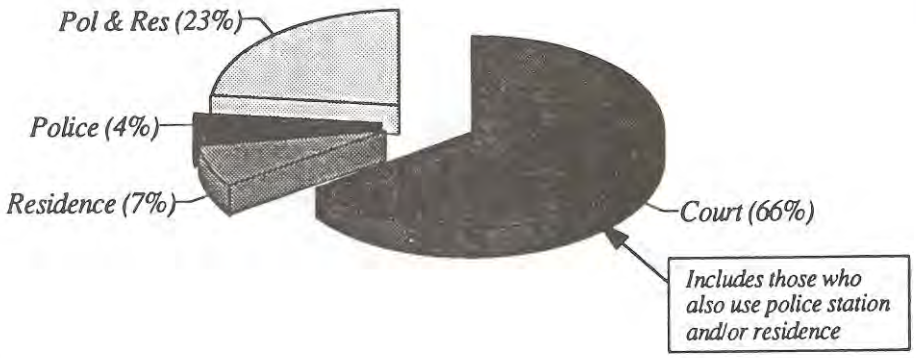
In addition, sixteen respondents either said their powers were limited to specific tasks or areas of work or they cited matters over which they believed they had no authority. For example, some said their powers were limited to issuing process or other documents, sometimes for a specific court or pursuant to a named statute, while others said they could not take guilty pleas or work outside of a particular time frame or location.

D. WORK ENVIRONMENT

1. Worksite

5.5

Common Work Sites
of Magistrates and Justices



When magistrates and justices of the peace were asked in what location they normally performed their duties, the category of worksite most commonly identified was a court house (Fig. 5.5). That locale was used by 66% of all officers at least some of the time and 38% reported working there exclusively. A police station and/or residence were also commonly

[20]Provincial Court (Manitoba), *Justices of the Peace and Magistrates Procedures and Training Manual* (undated) II.8.

[21]Given that s. 42(2) of *The Provincial Court Act* used to allow jurisdiction under Part XVI of the *Criminal Code* to be conferred by the Lieutenant Governor in Council, it may be that the term "limited jurisdiction magistrate" was first used as a short-hand reference to those magistrates not so authorized. However, that offers no explanation for the two responding justices of the peace who also characterized themselves as holding "limited jurisdiction".

identified, but few respondents said they used those worksites exclusively (4% and 7%, respectively). Slightly more than half (51%) of all respondents reported working in two or more locations. (see Appendix B, Table 14)

Some worksites were more common in particular geographic locations. Ninety-four percent of officers in Winnipeg performed their duties in a court house setting at least some of the time, as did 80% of those in communities with populations of 5000 or more (north and south combined). However, only 39% of those in smaller communities (north and south) said that they worked in that kind of setting.

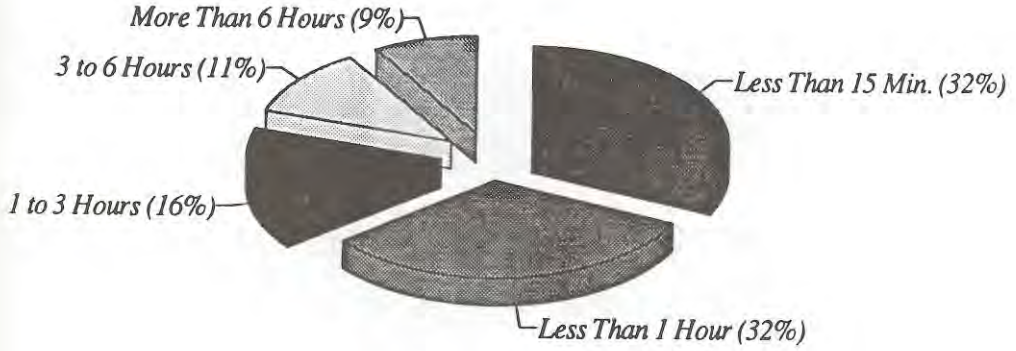
Winnipeg magistrates and justices of the peace were less likely than others to report working in a police station even some of the time. While 65% of all those working outside Winnipeg sometimes carried out their duties in a police station, only 16% of those in Winnipeg reported doing so.

Geographic differences in worksites may simply reflect the accessibility of public buildings like court houses in larger centres and the relative lack of such facilities in more rural areas.[22] Magistrates in rural Manitoba may be required to work in a police station or a private residence or workplace due to lack of viable alternatives. Those differences may also be related to the concentration of Justice Department staff in Winnipeg and other larger centres.[23] Those working full-time in court houses or government offices would be unlikely to carry out their official duties elsewhere.

2. Time Spent on Official Duties

5.6

Time Spent on Duties
by Magistrates and J.P.s



[22]There are regional courts located in almost all Manitoba communities with populations of 5000 or more. All 3 regional courts in the north are located in larger centres (Thompson, Flin Flon, The Pas).

[23]More than 90% of Department of Justice staff officers had a mailing address in Winnipeg or another community with a population of 5000 or more.

When asked how much time they spent each day on justice of the peace/magistrate duties, 64% of respondents said they spent less than one hour per day on those activities (Fig. 5.6).

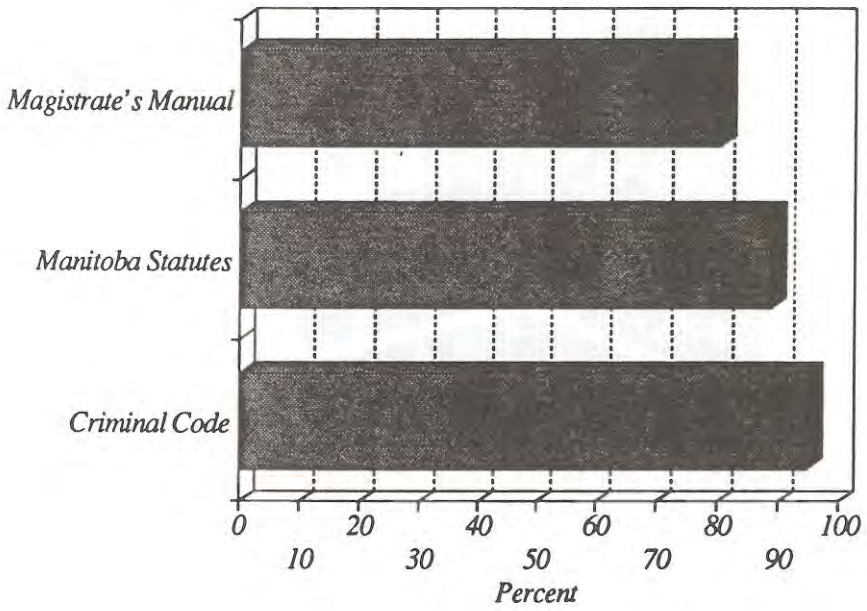
Proportionately more (83%) of those officers working in communities with populations under 5000 (north and south combined) said they spent less than one hour per day on those duties while almost none (4%) spent three or more hours. A majority (54%) of those working in larger communities outside Winnipeg reported spending from 1 to 6 hours daily on those tasks. Those officers working in Winnipeg tended to fall at opposite ends of the spectrum. They had the largest proportion (42%) who spent less than 15 minutes daily on judicial officer tasks but also the largest proportion (22%) who spent more than 6 hours. (see Appendix B, Table 15)

As mentioned previously, over 80% of non-staff or "fee paid" magistrates and justices of the peace had mailing addresses in communities of less than 5000. Given the level of remuneration of non-staff officers, it is reasonable to expect that many would hold other kinds of employment and that their judicial officer duties would be carried out on a part-time basis. This would explain the large proportion of officers in those communities who spend less than one hour per day on their duties.

3. Resource Materials

5.7

Resource Materials Available
to Magistrates and Justices

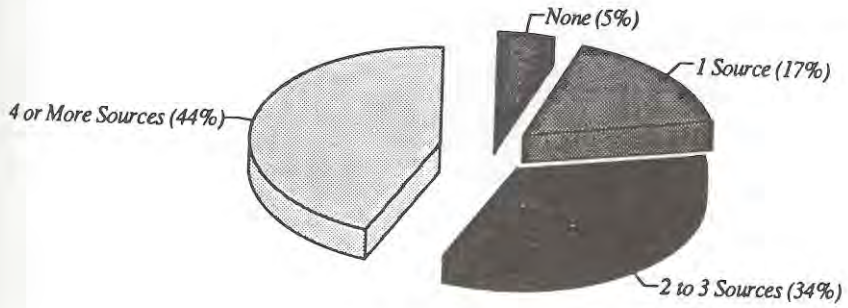


In response to questions about the kinds of resource materials they had access to, 95% of magistrates and justices of the peace said they had a *Criminal Code* available to them (Fig. 5.7). Eighty-nine percent reported having access to Manitoba Statutes and 80% to a copy of the *Justices of the Peace and Magistrates Procedures and Training Manual.* Of those officers who said they had a *Criminal Code* available, nine (5%) reported that it was located at an R.C.M.P./police office.[24] (see Appendix B, Table 16)

4. Number of Sources Contacted for Assistance

5.8

Percent Seeking Assistance From One or More Sources



Magistrates and justices of the peace were asked how often they sought assistance from various named individuals in the performance of their duties.[25] In this instance, the nature of the assistance sought was not identified. Ninety-five percent identified at least one source from whom they sought assistance, while 78% identified two or more such sources (Fig. 5.8). Only 5% said they never sought assistance in the performance of their duties. (see Appendix B, Table 17)

The three most commonly cited sources of assistance were another magistrate or justice of the peace (65%), a police officer (56%) and a Crown attorney (50%). It is interesting to note that those preferences were not constant across geographic locations. The percentage of judicial officers working in Winnipeg who sought assistance from another magistrate or justice of the peace was 71%. On the other hand, those officers working in communities with populations of less than 5,000 (north and south combined) were most likely to seek assistance from a police officer (79%). Those differences may simply reflect the most accessible sources in various locations. Magistrates and justices of the peace in Winnipeg may be one of several in the same

[24]All nine worked in communities with populations under 5000.

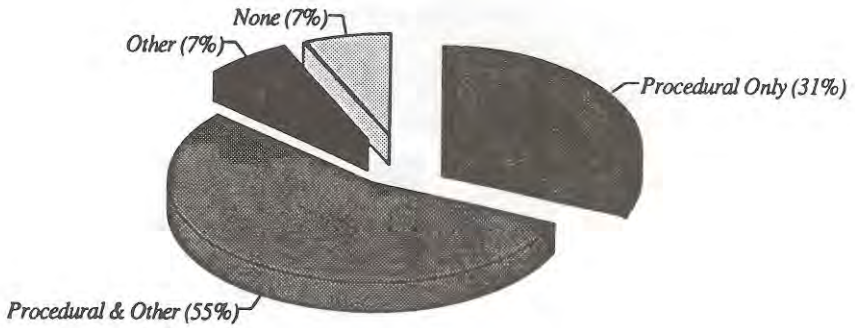
[25]The choices offered included judge, police officer, Crown attorney, other lawyer, legal adviser, other magistrate/justice of the peace, court official and "other".

office or location while those working in smaller communities may be more likely to seek assistance from the police because of the unavailability of other judicial officers.

5. Help Received

5.9

Nature of Help Received in Performance of Duties



Respondents were also asked about specific kinds of help received in the performance of their duties including procedural advice, legal opinions, or advice on penalties. Although some did get advice on penalties and/or legal opinions, the most common kind of help received was procedural advice (Fig. 5.9).

While 31% reported receiving procedural advice alone, 55% had some other kind of help as well. Seven percent received legal opinions or advice on penalties, but no help with procedural matters. Seven percent said they had not received help in any of those three areas. (see Appendix B, Table 18)

The most commonly cited source of advice on procedural matters was a 'court official'[26] (49% of respondents who received that kind of help). The most common source of legal opinions was a Crown attorney (49%) and a 'court official' was the most likely source of advice on penalties (39%).

E. OFFICERS' COMMENTS ON TRAINING/GENERAL RECOMMENDATIONS

Magistrates and justices of the peace were asked to identify the kinds of training and support that could assist them in carrying out their duties. They were also asked for other comments or suggestions that might be useful to the Commission in its review.

[26]This includes administrator, manager, director, supervisor, superior and training officer.

1. Training and Resources

Eighty-seven percent of respondents offered suggestions for training, many of which were simply calls for more of the kind of preparation already received.[27] The remaining 13% saw no need for additional training in their present role or spoke favourably of the training and support currently provided.

Many expressed the opinion that training was desirable, at least initially, while some thought that formal training by the Department should be a prerequisite to acting in an official capacity. Regularly scheduled seminars were a commonly suggested means to provide both initial and on-going training and many recommended that these seminars be provided annually, at minimum.

Training courses or seminars were viewed as an opportunity to discuss issues with fellow judicial officers and to become informed on the latest developments in legislation and practice. A few respondents expressed a wish for more specific information about the extent of their powers while others indicated an interest in learning stress management techniques.

Several respondents said they used the *Justices of the Peace and Magistrates Procedures and Training Manual* and some expressed a wish for regular updates or specific information to be added.

2. General Comments

There were non-staff officers who expressed a concern with the lack of backup or replacement officers. This lack of replacements would result in a gap in service, should they be unavailable. Others wanted more work and saw fuller utilization of their time and powers as a means of minimizing court delays. Some said it was difficult to maintain their knowledge and skills because they were only rarely called upon to exercise them.

A number of non-staff officers were of the opinion that the fees paid were too low and not in keeping with the workload and responsibility imposed by their official duties. They felt that this was particularly true because they were often called upon to discharge those duties on weekends or evenings when local court staff were unavailable. The view was also expressed that non-staff officers should be compensated for travel time and income loss occasioned to attend training seminars.

F. SUMMARY

The results of the survey have provided the following profile of Manitoba magistrates and justices of the peace:

About three-quarters held appointment as magistrates. While magistrates were more likely to include adjudicative or highly discretionary tasks among their duties than were justices of the peace, there was a significant overlap of duties. The average age of magistrates and justices of the peace was 49 while the average age at appointment was 40. A majority were men, but those more recently appointed were more likely to be women. Most live and work in southern Manitoba and most have lived in their present community for 20 years or more.

[27] 135 respondents answered this question.

A majority had a high school diploma or less, with the exception of those appointed after 1985, most of whom had some university or other post-secondary education. Most spoke English only and all of the handful who spoke an aboriginal language lived in northern Manitoba.

Most officers were called upon to administer oaths, receive information, issue process, impose sentence and hear bail and search warrant applications. They were engaged in a number of different official activities and those activities most likely included tasks of an adjudicative or highly discretionary nature.

Most did their work in a court house, except those in smaller communities who were more likely to work in a police station or residential location. Most spent less than an hour a day on their official duties.

Most officers had access to a *Criminal Code*, to Manitoba statutes, and to a copy of the *Justices of the Peace and Magistrates Procedures and Training Manual*. A majority sought assistance in the performance of their duties from two or more sources and the most common sources varied by geographic work location.

Magistrates and justices of the peace identified a need for training and many expressed an interest in regularly scheduled sessions to develop and maintain skills.

There were officers who wanted more work and thought they could relieve some of the courts' burden, while some said it was difficult to maintain their skills because they were not often called upon to use them. Some non-staff officers said they were not paid enough for the work that they did.

G. CONCLUSIONS

The foregoing results suggest several points or questions to be considered when discussing reform of the current role of inferior judicial officers in Manitoba and some of those questions are canvassed below.

1. Classification of Officers/Functions Performed

Given the similarities in jurisdiction and the overlap of functions, do the two titles currently in use actually draw useful distinctions? If there is a need to tailor jurisdiction, should that be done by some means other than administrative directive? It may be that statutory classifications which confer specific and identifiable jurisdictions would be less threatening to the independence of these officers and less confusing to all involved in the justice system.

It is apparent from the results that a large proportion of government employees (Justice Department staff) perform highly discretionary or adjudicative work as part of their paid employment. Does that employment status pose any special difficulties in providing judicial officers with the essential conditions of independence discussed in Chapter 4?

2. Appointment

Are the right people being appointed magistrates or justices of the peace, in the right locations? While there is evidence of a move toward more equal representation of women in these positions, the low proportion of respondents who spoke French or an aboriginal language

may be cause for concern. Given the high proportion of officers performing difficult adjudicative tasks such as the consideration of search warrant applications, should specific educational requirements be instituted? Should certain kinds of employment disqualify otherwise suitable candidates for appointment, such as those engaged in law enforcement or working in certain government departments or agencies? Does the fact that a majority of respondents spent less than an hour per day on their official duties mean that there are more of these judicial officers than required?

3. Remuneration

Given the dissatisfaction with pay levels expressed by some non-staff officers, is there a need to review the method of determining those levels? Should the method of payment (fee-for-service) of non-staff officers be reviewed at the same time? What effect, if any, might those changes have on the remuneration of Justice Department staff?

4. Training, Resources, Support

The officers themselves expressed the need for training at the time of appointment, followed by an on-going process which would develop additional skills as well as reinforce the basics. Is additional training necessary, considering the wide range of activities performed by most magistrates and justices of the peace? Does the large proportion of officers who received procedural, legal, or penalty advice further reinforce the view that additional training would be useful?

It is apparent that a large proportion of officers in rural areas perform their duties in a police station or residence and rely on assistance from the police in the performance of their duties. While that may raise questions about the public's perception of their relationship with the police, it could also be indicative of a need for better or more appropriate resources for officers in rural areas. The fact that even a few officers relied on the police for access to a *Criminal Code* may further illustrate that need.

These and other issues and questions must now be reviewed in the context of the applicable legal principles and policy considerations in order to identify the appropriate course of action.

CHAPTER 6

TENURE AND APPOINTMENT

A. INTRODUCTION

The various interviews and the survey conducted in the course of researching this Report have demonstrated very clearly that Manitoba magistrates and justices of the peace take their responsibilities seriously and work very hard to fulfil the public's expectation of an independent and impartial tribunal.

The purpose of this Report is not to impugn the subjective independence of individual magistrates or justices of the peace in Manitoba. However, we are concerned that the present structure within which these officers work does not provide them with the essential conditions of judicial independence required under section 11(d) of the *Charter of Rights and Freedoms* identified in *Valente*.

It must be remembered that those essential conditions of independence constitute the minimum standards to which various inferior courts or tribunals will be held and, in the following recommendations, we have attempted to build on those in order to suggest a plan which is both principled and viable in the present Manitoba context.

As a preliminary issue, the Commission considered whether a need still exists for justices of the peace and magistrates at all. However, we concluded that the abolition of both offices (as in New Brunswick) is not a realistic option, in light of Manitoba's geographic and social realities and the major role currently played by these judicial officers in the administration of justice. There is no utility though in preserving two separate offices which carry very similar statutory jurisdictions and which tend to cause confusion on the part of the public and the officers themselves. While we have no strong preference for any particular title, it should be noted that term "magistrate" is no longer contained in the *Criminal Code* and is not in common use in other jurisdictions in Canada. For the purposes of our recommendations, we will call these officers justices of the peace.

RECOMMENDATION 1

A category of inferior judicial officer should be retained in Manitoba. However, the distinction between magistrates and justices of the peace should be abolished. For the purposes of this Report, the title 'justice of the peace' will be used.

B. CLASSIFICATION BY FUNCTION

The functions carried out by justices of the peace and magistrates are extremely varied. They range from relatively straightforward administrative tasks like receiving informations and administering oaths to much more complex matters like determining guilt or innocence or deciding whether a search warrant should issue.

As discussed in Chapter 4, not all of those activities will attract a legal requirement for judicial independence but, when highly discretionary or adjudicative tasks are undertaken, we are agreed that the tribunal involved should meet at least the basic essential requirements of section 11(d) of the *Charter*. A case can also be made that these officers would require a higher level of education, training and skills than would be needed to carry out tasks of a more administrative nature.

In the past, a number of Canadian jurisdictions have chosen to tailor the scope of an individual justice's powers to their ability, skills and preparation as well as to the needs of the community. This has been accomplished either by administrative directive or, more recently, by statutory classification.

Justices of the peace in British Columbia receive administrative directives in the form of an annual "assignment letter" from the Chief Judge which advises them of the matters over which they may exercise jurisdiction.[1] Manitoba magistrates and justices of the peace have also had the scope of their legislative powers limited by policy directives of the Department of Justice or by letter from court administrative staff.[2]

A recent statutory scheme proposed for the Northwest Territories gives the Chief Judge power to assign specific duties and justices of the peace are required to perform only those assigned.[3] Thus, classification is achieved through directive rather than legislation.

Ontario and Saskatchewan have both recently established classification systems whereby justices of the peace are granted quite specific powers which are set out in the governing Act or in regulations. While not identical in the division of functions, both provinces have created a classification of officer who has fewer judicial or discretionary duties and both have called that officer a 'non-presiding' justice of the peace. The remaining officers are 'presiding' justices of the peace. Presiding justices of the peace in Saskatchewan are further sub-divided and the trial of provincial offences is restricted to 'senior presiding' justices of the peace.[4]

In order to ensure that justices of the peace are adequately prepared and possess the requisite level of independence for the task at hand, we are agreed that it should be possible to vary the scope of judicial powers granted with an appointment. However, we are of the view that the jurisdiction of judicial officers should be ascertainable from their title or appointment, since limitation by oral or written directive leads to confusion and does not inform the public. We are also concerned that limitation by administrative directive may be perceived as a fettering of judicial discretion which could jeopardize the judicial independence required by section 11(d) of the *Charter of Rights and Freedoms*. Limitation by administrative directive also carries the disadvantage that it may be perceived as a means to carry out a back-door disciplinary process, a perception that should be eliminated by statutory limits which can be regulated and administered publicly.

For those reasons, we prefer the use of statutorily sanctioned classifications to limit the powers of individual justices of the peace, although, as previously discussed, that method is not entirely without its own problems concerning the division of federal and provincial legislative powers. Nonetheless, such a scheme should allow more effective allocation of resources by

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[1]A.N. Doob, P.M. Baranek and S.M. Addario, *Understanding Justices: A Study of Canadian Justices of the Peace* (draft) (1991) 79.

[2]*R.* v. *Dorion*, unreported, February 27, 1989, Giesbrecht P.C.J.

[3]*An Act to Amend the Justices of the Peace Act*, S.N.W.T. 1989(2), c. 11, s. 6 (not yet in force).

[4]A further sub-category of 'presiding' justice of the peace is a 'court official' with fewer powers than one who is not.

linking levels of education, training, remuneration, and even terms of tenure to the work that justices of the peace are expected to do. We are agreed that three levels of jurisdiction should be sufficient and suggest the following classifications:

1) **Non-presiding justices of the peace**, who would have the power to receive informations and to take oaths or affirmations. It is intended that these officers will not be called upon to exercise jurisdiction of a discretionary or judicial nature. The *Criminal Code* provision requiring that informations be received by a justice means that they must be readily available in every part of the province to enable criminal proceedings to be initiated as required. However, it is expected that the very restricted role will result in relatively few justices of the peace being appointed in this category.

2) **Presiding justices of the peace**, whose jurisdiction would include those duties carried out by non-presiding justices of the peace, as well as other tasks which may be characterized as judicial in nature, or which call for the exercise of some significant level of discretion. Included in this group of activities will be:

   (a) issuing process documents like warrants, summonses and subpoenas;

   (b) confirming or cancelling appearance notices/promises to appear/ recognizances;

   (c) remands in custody;

   (d) (offence notice) guilty pleas; and

   (e) (offence notice) default convictions.

3) **Senior presiding justices of the peace**, whose jurisdiction would include all of the above. Justices of the peace with this classification would also have jurisdiction to:

   (a) adjudicate contested matters including summary conviction trials, applications for firearms prohibition, and requests for orders of recognizance to keep the peace;

   (b) impose sentence after adjudication or upon a plea;

   (c) consider applications for judicial interim release (bail); and

   (d) consider applications for search warrants.

Given the substantive nature of these provisions, it would be our preference to see the various jurisdictions set out in the statute, although we do acknowledge that regulations would more easily facilitate subsequent fine-tuning, should that be required.

Of course, the use of statutory classifications would not prevent the Chief Judge (in his or her administrative capacity) from assigning justices of the peace to specific areas or duties within the scope of their powers, just as he presently does for provincial judges.[5]

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[5]The Chief Judge has "general supervisory powers" in respect of judges, magistrates and justices of the peace: *The Provincial Court Act*, C.C.S.M. c. C275, s. 8.1(1)(a).

RECOMMENDATION 2

The office of justice of the peace should be divided into three classifications: non-presiding, presiding, and senior presiding, with the jurisdiction of each set out in statute.

RECOMMENDATION 3

The jurisdiction of non-presiding justices of the peace should be restricted to matters of an essentially administrative nature. The jurisdiction of presiding justices of the peace should include matters of a more judicial nature. The jurisdiction of senior presiding justices of the peace should extend to matters of the most judicial nature.

C. TENURE

Currently, appointment of magistrates and justices of the peace is by Order in Council upon recommendation of the provincial Minister of Justice. There is no specific term or age limit imposed by statute, nor is there any provision for removal. *The Interpretation Act* suggests that the lack of such provisions results in those appointments being held "at pleasure".[6]

Security of tenure was identified by the Supreme Court in *Valente* as "the first of the essential conditions of judicial independence".[7] At minimum, security of tenure requires that removal from office will only be for cause related to capacity to perform judicial functions and then only after independent review where the person affected has had full opportunity to be heard. That principle has been applied to justices of the peace in performing an adjudicative function in Ontario[8] and to presidents of Standing Courts Martial adjudicating service offences.[9]

While officers in a number of Canadian jurisdictions continue to hold office at pleasure, there has been significant movement away from that during recent years.[10] Saskatchewan, Ontario, British Columbia, and the Yukon Territory all have some system to review complaints against justices of the peace and to effect or recommend discipline or removal of the officer in question (although non-presiding justices of the peace in Saskatchewan continue to hold office at pleasure[11]). The previously mentioned amendments to the *Justices of the Peace Act* in the Northwest Territories will also allow removal only after inquiry and recommendation by the Justices of the Peace Review Council.[12] In each of those jurisdictions, justices of the peace could

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[6]Public officers hold office during pleasure, in the absence of an express intention to the contrary, and the authority to appoint includes the power to remove: *The Interpretation Act*, C.C.S.M. c. I80, ss.17 and 18(1).

[7]*Valente* v. *The Queen* (1985), 24 D.L.R. (4th) 161 at 176 (S.C.C.).

[8]*Re Currie and Niagara Escarpment Commission* (1984), 14 D.L.R. (4th) 651 (Ont. C.A.).

[9]*R.* v. *Ingebrigston* (1990), 76 D.L.R. (4th) 481 at 498 (C.M.A.C.). Appointment of those presidents was subject to discretionary revocation by the Minister of National Defence, although the appointing authority was routinely delegated to the Judge Advocate-General.

[10]Justices of the peace in Québec, Nova Scotia and Alberta continue to hold office at pleasure.

[11]*The Justices of the Peace Act, 1988*, S.S. 1988-89, c. J-5.1, s. 7. The activities of non-presiding justices of the peace are restricted to administering oaths, receiving informations and reading riot proclamations.

[12]*An Act to Amend the Justices of the Peace Act*, S.N.W.T. 1989(2), c. 11, s. 5 (not yet in force).

be said to hold office during good behaviour.[13] Although the necessity for an independent review prior to removal is implied in some jurisdictions rather than specifically demanded, it is probably safe to assume that the process would always be followed.[14] However, such a requirement should be explicitly provided for in legislation.[15]

As noted, all Manitoba magistrates and justices of the peace currently hold office at pleasure, with no process of review to allow for or challenge their discipline or removal from office. The complete lack of such a process for those performing a judicial function is a serious impediment to their independence on the basis of security of tenure, as well as a disservice to the public and to the officers themselves.

RECOMMENDATION 4

Senior presiding and presiding justices of the peace should hold office during good behaviour.

RECOMMENDATION 5

Removal of a senior presiding and presiding justice of the peace from office should only be upon recommendation of the Judicial Council.

Of course, the function performed by a justice of the peace will dictate the level of judicial independence required. For those performing only administrative tasks which do not involve the exercise of discretion, there is no logical reason for the application of independence requirements. Furthermore, we know from *Valente* that the actions of those justices of the peace who do perform adjudicative or judicial tasks are not vitiated by the fact that others lack the essential conditions of independence:

> In my opinion, the fact that certain judges of the court may have held office during pleasure at the time Judge Sharpe declined jurisdiction could not impair or destroy the independence of the court as a whole. The objection would have to be taken to the status of the particular judge constituting the tribunal.[16]

Therefore, we see no impediment to non-presiding justices of the peace continuing to hold office at pleasure, so long as their functions are administrative in nature and so long as those in a more expanded judicial role do possess the essential conditions of independence.

RECOMMENDATION 6

Non-presiding justices of the peace should continue to hold office at pleasure.

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[13]Although they may be removed without review for failure to prepare and file reports (Saskatchewan: *The Justices of the Peace Act, 1988*, S.S. 1988-89, c. J-5.1, s. 11) or upon a change of residence or occupation contrary to a condition of employment (British Columbia and the Yukon Territory: *Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 27; *Territorial Court Act*, R.S.Y. 1986, c. 169, s. 41(2)).

[14]E.g., statutes in the Yukon Territory and British Columbia do not specifically require such review before removal from office.

[15]In *Re Currie and Niagara Escarpment Commission*, *supra* n. 8, the Ontario Court of Appeal based its acceptance of a non-compulsory review process for justices of the peace on the belief that the government was unlikely to circumvent the process, since such action would be a violation of the accepted tradition of non-interference with judicial independence.

[16]*Supra* n. 7, at 183.

There is also currently no legislated mechanism for resignation, although the current practice is to revoke appointments by Order in Council after receiving written notification of resignation. We are of the opinion that such a process is unnecessarily cumbersome. Several other jurisdictions now have statutory provisions effecting termination of appointment upon resignation[17] and we are agreed that a similar legislative provision is indicated for Manitoba.

RECOMMENDATION 7

The appointment of any justice of the peace should terminate upon receipt of written notification of his or her resignation.

D. APPOINTMENT

Magistrates and justices of the peace are currently appointed by Order in Council. The need for another (non-staff) officer may be identified by the community, local police, or the Department of Justice. Names of potentially suitable candidates are solicited by the Department of Justice from a number of community sources which may include law enforcement agencies and local government.[18] Those individuals are then asked to complete an application and, following screening by the office of the Chief Judge, the names of qualified applicants are forwarded to the Minister who submits a name for appointment.[19] Because there is no statutory requirement for this consultative process, it constitutes a purely voluntary delegation on the part of the Minister.

The process of appointment of Justice Department staff as magistrate or justice of the peace is quite different. Presumably, names of those department staff whose work is thought to require an appointment would simply be submitted to the Minister who sets in process the necessary Order in Council. In situations where the work of the staff officer will be almost entirely of a judicial nature, the positions may be advertised as such and the candidates screened by representatives of both the Department of Justice and the office of the Chief Judge, before recommendation for appointment is made by the Attorney General.[20]

For reasons fully canvassed in our previous Report concerning *The Independence of Provincial Judges*,[21] whenever judicial appointments are made in the sole discretion of Cabinet, there is the risk that appointments will be perceived by some to be political in nature.[22] While there is no evidence that appointments are politically motivated or that the present system would not meet the minimum standards of independence enunciated by the Supreme Court in *Valente*, such a perception is clearly harmful to the credibility of the justice system. We are of the opinion that this system of appointment, at the sole discretion of the Executive, is unsatisfactory and could pose a threat to the perceived independence of justices of the peace.

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[17]E.g. Saskatchewan, Ontario, British Columbia (by-law and traffic adjudicators), Alberta, Yukon Territory.

[18]Memorandum from M. Bruce, Assistant Deputy Minister, Courts, November 28, 1989, incorporating memorandum from S. Davis, Administrative Officer, Rural Courts, November 20, 1989.

[19]Telephone interview with Chief Judge K. Stefanson, May 6th, 1991.

[20]As for the most recent appointment of five 'hearing officer' magistrates.

[21]Manitoba Law Reform Commission, *The Independence of Provincial Judges* (1989, Report #72).

[22]The objection to the appointment of justices of the peace as a political reward was very forcefully made in the McRuer Report: Ontario (J.C. McRuer), *Royal Commission Inquiry Into Civil Rights*, Report No. 1, vol. 2 (1968) 519.

It is agreed that the provincial government should retain the power of appointment and that the Department of Justice should retain responsibility for identifying the need for additional justices of the peace. However, just as we recommended for provincial judges, we believe that there is a need for reform of the selection process in order to place the choice of suitable candidates in the hands of an independent advisory committee. It is intended that such an independent advisory committee will institute a consistent selection process for presiding and senior presiding justices of the peace, using identifiable and objective criteria so that the public and the justices of the peace themselves can be assured that candidates are selected on the basis of merit and aptitude.[23]

Because of the limited jurisdiction of non-presiding justices of the peace, the appointment process for that category need not change.

1. Nature of Advisory Committee

While the process of appointing justices of the peace in most other Canadian jurisdictions is similar to that in Manitoba (appointment by or on the recommendation of the Attorney General or Minister of Justice), there is a movement toward greater consultation. The appointment of justices of the peace in Ontario, British Columbia and the Yukon Territory is no longer entirely within the discretion of government, but requires consultation.[24] In Ontario[25] and British Columbia,[26] that consultation takes the form of a review of appointments proposed by the Attorney General who retains the final right of decision. The committee in the Yukon takes a much more active part, since appointments are required to be made upon the recommendation of that group.[27]

Even the existence of a review committee, like those in Ontario and British Columbia, can serve to open up the process by encouraging public participation through lay membership on the committees. However, the obvious advantages of the more direct involvement of an appointing committee include the broader range of candidates which can be considered by the committee, as well as the binding effect of recommendations which guarantees that committee views cannot be ignored.

For those reasons and others more fully discussed in the Commission's Report on *The Independence of Provincial Judges*, we are of the opinion that a nominating committee is the preferable advisory body to be consulted.[28]

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[23]Some justices of the peace are appointed *ex officio*. An example may be found in *The Mines Act*, C.C.S.M. c. M160, s. 54: "The director [of Mines] or any inspector, recorder, or resident engineer, appointed under this Act is, ex officio, a justice of the peace for every district in Manitoba. . . ." In our view, *ex officio* appointment of presiding or senior presiding justices of the peace would generally be inappropriate, although there may be sufficient cause to continue with appointment of non-presiding justices of the peace in that way.

[24]The Attorney General in Newfoundland is required to obtain the views of the Provincial Court judge for whose district the appointment is proposed: *The Justices Act*, R.S.N. 1970, c. 188, s. 3, as am.

[25]*Justices of the Peace Act, 1989*, S.O. 1989, c. 46, ss. 2(1) and 10(1)(a). The Justices of the Peace Review Council is directed to consider all proposed appointments and report to the Attorney General, upon whose recommendation appointments are ultimately made by the Lieutenant Governor in Council.

[26]*Provincial Court Act*, R.S.B.C. 1979, c. 341, ss. 13(a) and 24(1). The Judicial Council is required to consider appointments proposed by the Lieutenant Governor in Council.

[27]*Territorial Court Act*, R.S.Y. 1986, c. 169, s. 40(1). Appointments are made by the Commisioner in Executive Council "on the recommendation of the judicial council".

[28]*Supra* n. 21, Ch. 3.

RECOMMENDATION 8

Upon identifying the need for a senior presiding or presiding justice of the peace in a particular location, the Minister of Justice and Attorney General should request a Nominating Committee to submit a list of names of persons recommended for the vacancy.

RECOMMENDATION 9

Senior presiding and presiding justices of the peace should be appointed by the Lieutenant Governor in Council from a list of names provided to the Minister of Justice and Attorney General by a Nominating Committee.

2. Composition of the Nominating Committee

While the advisory groups in other jurisdictions may operate as a review committee or a nominating committee, none are specially constituted for that single purpose. They all perform additional functions as well, such as investigating complaints or conducting inquiries.

This Report includes a subsequent recommendation that justices of the peace be subject to discipline by the same Judicial Council which currently reviews complaints against Provincial Court judges. While that body is presently in existence, enjoys the respect of the public, and will eventually develop a familiarity with discipline issues affecting justices of the peace, we are of the opinion that it is not the ideal body to make recommendations concerning appointment.

In addition to the obvious difficulties which could arise for a committee required to discipline a justice of the peace whose appointment they may have recommended, there is a strong case for a very differently constituted nominating committee, given the issues to be considered. Judicial Councils are quite properly made up of persons with knowledge and expertise regarding appropriate behaviour of judicial officers within their various roles. On the other hand, nominating committees will be expected to assess not only the qualifications of candidates for appointment to the office of justice of the peace, but also their suitability for office in a particular community setting. We are therefore of the view that the very different issues to be considered in the process call for a committee separate and distinct from the Judicial Council.

RECOMMENDATION 10

The Nominating Committee should not be the Judicial Council.

In addition to representation by those individuals responsible for the supervision, training and support of individual justices of the peace in the field, there is a need for participation in the selection process by non-lawyers familiar with the geographic and social imperatives of the area. For that reason, the committee should include non-lawyers who are, as much as possible, geographically and culturally representative of the Manitoba population. Although all members would be advised of meetings, a small quorum could help control the workload, since participation in the selection process would be particularly encouraged from the member or members most familiar with the community in question. Given that the office of the Chief Judge is involved in the training and supervision of justices of the peace, we are agreed that the Chief Judge or his/her designate should chair the committee. In addition, in light of the anticipated workload, at least during the transitional phase, we are also of the opinion that the committee should be a standing committee.

RECOMMENDATION 11

The Nominating Committee should be a standing committee composed of the following seven persons, three of whom should constitute a quorum:

(a) as chair of the Committee, the Chief Judge or his or her designate who shall be a provincial judge;

(b) one additional judge of the Provincial Court to be named by the Chief Judge; and

(c) five other persons appointed by the Lieutenant Governor in Council, none of whom shall be lawyers or persons disqualified from appointment as justice of the peace.

3. Recruitment and Evaluation of Candidates

We propose that the procedure followed by the Nominating Committee should roughly parallel that proposed by us for provincial judges.[29] In order to ensure notification of as many potential candidates as possible, the Nominating Committee should be empowered to advertise as widely as possible, but certainly within the geographic area concerned. Advertisement need not be restricted to newspaper publications, but could be in the form of bulletins or radio messages, and should be in the language or languages of the community to be served. Where deemed appropriate by the Nominating Committee, they should be able to approach potential candidates to encourage their application.

RECOMMENDATION 12

The Nominating Committee should be required to advertise for candidates for any vacancy to be filled.

RECOMMENDATION 13

The Nominating Committee should be empowered to seek out and recruit candidates for vacancies.

Given the onerous responsibilities sometimes faced by justices of the peace, often with limited immediate resources, adequate education and literacy standards are critically important in assessing potential candidates for office. For example, there is at least an arguable case that the functions performed by senior presiding justices of the peace would call for a degree in law. However, we do recognize the value in appointing judicial officers representative of and connected to their community and acknowledge that candidates with a specific educational background may be scarce in certain locations. Since we agree that the Committee should not be hamstrung by formal educational requirements which might disqualify an otherwise suitable candidate, we are of the opinion that the Committee itself should determine the level of educational preparation to be required. This is especially appropriate, given that those charged with the training and supervision of justices of the peace are represented on the Committee.

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[29] *Supra* n. 21, Ch. 3. These recommendations were implemented in *The Provincial Court Amendment Act*, S.M. 1989-90, c. 34.

While there will be other criteria which ought to be considered, the varied backgrounds of justices of the peace (particularly non-staff) make it difficult to articulate any other than the most vaguely worded qualifications of office. For example, it has been said of British lay justices of the peace that they were appointed for their "common sense, sympathy and wide experience of life and affairs".[30] Other qualities which contribute to a person's ability to act judicially may include freedom from prejudice, the capacity to make a decision, and independence of mind.[31] We are of the opinion that additional criteria should be left to be developed by the Nominating Committee, with those criteria being communicated to prospective candidates through advertising.

We are aware that there will continue to be a need for appointments in less accessible areas of the province. However, given that those qualities required in a justice of the peace may be difficult to measure otherwise, we would urge that a personal interview by the Nominating Committee or its delegated members be made a prerequisite to a recommendation for appointment.

The Nominating Committee will no doubt identify characteristics or circumstances which they feel should disqualify potential candidates and that should also be within their mandate. However, the Commission is of the opinion that there are occupations which carry significant potential for conflict with the role of justice of the peace. Although persons engaged in these occupations may be suitable candidates in every other respect, the jobs are likely to be perceived as incompatible with judicial office, especially in light of the Supreme Court's comments in *R.* v. *Lippé*.[32] For that reason, we are of the opinion that anyone engaged in those occupations should be ineligible for appointment as presiding or senior presiding justice of the peace. Those disqualified would include sheriffs, bailiffs, wardens and employees or members of any police force or law enforcement agency, as well as other persons carrying out certain functions normally associated with those occupations.

RECOMMENDATION 14

The following persons should be ineligible for appointment as justice of the peace:

(a) sheriffs, bailiffs, and employees or members of any police force or law enforcement agency and any other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process or anyone responsible for issuing summary conviction offence notices; and

(b) wardens, guards, jailers or any other person employed in a penitentiary, jail, or detention home.

RECOMMENDATION 15

The determination of any other disqualifications or selection criteria should be in the discretion of the Nominating Committee.

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[30]E. Moir, *The Justice of the Peace* (1969) 189.

[31]J. Kellock, *The Layman as a Magistrate* (1990) 6.

[32]*R.* v. *Lippé*, S.C.C., unreported, June 6, 1991.

RECOMMENDATION 16

The Nominating Committee should state in its advertisements the general selection criteria which it will use.

It is anticipated that the Minister of Justice and Attorney General will identify the need for justices of the peace in various locations and the category of appointment they must hold. The Nominating Committee would then direct their search to persons possessing the qualifications required by a justice of the peace of that category.

While it is desirable that the Minister have some discretion in choosing among potential candidates identified by the Nominating Committee, it may be that only one or two qualified people will apply for a position in a particular location. For that reason, there should be no minimum number of recommended candidates.

RECOMMENDATION 17

At the request of the Minister of Justice and Attorney General, the Nominating Committee should supply a list of not more than three names of candidates per vacancy, recommended for appointment as either senior presiding or presiding justice of the peace, as specified at the time of the request.

As with the evaluation of candidates for the office of provincial judge, we are of the opinion that only the names of those candidates who are assessed as suitable for appointment should appear on the list provided to the Attorney General. For that reason, there should be no rating of candidates, although the Committee should be able to indicate an exceptional candidate, where applicable.

RECOMMENDATION 18

The Nominating Committee should not rank the names on any list of recommended candidates submitted to the Minister of Justice and Attorney General, but they should have the discretion to designate any name as 'highly recommended'.

For reasons previously articulated in the Commission's Report on *The Independence of Provincial Judges*, we are agreed that the Attorney General should be obliged to appoint from the list of names provided by the Nominating Committee and should not be able to ask for more names.[33] In the event that only one name is recommended and that person refuses or becomes unable to accept an appointment, the Nominating Committee should of course be obliged to recommend an additional name to the Minister.

[33]*Supra* n. 21, Ch. 3.

RECOMMENDATION 19

The Lieutenant Governor in Council, on the recommendation of the Minister of Justice and Attorney General, should be obliged to appoint a senior presiding or presiding justice of the peace from the list of individuals submitted by the Nominating Committee.

RECOMMENDATION 20

Should only one name be recommended by the Nominating Committee and that person refuse or become unable to accept an appointment, the Nominating Committee should be required to add another name to the list.

Again, for many reasons previously articulated in the Report on *The Independence of Provincial Judges*, we are agreed that the screening and selection process of the Nominating Committee should be confidential and that the Nominating Committee should be under no obligation to advise a candidate why they were not nominated. While the process of advertising vacancies and applicable criteria is intended to involve the public through participation in the Committee and by expanding the sources of nominees, that public involvement should not extend to the evaluation of candidates who might be discouraged from applying, should the names of applicants be made public.

RECOMMENDATION 21

All aspects of the Nominating Committee's screening and selection process should be kept strictly confidential.

RECOMMENDATION 22

The Nominating Committee should be under no obligation to advise a candidate why he or she was not nominated.

CHAPTER 7

REMUNERATION

A. INTRODUCTION

We have seen from *Valente* that the issue of remuneration also bears upon the independence of judicial officers, financial security having been cited as the second essential condition of judicial independence under subsection 11(d) of the *Charter of Rights and Freedoms*. That security was described as meaning

> . . . security of salary or other remuneration, and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the executive in a manner that could affect judicial independence.[1]

There is no doubt that Manitoba magistrates and justices of the peace do not enjoy the same kind of financial security recommended for provincial judges in an earlier Commission Report on *The Independence of Provincial Judges*.[2] However, an assessment of their actual situation is not a straightforward exercise. Any meaningful discussion of remuneration for these magistrates and justices of the peace requires some differentiation between officers, since the nature and quantum of pay received by them is essentially determined by their place in the administrative groupings mentioned at the beginning of Chapter 5. Leaving aside, for now, the question of an appropriate method to determine or review salary levels, there are problems inherent with the two different methods of remuneration currently in use.

As discussed in Chapter 5, non-staff magistrates and justices of the peace do not work for a government agency or department. As compensation for their work as judicial officers, they receive a monthly retainer of $75 and an additional $4 for each judgment and disposition, each bail hearing, and each search warrant hearing. Department of Justice staff officers, on the other hand, are paid a salary according to their classification within the civil service. There will be considerable variation in those salaries since a magistrate who is also a 'Clerk of Court 3' could receive a maximum salary of $33,209, while a magistrate who is an 'Administrative Officer 3' could receive a maximum of $43,216.[3] Of course, these officers receive additional civil service benefits such as earned pension. The 'other' or remaining officers mentioned in Chapter 5 were predominantly employees of some federal, provincial, or municipal government department or agency.[4] As such, they also would receive the salary and benefits due them in their capacity as employees, whatever that might be.

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[1] *Valente* v. *The Queen* (1985), 24 D.L.R. (4th) 161 at 184 (S.C.C.).

[2] Manitoba Law Reform Commission, *The Independence of Provincial Judges* (1989, Report #72) Ch. 4.

[3] Appendix "A", Manitoba Government Employees Master Agreement (1987-1990).

[4] With the exception of two non-employees who were paid on the basis of a contract.

B. CURRENT METHODS OF PAYMENT

1. Fee for Service

The major difficulty associated with payment on a fee-for-service basis is the inherent potential in such a system for linking income to judicial decisions. The problem, simply stated, is that any system of remuneration based on volume of work done may be perceived as encouraging judicial officers to attract more business by cooperating with police requests. This potential link has been identified and criticized by several commentators concerned with the unique role of justices of the peace.

In 1968, the McRuer report called Ontario's fee-for-service system "subversive to the administration of justice".[5] The potential for abuse in such a system was reiterated in 1973 by the Ontario Law Reform Commission[6] and, again, in 1982 in Alan Mewett's report to the Attorney General of Ontario.[7] Moreover, the results of a 1990 survey showed that many justices of the peace in Ontario believed that the method of payment could influence decisions in individual cases.[8] However, this controversial method of payment has continued in other jurisdictions as well as in Manitoba.[9] Of course, the current scheme for payment of non-staff magistrates and justices of the peace in Manitoba is not purely fee-for-service, since a monthly $75 honorarium is also provided.

An additional drawback to fee-for-service is the difficulty in determining what activities will be compensated. In Manitoba, only three functions attract a fee. Is the lack of payment for other jobs intended to reflect the lack of importance attached to them?

(a) The Ontario and British Columbia solutions

In response to the foregoing concerns, recent legislative amendments in Ontario appear to be aimed at eliminating, as much as possible, the payment of justices of the peace by fee-for-service and the problems associated therewith. Not only are part-time justices of the peace to be paid a salary based on their workload, but they are also authorized to act only in accordance with a duty roster established by the Co-ordinator of Justices of the Peace.[10]

British Columbia has implemented a similar solution by eliminating fee-for-service payments entirely. Justices of the peace are now paid a salary based on an assessment of their workload which takes into consideration a number of factors, including the size of the community in which they work as well as the time spent on their official duties.[11] Unfortunately, that remains an imperfect solution, so long as the level of remuneration continues to be directly linked to the workload of each individual justice of the peace.

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[5]Ontario (J.C. McRuer), *Royal Commission Inquiry Into Civil Rights*, Report No. 1, vol. 2 (1968) 523.

[6]Ontario Law Reform Commission, *Report on the Administration of Ontario Courts, Part II* (1973) 18.

[7]A.W. Mewett, *The Office and Function of Justices of the Peace in Ontario* (1982).

[8]A.N. Doob, P.M. Baranek and S.M. Addario, *Understanding Justices: A Study of Canadian Justices of the Peace* (draft) (1991) 112.

[9]Saskatchewan still pays some justices of the peace a fee for specific tasks, as does Alberta. Those in the Yukon Territory may receive an annual honorarium as well as a fixed amount for each time a certain task is performed, or an hourly rate for time spent in hearings.

[10]*Justices of the Peace Act, 1989*, S.O. 1989, c. 46, ss. 14(3) and 18. However, in those areas where the Lieutenant Governor in Council has not proclaimed those provisions authorizing a part-time salary, non-staff justices of the peace continue to be paid a fee for various tasks performed.

[11]Telephone interview with L. Baker, Legal Officer, Office of the Chief Judge, the Provincial Court of British Columbia, April 3, 1991.

(b) The Manitoba situation

First of all, it must be stressed that we do not allege any link between method of payment and the individual decisions of any justice of the peace or magistrate in Manitoba (or elsewhere). The fact that some justices of the peace express the fear that method of payment could affect decisions "does not mean that it *does* have this effect."[12] However, we know that courts will assess the independence of tribunals on the basis of the perception of a reasonably informed member of the public. We also have ample proof, cited above, that many such reasonable observers have perceived a potential for such a connection.

For all of those reasons, we agree that individual justices of the peace should not be paid on the basis of the volume of work they perform. Rather, we advocate a system of payment for non-staff justices of the peace which is actually a simple refinement of the British Columbia response. We propose that they be paid a salary to be determined primarily by reference to two factors. First, regard should be had to the jurisdictional classification of the individual. Thus, generally, senior presiding justices of the peace should expect to be on a higher scale of remuneration than presiding justices of the peace, in light of their greater level of responsibility. Second, regard should be had to the average estimated workload of all justices of the peace of a particular classification in similar circumstances; among the relevant circumstances would be geographic and demographic factors. The key is that a given justice's remuneration would not be tied to his or her individual workload; it would be tied to an estimation of the average workload of all similarly-situated justices of the peace.

Because salaries would be based on the average workload, there may be a degree of over-compensation for some and under-compensation for others. However, such a method would remove the connection between the individual justice's workload and the payment received. It also has the advantage over the alternative of a fixed flat fee for all justices of the peace, in that it attempts at least an approximate accommodation for the time commitment and work involved. Ideally, the fact that some are underpaid may result in the need for another justice of the peace being identified so as to spread the workload more equitably.

Because non-presiding justices of the peace would perform an essentially administrative role, there is no constitutional requirement for any particular method of payment, although it may simply be less complicated to use the same method for that group.

For reasons which are elaborated in the subsequent discussion of remuneration for Justice Department or other government staff, we are agreed that the proposed scheme will apply only to non-staff justices of the peace.

RECOMMENDATION 23

A classification plan should be established with divisions of justices of the peace based upon:

(a) their classification as senior presiding or presiding justice of the peace; and

(b) other relevant factors, including the average type and amount of work likely to be performed, having regard to the size of the population to be served.

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[12]*Supra* n. 8, at 112.

RECOMMENDATION 24

Senior presiding and presiding justices of the peace should receive the remuneration and benefits that attach to their division within the classification plan.

2. Salaried Civil Servants

Just as objections to fee-for-service payments have been raised by certain observers, a number have also argued against the appointment of government staff to the office of justice of the peace. The arguments are based on various concerns, including the opposing interests of the justices' employer and those of the accused or any other member of the public whose fate may be affected by that employee in his or her judicial capacity.

In 1973, the Ontario Law Reform Commission recommended that justices of the peace be appointed on a full-time basis, spending their entire work day on justice of the peace duties, unlike those employed in the Department. However, it did express the view that the appointment of "suitable government officials" to the office of justice of the peace would be acceptable in remote areas where the appointment of full-time justices of the peace might not be warranted.[13] Alan Mewett expressed the view that the practice of appointing civil servants as 'sitting' justices of the peace was "highly improper" because he believed civil service status to be incompatible with judicial office.[14]

No doubt in response to some of those concerns, there has been some movement away from the appointment of civil servants to judicial office in a few jurisdictions. The practice of appointing court administrative staff to judicial office has apparently been substantially curtailed in Ontario.[15] In Saskatchewan, employees of the provincial government and Crown corporations are disqualified from appointment as presiding justice of the peace, with the exception of 'court officials' whose activities are significantly restricted by regulation.[16] In addition, 'traffic justices', who try Highway Traffic Act offences in Saskatchewan, are not part of the public service, but have many similar benefits provided by regulation.[17]

The issue of salaries raises perhaps the most troubling aspect of the appointment of civil servants to the office of justice of the peace. Salaries of civil servants are generally determined on the basis of merit which is assessed through a formal evaluation process. Where a significant portion of a court administrator's daily workload is given over to issuing arrest warrants or taking guilty pleas to *Highway Traffic Act* offences, is there a risk that the way in which those duties are performed could affect or be perceived to affect the individual's evaluation and, thereby, chances for receiving a merit increment?[18]

The Québec Court of Appeal found that the independence of civil servant justices of the peace was not threatened by the fact that their status could be affected by evaluations done by

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[13]*Supra* n. 6, at 18.

[14]*Supra* n. 7, at 53. 'Sitting' justices of the peace in Ontario at that time performed adjudicative functions.

[15]*Supra* n. 8, at 67, quoting a senior Ministry official.

[16]*The Justices of the Peace Act, 1988*, S.S. 1988-89, c. J-5.1, ss. 6 (2) and 6(3).

[17]These traffic justices are required to hold appointment as presiding justices of the peace: *The Traffic Safety Court of Saskatchewan Act, 1988*, S.S. 1988-89, c. T-19.1, s. 5(6).

[18]Once again, our concern here is not with non-presiding justices of the peace, given their non-judicial role.

supervisors in the Department of Justice, at least for the purposes of receiving informations and issuing process.[19] However, the opposite conclusion was recently reached in *R.* v. *Ingebrigtson*, where the Court Martial Appeal Court of Canada found that the means of fixing the salaries of Standing Courts Martial presidents impinged on their financial independence. In that case, the discretionary authority to fix salaries, on the basis of merit, rested with the Chief of the Defence Staff (although the Judge Advocate-General was the reporting or reviewing officer for the purposes of annual evaluations and although performance as president was not supposed to be taken into account). The Court found that those circumstances failed to ensure that "the right to salary . . . [could] not be subject to arbitrary interference by the executive in a manner that could affect judicial independence," as required by *Valente*.[20]

> Again, it seems to me that no reasonable, informed person would be likely to conclude that the measure of financial security essential to their judicial independence is present when the authority ultimately responsible for prosecuting the charges they must try is required to rate those officers and compensate them according to its view of their merit.[21]

Thus we see that the fixing of a judicial officer's remuneration on the basis of merit assessed by the executive branch of government has been held to be a significant danger to the officer's financial and, therefore, judicial independence.[22] Of course, this is not expressed as a suspicion concerning any individual justice's actual independence but, once again, concern about the way such a tribunal may be perceived by the public.

In light of the foregoing, we are of the view that civil servants, including court administrative staff, should not hold office as presiding or senior presiding justice of the peace. However, we are also very mindful of the broad range of judicial activities currently carried out by court staff in many locations in the province and the difficulties which would arise if that practice were to cease tomorrow. Those difficulties are not limited to the consequences to the Department of Justice in the administration of the courts, nor to the inconvenience that law enforcement agencies would certainly suffer. Many Manitoba citizens' access to the justice system could be severely curtailed in those areas where there are insufficient numbers of provincial judges and non-staff justices of the peace to handle the volume of work currently being done by Justice Department staff.

For those reasons, we attempted to formulate a scheme which would allow justices of the peace who also hold civil service employment to achieve the level of judicial independence required. We considered a scheme in which judicial duties would be removed from the job descriptions of court staff; such duties could be exercised by court staff only after obtaining a separate appointment as a justice of the peace from our proposed Nominating Committee. However, court staff would continue to receive the full remuneration presently associated with their civil service positions; no additional remuneration would be paid to those members of the court staff who were successful in obtaining an appointment as a justice of the peace.[23] Our hope was that this would reduce the possibility that the manner in which court staff discharged their judicial duties might affect their evaluation and, hence, remuneration. However, we became

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[19]*Re Valois and Universal Spa Ltée* (1986), 33 C.C.C. (3d) 535 (Que. C.A.).

[20]*Supra* n. 1, at 184.

[21]*R.* v. *Ingebrigtson* (1990), 76 D.L.R. (4th) 481 at 496 (C.M.A.C.).

[22]The same Court considered a similar issue in *R.* v. *Généreux* (1990), 75 D.L.R. (4th) 207 (C.M.A.C.) (leave to appeal to the Supreme Court granted February 7, 1991). It found tribunals in General Courts Martial (whose members are appointed on an *ad hoc* basis for the duration of a single case) to be independent largely because members of that Court need not fear any loss of salary or rank. Furthermore, "the fact that no pay or benefit is attached to the performance of judicial duties in the military is as effective a guarantee of independence as that of tenure and financial security to the 'ordinary' judge." (at 212) A dissenting opinion found that they lacked institutional independence because they were appointed by the prosecuting authority.

[23]Bearing in mind the judicial observation that no pay is an effective guarantee of independence: *R.* v. *Généreux*, *ibid.*

convinced that such a scheme would be excessively complex in practice. Consequently, after much long and difficult debate, we must recommend that civil servants be ineligible for appointment as justice of the peace.

In light of the significant human and financial costs of such a prohibition, particularly in certain geographic locations, those responsible for the administration of justice may choose to delay implementation of that part of the recommendations until such time as those costs have been assessed and the required resources located. However, it should be recognized that such a delay could cause complications.[24]

Of course, the situation is much simpler for those civil servants whose work is confined exclusively to judicial officer tasks and the administrative matters incidental to those tasks.[25] Those officers have no need for dual appointments, as held by other civil servant justices of the peace. Rather, they should hold only a judicial appointment (probably as senior presiding justices of the peace) and be remunerated solely for that, as are part-time non-staff justices of the peace. We are agreed that those positions should be independent of the civil service and that transfer of earned benefits should also be allowed so that the financial security of these full-time justices of the peace can be assured without discouraging highly qualified persons with accumulated civil service benefits from seeking those positions.

RECOMMENDATION 25

Employees of all federal, provincial and municipal government departments, agencies and Crown corporations should be ineligible for appointment as justice of the peace.

RECOMMENDATION 26

In the event that the provincial government determines that a period of transition is required, it should be empowered to delay the implementation of the prohibition on civil servants being appointed as justice of the peace.

C. SALARIES FIXED BY LAW

As was seen in *Valente*, the practice of fixing salaries of judicial officers by the executive branch of government is constitutionally valid. Thus, there can be no objection, on *Charter* grounds, to the present practice of setting salaries by order of the Lieutenant Governor in Council, as authorized by statute.[26] In virtually all other Canadian jurisdictions, some person or group within the executive branch of government sets the salaries of justices of the peace.[27]

However, we believe that such a system is less than ideal. Given the level of responsibility carried by many of these officers and the need to foster the perception of judicial independence, we believe that a systematic consultative process is called for in determining appropriate salary

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[24]Among the complications might be windfall payments to civil servant justices of the peace, receiving their normal civil service remuneration as well as the remuneration to which they would be entitled under our classification plan.

[25]E.g. hearing officers, whose jobs are apparently entirely concerned with matters requiring a judicial officer appointment.

[26]*The Provincial Court Act*, C.C.S.M. c. C275, s. 41(a).

[27]Although consultation with the Chief Judge is mandated in British Columbia (*Provincial Court Act*, R.S.B.C. 1979, c. 341, ss. 26(1)) and in the Yukon Territory (*Territorial Court Act*, R.S.Y.T. 1986, c. 169, s. 42(1)).

levels for presiding and senior presiding justices of the peace.[28] For many of the reasons discussed in the Report on *The Independence of Provincial Judges*,[29] we are agreed that salaries of justices of the peace should be set by the executive branch of government, after recommendations received from an independent committee have been tabled in the Legislature. We believe that, as officers of the same court, the remuneration for justices of the peace should be set in the same manner as the remuneration for provincial judges.

The Commission is agreed that the Judicial Compensation Committee, which is already in place and which is mandated to perform regular reviews of remuneration for provincial judges,[30] is ideally suited to recommending appropriate remuneration levels for justices of the peace. The present composition of the Judicial Compensation Committee recognizes the interests and expertise of those in the court system, those outside the system and the government which must ultimately shoulder the cost. Admittedly, the level of expertise and responsibility will vary among justices of the peace and will present a challenge in determining appropriate salary levels. However, the Judicial Compensation Committee will have the dual advantages of an expertise in assessing compensation entitlements and a familiarity with the justice system.

Again, for reasons previously reviewed respecting provincial judges, the Commission is agreed that the terms of reference of the review committee should include consideration of benefits such as pensions, vacation and sick leave, travel expenses and allowances.

RECOMMENDATION 27

The remuneration of senior presiding and presiding justices of the peace should be recommended by an independent committee.

RECOMMENDATION 28

That independent committee should be the Judicial Compensation Committee which is also responsible for recommending salaries and benefits payable to provincial judges.

RECOMMENDATION 29

The same terms of reference and process currently mandated in The Provincial Court Act for the Judicial Compensation Committee respecting provincial judges should apply to justices of the peace.

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[28]It is also important to note that the current quantum of remuneration to non-staff justices of the peace has not been increased in more than 5 years. That alone suggests that some sort of formal process may be needed to bring the issue forward for regular review.

[29]*Supra* n. 2.

[30]The Judicial Compensation Committee is established pursuant to *The Provincial Court Act*, C.C.S.M. c. C275, s. 11.1.

CHAPTER 8

DISCIPLINE

A. INTRODUCTION

A truly independent judiciary is essential to public confidence in the judicial system as a whole and we have seen that the legal requirement of independence will extend to include officers of inferior courts when performing a judicial function. That public confidence demands accountability on the part of the judiciary, which can best be achieved through a formal disciplinary process.

However, the legal requirement for such a process arises directly out of two of the essential conditions of independence. Security of tenure requires that justices of the peace exercising judicial functions may be removed from office only for cause related to the ability to perform their duties, and then only after an independent review giving the justice of the peace full opportunity to be heard.[1] The requirement of financial security means that the right to remuneration must be established by law and not subject to arbitrary interference by the Executive in a manner which could affect independence. Obviously, removal from office may profoundly affect that right to remuneration.

B. THE OPTIONS

A number of Canadian jurisdictions now have some type of formal review process for investigating complaints against justices of the peace and imposing disciplinary sanctions.

1. A Separate Review System

(a) Ontario

There has been a formal review process in place for justices of the peace in Ontario since 1973, in accordance with a recommendation of the Ontario Law Reform Commission made that same year.[2] However, a hearing before the Justice of the Peace Review Council did not become mandatory for removal from office until 1984.[3] Recent legislative amendments placed a justice of the peace on the Council and expanded its role to include the review of appointments and designations and reporting thereon to the Attorney General.[4] A complaint against a justice of the peace is investigated by the Review Council and a report forwarded to the Attorney General.

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[1]That standard, enunciated in *Valente*, has been applied to a justice of the peace by the Ontario Court of Appeal in *Re Currie and Niagara Escarpment Commission* (1985), 14 D.L.R. (4th) 651.

[2]Ontario Law Reform Commission, *Report on Administration of Ontario Courts, Part II* (1973).

[3]*Justices of the Peace Amendment Act, 1984*, S.O. 1984, c. 8, s. 3.

[4]*Justices of the Peace Act, 1989*, S.O. 1989, c. 46, ss. 9(1)(d) and 10 (1)(a).

The justice of the peace has a right to notification of the investigation and the opportunity to be heard and to adduce evidence. Where indicated, the Council may recommend that an inquiry be held by a provincial judge who may recommend removal from office.

(b) Saskatchewan

Saskatchewan also uses an independent body, specifically constituted to review the conduct of justices of the peace, to receive and investigate complaints and to hold an inquiry (where indicated) to determine whether a justice of the peace should be removed from office. A justice of the peace has the right to notice, representation by counsel, cross-examination of witnesses and production of evidence on the justice's own behalf.[5] Except for cancellation of appointment for failure to make and file reports, the review process is mandatory for removal of a presiding justice of the peace.[6] Unlike Ontario's review body, there is no justice of the peace appointed to the Saskatchewan Justices of the Peace Review Council.[7]

(c) Northwest Territories

The new legislative provision contemplated for the Northwest Territories also provides for the establishment of an independent body to review complaints against justices of the peace. The Act provides for representation on the Review Council by a justice of the peace appointed by the Commissioner in Executive Council and the justice is entitled to notice and to produce evidence.[8]

2. Existing Judicial Councils

(a) British Columbia

In British Columbia, justices of the peace are subject to the same Judicial Council which reviews the conduct of provincial judges and which has the additional responsibility of reviewing proposed appointments of judges and justices of the peace.[9] Complaints are received by the Chief Judge who has the power to investigate and, where necessary, to order an inquiry respecting fitness to perform duties.[10] Where an inquiry is ordered, the judge or justice of the peace may elect either the Judicial Council or a judge of the provincial Supreme Court as the tribunal to conduct the inquiry.[11] The membership of this Judicial Council does not include a justice of the peace.[12] In the event of an inquiry, a justice of the peace has the right to notice and particulars and the right to be heard, to cross-examine witnesses, and to adduce evidence. A justice's term of office may also cease upon a change of residence or occupation which is contrary to a condition of the justice's appointment.[13]

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[5]*The Justices of the Peace Act, 1988*, S.S. 1988-89, c. J-5.1, s. 12.

[6]*The Justices of the Peace Act, 1988*, S.S. 1988-89, c. J-5.1, s. 8(1).

[7]*The Justices of the Peace Act, 1988*, S.S. 1988-89, c. J-5.1, s. 12(2).

[8]*An Act to Amend the Justices of the Peace Act*, S.N.W.T. 1989(2), c. 11, s. 5 (not yet in force).

[9]*Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 13(a).

[10]*Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 6.1.

[11]*Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 15(1).

[12]*Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 12(2).

[13]*Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 27(1)(c).

(b) Yukon Territory

The review process for justices of the peace in the Yukon Territory is very similar to that in British Columbia, with the notable difference that the president of the Justice of the Peace Association, or his or her nominee, is a member of the Judicial Council.[14] Again, this is a dual-purpose Council which deals with formal complaints against judges and justices of the peace and also makes recommendations respecting appointments to both offices.[15] A judge or justice of the peace who is the subject of an inquiry is entitled to a similar election of tribunal and to the same rights before that tribunal.[16]

(c) Québec

Although statutory provisions allow that justices of the peace in Québec may have their appointment revoked at any time by the Minister of Justice, the application of that section is not universal.[17] Those justices of the peace appointed with jurisdiction throughout the Province of Québec may also be granted retirement benefits and the right to be removed only after inquiry.[18] The conduct of those justices of the peace is subject to review by the "Conseil de la magistrature", the same body charged with receiving and examining complaints against judges of that Court.[19] The Conseil may decide to conduct an inquiry following the investigation of a complaint and the report of the inquiry is ultimately forwarded to the Minister of Justice.[20] If the report of the inquiry establishes that the complaint is justified, the Conseil, acting on the recommendations of the inquiry, may reprimand the judge or recommend the filing of a motion for removal with the Court of Appeal.[21]

C. OUR PROPOSAL

Given that provincial judges and justices of the peace are officers of the same court, albeit with different levels of jurisdiction and responsibility, there appears to be little merit in creating a new and separate scheme to review the conduct of justices of the peace. Those involved in reviewing the conduct of provincial judges will certainly have the expertise required to deal with complaints against justices of the peace. Given the nature of the decision, the same procedural safeguards would be required and the general grounds for removal from office (misconduct, neglect, or incapacity) should be virtually the same.[22]

As we indicated in our Report on *The Independence of Provincial Judges*,[23] the present method by which provincial judges are disciplined is flawed, as the Judicial Council acts as prosecutor, judge and jury. We recommended that the Judicial Council's investigative and

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[14]*Territorial Court Act*, R.S.Y. 1986, c. 169, s. 17(1)(c).

[15]*Territorial Court Act*, R.S.Y. 1986, c. 169, s. 16(2).

[16]*Territorial Court Act*, R.S.Y. 1986, c. 169 ss. 27(2) and 30(3).

[17]*Courts of Justice Act*, R.S.Q. 1977, c. T-16, s. 178.

[18]*Courts of Justice Act*, R.S.Q. 1977, c. T-16, ss. 186 and 189.

[19]*Courts of Justice Act*, R.S.Q. 1977, c. T-16, ss. 264(c) and 268, as am. S.Q. 1978, c. 19, s. 33.

[20]*Courts of Justice Act*, R.S.Q. 1977, c. T-16, ss. 276 and 285, as am. S.Q. 1978, c. 19, s. 33.

[21]*Courts of Justice Act*, R.S.Q. 1977, c. T-16, s. 287, as am. S.Q. 1978, c. 19, s. 33.

[22]Just as is currently the case with provincial judges, a further ground for discipline might be the taking of other employment which is incompatible with the office of justice of the peace, as might the breaching of any requirements as to area of residence which were imposed at the time of the appointment.

[23]Manitoba Law Reform Commission, *The Independence of Provincial Judges* (1989, Report #72) Ch. 5.

prosecutorial roles be given to a new body (the Judicial Inquiry Board) and that the Judicial Council be restricted to an adjudicative function. We reiterate that recommendation and are agreed that the same scheme should be utilized for both provincial judges and justices of the peace.

We are agreed that the full range of remedies recommended for the Judicial Council respecting judges should be available for disciplinary proceedings against justices of the peace. We are also of the opinion that the Judicial Council should have the additional option of a change of designation available as a penalty, should the Council consider that remedy; that is, amongst the penalties available to it, the Judicial Council should be able to reduce an individual's classification from, for example, senior presiding justice of the peace to non-presiding justice of the peace.

We are also agreed that there should be some form of representation for justices of the peace on the Judicial Council when the conduct of a justice of the peace is under review. Although we recommended that provincial judges be empowered to choose the two Judicial Council appointees named from their ranks, we think that the Lieutenant Governor in Council, on the recommendation of the Minister of Justice and Attorney General, should appoint the justice of the peace representative to the Council. Currently, magistrates and justices are a much larger and less cohesive group than judges and most would not be acquainted with even a majority of their colleagues.[24]

RECOMMENDATION 30

The conduct of justices of the peace should be subject to the same three-tier disciplinary process as recommended by the Commission for provincial judges in its Report on The Independence of Provincial Judges.

RECOMMENDATION 31

When the conduct of a justice of the peace is the subject of review, the membership of the Judicial Council should be expanded to include a justice of the peace, to be named by the Lieutenant Governor in Council.

RECOMMENDATION 32

When reviewing the conduct of justices of the peace, the Judicial Council should use the same grounds for discipline as set out in The Provincial Court Act for provincial judges (conduct unbecoming a justice of the peace, neglect of duty, or inability or incapacity to perform those duties).

RECOMMENDATION 33

The Judicial Council should be empowered to dispose of matters heard by it in one or more of the following ways:

(a) by dismissing the complaint;

[24]It might be argued that the Chief Judge is in a better position to select a suitable justice of the peace for the Judicial Council. However, it seems to us inappropriate that the Chief Judge should make this appointment to the adjudicative body after he or she has played a role in the investigative phase.

(b) by reprimanding the justice of the peace;

(c) by fining the justice of the peace;

(d) by suspending the justice of the peace for a fixed period of time;

(e) by removing the justice of the peace;

(f) by changing the designation of the justice of the peace;

(g) by ordering costs in favour of or against the justice of the peace or the Judicial Inquiry Board;

(h) by requiring the justice of the peace to take a leave of absence (with or without pay) for the purposes of obtaining treatment;

(i) where the justice of the peace is unable to perform the duties of his or her office by reason of disability, by ordering that the justice of the peace be deemed to have voluntarily resigned with full pension (where applicable);

(j) by ordering that all or part of any salary forfeited by the justice of the peace during the suspension (prior to the inquiry) be remitted, provided that the Council does not order that the justice of the peace be suspended from office.

It is intended that the conduct of justices of the peace will be reviewable by the same bodies, in the same way the conduct of judges of the Provincial Court would be reviewed. Initial complaints will be required to be written and signed and directed to the Chief Judge. As with provincial judges, suspension would not be available during the investigation stage but would become automatic on the filing of charges, unless waived by the Judicial Inquiry Board. The same provisions would operate regarding pay during suspension, and hearings would be public unless the Judicial Council determined that private hearings would better serve the public interest. As with provincial judges, the jurisdiction of the Judicial Council would terminate upon departure of the justice of the peace from office and appeal to the Court of Appeal would be available to either party on the findings of the Council as well as the penalty imposed.

RECOMMENDATION 34

Complaints respecting a justice of the peace should be in writing, signed by the complainant and directed to the Chief Judge of the Provincial Court.

RECOMMENDATION 35

The Chief Judge should be empowered to review, on his or her own initiative, any matter regarding the conduct or fitness of a justice of the peace which comes to his or her attention, and the Judicial Inquiry Board should have the same power.

RECOMMENDATION 36

There should be no provision for suspending a justice of the peace while an investigation into his or her conduct is pending. However, the Chief Judge would remain free to re-assign such a justice of the peace to administrative duties.

RECOMMENDATION 37

Upon the filing of charges against a justice of the peace by the Judicial Inquiry Board, the justice of the peace should be automatically suspended unless the Judicial Inquiry Board waives the suspension.

RECOMMENDATION 38

Unless a member of the Judicial Council (designated for the purpose by the chair of the Judicial Council) decides otherwise upon an application of the Judicial Inquiry Board, the suspension of a justice of the peace should be with pay.

RECOMMENDATION 39

The Judicial Council should hold its hearings in public unless it determines that it is in the public interest that they be held in private.

RECOMMENDATION 40

Both the justice of the peace and the Judicial Inquiry Board should be permitted to appeal a decision of the Judicial Council (as to finding of guilt or penalty or both) to the Manitoba Court of Appeal.

CHAPTER 9

TRANSITIONAL AND MISCELLANEOUS MATTERS

A. THE TRANSITION

The Commission recognizes that recommendations such as those contained in this Report call for entirely new legislative and administrative processes and, as such, will require some accommodation for transition from the present Manitoba situation.

1. Ontario, Saskatchewan and Northwest Territories

Similarly fundamental changes were recently effected in Ontario and Saskatchewan, using slightly different transitional provisions. However, it is interesting to note that, in both jurisdictions, the legislation applied to those justices of the peace holding office at the time of implementation.

In Ontario, a certain group of justices of the peace (those authorized to preside at trials) are 'deemed' by statute to be presiding justices of the peace, while the remaining existing officers receive their designation from the Lieutenant Governor in Council following recommendation by the Review Council.[1] There is a further provision which prohibits the exercise of authority or the receipt of remuneration unless or until a justice of the peace is designated either presiding or non-presiding.[2] Thus, even though both designations in Ontario hold office subject to removal only after an inquiry of the Review Council, those deemed non-presiding at the time of proclamation are (effectively) removed from office without that process.

In Saskatchewan, all existing justices of the peace continued in office but all were deemed to be designated non-presiding justices of the peace and that designation could be changed by the Lieutenant Governor in Council.[3] Just as there is no consultation process for appointment, there is none for a change of designation from non-presiding to presiding.

The proposed scheme for the Northwest Territories, on the other hand, would simply revoke the appointments of those justices of the peace appointed before the new provisions come into force.[4]

2. A Plan for Manitoba

Because justices of the peace and magistrates may hold office for many years, a solution which did not affect those presently appointed would have no appreciable impact for a very long

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[1] *Justices of the Peace Act, 1989*, S.O. 1989, c. 46, ss. 4(2) and 4(3). However, the deeming provision is not yet proclaimed in force.

[2] *Justices of the Peace Act, 1989*, S.O. 1989, c. 46, ss. 4 (4). Not yet proclaimed in force.

[3] *The Justices of the Peace Act, 1988*, S.S. 1988-89, c. J-5.1, s. 6(7).

[4] *An Act to Amend the Justices of the Peace Act*, S.N.W.T. 1989(2), c. 11, s. 5 (not yet in force).

time. However, we have seen that the concerns expressed by the courts suggest a more immediate need for significant changes to the laws affecting the independence of justices of the peace and magistrates in Manitoba.

For those reasons, we are agreed that transitional provisions should be implemented to achieve the desired reforms as soon as practicable, with the least possible disruption to the administration of justice and to the individual judicial officers themselves.

We are agreed that the proclamation of legislation effecting our proposals should be deferred for a period of time sufficient to allow for an orderly transition. However, the parts of the legislation respecting the Nominating Committee should be proclaimed immediately. During the transition period, the provincial government should assess the need for justices of the peace and advise the Nominating Committee of the number and designations of justices of the peace required in each location. The Nominating Committee should then, following the requisite advertising and interviewing, present the government with lists of candidates for each position. On the date of proclamation of the legislation, the government would cause Orders in Council to issue with appointments for each position drawn from the lists submitted by the Nominating Committee. All justices of the peace and magistrates who did not receive an appointment as a senior presiding or presiding justice of the peace on the proclamation date would be deemed thereafter to be a non-presiding justice of the peace.

Of course, persons now performing the kinds of functions assigned to these (future) officers would be eligible to apply and the Nominating Committee would have the opportunity to draw from those presently performing the kinds of work involved (assuming those persons possess the necessary attributes as identified by the Committee). While there may be some currently holding office whose powers will be curtailed (such as those who are inactive, who are holding employment which is incompatible with the office, or whose qualifications for some reason are particularly inadequate), it is anticipated that their numbers will be small and it does seem appropriate that their powers be permanently limited.

RECOMMENDATION 41

Prior to the coming into force of the proposals in this Report, the Minister of Justice and Attorney General should identify the number of senior presiding and presiding justices of the peace required in each location and the Nominating Committee should prepare lists of candidates after the normal advertising and interviewing process.

RECOMMENDATION 42

Upon the coming into force of the proposals in this Report, the Minister of Justice and Attorney General should fill each identified position with persons selected from the lists submitted by the Nominating Committee.

RECOMMENDATION 43

All persons holding appointment as either justice of the peace or magistrate prior to the coming into force of these recommendations who are not so appointed should be deemed thereafter to be a non-presiding justice of the peace.

RECOMMENDATION 44

Although the Nominating Committee should give very serious consideration to those individuals currently holding appointment in their recommendations for candidates for senior presiding or presiding justice of the peace, it should not be restricted to them.

B. DIVISION OF POWERS

As discussed in Chapter 6, we are of the view that classification of justices of the peace by the scope of their powers is a very useful means of ensuring that each officer is adequately trained and prepared for the tasks assigned. However, we are of the opinion that the present method of limiting powers by directive is unacceptable. Although we also noted in Chapter 4 some concerns about the ability of the province to restrict or limit the jurisdiction of justices of the peace under federal legislation such as the *Criminal Code*, we are convinced that a statutory classification of justices of the peace by jurisdiction is far preferable to the present system. That is true not only because of the drawbacks to administrative limitations but also because the statutory scheme offers solutions to many problems caused by independence and impartiality requirements.

For that reason, we are agreed that the Province of Manitoba should seek amendments to the *Criminal Code* definition of justices of the peace in order to remove any doubt about the province's right to stipulate the jurisdiction of justices of the peace exercisable under the *Criminal Code*.

RECOMMENDATION 45

The provincial government should request the federal government to amend the Criminal Code definition of justice of the peace specifically to allow the province to limit the jurisdiction of justices of the peace under federal statutes.

C. IMMUNITY

The issue of the immunity of inferior court judges was canvassed at some length in the Commission's Report concerning the independence of Provincial Court judges.[5] Given the scope of powers proposed in this Report for presiding and senior presiding justices of the peace, we are of the opinion that the issue of immunity should now be revisited.

Manitoba magistrates and justices of the peace (and provincial judges) currently enjoy protection from liability for any act done in the execution of duties, unless the act was done maliciously and without reasonable and probable cause.[6] The confusion surrounding the protection actually granted by those kinds of statutory provisions, in light of applicable common law, was one of the reasons cited in support of our recommendation that Provincial Court judges be extended the same immunity from suit as superior court judges. It has been suggested that immunity from suit is a necessary protection which enables judges to decide the cases which come before them freely and without fear of personal consequences. That level of independence may not be achievable without some protection from actions brought by parties appearing before a judge or justice of the peace. In *R.* v. *Lippé*, the Supreme Court accepted that extending the

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[5]Manitoba Law Reform Commission, *The Independence of Provincial Judges* (1989, Report #72) Ch. 7.

[6]*The Provincial Court Act*, C.C.S.M. c. C275, s. 49.

immunity enjoyed by judges of the superior court to Québec Municipal Court judges contributed to their judicial independence and impartiality by protecting them from actions arising out of a particular decision.[7]

The same immunity granted Québec Municipal Court judges under their *Magistrate's Privileges Act*[8] also extends to those justices of the peace whose appointment provides for jurisdiction throughout the province and for security of tenure. Since 1985, justices of the peace in British Columbia have also been granted the same immunity as that of a superior court judge and recent legislative amendments in Ontario have achieved the same protection for their justices of the peace.[9]

In light of the foregoing, we are agreed that justices of the peace in Manitoba should enjoy the same immunity as that recently recommended for provincial judges.

RECOMMENDATION 46

Justices of the peace should have the same immunity from suit as Provincial Court judges and superior court judges.

D. ADDITIONAL CONCERNS

For reasons articulated above, the Commission considers the foregoing recommendations necessary to provide Manitoba magistrates and justices of the peace with the framework within which they can achieve the level of judicial independence and impartiality needed to meet the requirements of section 11(d) of the *Charter* and to foster continued public confidence in our judicial system.

In addition to those issues canvassed in our recommendations, there are other important matters which will not be the subject of formal recommendations. However, given their significance, the Commission offers the following comments and suggestions respecting those issues.

1. Training

Given that justices of the peace with widely varying levels of education and experience will no doubt continue to be appointed, it would seem that some form of initial training will be critical to the effective functioning of a newly appointed justice of the peace. We are advised that (non-staff) applicants for appointment are now asked to indicate a willingness to attend several days of instruction and that a recent group of new appointees underwent a full 6 days of training prior to embarking on the full exercise of their powers. While we would not suggest that successful completion of a training programme should be a prerequisite to appointment (as is the practice in British Columbia and the Native Justice of the Peace Program in Ontario), we do believe that a similar commitment should continue to be sought from new appointees.

The comments of survey respondents concerning the need for continuing education also suggest that at least annual educational programmes could be of great benefit to these officers.

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[7] *R.* v. *Lippé*, S.C.C., unreported, June 6, 1991.

[8] *Magistrate's Privileges Act*, R.S.Q. 1977, c. P-24, s. 1.

[9] *Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 37, as am.; *Justices of the Peace Act, 1989*, S.O. 1989, c. 46, s. 20.

The number of respondents who sought specific kinds of advice in the performance of their duties may also reflect a need for more training.

A number of survey respondents commented that they were unable to attend training courses because of their inability to leave job or other responsibilities behind. In order to encourage potential candidates to apply and to facilitate attendance at regular continuing educational programmes, reimbursement of costs should be offered so that all justices of the peace would be able to participate without financial penalty.

2. Resources

The aforementioned wide variety of levels of education and experience among justices of the peace also means that they may need to rely heavily on written resource material and the advice of senior judicial officers, especially when new or unusual situations are encountered.

For that reason, we would urge that every effort be made to provide each justice of the peace with, at the very least, an up-to-date *Criminal Code* so that they are not dependent upon the police for that vital information. The current *Justices of the Peace and Magistrates Procedures and Training Manual* was identified by a number of survey respondents as a very useful resource and we are agreed that continued refinement and updating of that Manual should be encouraged as one relatively inexpensive step toward providing justices of the peace with the tools they need to do their job.

With the reorganization of the courts in the summer of 1990, there was some movement toward clarifying the lines of authority and reporting for magistrates and justices of the peace. That reorganization provided for the supervision of magistrates and justices of the peace, in their judicial capacity, by the Chief Judge, through the Senior Hearing Officer. That Senior Hearing Officer has also been designated as Legal Advisor to magistrates and justices of the peace in order to provide consultation and advice on procedural or legal matters. While the concept is laudable and appears to have worked well in other jurisdictions, certain refinements might improve the utility of this process. The Senior Hearing Officer, while undoubtedly an excellent resource in such matters, may not be able to make himself or herself available because of court or administrative demands and it may be that the need for consultation and guidance is great enough to justify the full-time assignment of a senior justice of the peace to such duties, either permanently or on a rotation basis. British Columbia's solution of a "legal officer", attached to the office of the Chief Judge, appears to be a move in that direction. Whatever choice is made in Manitoba, it seems that the most important consideration for the provision of such a resource should be accessibility when advice or assistance is required.

E. DRAFT STATUTE

In order to illustrate the manner in which our proposals might be implemented, we have prepared a draft of a new Justices of the Peace Act. It may be found in Appendix A.

RECOMMENDATION 47

A new Justices of the Peace Act, substantially in the form of the draft Act set out in Appendix A, should be enacted in order to give effect to the recommendations contained in this Report.

CHAPTER 10

LIST OF RECOMMENDATIONS

We now restate this Report's recommendations:

CHAPTER 6 - TENURE AND APPOINTMENT

1. A category of inferior judicial officer should be retained in Manitoba. However, the distinction between magistrates and justices of the peace should be abolished. For the purposes of this Report, the title 'justice of the peace' will be used. (p. 50)

2. The office of justice of the peace should be divided into three classifications: non-presiding, presiding, and senior presiding, with the jurisdiction of each set out in statute. (p. 53)

3. The jurisdiction of non-presiding justices of the peace should be restricted to matters of an essentially administrative nature. The jurisdiction of presiding justices of the peace should include matters of a more judicial nature. The jurisdiction of senior presiding justices of the peace should extend to matters of the most judicial nature. (p. 53)

4. Senior presiding and presiding justices of the peace should hold office during good behaviour. (p. 54)

5. Removal of a senior presiding and presiding justice of the peace from office should only be upon recommendation of the Judicial Council. (p. 54)

6. Non-presiding justices of the peace should continue to hold office at pleasure. (p. 54)

7. The appointment of any justice of the peace should terminate upon receipt of written notification of his or her resignation. (p. 55)

8. Upon identifying the need for a senior presiding or presiding justice of the peace in a particular location, the Minister of Justice and Attorney General should request a Nominating Committee to submit a list of names of persons recommended for the vacancy. (p. 57)

9. Senior presiding and presiding justices of the peace should be appointed by the Lieutenant Governor in Council from a list of names provided to the Minister of Justice and Attorney General by a Nominating Committee. (p. 57)

10. The Nominating Committee should not be the Judicial Council. (p. 57)

11. The Nominating Committee should be a standing committee composed of the following seven persons, three of whom should constitute a quorum:

    (a) as chair of the Committee, the Chief Judge or his or her designate who shall be a provincial judge;

    (b) one additional judge of the Provincial Court to be named by the Chief Judge; and

    (c) five other persons appointed by the Lieutenant Governor in Council, none of whom shall be lawyers or persons disqualified from appointment as justice of the peace. (p. 58)

12. The Nominating Committee should be required to advertise for candidates for any vacancy to be filled. (p. 58)

13. The Nominating Committee should be empowered to seek out and recruit candidates for vacancies. (p. 58)

14. The following persons should be ineligible for appointment as justice of the peace:

    (a) sheriffs, bailiffs, and employees or members of any police force or law enforcement agency and any other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process or anyone responsible for issuing summary conviction offence notices; and

    (b) wardens, guards, jailers or any other person employed in a penitentiary, jail, or detention home. (p. 59)

15. The determination of any other disqualifications or selection criteria should be in the discretion of the Nominating Committee. (p. 59)

16. The Nominating Committee should state in its advertisements the general selection criteria which it will use. (p. 60)

17. *At the request of the Minister of Justice and Attorney General, the Nominating Committee should supply a list of not more than three names of candidates per vacancy, recommended for appointment as either senior presiding or presiding justice of the peace, as specified at the time of the request. (p. 60)*

18. *The Nominating Committee should not rank the names on any list of recommended candidates submitted to the Minister of Justice and Attorney General, but they should have the discretion to designate any name as 'highly recommended'. (p. 60)*

19. The Lieutenant Governor in Council, on the recommendation of the Minister of Justice and Attorney General, should be obliged to appoint a senior presiding or presiding justice of the peace from the list of individuals submitted by the Nominating Committee. (p. 61)

20. Should only one name be recommended by the Nominating Committee and that person refuse or become unable to accept an appointment, the Nominating Committee should be required to add another name to the list. (p. 61)

21. All aspects of the Nominating Committee's screening and selection process should be kept strictly confidential. (p. 61)

22. The Nominating Committee should be under no obligation to advise a candidate why he or she was not nominated. (p. 61)

CHAPTER 7 - REMUNERATION

23. A classification plan should be established with divisions of justices of the peace based upon:

    (a) their classification as senior presiding or presiding justice of the peace; and

    (b) other relevant factors, including the average type and amount of work likely to be performed, having regard to the size of the population to be served. (p. 64)

24. Senior presiding and presiding justices of the peace should receive the remuneration and benefits that attach to their division within the classification plan. (p. 65)

25. Employees of all federal, provincial and municipal government departments, agencies and Crown corporations should be ineligible for appointment as justice of the peace. (p. 67)

26. In the event that the provincial government determines that a period of transition is required, it should be empowered to delay the implementation of the prohibition on civil servants being appointed as justice of the peace. (p. 67)

27. The remuneration of senior presiding and presiding justices of the peace should be recommended by an independent committee. (p. 68)

28. That independent committee should be the Judicial Compensation Committee which is also responsible for recommending salaries and benefits payable to provincial judges. (p. 68)

29. The same terms of reference and process currently mandated in *The Provincial Court Act* for the Judicial Compensation Committee respecting provincial judges should apply to justices of the peace. (p. 68)

CHAPTER 8 - DISCIPLINE

30. The conduct of justices of the peace should be subject to the same three-tier disciplinary process as recommended by the Commission for provincial judges in its Report on *The Independence of Provincial Judges*. (p. 72)

31. When the conduct of a justice of the peace is the subject of review, the membership of the Judicial Council should be expanded to include a justice of the peace, to be named by the Lieutenant Governor in Council. (p. 72)

32. When reviewing the conduct of justices of the peace, the Judicial Council should use the same grounds for discipline as set out in *The Provincial Court Act* for provincial judges (conduct unbecoming a justice of the peace, or neglect of duty, or inability or incapacity to perform those duties). (p. 72)

33. The Judicial Council should be empowered to dispose of matters heard by it in one or more of the following ways:

    (a) by dismissing the complaint;

    (b) by reprimanding the justice of the peace;

    (c) by fining the justice of the peace;

    (d) by suspending the justice of the peace for a fixed period of time;

    (e) by removing the justice of the peace;

    (f) by changing the designation of the justice of the peace;

    (g) by ordering costs in favour of or against the justice of the peace or the Judicial Inquiry Board;

    (h) by requiring the justice of the peace to take a leave of absence (with or without pay) for the purposes of obtaining treatment;

    (i) where the justice of the peace is unable to perform the duties of his or her office by reason of disability, by ordering that the justice of the peace be deemed to have voluntarily resigned with full pension (where applicable);

    (j) by ordering that all or part of any salary forfeited by the justice of the peace during the suspension (prior to the inquiry) be remitted, provided that the Council does not order that the justice of the peace be suspended from office. (pp. 72-73)

34. Complaints respecting a justice of the peace should be in writing, signed by the complainant and directed to the Chief Judge of the Provincial Court. (p. 73)

35. The Chief Judge should be empowered to review, on his or her own initiative, any matter regarding the conduct or fitness of a justice of the peace which comes to his or her attention, and the Judicial Inquiry Board should have the same power. (p. 73)

36. There should be no provision for suspending a justice of the peace while an investigation into his or her conduct is pending. However, the Chief Judge would remain free to re-assign such a justice of the peace to administrative duties. (p. 74)

37. Upon the filing of charges against a justice of the peace by the Judicial Inquiry Board, the justice of the peace should be automatically suspended unless the Judicial Inquiry Board waives the suspension. (p. 74)

38. Unless a member of the Judicial Council (designated for the purpose by the chair of the Judicial Council) decides otherwise upon an application of the Judicial Inquiry Board, the suspension of a justice of the peace should be with pay. (p. 74)

39. The Judicial Council should hold its hearings in public unless it determines that it is in the public interest that they be held in private. (p. 74)

40. Both the justice of the peace and the Judicial Inquiry Board should be permitted to appeal a decision of the Judicial Council (as to finding of guilt or penalty or both) to the Manitoba Court of Appeal. (p. 74)

CHAPTER 9 - TRANSITIONAL AND MISCELLANEOUS MATTERS

41. Prior to the coming into force of the proposals in this Report, the Minister of Justice and Attorney General should identify the number of senior presiding and presiding justices of the peace required in each location and the Nominating Committee should prepare lists of candidates after the normal advertising and interviewing process. (p. 76)

42. Upon the coming into force of the proposals in this Report, the Minister of Justice and Attorney General should fill each identified position with persons selected from the lists submitted by the Nominating Committee. (p. 76)

43. All persons holding appointment as either justice of the peace or magistrate prior to the coming into force of these recommendations who are not so appointed should be deemed thereafter to be a non-presiding justice of the peace. (p. 76)

44. Although the Nominating Committee should give very serious consideration to those individuals currently holding appointment in their recommendations for candidates for senior presiding or presiding justice of the peace, it should not be restricted to them. (p. 77)

45. The provincial government should request the federal government to amend the *Criminal Code* definition of justice of the peace specifically to allow the province to limit the jurisdiction of justices of the peace under federal statutes. (p. 77)

46. Justices of the peace should have the same immunity from suit as Provincial Court judges and superior court judges. (p. 78)

47. A new Justices of the Peace Act, substantially in the form of the draft Act set out in Appendix A, should be enacted in order to give effect to the recommendations contained in this Report. (p. 79)

The proposals which we make in this Report would effect significant changes in the status of justices of the peace and magistrates in Manitoba. In part, they are aimed at ensuring that their status is consistent with the level of independence and impartiality mandated by the *Charter of Rights and Freedoms*. However, in some instances, they go beyond these minimum requirements and aim to build a system which will continue to deserve the confidence of the public. We believe that our justice system requires no less.

This is a Report pursuant to section 15(1) of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 15th day of August 1991.

Clifford H.C. Edwards, President

John C. Irvine, Commisioner

Gerald O. Jewers, Commissioner

Eleanor R. Dawson, Commissioner

Pearl K. McGonigal, Commissioner

APPENDIX A

THE JUSTICES OF THE PEACE ACT
(DRAFT)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

INTERPRETATION

Definitions

1 In this Act

"charge" means a charge against a justice of the peace made under section 25;

"Chief Judge" means the Chief Judge of the Provincial Court of Manitoba;

"complaint" means a complaint against a justice of the peace made under section 16;

"Judicial Compensation Committee" means a compensation committee appointed under The Provincial Court Act;

"Judicial Council" means the Judicial Council established under this Act;

"Judicial Inquiry Board" means the Judicial Inquiry Board established under this Act;

"minister" means the member of the Executive Council charged by the Lieutenant Governor in Council with the administration of this Act;

"nominating committee" means the Justices of the Peace Nominating Committee established under section 6;

"non-presiding justice of the peace" means a justice of the peace who is designated as a non-presiding justice of the peace in accordance with this Act;

"presiding justice of the peace" means a justice of the peace who is designated as a presiding justice of the peace in accordance with this Act;

"senior presiding justice of the peace" means a justice of the peace who is designated as a senior presiding justice of the peace in accordance with this Act.

CLASSIFICATION

Jurisdiction

2 A justice of the peace has jurisdiction throughout Manitoba.

General duties and powers
3(1) Subject to subsection (2), a justice of the peace who is designated under section 4 as a senior presiding justice of the peace or as a presiding justice of the peace is appointed as a justice of the peace for the purpose of performing the duties and exercising the powers that are conferred or imposed on a justice of the peace by

(a) an Act of the legislature or any regulations made under it;
(b) an Act of the Parliament of Canada or any regulations made under it; or
(c) a municipal by-law.

Presiding justice of the peace
3(2) A justice of the peace who is designated under section 4 as a presiding justice of the peace is not appointed as a justice of the peace for the purpose of performing the following duties or exercising the following powers:

(a) conducting a preliminary inquiry under the Criminal Code (Canada), as amended from time to time;
(b) presiding at the trial of an offence created under any federal or provincial legislation, regulations or municipal by-law;
(c) exercising any jurisdiction under the Criminal Code (Canada), as amended from time to time, concerning the competency of an accused to conduct a defence or the fitness of an accused to stand trial;
(d) remanding an accused where the offence was committed outside the province; and
(e) issuing any of the following orders:
    (i) a warrant under The Mental Health Act;
    (ii) an order for judicial interim release;
    (iii) a search warrant;
    (iv) a warrant to obtain a blood sample;
    (v) a firearms prohibition order;
    (vi) an order for recognizance to keep the peace.

Non-presiding justice of the peace
3(3) A justice of the peace who is designated under section 4 as a non-presiding justice of the peace is appointed as a justice of the peace solely for the purpose of performing the following duties and exercising the following powers:

(a) administering an oath, affirmation or declaration; and
(b) swearing an information pursuant to federal or provincial legislation, regulations or a municipal by-law.

APPOINTMENT

Appointment and designation
4(1) The Lieutenant Governor in Council may appoint a person as a justice of the peace and shall, in the order of appointment, designate that person as a senior presiding justice of the peace, a presiding justice of the peace, or a non-presiding justice of the peace.

Appointment from list
4(2) An appointment under subsection (1) of a senior presiding justice of the peace and of a presiding justice of the peace shall be made from a list of candidates prepared under section 7.

Ineligibility
5(1) Every employee of a federal, provincial or municipal government department, agency or crown corporation is ineligible for appointment as a justice of the peace.

Specific list of ineligibles
5(2) A person is ineligible for appointment as a justice of the peace where that person is engaged, by any employer, to

(a) serve or execute civil process, including as a sheriff and as a bailiff;
(b) preserve and maintain the public peace, including as a member of any police force or law enforcement agency;
(c) prosecute an offence created by any federal or provincial statute or regulation or municipal by-law;
(d) issue any summary conviction offence notice; or
(e) work in a penitentiary, correctional institution or detention home, including as a warden and as a guard.

Establishment of nominating committee
6(1) There is hereby established a nominating committee, to be known as the Justices of the Peace Nominating Committee, composed of

(a) the Chief Judge as chairperson or a provincial judge designated by the Chief Judge;
(b) a provincial judge designated by the Chief Judge; and
(c) five persons appointed by the Lieutenant Governor in Council, none of whom is a lawyer or ineligible for appointment as a justice of the peace under subsection 5(2).

Separate judges
6(2) The Chief Judge may not designate the same provincial judge under clauses (1)(a) and (b).

Expenses
6(3) A member of a nominating committee shall serve on it without remuneration but is entitled to be reimbursed for reasonable travelling and out-of-pocket expenses in accordance with guidelines established for provincial civil servants and incurred by the member in performing duties as a member while away from his or her ordinary place of residence.

Quorum
6(4) Three members of a nominating committee constitute a quorum.

Duties of nominating committee
7(1) Upon the request of the minister to prepare a list of candidates for a position in a specified area of the province as a senior presiding justice of the peace or as a presiding justice of the peace, a nominating committee shall

(a) establish criteria for the selection of candidates for appointment under section 4;
(b) advertise for applications and nominations of candidates, in such manner as it may decide;
(c) accept applications and nominations, in such form as it may decide, of candidates; and may invite persons to make application;
(d) evaluate, in such manner as it considers advisable, the application of a candidate, and the nomination of a candidate who consents to the nomination;
(e) provide the minister with a list for each available position of not more than three different candidates that the nominating committee recommends as qualified for appointment under section 4.

No ranking
7(2) A nominating committee shall not rank the candidates named in a list prepared under subsection (1), but may designate an exceptional candidate as "highly recommended".

When second list to be provided
7(3) Where a list provided to the minister under subsection (1) consists of one candidate and that candidate is not willing or able to accept an appointment under section 4, the nominating committee shall provide the minister with another list naming a different candidate, and the nominating committee may recommend a candidate that it considered in preparing the original list, or may advertise for new candidates, or both.

Interviews and consultations
8(1) A nominating committee may interview candidates, and may consult such persons as it considers necessary in respect of a candidate.

Confidentiality of information
8(2) A nominating committee shall conduct its proceedings in private, and its members shall maintain secrecy in respect of information obtained from or about a candidate.

Report to minister
8(3) Notwithstanding subsection (2), a nominating committee may report to the minister on the process of selecting candidates, and that report shall not divulge information that identifies a candidate or a person from whom the nominating committee obtains information about a candidate.

Oath or affirmation of office
9(1) *Every justice of the peace shall before entering upon the duties of office take and* subscribe before a person authorized to administer oaths in Manitoba the oath or affirmation of allegiance and of office in the following form:

> I, of , in the Province of Manitoba, swear (or affirm) that I will well and truly serve our Sovereign Lady the Queen in the office of a justice of the peace, and that I will duly, faithfully and to the best of my knowledge and ability execute the duties and requirements of the office to which I have been appointed, *and for so long as I continue to hold office, without fear or favour. So help me God. (Omit last four words where person affirms.)*

Forwarded to Executive Council
9(2) A justice of the peace shall forthwith transmit the oath or affirmation of allegiance and of office to the Chief Judge who shall send them to the Clerk of the Executive Council together with such copies thereof as may be directed by the minister.

TENURE

During good behaviour
10(1) A senior presiding justice of the peace and a presiding justice of the peace hold office during good behaviour and may be removed from office only in accordance with the provisions of this Act.

At pleasure
10(2) A non-presiding justice of the peace holds office at the pleasure of the Lieutenant Governor in Council.

Resignation
11(1) A justice of the peace may resign from office by delivering a signed letter of resignation to the minister.

Effective date
11(2) The resignation is effective on the date specified in the letter or on the date the letter is delivered to the minister, whichever is later.

Residence
12(1) Upon appointment, a justice of the peace shall reside in, or in the vicinity of, the area of the province that the Lieutenant Governor in Council may direct.

Change of residence
12(2) Where a justice of the peace establishes residence in accordance with a direction made under subsection (1), the justice of the peace shall not afterwards

(a) be directed to move residence to, or to the vicinity of, another area of the province unless the justice of the peace consents to the move; or
(b) move residence to, or to the vicinity of, another area of the province unless the Lieutenant Governor in Council approves the move.

REMUNERATION

Judicial Compensation Committee
13(1) The minister shall, once every two years, commencing in 1993, cause the Judicial Compensation Committee to review, determine and report to the minister on, the remuneration and benefits payable to senior presiding justices of the peace and to presiding justices of the peace, including pensions, vacations, sick leave, travel expenses and allowances.

Note: The date "1993" is used in the above subsection to coincide with the next scheduled Report of the Judicial Compensation Committee concerning remuneration for provincial judges. If earlier implementation is to occur, the two duties of the Committee would be performed at different times, resulting in separate Reports initially and thereafter.

Minister to table report
13(2) A report submitted under subsection (1) shall, within 30 days after it is submitted, be tabled by the minister in the Legislature if it is in session, and if the Legislature is not in session, not later than 30 days after the opening of the next session of the Legislature.

Referral of report to committee
13(3) A report that is tabled in the Legislature under subsection (2) shall be referred, within 30 days of being tabled, to a standing committee of the Legislature to report, within 60 days or such time as the Legislative Assembly may direct, on the recommendations of the Judicial Compensation Committee.

Implementation of report
13(4) Where the Legislative Assembly receives and votes on the report of a standing committee that is received under subsection (3), the government shall proceed to implement the report in accordance with the vote of the Legislative Assembly, and all Acts, regulations and administrative practices shall be deemed to be amended as necessary to implement the report.

Classification plan
14 The Judicial Compensation Committee, in preparing a report under subsection 13(1), shall

(a) establish a classification plan with divisions of justices of the peace based upon similarity of:
  (i) designation under section 4;
  (ii) average type and amount of work likely to be performed, in the opinion of the Judicial Compensation Committee, having regard to the size of the population to be served; and
  (iii) such other factors as the Judicial Compensation Committee may determine; and
(b) recommend rates of remuneration and of benefits for each division within the classification plan.

Remuneration
15(1) A senior presiding justice of the peace and a presiding justice of the peace are entitled to receive the remuneration and benefits that attach to their division within the classification plan contained in the most recent report of the Judicial Compensation Committee implemented under subsection 13(4).

Remuneration of non-presiding
15(2) *The Lieutenant Governor in Council shall fix the remuneration and benefits of a non-presiding justice of the peace.*

DISCIPLINE AND REMOVAL

Complaint
16(1) Any person may make a complaint respecting the
(a) conduct of a justice of the peace;
(b) neglect of duty by a justice of the peace; or
(c) ability or capacity of a justice of the peace to perform the duties of that office.

Complaint to be written
16(2) A complaint must be in writing and signed by the complainant.

Initiation of review without complaint
16(3) The Chief Judge or the Judicial Inquiry Board may initiate proceedings under this Act against a justice of the peace on any ground listed in subsection (1) whether or not any person has made a complaint.

Chief Judge

Functions of Chief Judge
17(1) Subject to subsections (2) and (3), the Chief Judge shall receive and informally inquire into a complaint in the first instance and may

(a) make an order resolving the matter that has the consent of the complainant and of the justice of the peace about whom the complaint was made;
(b) direct the complaint to the Judicial Inquiry Board; or
(c) dismiss the complaint where it is frivolous, vexatious or unfounded.

Chief Judge to direct complaint
17(2) The Chief Judge shall immediately direct to the Judicial Inquiry Board any complaint that alleges that a justice of the peace

(a) has committed an indictable offence; or
(b) has engaged in conduct that is prejudicial to the administration of justice.

Recommencement of dismissed complaint
18(1) A complainant whose complaint has been dismissed by the Chief Judge may recommence the dismissed complaint before the Judicial Inquiry Board.

Complainant to be advised
18(2) Where the Chief Judge dismisses a complaint, the Chief Judge shall advise the complainant that it has been dismissed and that it may be recommenced as provided in subsection (1).

Judicial Inquiry Board

Judicial Inquiry Board established
19(1) There is hereby established a Judicial Inquiry Board that is composed of

(a) a lawyer appointed by the Lieutenant Governor in Council;
(b) a person who is not a lawyer, a judge, or a retired judge, appointed by the Lieutenant Governor in Council; and
(c) a provincial judge, other than the Chief Judge, elected by the provincial judges.

Decision by majority
19(2) A decision by the majority of its members constitutes a decision by the Judicial Inquiry Board.

Term
20(1) A member of the Judicial Inquiry Board holds office for a term of three years and may be reappointed for a single term.

Remuneration
20(2) A member of the Judicial Inquiry Board appointed under clauses 19(1)(a) or (b) shall be paid such remuneration and out-of-pocket expenses as may be approved by the minister.

Expenses only
20(3) A member of the Judicial Inquiry Board appointed under clause 19(1)(c) shall be reimbursed for such out-of-pocket expenses as may be approved by the minister.

Staff
21 The Judicial Inquiry Board may retain legal counsel and agents as it considers necessary.

Functions of Judicial Inquiry Board
22(1) The Judicial Inquiry Board shall receive and investigate any complaint directed to it and may

(a) make an order resolving the matter that has the consent of the complainant and of the justice of the peace about whom the complaint was made;
(b) dismiss the complaint where it is frivolous, vexatious or unfounded;
(c) lay and prosecute a charge before the Judicial Council;
(d) stay any charge laid by it.

Procedures
22(2) Subject to subsection (3), the Judicial Inquiry Board may determine its own procedures and conduct investigations in the manner it considers appropriate.

Complainant to be advised
22(3) Where the Judicial Inquiry Board concludes that a complaint is frivolous, vexatious or unfounded, it shall in writing advise the complainant why it reached that conclusion.

Definition of "premises"
23(1) In this section, "premises" means any land, residence or commercial premises identified in an order made under subsection (2).

Access to premises and documents
23(2) The Judicial Inquiry Board may apply, without notice to any person, to a judge of the Queen's Bench for an order that the Judicial Inquiry Board or its investigator

(a) shall have access to premises;
(b) may inspect any document or thing relating to a complaint that is situated on or in premises; and

(c) may, after providing a receipt to the occupier of the premises or posting a receipt in a prominent place on the premises, remove from the premises any document or thing relating to the complaint, make copies or take photographs of a document or thing removed, and forthwith return it to the place from which it is taken.

Where order may be issued
23(3) Upon hearing an application made under subsection (2), a judge may grant the order on such terms and conditions as the judge considers appropriate, if satisfied that

(a) there are reasonable and probable grounds to believe that access to the premises will assist in the investigation of the complaint; and
(b) access to the premises is reasonable and necessary for purposes of investigating the complaint.

Assistance of peace officers
23(4) Where an order is issued under subsection (2), the Judicial Inquiry Board or its investigator may engage the assistance of one or more peace officers in exercising the powers granted by the order.

Copy as evidence
23(5) A copy of all or part of a document or thing obtained under this section is admissible in evidence to the same extent, and has the same evidentiary value, as the original document or thing, if certified as a true copy by the person who made it.

Immunity from liability
24 The Judicial Inquiry Board and its members and agents are immune from civil liability for any act or omission that occurs in the course of carrying out their respective responsibilities under this Act, if the act or omission is done in good faith and without negligence.

Grounds for charge
25(1) A charge shall allege one or more of the following grounds:

(a) conduct unbecoming a justice of the peace;
(b) neglect of duty by a justice of the peace; or
(c) inability or incapacity of a justice of the peace to perform the duties of that office.

Public record
25(2) A charge laid before the Judicial Council is a matter of public record.

Particulars
25(3) The Judicial Inquiry Board shall give, or cause to be given, the particulars of the charge to the justice of the peace in respect of whom the charge is laid.

Suspension when charged
26(1) Subject to subsections (2) and (3), where a charge is laid against a justice of the peace, that justice of the peace is immediately suspended, with no reduction in remuneration, from the performance of the duties of that office pending the hearing and disposition of the charge by the Judicial Council.

Waiver of suspension
26(2) The Judicial Inquiry Board may in writing waive a suspension under subsection (1).

Suspension without remuneration
26(3) A member of the Judicial Council, designated for this purpose by its chairperson, may upon application by the Judicial Inquiry Board order that a suspension under subsection (1) be accompanied with suspension of remuneration.

Judicial Council

Judicial Council established
27(1) There is hereby established a Judicial Council that is composed of

(a) the Chief Justice of Manitoba who, when acting, is chairperson or another judge of the Court of Appeal designated by that Chief Justice, who, when so designated, is chairperson;
(b) the Chief Justice of the Queen's Bench or another judge of that Court designated by that Chief Justice;
(c) two provincial judges, elected by the provincial judges;
(d) the President of the Law Society of Manitoba or a member of that Society designated by its president;
(e) the President of the Manitoba Branch of the Canadian Bar Association or a member of that Branch designated by its president;
(f) three persons, none of whom is a lawyer, a judge, or a retired judge, appointed by the Lieutenant Governor in Council; and
(g) a justice of the peace named by the Lieutenant Governor in Council on the recommendation of the minister.

Ineligible persons
27(2) The Chief Judge and any sitting member of the Judicial Inquiry Board shall not be members of the Judicial Council.

Quorum
27(3) Six members of the Judicial Council constitute a quorum.

Acting chairperson
27(4) Where for any reason the chairperson of the Judicial Council is unable to act, the other members of the Judicial Council shall choose a member to act as chairperson for the duration of the absence.

Term of certain members
28(1) A member of the Judicial Council under clauses 27(1)(c), (f) or (g) holds office for a term of three years and may be reappointed for a single term.

Remuneration and expenses
28(2) A member of the Judicial Council under clauses 27(1)(d), (e) or (f) shall be paid such remuneration and out-of-pocket expenses as may be approved by the minister.

Expenses
28(3) A member of the Judicial Council under clauses 27(1)(a), (b), (c) or (g) shall be reimbursed for such out-of-pocket expenses as may be approved by the minister.

Function of Judicial Council
29(1) The function of the Judicial Council is to hear and adjudicate any charge laid and prosecuted by the Judicial Inquiry Board.

Non-participation of certain members
29(2) A member of the Judicial Council who participates in the receipt or investigation of a complaint or who makes an order under subsection 26(3) shall not participate in any proceeding or further proceeding of the Judicial Council respecting that complaint or charge.

Termination of jurisdiction
30 The Judicial Council has no jurisdiction over a justice of the peace who leaves office by resignation, retirement or death.

Procedure
31(1) The Judicial Council may determine its own procedure and conduct hearings in the manner it considers appropriate.

Notice of hearing
31(2) The Judicial Council shall give, or cause to be given, at least 15 days written notice of the date, time and place of the hearing to the justice of the peace in respect of whom the charge is laid.

Rights of justice of the peace
31(3) A justice of the peace in respect of whom the Judicial Council is holding a hearing may

(a) be present and represented by counsel at the hearing; and
(b) adduce evidence and cross-examine witnesses.

Public hearing
33(1) The Judicial Council shall hold a hearing in public unless it determines that, in the public interest, all or part of a hearing should be held in private.

Prohibition on publication
32(2) The Judicial Council may prohibit the publication of information or of documents placed before it that relate to a hearing where it is of the opinion that the publication is not in the public interest.

Powers and protection of Evidence Act
33 The Judicial Council has all the powers of a commissioner appointed under Part V of the Manitoba Evidence Act and each member of the Judicial Council has the same protection as a commissioner appointed under Part V of that Act.

Powers of Judicial Council
34(1) Where the Judicial Council, on the conclusion of a hearing, finds a justice of the peace to be guilty of a charge of conduct unbecoming a justice of the peace or of neglect of duty, it may do one or more of the following:

(a) reinstate the justice of the peace with or without
  (i) a reprimand;
  (ii) a fine; or
  (iii) a change of the designation of that justice of the peace as a senior presiding justice of the peace or as a presiding justice of the peace;
(b) continue the suspension of the justice of the peace from the performance of the duties of that office, without remuneration, for a fixed period of time;
(c) order the justice of the peace to take a leave of absence from the performance of the duties of that office, with or without a reduction in remuneration, for the purpose of obtaining specified treatment; or
(d) remove the justice of the peace from office and revoke the appointment of that justice of the peace.

Powers where incompetent
34(2) Where the Judicial Council, on the conclusion of a hearing, finds a justice of the peace to be guilty of a charge of inability or incapacity to perform the duties of that office, it may do one or more of the following:

(a) order the justice of the peace to take a leave of absence from the performance of the duties of that office, with or without a reduction in remuneration, for the purpose of obtaining specified treatment;
(b) remove the justice of the peace from office and revoke the appointment of that justice of the peace; or
(c) where the inability or incapacity is due to disability, conclusively deem that the justice of the peace voluntarily retires from office with retention of all pension rights, if any.

Costs
34(3) The Judicial Council, on the conclusion of any hearing, may make such order regarding costs as it considers just.

Remittance of remuneration
34(4) The Judicial Council, on the conclusion of any hearing, may order that all or any part of remuneration not paid to a justice of the peace under subsection 26(3) be remitted to the justice of the peace, unless it has made an order against that justice of the peace under clauses (1)(b) or (d) or (2)(b).

Order to be served
35 An order made under section 34 shall be in writing and shall be forthwith served personally on the justice of the peace against whom it is made and on the Judicial Inquiry Board.

Appeal
36 The Judicial Inquiry Board or the justice of the peace against whom an order under section 34 is made may, within 30 days after the date the order is signed by the Judicial Council, appeal the order to the Court of Appeal upon any issue of fact or law or mixed fact and law.

GENERAL

Immunity from liability
37 A justice of the peace has the same immunity from liability as a judge of the Queen's Bench.

Remittance of fines
38 All fines and costs collected by a justice of the peace shall be remitted forthwith to the Minister of Finance or to whomever the same are lawfully payable.

Offence and penalty
39 Every justice of the peace who

(a) whether or not that justice of the peace made the conviction, collects a fine or costs or both and neglects or refuses to remit that money as required under section 38; or
(b) wilfully refuses or neglects to make a return required under the regulations or wilfully makes a false or partial return;

is guilty of an offence and is liable on summary conviction to a fine of not more than $500.

Regulations
40 The Lieutenant Governor in Council may make regulations

(a) respecting the returns and records to be made or kept by a justice of the peace;
(b) providing for the safekeeping, inspection and maintenance of books, documents and papers; and
(c) respecting such other matters as may be necessary to carry out the intent and purpose of this Act.

TRANSITIONAL

Transitional
41 A person who, on the day before this Act comes into force, held office as a justice of the peace or magistrate pursuant to Part V of The Provincial Court Act, as that Act existed on the day before this Act comes into force, and who is not appointed and designated under this Act as a senior presiding justice of the peace or as a presiding justice of the peace

(a) continues to hold office as a justice of the peace pursuant to this Act as if appointed pursuant to this Act; and
(b) is deemed to be designated as a non-presiding justice of the peace.

CONSEQUENTIAL AMENDMENTS

Note: Many consequential amendments would be necessary with the enactment of this legislation. The most obvious consequential amendment is repeal of Part V of The Provincial Court Act. Eliminating references in Manitoba legislation to the office of "magistrate" would account for the bulk of the consequential amendments.

COMING INTO FORCE

Coming into force

42(1) Subject to subsection (2), this Act comes into force on a day fixed by proclamation.

Certain sections on royal assent

42(2) Sections 6, 7, 8, 13 and 14 come into force on the day this Act receives the royal assent.

* * * * * * * * * * * * * * *

Note: We have given legislative form to our Recommendations by way of a separate, self-contained statute so as to provide the most easily understandable illustration of the proposed model. However, if the Commission's recommended disciplinary process for provincial judges were enacted in The Provincial Court Act, it is more likely that implementation of the Recommendations concerning justices of the peace would also occur as amendments to that Act in order that the shared disciplinary provisions need not be duplicated.

APPENDIX B

SURVEY OF MANITOBA MAGISTRATES AND JUSTICES OF THE PEACE
February 1990

Statistical Tables

Table 1

GEOGRAPHIC WORK LOCATION

Location	Percent
Winnipeg	30
North (5000 and over)	8
South (5000 and over)	16
North (under 5000)	8
South (under 5000)	38
(N = 168)	100

Table 2

RESIDENTIAL LOCATION

Location	Percent
Winnipeg	36
North (5000 and over)	7
South (5000 and over)	13
North (under 5000)	8
South (under 5000)	36
(N = 172)	100

Table 3

NUMBER OF YEARS IN COMMUNITY OF RESIDENCE

Years resident in community	Percent
Less than 10 years	10
10-19 years	20
20-29 years	20
30-39 years	22
40-49 years	15
50 years or more	13
(N = 167)	100

Table 4.1

AGE BY WORK LOCATION (IN PERCENT)

Location	Under 40	40-49	50-59	Over 60	Total (N)
Winnipeg	45	36	17	2	47
North (5000 & over)	39	31	15	15	13
South (5000 & over)	33	26	11	30	27
North (under 5000)	14	22	50	14	14
South (under 5000)	7	25	21	47	61
Total	25	29	20	26	162

Table 4.2

MEAN AGE BY WORK LOCATION

Location	Mean Age
Winnipeg	41
North (5000 & over)	44
South (5000 & over)	48
North (under 5000)	51
South (under 5000)	57
Overall	49

Table 5.1

AGE AT APPOINTMENT BY WORK LOCATION (IN PERCENT)

Location	Under 30	30-39	40-49	50-59	Over 60	Total (N)
Winnipeg	43	26	29	2	0	49
North (5000 & over)	23	46	23	8	0	13
South (5000 & over)	22	26	26	19	7	27
North (under 5000)	14	29	36	21	0	14
South (under 5000)	10	30	27	22	11	63
Total	23	30	28	14	5	166

Table 5.2

MEAN AGE AT APPOINTMENT BY WORK LOCATION

Location	Mean Age
Winnipeg	34
North (5000 & over)	36
South (5000 & over)	41
North (under 5000)	43
South (under 5000)	45
Overall	40

Table 6

GENDER BY YEAR OF APPOINTMENT (IN PERCENT)

Year Appointed	Female	Male	Total (N)
Before 1980	28	72	57
1980-1985	41	59	71
1986-1990	72	28	39
Total	44	56	167

Table 7

GENDER BY TYPE OF APPOINTMENT (IN PERCENT)

Gender	Magistrates	Justices	Total (N)
Male	82	18	97
Female	66	34	76
Total	75	25	173

Table 8

GENDER BY WORK LOCATION (IN PERCENT)

Location	Male	Female	Total (N)
Winnipeg	28	72	50
N (5000 & over)	31	69	13
S (5000 & over)	50	50	26
N (under 5000)	79	21	14
S (under 5000)	83	17	64
Total	57	43	167

Table 9

LEVEL OF EDUCATION BY YEAR OF APPOINTMENT (IN PERCENT)

Appointed	Some University	Other Post-Secondary	H.S. Diploma	None of Those	Total (N)
Before 1980	13	22	50	15	54
1980-1985	24	17	49	10	70
1986-1990	25	31	31	13	39
Total	21	22	45	12	163

Table 10

LEVEL OF EDUCATION BY WORK LOCATION (IN PERCENT)

Location	Some University or Other Post-Secondary	High School Diploma	None of Those	Total (N)
Winnipeg	47	47	6	49
N (5000 & over)	38	62	0	13
S (5000 & over)	41	52	7	27
N (under 5000)	23	46	31	13
S (under 5000)	46	36	18	62
Total	44	44	12	164

Table 11

LANGUAGES SPOKEN BY WORK LOCATION (IN PERCENT)

Location	English only	English & French	English & Aboriginal	English & Other	Total (N)
Winnipeg	86	8	0	6	49
N (5000 & over)	69	8	15	8	13
S (5000 & over)	81	0	0	19	27
N (under 5000)	71	0	29	0	14
S (under 5000)	80	6	0	14	64
Total	80	5	4	11	167

Table 12

NUMBER OF DIFFERENT KINDS OF TASKS PERFORMED

Number of Tasks	Percent
none	1
one only	6
two to four	25
five or more	68
(N = 171)	100

Table 13.1

PERCENT OF RESPONDENTS ADMINISTERING OATHS

Administer Oaths	Percent
yes	93
no	7
(N = 171)	100

Table 13.2

PERCENT OF RESPONDENTS RECEIVING INFORMATIONS

Receive Informations	Percent
yes	80
no	20
(N = 171)	100

Table 13.3

PERCENT OF RESPONDENTS ISSUING PROCESS

Issue Process	Percent
yes	91
no	9
(N = 171)	100

Table 13.4

PERCENT OF RESPONDENTS HEARING BAIL APPLICATIONS

Bail Applications	Percent
yes	53
no	47
(N = 171)	100

Table 13.5

PERCENT OF RESPONDENTS HEARING SEARCH WARRANT APPLICATIONS

Search Warrants	Percent
yes	69
no	31
(N = 171)	100

Table 13.6

PERCENT OF RESPONDENTS SENTENCING AFTER PLEA

Guilty Pleas/Sentencing	Percent
yes	65
no	35
(N = 171)	100

Table 13.7

PERCENT OF RESPONDENTS ADJUDICATING SUMMARY CONVICTION OFFENCES

Adjudicate Summary Conviction	Percent
yes	33
no	67
(N = 171)	100

Table 13.8

PERCENT OF RESPONDENTS ADJUDICATING OTHER MATTERS*

Adjudicate Other	Percent
yes	5
no	95
(N = 171)	100

*such as applications for peace bonds, firearms prohibition, s. 242.1(4) *Highway Traffic Act* revocation

Table 13.9

PERCENT OF RESPONDENTS REMANDING PRISONERS IN CUSTODY

Remands	Percent
yes	4
no	96
(N = 171)	100

Table 13.10

PERCENT OF RESPONDENTS ENGAGED IN OFFENCE NOTICE PROCEEDINGS

Offence Notices Plea/Default Conviction	Percent
yes	3
no	97
(N = 171)	100

Table 13.11

PERCENT OF RESPONDENTS PERFORMING OTHER TASKS*

"Other" Duties	Percent
yes	16
no	84
(N = 171)	100

*including setting hearing dates, preparing court orders, dockets, providing information to the public, etc.

Table 14

WHERE DUTIES PERFORMED BY WORK LOCATION (IN PERCENT)

Location	*Court House	Court House/ Police Station	Court House/ Residence	Court House /Police Station/ Residence	¶Police Station	ƒResidence	Police Station/ Residence	Total (N)
Winnipeg	82	4	2	6	6	0	0	49
N (5000 & over)	23	8	8	38	0	0	23	13
S (5000 & over)	40	22	0	19	0	0	19	27
N (under 5000)	8	0	0	23	15	15	39	13
S (under 5000)	11	5	9	16	3	16	40	63
Total	38	7	5	16	4	7	23	165

*Includes government or municipal office and various circuit court locations
¶Includes jail
ƒOwn/other residence or place of work

Table 15

TIME SPENT ON DUTIES BY WORK LOCATION (IN PERCENT)

Location	Less than 15 min.	Less than 1 hour	1-2 hours	3-6 hours	More than 6 hours	Total (N)
Winnipeg	42	16	9	11	22	45
N (5000 & over)	8	31	38	15	8	13
S (5000 & over)	4	31	23	31	11	26
N (under 5000)	38	38	24	0	0	13
S (under 5000)	40	44	11	5	0	62
Total	32	32	16	11	9	159

Table 16

AVAILABILITY OF RESOURCE MATERIALS BY WORK LOCATION (IN PERCENT)

Location	Criminal Code	No Criminal Code	Total(N)	Statute	No Statute	Total(N)	Manual	No Manual	Total(N)
Winnipeg	94	6	50	98	2	48	50	50	46
N (5000 & over)	100	0	13	92	8	13	100	0	13
S (5000 & over)	89	11	27	93	7	27	89	11	27
N (under 5000)	92	8	13	77	23	13	92	8	13
S (under 5000)	98	2	60	82	18	60	94	6	63
Total	95	5	163	89	11	161	80	20	162

Table 17

NUMBER OF SOURCES OF ASSISTANCE (IN PERCENT)

Location	None	1 source	2-3 sources	4 or more	Total (N)
Winnipeg	10	17	33	40	48
N (5000 & over)	0	15	8	77	13
S (5000 & over)	4	11	26	59	27
N (under 5000)	0	24	38	38	13
S (under 5000)	3	19	43	35	63
Total	5	17	34	44	164

Table 18

HELP RECEIVED IN PERFORMANCE OF DUTIES BY WORK LOCATION (IN PERCENT)

Location	Procedural Only	Procedural /Penalty	Procedural /Legal opinion	Procedural /Penalty /Legal opinion	Other	None of Those	Total (N)
Winnipeg	30	7	25	18	11	9	44
N (5000 & over)	15	15	8	47	15	0	13
S (5000 & over)	27	4	27	38	0	4	26
N (under 5000)	27	18	18	27	0	10	11
S (under 5000)	40	23	8	15	6	8	52
Total	31	14	17	24	7	7	146

Manitoba

Law Reform Commission

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EXECUTIVE SUMMARY

THE INDEPENDENCE OF JUSTICES OF THE PEACE AND MAGISTRATES

The Manitoba Law Reform Commission's Report on *The Independence of Justices of the Peace and Magistrates* proposes major reforms aimed at ensuring the independence and impartiality of justices of the peace and maintaining public confidence in that office. It completes the project referred to the Manitoba Law Reform Commission by the Minister of Justice and Attorney General, James C. McCrae, that has already resulted in the Commission's 1989 Report entitled *The Independence of Provincial Judges.*

Justices of the peace and magistrates exercise a varied mix of statutory jurisdictions. While some of their duties are more administrative in nature, some duties can be quite judicial and the justice of the peace or magistrate is called upon to decide questions of liberty or security of the person or to determine guilt or innocence.

The *Canadian Charter of Rights and Freedoms* requires that a judicial officer be independent and impartial when deciding questions of liberty or security of the person and when determining guilt or innocence. These *Charter* requirements apply to justices of the peace and magistrates when they exercise those judicial functions. In addition, independence and impartiality, both in fact and in appearance, must also be maintained to preserve public confidence in our judicial system.

To protect judicial independence from the possibility of arbitrary interference by the Executive Branch of government, the Supreme Court of Canada has identified three essential conditions: security of tenure for the judicial officer, financial security for the judicial officer, and institutional independence. The presence of such judicial independence is, in turn, the central condition needed to create the fact and the appearance of impartiality.

The following summarizes some of the Report's major recommendations:

A single kind of inferior judicial officer: Currently, the separate offices of "magistrate" and "justice of the peace" carry very similar statutory jurisdictions and tend to cause confusion to officials and the public. The Commission recommends the removal of distinctions between these offices and the creation of a single inferior judicial office called "justice of the peace".

Classification by function: Justices of the peace and magistrates are granted extensive and varied statutory powers, but a lot of these powers are never actually exercised by many judicial officers. Their powers and duties are often narrowed and restricted by administrative directives. The Commission is concerned that this method leads to confusion, is not readily ascertainable by the public, and may jeopardize judicial independence.

The Commission therefore proposes that justices of the peace be statutorily classified according to the type of functions they will perform. The three classifications would be:

1) **Non-presiding justice of the peace:** powers restricted solely to receiving informations and taking oaths.

2) **Presiding justice of the peace:** has the above powers plus those duties calling for the exercise of a more significant level of discretion, like issuing subpoenas, remanding in custody, and confirming or cancelling recognizances.

3) **Senior presiding justice of the peace:** has all the above powers plus more traditionally judicial duties like adjudicating bail applications and summary conviction trials and issuing search warrants.

Appointment: Selection and appointment of justices of the peace is currently within the sole discretion of the provincial Cabinet. The Commission is concerned that this may result in the unfortunate public perception that some appointments are politically motivated or influenced, which undermines the appearance of independence and impartiality of all justices of the peace. Accordingly, the Commission proposes a new method intended to minimize that perception, to widen the process to more candidates and greater public participation and to focus the selection criteria on merit alone.

The Commission proposes a "nominating committee" method of appointment for senior presiding and presiding justices of the peace. This standing committee would consist of:

- the Chief Judge of the Provincial Court;
- another provincial judge named by the Chief Judge; and
- five non-lawyers, named by the provincial Cabinet.

The nominating committee could act by a quorum of three members. Whenever an appointment needs to be made, the nominating committee must advertise the vacancy and evaluate candidates according to established criteria. It would also be empowered to seek out appropriate candidates. Upon completing its assessment, it would submit to the Attorney General a list of not more than three names of qualified individuals. Cabinet must use this list to fill the vacancy and appoint one of the named candidates.

The current appointment process may continue to be used for non-presiding justices of the peace because their duties are solely administrative and the *Charter*'s independence requirements need not be applied.

Tenure: At present, an appointment as a justice of the peace or magistrate is held at the pleasure of the provincial Cabinet; the appointment can be ended at any time without cause. This system can continue for non-presiding justices of the peace, again because their limited jurisdiction would not attract *Charter* scrutiny. However, for presiding and senior presiding justices of the peace, the Commission recommends that office should be held during good behaviour, so that misconduct or incompetence must occur before an appointment is revoked.

Remuneration: Currently, if a justice of the peace is also a civil servant, there is no remuneration in addition to the civil service salary. If the justice of the peace is a non-civil servant, there is remuneration in the form of a small monthly retainer plus a fee for each performance of certain judicial services.

The problem with the civil service salary method is that the independence of a civil servant/justice of the peace is jeopardized in two ways. Apart from the judicial officer being too closely identified with the interests of the state employer, there is the risk that a job evaluation for the purpose of a merit increment in civil service salary could be used or appear to be used as a way to control how that civil servant/justice of the peace exercises judicial discretion.

The problem with the fee-for-service method is that any system of remuneration based on volume of work done may be perceived as encouraging judicial officers to attract more business by cooperating with police requests, again jeopardizing both independence and the appearance of impartiality.

To address these problems, the Manitoba Law Reform Commission has two recommendations. First, employees of all federal, provincial and municipal government departments, agencies and Crown corporations should be ineligible for appointment as a justice of the peace. Secondly, all presiding and senior presiding justices of the peace should be paid according to a set of salary scales that reflect jurisdictional classification and the average estimated workload of all justices of the peace of a particular classification in similar circumstances, including geographic and demographic factors.

All issues of salaries, pensions and other benefits would be handled by the Judicial Compensation Committee, using the same process and terms of reference that already exist to review the remuneration of judges of the Provincial Court.

Discipline: The security of tenure and remuneration necessary for the independence of judicial officers requires some type of formal review process for investigating complaints against justices of the peace and for imposing disciplinary sanctions, including revocation of appointment. It is logical to use the same system that is used to discipline provincial judges, since they and justices of the peace are officers of the same court (albeit with different levels of jurisdiction and responsibility).

However, as indicated in the Commission's previous Report on *The Independence of Provincial Judges*, the current disciplinary method is flawed because the same body (the Judicial Council) acts as investigator, prosecutor and judge. In that Report, a new system was proposed that solved this problem. The Law Reform Commission recommends that this new system also be used to discipline justices of the peace.

Briefly, minor complaints would be dealt with by the Chief Judge of the Provincial Court, who would attempt to resolve the matter to the satisfaction of the complainant and the justice of the peace. Unresolved complaints and more serious complaints would go to a new body called the Judicial Inquiry Board that would be responsible for investigation and prosecution. The Board would be composed of three persons: a lawyer and a non-lawyer named by the Cabinet, and a provincial judge (other than the Chief Judge) named by the judges of the Provincial Court.

The Judicial Council would adjudicate any charges laid by the Judicial Inquiry Board. The Council would be composed of:

- the Chief Justice of Manitoba (or another judge of the Court of Appeal designated by the Chief Justice);
- the Chief Justice of the Manitoba Court of Queen's Bench (or another judge of that court designated by its Chief Justice);
- two judges of the Provincial Court, named by the judges of that court;
- the president of the Law Society of Manitoba (or designate);
- the president of the Manitoba Branch of the Canadian Bar Association (or designate);
- three non-lawyers appointed by the Cabinet; and
- when the person being disciplined is a justice of the peace, a justice of the peace named by the Cabinet on the recommendation of the minister.

After holding a hearing, the Judicial Council could take a range of disciplinary measures including reprimand, fine, suspension, or ordering a leave of absence for the purpose of treatment. It could also change a classification as a presiding or senior presiding justice of the peace. Only the Judicial Council would be able to revoke an appointment, a power currently vested in the Cabinet.

All decisions of the Judicial Council could be appealed to the Manitoba Court of Appeal.

Immunity: The Commission recommends that justices of the peace should have the same immunity from law suits as superior court judges (judges of the Court of Queen's Bench and Court of Appeal) so that they, too, can be (and appear to be) free in thought and independent in judgment, without fear that a decision will result in personal liability.

Training: The Commission also suggests that justices of the peace receive increased training and on-going support.

August 15, 1991

ERRATA

P. 4 - second paragraph, line 3:
"Coordinator Designate" should be
amended to read "Services Administrator"