



Second Session - Thirty-Sixth Legislature
of the
Legislative Assembly of Manitoba
Standing Committee
on
Privileges and Elections

Chairperson
Mr. Jack Penner
Constituency of Emerson



MANITOBA LEGISLATIVE ASSEMBLY
Thirty-Sixth Legislature

Members, Constituencies and Political Affiliation

Name	Constituency	Party
ASHTON, Steve	Thompson	N.D.P.
BARRETT, Becky	Wellington	N.D.P.
CERILLI, Marianne	Radisson	N.D.P.
CHOMIAK, Dave	Kildonan	N.D.P.
CUMMINGS, Glen, Hon.	Ste. Rose	P.C.
DACQUAY, Louise, Hon.	Seine River	P.C.
DERKACH, Leonard, Hon.	Roblin-Russell	P.C.
DEWAR, Gregory	Selkirk	N.D.P.
DOER, Gary	Concordia	N.D.P.
DOWNEY, James, Hon.	Arthur-Virden	P.C.
DRIEDGER, Albert, Hon.	Steinbach	P.C.
DYCK, Peter	Pembina	P.C.
ENNS, Harry, Hon.	Lakeside	P.C.
ERNST, Jim, Hon.	Charleswood	P.C.
EVANS, Clif	Interlake	N.D.P.
EVANS, Leonard S.	Brandon East	N.D.P.
FILMON, Gary, Hon.	Tuxedo	P.C.
FINDLAY, Glen, Hon.	Springfield	P.C.
FRIESEN, Jean	Wolseley	N.D.P.
GAUDRY, Neil	St. Boniface	Lib.
GILLESHAMMER, Harold, Hon.	Minnedosa	P.C.
HELWER, Edward	Gimli	P.C.
HICKES, George	Point Douglas	N.D.P.
JENNISSEN, Gerard	Flin Flon	N.D.P.
KOWALSKI, Gary	The Maples	Lib.
LAMOUREUX, Kevin	Inkster	Lib.
LATHLIN, Oscar	The Pas	N.D.P.
LAURENDEAU, Marcel	St. Norbert	P.C.
MACKINTOSH, Gord	St. Johns	N.D.P.
MALOWAY, Jim	Elmwood	N.D.P.
MARTINDALE, Doug	Burrows	N.D.P.
McALPINE, Gerry	Sturgeon Creek	P.C.
McCRAE, James, Hon.	Brandon West	P.C.
McGIFFORD, Diane	Osborne	N.D.P.
McINTOSH, Linda, Hon.	Assiniboia	P.C.
MIHYCHUK, MaryAnn	St. James	N.D.P.
MITCHELSON, Bonnie, Hon.	River East	P.C.
NEWMAN, David	Riel	P.C.
PALLISTER, Brian, Hon.	Portage la Prairie	P.C.
PENNER, Jack	Emerson	P.C.
PITURA, Frank	Morris	P.C.
PRAZNIK, Darren, Hon.	Lac du Bonnet	P.C.
RADCLIFFE, Mike	River Heights	P.C.
REID, Daryl	Transcona	N.D.P.
REIMER, Jack, Hon.	Niakwa	P.C.
RENDER, Shirley	St. Vital	P.C.
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ROCAN, Denis	Gladstone	P.C.
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STRUTHERS, Stan	Dauphin	N.D.P.
SVEINSON, Ben	La Verendrye	P.C.
TOEWS, Vic, Hon.	Rossmere	P.C.
TWEED, Mervin	Turtle Mountain	P.C.
VODREY, Rosemary, Hon.	Fort Garry	P.C.
WOWCHUK, Rosann	Swan River	N.D.P.

**LEGISLATIVE ASSEMBLY OF MANITOBA
THE STANDING COMMITTEE ON PRIVILEGES AND ELECTIONS**

Thursday, October 24, 1996

TIME – 10 a.m.

LOCATION – Winnipeg, Manitoba

CHAIRPERSON – Mr. Jack Penner (Emerson)

VICE-CHAIRPERSON – Mr. Peter Dyck (Pembina)

ATTENDANCE - 10 – QUORUM - 6

Members of the Committee present:

Hon. Messrs. Stefanson, Toews

Messrs. Dyck, Kowalski, Lathlin, Mackintosh,
Penner, Radcliffe, Rocan, Ms. Wowchuk

WITNESSES:

Mr. Murray Sinclair, Manitoba Provincial Judges
Association

Mr. Robert Kopstein, Manitoba Provincial Judges
Association

MATTERS UNDER DISCUSSION:

Report and Recommendations of the Judicial
Compensation Committee, dated December 29, 1995.

Mr. Chairperson: Good morning. Will the Standing Committee on Privileges and Elections please come to order. This morning the committee will be considering the Report and Recommendations of the Judicial Compensation Committee.

Committee members will recall that the Standing Committee on Privileges and Elections had previously met on June 4, 1996, to consider the report. At that time, the committee had agreed to the motion to defer consideration of report until a future time.

Also, for the benefit of the committee members, I will outline the process of consideration of the Judicial

Compensation Committee Report which occurred in 1992. At that time, an opening statement was given by the then-House leader to outline the position of the government. Opposition critics were then given the opportunity to similarly make opening statements, and the floor was then opened for comments and questions.

I am wondering whether you want to follow that same procedure again today. I will ask that question a bit later.

After discussions were concluded, a motion was then moved by the then-House leader that the Standing Committee on Privileges and Elections adopt a proposal contained in Schedule A of the 1992 report and recommend that the same go to the Assembly.

I think it would be appropriate at this time to ask the minister responsible whether he has an opening statement, and I would then ask the opposition members whether they want to make an opening statement. Is that the will of the committee?

Hon. Eric Stefanson (Minister of Finance): Mr. Chairman, I will make a very brief opening statement. As you have outlined, this report was before this committee in the spring of this year. The committee decided at that time to adjourn, I believe, in part for the opportunity for members of the committee to more thoroughly review that report and also to allow the judges to make representation.

I understand we have Judges Sinclair and Kopstein here before us today, and I think it would obviously be in all of our best interests to hear what they have to say on the report and to allow us the opportunity to ask them any questions and then, subsequent to that, determine what we will do with this report.

Mr. Chairperson: Do opposition members want to make a statement? No.

We do have two presenters before us today. We have Judge Kopstein, and we also have Associate Chief Judge Murray Sinclair with us today. So if it is the will of the

committee, I will ask them to come forward to make presentation to the committee. I do not know who will be first. Judge Sinclair.

Mr. Murray Sinclair (Manitoba Provincial Judges Association): We will sort of tag team today, if you do not mind, Mr. Chair.

Mr. Chairperson: Not at all. If you both want to come forward, you are certainly welcome to do that.

Mr. Sinclair: Members of the committee, I am Associate Chief Judge Murray Sinclair. We have prepared a presentation which is being distributed to you. Judge Kopstein will read that presentation to you, and then we will be available for any questions that you may have of us.

Mr. Robert Kopstein (Manitoba Provincial Judges Association): Mr. Chairman, we wish to thank you firstly on behalf of the judges for the opportunity to appear before you.

Our purpose in being here today is not to rehash, reargue or take issue with the Green report. Because the judges advocated the process involving the Judicial Compensation Committee in 1989, they accept that short of any demonstrated failure by that committee to consider relevant issues, the judges must be satisfied with the majority report even though they may be disappointed with its contents.

Our purpose in this presentation is rather to speak about the process itself and the importance of respecting its integrity.

In the years prior to the mid-1970s, members of the bar appointed to the provincial bench made their own private deals with the governments which appointed them. When I was appointed in 1971 at a salary of \$19,000 negotiated through the office of the Attorney General, my salary, I was told, was about \$3,000 higher than that of a colleague who, appointed by a previous administration, was out of favour with the government which appointed me. Salaries varied among the judges, and what is now appalling in terms of judicial independence, judges were appointed at the pleasure of the Lieutenant Governor. In other words, they could be fired at will.

* (1010)

I can recall in the early years after my appointment, the then-Deputy Attorney General, Mr. Gordon Pilkey, Q.C., not infrequently attended the courts over which my colleagues and I presided to watch the proceedings, and I have to say that I was uncomfortable when he did so in light of the fact that my appointment was at pleasure, lest the purpose of Mr. Pilkey's attendances was to assess whether my decisions favoured the government's position frequently enough. That was probably not the reason for his attendances, but the at-pleasure appointment nonetheless opened the door to a negative public perception regarding judicial impartiality.

Since those days, there have been substantial steps toward assuring a more independent provincial judiciary. First among those was the enactment of The Provincial Judges' Act in the mid-1970s. That act not only standardized salaries but permitted the removal of a judge only upon the recommendation of an independent judicial council on a finding of judicial misconduct by that council after a public hearing. Thus, judicial tenure became as secure as it should be; that is, a judge could be removed only upon an independent finding of judicial misconduct.

That advance, however, still left unaddressed the issue of judicial compensation. The reality was that judges still had to negotiate directly with members of the government on compensation issues. Arising out of that spectacle there was the potentially destructive perception that judicial decision making could be affected by the government's sole and direct control over judicial salaries.

That unsatisfactory situation was addressed in part in 1989 when amendments to The Provincial Judges Act provided for the process in which you are now engaged; that is, every two years, the government must establish a Judicial Compensation Committee to consider the compensation and pensions of judges. The committee is required to report to the minister, and the report must be tabled in the House. As you know, the report is then considered by a standing committee of the House.

The intent of the enactment creating this process was to put distance between the government and the judges respecting judicial compensation so that neither in

perception nor in fact could the independence and impartiality of the judges be diminished by the spectacle of judges' salaries being tied to a favourable or unfavourable assessment of judicial performance by the government. It is that fundamental intent at which the committee process is aimed, the avoidance of public perception that government controls judicial decision making through its control of judges' salaries and pensions.

While the Canadian Charter of Rights and Freedoms entitles every person charged with an offence to be tried by an independent and impartial tribunal, the extent to which there is direct government control of judicial salaries diminishes the perception of judicial independence and impartiality.

Now we acknowledge that your committee is not bound to accept the majority report. It is our submission, however, that the integrity of the process dictates that the majority report of the Green committee be adopted by this committee unless, and only unless, the Judicial Compensation Committee has demonstrably failed to consider factors relevant to the issues before it. If, for instance, the report had failed to consider the bottom line, the ability of the province to pay, that might well have been a ground for rejection, but it has considered that factor on the basis of relevant indicators. If it had failed to consider the government's argument that an important factor in the determination of judicial compensation within Manitoba should be other salaries within Manitoba, that might be a basis for rejection, but it did recommend judicial salaries in the midrange of senior justice officials in Manitoba.

If without examining in the Manitoba and Canadian context the actual cost and benefit under the proposed three-province average pension the majority had recommended that average as an appropriate pension for Manitoba judges, that might have been grounds for rejection, but it did consider, in the context of the Manitoba situation, the implications of that proposal and found it to be unacceptable. If the majority had failed to show that on the basis of actual cost projections the cost of the recommended pension retroactivity would not result in a significant burden to the public purse, that might have been grounds for rejection, but it did prepare and actuarial projection to demonstrate the modest annual cost of that recommendation. If the majority had failed to

consider the justification for an enhanced mileage allowance, that might have been cause for rejection, but it did consider the justification and declined to recommend the higher allowance.

There is no issue which the majority has failed to consider and address carefully in the light of all the surrounding circumstances and arguments. That neither side may be happy with all the conclusions suggests only that in many ways the report is a compromise solution. The failure of your committee, however, to adopt the majority report without identifying some significant defect in the foundations upon which it is drawn, the conclusions are drawn, would be a failure to respect the process itself, and it is our submission that it is important to the public interest that the process be respected.

The 1991 report of the first Judicial Compensation Committee, the Baizley report, was largely rejected without any justification being stated by the standing committee which considered it. The standing committee adopted instead a government formula of its own design, thus asserting unabashed government control. That action defeated and made a mockery of the process.

You are now considering the report of the second Judicial Compensation Committee, the Green report. Again, the present report is the result of a process which was designed to avoid the public perception of impaired judicial impartiality by means of an objective third-party determination of judicial compensation.

If this standing committee rejects the majority report of the Green committee, as did the standing committee which considered the Baizley report, and recommends to the Legislature a judicial compensation package based upon the government's own view of how judges should be compensated, and the recommendation is carried by the government's majority in this committee and in the House, the compensation committee process set out in the legislation would clearly be reduced to a sham. If the government ignores the report and recommends the fixing of judges' salaries as though the Judicial Compensation Committee did not exist, the whole Judicial Compensation Committee process would be nothing more than a time-consuming, expensive but pointless exercise. The purpose of the legislation creating the process would be defeated.

The procedure carefully prescribed by the legislation involving public hearings could easily be seen as a cynical orchestration of an objective process to determine judges' salaries which, in fact, is nothing more than an illusion based on a deception, the illusion being that judicial salaries are determined by an objective process, the deception being that a report of the Judicial Compensation Committee is the vehicle through which judicial compensation is objectively determined.

In your deliberations, we request that you bear in mind the purpose for which the Judicial Compensation Committee process was established and recommend to the Legislature the adoption of its recommendations.

Associate Chief Judge Sinclair and myself can answer any questions that you wish to put to us.

Mr. Chairperson: Thank you, Judge Kopstein. Does Judge Sinclair have anything to add at this time?

Mr. Sinclair: I do not, Mr. Chairperson.

* (1020)

Mr. Chairperson: Thank you very much. I am now going to open the committee for discussion. Is there any discussion or questioning at this time?

Mr. Kopstein: May we join you at the table, Mr. Chairperson?

Mr. Chairperson: Yes, you may or if you choose to, you could pull up chairs at the end of the table, so we can maybe see you better, if we want to direct questions at you. We can also turn those mikes toward you, Nos. 19 and 18, and we can direct questions to you there.

Mr. Gary Kowalski (The Maples): First of all, I do not know if I should call you Your Honour. As a police officer, I had to testify before you many a time, and I always had to call you Your Honour. Have you done an analysis of comparing and contrasting the Wally Fox-Decent report on MLA salaries and benefits and how the process was handled there in comparison to how the process was handled in this Judicial Compensation Committee?

Mr. Kopstein: I have not studied it. I did look at it some time ago. I cannot comment specifically upon it.

Mr. Sinclair: I can say that we have not looked specifically at the recommendations of the committee that you referred to, but I can assure you that we were quite intrigued by the logic behind the establishment of the committee. We followed that process very carefully primarily because at the time that the judicial amendments occurred in 1989, it was the position of the judges of the Provincial Court that there should be a process very similar to what the Fox-Decent committee eventually was mandated, and that is an independent committee whose recommendations would be enacted without there being any opportunity or need for intervention.

But that did not happen. Our current amendments resulted from a government initiative after discussions with the judges, and we agreed at that time, in fairness to the process, that that would be an adequate step at that time. We were prepared to see if that process worked, and if it did not, then we clearly made it known that we were prepared to continue to push for a better process.

Mr. Chairperson: Just for clarification and explanation for the benefit of the judges, we have a system of recording over here, and if the Chairman does not clearly identify who the next speaker will be, there might be some mixup in the scripting. We would not want the records to not be accurate, so if you see me or hear me intervene, it is for the benefit of the recorders instead of for the committee, so I hope you understand that.

Mr. Kowalski: I remember hearing something; maybe you could refresh my memory. Is there a court challenge in one of the provincial jurisdictions of the provincial judges as to judicial independence for their compensation in Canada? Is that occurring anywhere else? Is there a court challenge occurring now for that?

Mr. Sinclair: There are court challenges occurring in, I believe, seven provinces respecting the issue of judicial compensation for provincial court judges, Manitoba being one of them, but the issues in each of the actions, while they all raise the issue of judicial independence, the factual foundations for each of them are slightly different.

It would not be fair to say that they all raise the same issue of government control or government judicial issues relating to judicial compensation. Some of them relate to other issues, as well.

Mr. Kopstein: The actions across the country by the seven provinces are indeed factually based quite differently from each other and, in particular, differently based than the one in Manitoba.

Mr. Kowalski: The Manitoba case that you referred to, is it based on the process of this Judicial Compensation Committee?

Mr. Sinclair: It raises the issue, but it is not based upon anything to do with the process itself. It merely points out that there was a judicial compensation process that in the view of the judges—and, of course, it is now before the Supreme Court, so I do not think I want to comment more than that—should have been followed and was not.

I think most of the actions, I do not know exactly how many, but most of the seven actions are now before the Supreme Court and are scheduled for hearing in the first week of December.

Hon. Vic Toews (Minister of Labour): I think the member for The Maples (Mr. Kowalski) has touched on the issue that I was particularly concerned about. I think that there is a direct bearing on this matter in respect of the present litigation involving, not just the provincial judges here in Manitoba but in other jurisdictions, relating to the terms and conditions of their duties in office.

I am concerned, and I will direct a question, that any decision that this committee might make might further exacerbate this issue, and I do not wish for this committee to in any way be seen as interfering in that very delicate issue. Perhaps it would be prudent for this committee to adjourn pending the decision of the Supreme Court of Canada on this matter, as well as the related matters brought by the provincial judges in other provinces.

In that respect, I would invite your comment, as well as in respect of the issues that you have raised in your brief. I note that from the Manitoba Law Reform Commission of 1989, the report on the independence of the provincial judges, where, while the commission specifically did endorse the establishment of an independent committee for the purposes of determining the remuneration of provincial judges, they however made it very, very clear that the decisions of that committee should in one way or

another be subject to the Legislature determining in fact what that compensation should be. So, on both those issues, the issues of awaiting a decision of the Supreme Court of Canada on all of the pending challenges as well as generally your comments on the issue of whether the Legislature should have the final say in this matter would be appreciated to the extent that you feel able to address those issues.

Mr. Sinclair: Two things. Certainly the report of the Law Reform Commission in its views on the subject influenced our ultimate position insofar as the amendments to the legislation that took place subsequent to its report. That is why the association felt it was important to see if the process would work that the Law Reform Commission itself endorsed and which the government favoured, so we are now engaged in that process. We do not dispute the fact that the Law Reform Commission made that statement, and I think that is generally a statement that has been endorsed in other provinces as well where it has come up for public discussion.

Secondly, insofar as the question of whether this committee should adjourn its proceedings to await the outcome of the Supreme Court action, you should bear in mind, Sir, that the Supreme Court action deals with a period of time different than this committee report deals with, and therefore I do not think they are connected at all.

Mr. Kopstein: It takes me a bit by surprise, Mr. Toews, when you suggest that perhaps the committee should adjourn. Court actions are being conducted often in many places, but government must go on according to the law as it stands, and judges must continue to function, the courts must continue to function.

The Manitoba law is quite clear: the Judicial Compensation Committee makes a recommendation, this standing committee considers it, and then it goes before the Legislature. With great respect, I think that procedure should proceed—that should proceed regardless of the present action before the courts.

Mr. Toews: I appreciate, Judge Kopstein, that the issue at a time under consideration is different, but clearly the issues are similar. Are you stating to this committee that if we were to adopt a position other than the majority

report, that would have no bearing on the Supreme Court of Canada case that you or other provincial judges will be arguing through counsel in the coming months?

Mr. Kopstein: I had not considered that what happens to the recommendation in this committee may have an effect upon what is argued in the Supreme Court. You must remember, however, that the action taken by the judges and now in the Supreme Court is an action on appeal based upon facts and circumstances that arose long before this particular process for this year. If you are suggesting that our council, the judges council, may argue that the committee did not adopt the majority report and say that shows that the committee is not serious about the process, I do not know, I cannot reply. I do not know what counsel will say, but I think notwithstanding that, life must go on. The law says that the committee is to consider it. It is true, you could adjourn it. The judges cannot stop you from doing so, but I think the Manitoba law is clear insofar as this process is concerned, and I think you should make a decision and go on.

* (1030)

Mr. Sinclair: Just two points that I would like to make, Sir. One is that the process in the legislation, I think, is clearly defined. There would have to be some kind of a legislative action at any event, other than just by the committee. In my view, I think the legislation is that clear. But secondly, the impact of a decision to adjourn by this committee, in my view, would have exactly the same impact as a decision by this committee to recommend because a decision not to do something would be just as important to the court, I think, as a decision to do something.

So, as Judge Kopstein has pointed out, I think that certainly the Legislature has the ultimate authority. The legislation does provide for that, but the decision of the Legislature, I think, whatever it does, whether it adjourns it, it adopts it or it rejects it, the impact will be the same one way or the other. So you consider that. It is really not for us to advise you. You have your own legal authorities advising you, I am sure.

That was really all I wanted to add to what Judge Kopstein had said.

Mr. Toews: I was just wondering, and I do not want to push this issue much further—I do appreciate your

comments very much, but I, from some experience that I have had myself before your courts, indeed before both of Your Honours, specifically, I am sure I can recall at least one or two occasions, when pressed for a decision, Your Honours felt that it would be more appropriate to await a pending Supreme Court of Canada decision to ensure that you had the appropriate direction and guidance. Would you not think it appropriate in this circumstance when it is the Supreme Court of Canada who in fact does certainly influence what the Legislature does on a daily basis?

Mr. Sinclair: That is clearly correct, and when we are considering matters before us, if there is a pending matter in the Supreme Court which has a direct bearing on the issues that we are called upon to consider, then I agree. I have often had lawyers make the same request about a decision that was being made by the Supreme Court that had no bearing on what I was considering, and I have refused to allow that request for an adjournment.

Mr. Gord Mackintosh (St. Johns): Since the current regime for assessing judicial compensation was legislated in 1989, we have noticed, over the course of that time, frustration of that process by the government, a process that it brought in itself. The history, I think, of the Baizley report and now the Green report attest to that, and I do not have to go back further, I think, than the spring, when the workings of this committee were frustrated by the neglect of the government to advise the judges of our consideration here in committee.

But, since 1989, we are now in 1996, quite a considerable period of time—and over the course of that period, it would be my thinking that judges in this province would by now have got a message from this government that very little value is being placed on their services to the Manitoba community, and it may well be affecting the morale of individuals serving in the position of Provincial Court judges in this province. I wonder if my supposition is in any way accurate that there is some frustration on the part of the provincial bench and whether there has been increased tensions between the bench and the government of the day, which may not be serving the best interests of the Manitoba community, and I am wondering if you may want to speak to that, either of the witnesses. Clearly, if they feel uncomfortable doing so, they will respond accordingly, but I think it is important for legislators to know, when dealing

with this issue, what the impact will be on people who are serving in this most important role in our society.

Mr. Sinclair: We would like to make it abundantly clear that as judges we recognize our public duty to do what we can and what we are bound to do in terms of our responsibilities in the courts. I want it clear here that the extent to which we are frustrated is reflected in our paper, and I want it known as well that we have a great deal of respect, as judiciary, for the decision-making authority of the Legislature ultimately. That being said, we put a lot of faith in this process to put us in a position in terms of our relationship with the government which, through its majority, controls the Legislature, that the process would be respected and the process would be followed as much as possible, that when it comes to this stage in the process, when the Legislature must be considering what is before it in terms of the report of the Judicial Compensation Committee and it is not accepted or it is not endorsed, it certainly does frustrate our feelings in terms of the process.

That being said, I do want it known that we as judges are constantly aware of our obligation to perform our work in a proper way, to do our work in an appropriate manner, to decide the cases before us in terms of the law that we have and the precedents that we are faced with, and that we strive every day not to be influenced by improper presentations or improper thoughts. That being said, I am sure that we all have our bad days, but we try to put these things behind us as much as possible. We are at a stage now where we are awaiting a decision of the Legislature. Once that decision is made, whatever it might be, then we will get on with our work.

Mr. Chairperson: Judge Kopstein, did you want to comment?

Mr. Kopstein: No, I think that my colleague has covered it well, thank you.

Mr. Mackintosh: My understanding of the court challenge revolves around government's decision on Filmon Fridays and how that impacted on the remuneration of Provincial Court judges. The Supreme Court issue, to my understanding, deals not with annual remuneration as was studied by the Green report. The time under consideration is different from that considered in the Green report, and to my understanding and I would

just like you to confirm, if you can, that the Supreme Court is considering in the Manitoba case the issue of the independence of the judiciary in Manitoba from the government of the day as opposed to the Legislature itself.

Mr. Kopstein: Well, I think that Mr. Mackintosh is quite correct. I think the basis of the Manitoba action is in the Filmon Friday issue and the judicial independence arising out of that. It does involve the action of the government in imposing that upon the judges as well as the civil service and not upon the legislation or this process.

Mr. Sinclair: We have a great deal of trepidation when it comes to discussing a matter that is before the Supreme Court at this point in time, so I want you to understand our hesitation in discussing the issues that the case raises, because I am sure that the government position is that it does not raise only that, it raises other issues as well, so it would not be fair, I think, to summarize the entirety of the case strictly on that point. But I do recommend to any of you who are interested that you read the facts that have been filed by the various counsel involved, including counsel for the intervenors, because they address all of the issues that counsel want to raise before the Supreme Court. While the facts are quite lengthy, I think that they would help you in understanding what the various issues are.

Mr. Mackintosh: It would be our view that failing to once again proceed and failing to proceed in a timely way with the recommendations of the Judicial Compensation Committee in and of itself is a further interference, through inaction, with the independence of the judiciary. It is our view that interference with the sacred underpinning, in our community, of the independence of the judiciary has been demonstrated to an ugly extent in recent weeks, and I do not think this is any time to exacerbate that situation. It is time to get on. I think the government has both a moral and legislated obligation to proceed now, and as the official opposition and as an important part of the Legislature, it is our view that we get down to business and get the matter dealt with.

* (1040)

Mr. Chairperson: I would caution all members of the committee to choose their language very carefully in

discussing or debating this issue, because this is a very sensitive issue before the committee. It will be very difficult for the committee, under the best of circumstances, to come forward with some clear recommendations to government on this matter.

Point of Order

Mr. Mackintosh: On a point of order, Mr. Chair, are you reflecting on comments that I have made in the sense that I have said something unparliamentary. As I would suggest, Sir, that if I have said something unparliamentary, it is your role to call attention to the words that were unparliamentary and to a remedy. If my words were not unparliamentary, Sir, it is not your role to interfere or interpret or in any way put a chilling effect on any comments of a member of the Legislature.

Mr. Chairperson: Mr. Mackintosh, I referred not to anybody making comments. I just cautioned the committee in general and how we proceed and the language we use to describe issues. I am very cognizant of the sensitive issue before us today, and I want to make sure that we proceed in an orderly fashion, so I ask all of you in this committee and those who appear before committee that we very carefully choose our words that we are able to deal with this in the most expeditious manner.

Point of Order

Mr. Mackintosh: On a point of order, Mr. Chair, I suggest to you with the deepest respect that it is not your role to in any way inhibit debate that is legitimate, that is parliamentary, that is within the rules, within Beauchesne, and all members of this House are well aware of their obligations as representatives of the citizens of this province to express views. That was done. Your comments were interjected after my statement. If there is some other language here that is unparliamentary, Sir, I ask you to call that to order.

Mr. Chairperson: I would suggest to you, Mr. Mackintosh, that you read Hansard or the script of this committee, and I think you will find that I have not directed my comments at any specific person. I reflect clearly on procedures, and I caution all members of the committee and those who appear before it to choose your words carefully.

* * *

Mr. Stefanson: Mr. Chairman, I have a couple of questions of Judges Sinclair and Kopstein. I think it is important at the outset—obviously there is a sensitivity because there are issues before the Supreme Court—to remember that Bill 22 was an act of the Legislature endorsed by the Legislature of Manitoba, and to date it has been upheld by the Court of Appeal. That is here in Manitoba, and that is the issue that is now before the Supreme Court.

I do take some exception to some of the comments made by the member for St. Johns (Mr. Mackintosh) when he goes so far as to suggest that the government puts little value on the services of our provincial judges, because that certainly is not the case. We recognize the role you play, value the role you play and respect the role you play on behalf of Manitobans, so I want to assure you and all provincial judges and refute the comments made by the member for St. Johns.

I do have a couple of questions. Reading some of the background material and the submissions, is it fair to say that provincial judges support the principles, and I will outline two principles, one, ability to pay, recognizing governments particularly today are very much focusing on living within their means? That is certainly what taxpayers are telling governments right across Canada. That seems to be a fairly fundamental principle being adopted by governments of all political stripes right across our country. I believe judges support that principle of taking into consideration the ability to pay of the taxpayers of the province and of the country—secondly, the issue of consistency with individuals who earn their compensation from taxpayers, that there should be a form of consistency and fairness in dealing with individuals earning their compensation from taxpayers.

Could both of you comment? Am I correct to interpret that judges do, in fact, support both of those principles?

Mr. Kopstein: The judges, I think, would have to live in Mars if they did not recognize that governments must look at ability to pay. That cannot be denied. On that ground, I do not think we can deny it, Mr. Stefanson. It is a question of how a committee looks at it, and it is a question, as well, as defining ability to pay, because there are so many factors and there are so many priorities. A

government might put some particular area of endeavour in priority to another area. Priority to pay depends upon government priorities and its will, I think. So priority to pay is, in principle, right. We cannot argue with it, but it is a question of priorities how that is applied. There must be, in my view, a process of doing that, and it is my submission, I think both of our submissions, that the Green committee has looked at what the priorities are and has considered ability to pay in the appropriate light.

Consistency—do I understand you, Sir, to mean consistency with other people who receive pay from the taxpayer? Are you talking about consistency in that sense?

Mr. Stefanson: Yes, in terms of individuals who earn their pay from money derived from taxpayers and/or consistency of the staffing in total.

Mr. Kopstein: With this qualification, Sir, that judges, like deputy ministers, are unique in the roles that they have. I think that it is probably correct to say that when government looks at what it has to pay a deputy minister, there is no one to whom it can compare that person. It has to look at what deputy ministers receive in other provinces, in other jurisdictions, because if it does not look in that direction, it cannot compete. If a deputy minister is highly qualified and Ontario or Nova Scotia are paying more, they are not going to keep the deputy minister here. So a deputy minister's role is unique because there is no one to compare it with. Similarly, a judge's role is unique because there is no one else to compare it with. So, when the Green committee and the Baizley committee said that there is logic in the proposition that you compare with other provincial judges across Canada, it was in that context that I think they came to that conclusion.

Having said that, that cannot be the only, and certainly should not be the only, factor that is looked at, because Manitoba has to pay its judges out of its resources. So a committee and anyone looking at salaries should properly look at what the salary ranges are within Manitoba, and judges should be placed within that salary range, in my opinion.

Mr. Chairperson: Judge Sinclair, do you wish to comment?

Mr. Sinclair: We had no problem with the issue of ability to pay being put before the committee. We did not agree with, of course, the matter becoming the be-all and end-all of the ultimate recommendation, and that view I think was endorsed by the Green committee itself which clearly considered the issue of ability to pay and took that into account in making its recommendation, but we do distinguish between ability to pay and willingness to pay. The issue of ability to pay I think fairly had to be put before the committee, and the committee in considering it made its determination about the role that it played. I think it has a role to play, but it is not and should not be the ultimate factor. I think it has to be factored into other things.

As far as consistency is concerned, we just point out I do not know to what extent there is consistency, because the members of the Legislature and senior officials of government appear not to be bound by rules that apply to other members of the civil service. I do not mean to get into that debate, but for us the issue of judicial compensation, in our view, whatever the ultimate result is, should be a matter that is determined through an independent process, independent from government. That is our primary concern.

* (1050)

If the Green committee, quite frankly, came up and said that there should be no increase to judges because of the government's inability to pay, then we would have lived with that. Their recommendation is a modest increase, but nonetheless—and it is certainly less than we had asked for, but we have to live with that, because it is a process that we have endorsed, it is a process that we have put our faith in in terms of allowing us to function in a manner that is not directly controlled by government. Whatever the committee report says in its majority decision we feel should be respected. We quite frankly do not like everything that it says, but we are prepared to live with it and get on with our lives.

I do want to make one point that I had missed mentioning earlier, and it had been raised with me, the issue that Minister Toews had raised about adjourning the proceedings pending the outcome of the legal process. I do want to recommend to the members of the Legislature that they reread Justice Scollin's decision in the Court of Queen's Bench. He stamped all over our

arguments, we acknowledge that, but he did make one thing perfectly clear that in his view, the judicial compensation process identified in the legislation that we are now discussing can proceed, even in the absence or even in the presence of the other legislation that was before the court and in the presence of litigation that was proceeding. So I think he made that point very clear.

Mr. Stefanson: Just one more question, and thank you for your responses. Judge Kopstein referred to the issue of the salary range in comparison to other provinces and also factoring in to a certain extent what is taking place in our province. The other issue recommended by the Green report is this issue of a pension adjustment, taking the supplementary judicial pension plan, instead of the implementation I believe being July '92, that it would in effect apply for all judges today. We really have not touched on that, and I would be interested in your responses.

I am sure when all of you—Judge Kopstein touched on—when you accepted your appointments you obviously knew what the compensation was. You also knew what the pension arrangement were, what the pension plans were, and I am sure at whatever age and state of life you were at that point in time you take all of those factors into consideration, probably anticipate what your pension might well be when you reach the age of retirement and so on, and I guess one could certainly argue that both of you accepted positions knowing that very clearly, knowing what the pension would be, and factoring out what it would mean for you when you retired. Therefore, I guess I would question the need to make an adjustment prior to the adjustment that was made in 1992. I would be interested in your comments.

Mr. Kopstein: Mr. Stefanson, you have echoed the question put to us by Mr. Benson at the compensation committee hearing. I guess it is a proper question to which I have no very good answer. I would point out that the whole reason for an enhanced pension for judges is that judges are normally not appointed until the ages of 40 to 45. That was the reason that the government enacted the enhanced pension arrangements. If that is recognized that the pension that judges can get under the civil service pension plan is not adequate for judges, the question can be asked, notwithstanding that I knew when I was appointed what the pensions were or should have known, one can ask the question why it should not apply

retroactively to all judges if in fact those judges who were appointed 25 years ago are not going to have an adequate pension.

Mr. Benson put the question more bluntly. He said, why do you think the taxpayers should support you if you did not look after yourself when you were younger, in a pension? My answer is this, that most lawyers, unless those who have independent wealth from some source, most lawyers who start in practice are not in any position to save money until well into the 40s or 50s. They are busy buying houses and cars and raising and educating children. People who begin to save money, they do it in the later years, my age, when they get old, when they do not have those responsibilities. Then the income that you earn can be put away into savings—not quite my age, even younger than me. But that is the only answer, Sir, that I can give you to the question that you put.

Mr. Kowalski: We brought up the subject of ability earlier, and I refer to the Wally Fox-Decent report in regard to the MLAs' pay and compensation, and I have read the addendum by Harold Piercy in which he addresses the ability to pay in this Judicial Compensation Committee. Do you think this committee put any more or any less weight than the Wally Fox-Decent committee did in ability to pay when it decided how much to pay MLAs?

Mr. Kopstein: I am going to defer to Judge Sinclair on that. I do not know.

* (1100)

Mr. Sinclair: I have read both reports, and to be honest with you, I did not compare it on that basis as to whether they were given equal consideration. I suspect that different factors were taken into account in terms of the Wally Fox-Decent committee report than occurred in terms of our report, because I know that ability to pay was considered as a factor in both committees; but it again was not the ultimate factor, it was not a deciding factor, I guess, is the way that I would put it.

And I think that is fair, because the compensation committee process involving both groups has got to take into account different factors other than just ability to pay, and that factor of ability to pay will weigh more or less as against other factors that come before it.

Mr. Kowalski: The other thing that we talked earlier about, the process, the importance of the process, because now we are in a committee of the Legislature, and hopefully this report will be recommended to go to the Legislature for approval, its recommendations. It becomes a political issue, and the public perception, of course, is: you know, we went through this with deciding the pay for MLAs is very sensitive in that, for someone making \$5 an hour, for an MLA to be making \$57,000 seems ridiculous, for MLAs making \$57,000 to look at judges making \$90,000.

Do you think it is an important issue here, important to the process that the public perception does not influence the pay that the judges get in Manitoba to keep their independence intact?

Mr. Sinclair: You are talking to representatives of a group of people who try to distance themselves from public perception in our decision-making process, and I recognize that I am talking to a group of people who try to attach themselves to public perception in terms of their decision-making process, so we are coming from different directions on that issue, quite frankly.

Obviously, our view would be that the public perception certainly is a factor to take into account, and it has to be considered, but the reality is that when we are dealing with this process, that again should not be the determining factor. It is an issue—and again, I suspect it is going to have more weight for you, as politicians. I am talking to, of course, all the members who are here, and maybe within this group, it will have more or less weight for individuals, depending on which side of the issue you are on, but the reality is that for us as judges, that is a battle that we cannot win, quite frankly. That is why, again, it is important, we believe, just as it is important for members of the Legislature, to place that process outside of the political arena as much as possible.

That is why originally, when we put the matter forward, we felt that because we, as judges, did not want to get caught up in the political arena too much, an independent process which made a recommendation that the government had to act upon was a better process than a process which put us, ultimately or initially, in the public arena, in the public debate. Because in a public debate, quite frankly, we acknowledge that we cannot win that, and I think you would acknowledge that as well, I

believe. It would be hard, and it is hard to justify increasing a \$90,000 salary as against increasing the minimum wage in this province. I acknowledge that. But the issue for us is that whatever the compensation process ultimately ends up in, it has to be a process that is independently and fairly determined to the judges as well as the public.

Mr. Chairperson: Judge Kopstein, did you wish to make a comment?

Mr. Kopstein: No, thank you, Mr. Chairperson, I have nothing further to say on that.

Mr. Chairperson: Are there any further comments or questions? If not, I would thank the honourable judges for—

Mr. Sinclair: I just wanted to make a closing remark, if you do not mind, and it is not controversial, I hope.

Mr. Chairperson: By all means.

Mr. Sinclair: First of all, I was going to point this out at the beginning, but I forgot to. That is that if you are wondering what two judges are doing here at ten o'clock in the morning when the courts are sitting, Judge Kopstein has a court sitting this afternoon that he is going to do, and I have stolen an office day away from another member of the court who is taking my court this morning so that we can be here.

But I do want to thank the members of the committee and Mr. Chairperson for allowing us to be here and giving us this time to make our presentation, and if there is anything else that you require of us, please let us know.

Mr. Chairperson: Thank you very much for your presentation. Just one further comment, and I do not know whether this is appropriate of the Chair, but there are a number of members in this Legislature that sat here till four o'clock this morning similarly, and maybe they have somebody else sitting in their place at this table today. Thank you very much for your presentation.

What is the wish of the committee? How do you wish me to proceed from here on? We have heard a number of recommendations here today, and if you would bear with me, I would suggest to the committee that we give due

consideration to those recommendations that we have made. They include reading material that has been presented, and I think that might have a bearing on the outcome of the decision of this committee. So I would recommend that we adjourn this committee for a very short period of time to give consideration to the comments that have been made to us today and consider those comments before a decision is rendered by this committee.

So I would ask that this committee be called again relatively soon to give due consideration and make recommendations to government. Is that the will of the committee?

Mr. Mackintosh: We have been sitting on this for a long time. We came here in the spring and went away. The recommendations; I am sure, have been reviewed, and the presentations today, I do not think, were in any way obscure, I think were directly to the point, and it would be our thinking that we should get on with our business that we are obligated and obliged to do and consider the recommendations now.

Mr. Chairperson: It is, of course, up to the committee, how they wish to proceed on this matter. It is, however, I think of importance that there were a number of issues raised and considerations made. Mr. Stefanson, did you wish to comment?

Mr. Stefanson: Yes, Mr. Chairman, I am not clear from the member for St. Johns' comments whether that means he is prepared today to accept the majority report from the Green committee. Is that what he is suggesting? I would be curious or interested in that.

I think you do raise a valid point, that this is the first opportunity that we have had to hear very directly from the judges, and even though they read their briefing into the record, they have provided us with a copy of the briefing. They have raised some very significant issues, and my sense would be similar to yours, that to do justice and give due consideration to the issues that we should adjourn with a view to be reconvening very shortly to make decisions and recommendations to the Legislature. But, I think, unless members of both the other opposition parties already came to this committee with their minds made up and are prepared to support the majority report, from my point of view, I think we should be giving due consideration to the comments made here this morning.

Mr. Chairperson: Are there any further comments? If not, then I would adjourn the committee. Is it the agreement of the committee then that we adjourn? [agreed]

The committee stands adjourned.

COMMITTEE ROSE AT: 11:06 a.m.