

March 27, 2001

Hon. Andy Scott, P.C., M.P.
Chair
Standing Committee on Justice
and Human Rights
House of Commons
180 Wellington Street
Ottawa ON K1A 0A6

Dear Mr. Scott,

**Re: Bill C-12, *Judges Act* Amendments
Submission of Canadian Bar Association**

The Canadian Bar Association supports the introduction of Bill C-12, *Judges Act* Amendments, and urges that it be passed without amendment.

Bill C-12 Promotes Judicial Independence

Judicial independence is a foundation of our democracy because it is an essential component of the rule of law. We depend upon democratically elected legislators to enact our laws. We depend upon the executive, chosen from those legislators, to enforce those laws. We depend on the judiciary to interpret those laws. To ensure the supremacy of the rule of law – that our nation is governed by laws as opposed to individuals – we need objective guarantees that our judiciary will interpret the laws independently from the other two branches of government and free from any other outside influences.

Judicial independence protects individuals against the abuse of state power by ensuring neutral adjudication of disputes between individuals and their governments. Members of the public must be confident that their legal disputes will be decided by judges who are free from any influences whatsoever. Without that confidence, the legitimacy of the legal system and of the rule of law is undermined.

An essential component of judicial independence is financial security. Financial security ensures that judges decide – and are seen to be deciding – cases free of economic influences. Every person who comes before a court has the right to expect that the judge is not anxious to please the government paymaster or susceptible to receiving economic incentives from unscrupulous parties. Financial security therefore requires that judicial compensation:

- be enshrined in legislation;
- be set in a manner which avoids the trade-offs usually associated with traditional negotiation; and
- be at a sufficient level to alleviate concerns that judges will be susceptible to outside economic influences.

The independent Judicial Compensation and Benefits Commission is a constitutional requirement,¹ established principally to meet the second and third criteria, above, and also to depoliticize the process of setting judicial compensation. Although the Commission's recommendations are non-binding on the executive and legislature, the Supreme Court of Canada has held that they should not be set aside lightly.² The executive and legislature must give reasons for any decision to depart from its recommendations based on a standard of simple rationality.

Bill C-12 promotes financial security for members of the judiciary and incorporates most of the recommendations of the Judicial Compensation and Benefits Commission. In the CBA's view, the Bill enhances judicial independence.

Bill C-12 Helps to Attract High Quality Candidates

The proper functioning of our judicial system depends on a high level of judicial competence and quality. Judges' salaries and benefits, including the benefits for their families, must be at a level to attract the best and most qualified candidates to the judiciary. They must also be commensurate with the position of a judge in our society and must be reflective of the respect with which our courts are to be regarded.

Before the Judicial Compensation and Benefits Commission, the CBA expressed concerns that judicial salaries are falling farther and farther behind those of senior practitioners, who form the pool from which judges are selected. In making its recommendations, which are reflected in Bill C-12, the Judicial

¹ *Reference re: Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3.

² *Ibid.*

Compensation and Benefits Commission considered the appropriate level of salary and benefits to ensure we continue to attract the best and brightest judges.

In the CBA's view, the Bill will enhance the government's ability to attract high quality candidates.

Bill C-12 Will Increase the Diversity of the Judicial Population

The CBA supports improvements to judicial compensation which enhance the proportion of judges who are women and, indeed, which enhance the overall diversity of the judicial population. Currently, about 23 per cent of judges are women, which does not adequately reflect the overall population.

Bill C-12 provides judges with some flexibility in terms of early retirement options. This will encourage younger candidates, many of whom are female, to apply for the judiciary.

A Cautionary Note on Parliamentary Review of the Bill

This is a Bill unlike many others because it is the culmination of a constitutional process. As a result, it engages a special obligation on the part of Parliamentarians to transcend partisanship. The Constitution requires the setting of judicial salaries to be objective, dispassionate and rational. The intention behind establishing judicial compensation commissions is to provide an effective and non-partisan method of reviewing and setting judicial remuneration. Parliament's consideration of the Commission's report involves special constitutional considerations, which risk being endangered by a politicized approach and by making any links between judges' remuneration and the decisions they make.

While some Parliamentarians may have concerns about judicial decisions or about judicial decision-making generally, we suggest Bill C-12 is not the appropriate context to raise such issues. Judicial independence demands that compensation issues remain separate from issues surrounding particular judicial decisions. The public's perception of judicial independence may be damaged if Parliamentarians suggest that compensation should be reduced or withheld because of dislike of particular decisions. Parliamentarians must avoid making direct links between judicial decisions, either specifically or generally, and compensation issues.

This is not to say that your Committee should avoid careful consideration of the Bill. Rather, that consideration should focus on the rationality of the proposals themselves and not on issues extraneous to compensation.

The CBA thanks you for the opportunity to present our views on this matter.

Yours truly,

A handwritten signature in black ink that reads "Daphne E. Dumont". The signature is written in a cursive, flowing style with a large initial 'D'.

Daphne E. Dumont, Q.C.