Submission on Bill C-17
Judges Act Amendments

CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Judicial Compensation & Benefits Committee, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Canadian Bar Association.

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I. INTRODUCTION

The Canadian Bar Association (CBA) welcomes the opportunity to express its views on the May 2006 Response of the Government of Canada (the Government Response) to the Report of the 2003 Judicial Compensation and Benefits Commission (the 2003 Commission Report) and Bill C-17, *An Act to amend the Judges Act and certain other acts in relation to courts.*

The CBA remains committed to protecting the independence of the judiciary from the executive and legislative branches of government. Independence and impartiality of the judiciary are cornerstones of Canada's legal system and, by extension, of our democracy itself. The CBA also recognizes the pivotal role that the process for determining judicial compensation and benefits can have in fostering or eroding that independence. With this in mind, the CBA makes regular submissions to federal Judicial Compensation and Benefits Commissions. Most recently, the CBA presented submissions to the 2003 Judicial Compensation and Benefits Commission (the 2003 Commission).

The CBA is concerned that the Government Response fails to pay adequate heed to the constitutional imperative to depoliticize the process of setting of judicial salaries and benefits, in accordance with the principles set out by the Supreme Court of Canada.

More particularly, the Government Response fails to provide adequate reasons, and evidence in support of those reasons, to deviate from the salary recommendations in the 2003 Commission Report. Its reasons suggest a tension between the salary increase recommended by the 2003 Commission and the "other economic and social priorities of the Government". However, the Government Response provides only generalized statements that other priorities exist, without supporting in any way the conclusion that implementing the recommendations in the Commission Report would have any bearing on these priorities.

In context, a reader of the Government Response is drawn to the conclusion that Government has chosen to disregard the recommendations of the 2003 Commission simply because it does not agree with the Commission Report. Such a perception undermines the depoliticizing effect of the Commission process, and thereby further risks damaging judicial independence and public support for the administration of justice.

Despite the CBA's concerns about the failure of the Government Response, and therefore Bill C-17, to meet this constitutional imperative, we believe that further delays will also have a negative effect upon judicial independence. In balancing these factors the CBA recommends that Bill C-17 should be amended to reflect the recommendations of the 2003 Commission with all due dispatch. If this is not possible, and it is necessary to pass Bill C-17 in its current form to avoid further delay, then the CBA recommends that the Standing Committee provide some guidance to the Government on the defects in its Response. In particular, the Standing Committee should comment on the Government's reliance on its "other priorities" to deviate from the recommendations in the 2003 Commission Report as failing to meet the test of rationality, especially in the absence of specific information about these other priorities, their costs, and its ability to comply with the recommendations in light of these costs.

II. CONSTITUTIONAL IMPERATIVE OF JUDICIAL INDEPENDENCE

An independent judiciary is a cornerstone of a democratic society. An independent judiciary is "the lifeblood of constitutionalism in democratic societies"[1]. "Judicial independence serves not as an end in itself, but as a means to *safeguard our constitutional order and to maintain public confidence in the administration of justice*."[2]

More recently, the Supreme Court of Canada has explained:

> Independence [of the judiciary] is necessary because of the judiciary's role as protector of the Constitution and the fundamental values embodied in it, including the rule of law, fundamental justice, equality and preservation of the democratic process.[3]

1 *Beauregard v. Canada,* [1986] 2 S.C.R. 56 at 70.

2 *Ell v. Alberta,* [2003] 1 S.C.R. 857 *("Ell")*, at para. 29.

3 *Provincial Court Judges Association of New Brunswick v. New Brunswick (Minister of Justice) et al.* [2005] 2 S.C.R. 286, 2005 SCC 44 (the *"Provincial Judges Ass'n of New Brunswick"*), at para 4.

Judicial independence has three components: security of tenure, administrative independence and financial security.[4] The Commission process addresses the third of these three components.

The financial security of the judiciary, in turn, embodies three constitutional requirements:[5]

1. Judicial salaries can be maintained or changed only by recourse to an independent commission;
2. No negotiations are permitted between the judiciary and the government; and
3. Salaries may not fall below a minimum level.

These three requirements exist in order to preserve the principle that not only must the judiciary be independent – but it must be *seen to be independent* from the executive and legislative branches of government:

> However independent judges were in fact, the danger existed that the public might think they could be influenced either for or against the government because of issues arising from salary negotiations. The *Reference* reflected the goal of avoiding such confrontations. Lamer C.J.'s hope was to 'depoliticize' the relationship by changing the methodology for determining judicial remuneration…[6]

The constitutional method for determining judicial remuneration is through a commission which is independent from both government and the judiciary – beholden to neither "party". The commission process is most frequently described as being an "institutional sieve",[7] and "a structural separation between the government and the judiciary".[8]

III. JUDICIAL INDEPENDENCE AND GOVERNMENT RESPONSE TO COMMISSION RECOMMENDATIONS GENERALLY

The CBA recognizes that "the Constitution does not require that commission reports be binding".[9] Ultimately, *within constitutional limits*, "the power to determine judicial compensation belongs to governments".[10] However, this requires that a Commission's findings not be set aside lightly.

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4 *Valente v. The Queen*, [1985] 2 S.C.R. 673 ("*Valente*") at pp. 694, 704; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Reference*"), at para. 115; and *Provincial Judges Ass'n of New Brunswick*, *supra* note *3,* at para. 7.

5 *Reference, supra* note 4, at para. 131-135; and *Provincial Judges Ass'n of New Brunswick*, *supra* note *3,* at para. 8.

6 *Provincial Judges Ass'n of New Brunswick*, *supra* note *3,* at para. 10.

7 *Reference*, *supra* note 4, at para. 170; and *Provincial Judges Ass'n of New Brunswick*, *supra* note 3, at para 14.

8 *Provincial Judges Ass'n of New Brunswick*, *supra* note 3, at para. 14.

9 *Provincial Judges Ass'n of New Brunswick*, *supra* note 3, at para. 20.

10 *Provincial Judges Ass'n of New Brunswick*, *supra* note 3, at para. 22.

In *Provincial Judges Association of New Brunswick*, the Supreme Court clarified that, in order to be constitutional, the government must articulate reasons for its decision to depart from recommendations made by a commission.[11] This requirement to give reasons is illuminated by three further principles:

- The government must give "rational reasons"[12] for departing from Commission recommendations. This has also been described as the need to give "legitimate" reasons.[13] The Supreme Court has further explained:

> Reasons that are complete and that deal with the commission's recommendations in a meaningful way will meet the standard of rationality. Legitimate reasons must be compatible with the common law and the Constitution. The government must deal with the issues at stake in good faith. Bald expressions of rejection or disapproval are inadequate. Instead, the reasons must show that the commission's recommendations have been taken into account and must be based on facts and sound reasoning. They must state in what respect and to what extent they depart from the recommendations, articulating the grounds for rejection or variation. The reasons should reveal a consideration of the judicial office and an intention to deal with it appropriately. They must preclude any suggestion of attempting to manipulate the judiciary. The reasons must reflect the underlying public interest in having a commission process, being the depoliticization of the remuneration process and the need to preserve judicial independence.[14]

- Reasons given by a government to reject a commission recommendation must also have a reasonable factual base:

> The reasons must also rely upon a reasonable factual foundation. If different weights are given to relevant factors, this difference must be justified. Comparisons with public servants or with the private sector may be legitimate, but the use of a particular comparator must be explained. If a new fact or circumstances arises after the release of the commission's report, the government may rely on that fact or circumstance in its reasons for varying the commission's recommendations. It is also permissible for the government to analyze the impact of the recommendations and to verify the accuracy of information in the commission's report.[15]

- When a court is called to review a government's response to a commission recommendation, it is to show deference to government because of the government's "unique position and accumulated expertise and its constitutional responsibility for management of the

11 *Supra,* note 3, at paras. 24-27.

12 *Provincial Judges Ass'n of New Brunswick*, *supra* note 3, at para. 21.

13 *Reference*, *supra* note 4, at para. 24.

14 *Provincial Judges Ass'n of New Brunswick*, *supra* note 3, at para. 25.

15 *Provincial Judges Ass'n of New Brunswick*, *supra* note 3, at para. 26.

[jurisdiction's] financial affairs."[16] Therefore, when there is a judicial review of a government response, the reviewing court must be satisfied that a third element is present, before intervening. Specifically, the court must ask itself the following, third, question:

> Viewed globally, has the commission process been respected and have the purposes of the commission – preserving judicial independence and depoliticizing the setting of judicial remuneration – been achieved?[17]

The third principle is engaged at the point of judicial review of a government response to a commission report. Substantial deference by a court to a government response is also appropriate because it also maintains public confidence in the judiciary – assuring the public that the Court itself is not influenced by its own self-interest.

The underlying basis for these requirements rests, as always, on the need to maintain public confidence in the separation between government and the judiciary. As a guiding principle, when the Standing Committee reviews a government's response to a commission report, it should ensure that reasons are not incomplete, generalized or lacking particulars. Reasons which fail in any of these measures will ultimately undermine public confidence in the separation between government and the judiciary, and therefore fail to meet the constitutional imperative that commission reports have a "meaningful effect".

IV. GOVERNMENT RESPONSE TO THE 2003 COMMISSION REPORT

With respect, the CBA believes that the Government Response is so generalized, and so lacking in particulars, it fails to give a "meaningful effect" to the 2003 Commission Report.

The Commission recommended a 10.8% salary increase effective April 1, 2004, inclusive of statutory indexing after considering submissions from the Government and the judiciary. The Government has identified two reasons for rejecting the salary proposal in the 2003 Commission Report, and substituting an alternative increase of 7.25% effective April 1, 2004:

16 *Provincial Judges Ass'n of New Brunswick*, *supra* note 3, at para. 30.

17 *Provincial Judges Ass'n of New Brunswick*, *supra* note 3, at para. 31(3).

- The Government concluded that the Commission did not give sufficient consideration to the statutory criterion prescribed in section 12(1.1) of the *Judges Act,*[18] stating:

> [T]he first statutory criterion itself recognizes that legitimate expectations in terms of judicial compensation are conditioned by the fact that judges are paid from the public purse – upon which there are many competing and legitimate demands. Canadians expect that any expenditure from the public purse should be reasonable and generally proportional to all of these other economic pressures and fiscal priorities. In sum, the Government does not believe that the Commission's salary recommendation pays adequate heed to this reality, as embodied in the first statutory criterion.[19]

- The Government places different weight than the 2003 Commission on the need to increase salaries in order to attract outstanding candidates to the judiciary. More specifically, the Government has taken the position that the comparator groups chosen by the 2003 Commission as providing salary comparisons was "misguided".[20] More significantly, the Government has concluded that the 2003 Commission "put excessive weight on the income of lawyers from eight urban centers, resulting in an inflated income proposal that is well beyond what is reasonable across Canada."[21]

The CBA is of the view that the second reason in the Government Response meets the constitutional standard. The Government's decision to substitute as a comparator "incomes at the 75th percentile across all provincial centres, urban and rural" is not the comparator used by the 2003 Commission (and would not, necessarily, have been the comparator that the CBA would recommend). Nonetheless, the Government has articulated a legitimate reason for departing from the Commission's recommendations in this regard and has supplied a reasonable factual foundation for its decisions.

However, the CBA does not believe that the Government's first reason for deviating from the salary recommendations is faithful to the constitutional standard. The Government Response suggests a tension between the recommendations of the 2003 Commission and the "other economic and social priorities of the Government". However, it provides only generalized statements that other priorities

18 R.S.C. 1985, c. J-1, as amended. Section 26(1.1) establishes the criteria by which the adequacy of judicial compensation is to be measured. The first of these is the "prevailing economic conditions in Canada, including the cost of living and the overall economic and financial position of the federal government."

19 Government Response, pp. 6-7.

20 See page 7 of the Government Response, with reference to consideration of the full average 'at risk' pay in calculating Deputy Ministerial salaries.

21 Government Response, p. 7.

exist, without supporting in any way the conclusion that implementing the recommendations of the 2003 Commission would have any bearing on these priorities.

The evidence upon which the Government relies to show that "economic pressures and [competing] fiscal priorities"[22] were not properly weighed in the Commission Report is in two paragraphs of the Government Response:

> In its 2006 Budget, the Government identified its key priorities, including measures to enhance accountability, create greater opportunity for Canadians, invest in our families and communities, protect Canadians' security and restore fiscal balance. Among other measures, the Government has committed to reducing the Goods and Services Tax, lowering personal and corporate income taxes, introducing Canada's Universal Child Care Plan, investing in Canada's military, hiring more Royal Canadian Mounted Police officers and working to develop a Patient Wait Times Guarantee.
>
> At the same time, and as importantly, the Government is committed to ongoing fiscal responsibility in order to ensure our future economic health and prosperity. Accordingly, we have committed to reducing the national debt by $3 billion each year, starting in this fiscal year, as well as to reducing growth in federal spending to a more sustainable level. The President of the Treasury Board has been tasked with identifying $1 billion of savings in 2006-07 and 2007-08 in order to support new and on going program expenses that are expected to grow by 5.4% in 2006-07 and 4.1% in 2007-08.[23]

Although the Government identifies its "key priorities" and refers to other budgetary objectives it is pursuing, there is no explanation as to how or why the implementation of the recommendations of the 2003 Commission would impair or affect the ability of the Government to pursue these goals or objectives. There is no substantive explanation nor adequate justification as to how or why the recommendation of the 2003 Commission is not reasonable and generally proportional to all of these other economic pressures and fiscal priorities. In the absence of further explanation, the basis for the Government's rejection of the Commission Report is a conclusion, not a reason.

To quote again from the Supreme Court of Canada, "reasons must also rely on a reasonable factual foundation. If different weights are given to relevant factors, this difference must be justified. Comparisons with public servants or with the private sector may be legitimate, but the use of a particular comparator must be explained."[24] To quote further from the Supreme Court of Canada:

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22 Government Response, p. 10.

23 Government Response, p. 6.

24 *Provincial Judges Ass'n of New Brunswick*, *supra note* 3, at para. 31(3)

> It is obvious that, on the basis of the test elaborated above, a bold expression of disagreement with a recommendation of the commission, or a mere assertion that judges' current salaries are "adequate", would be insufficient.[25]

The CBA accepts that judges are paid from the government purse and that the competing demands on public monies can mitigate the amount that might otherwise be paid for judicial salaries. The CBA further accepts that a dollar spent on judicial salaries or benefits is a dollar that cannot be spent on another priority (or not collected). However, judicial independence is not just a government priority, it is, for the reasons expressed above, a constitutional imperative. It is for this reason that any decision to deviate from a Commission recommendation not only should, but must, be based upon more than a simple conclusion.

A reasonable reader of the Government Response is left with the impression that, so far as it relies on the "economic conditions and the overall economic and financial position of the Government" as a reason to disregard the 2003 Commission Report, the Government simply thought that the recommendation was "too high" and that a lower salary level was "adequate". This does not meet the constitutional standard.

V. PARLIAMENT'S CONSIDERATION OF JUDICIAL COMPENSATION AND BILL C-17

The CBA cautions against the potential for Parliament *itself* to increase the likelihood of politicizing judicial compensation issues, as the Scott Commission pointed out.[26] Any attempt within Parliamentary deliberations to make direct links between judicial decisions, either specifically or generally, and compensation issues in evaluating Bill C-17 would have the effect of eroding judicial independence and should not be countenanced.

The CBA believes that Members of Parliament and Senators should focus upon whether the reasons in the Government Response pass constitutional muster. It is these reasons that underlie the salary portions of the Bill. However, the deficiencies of the Government Response must be weighed against the impact of further delays in implementing changes to judicial compensation in the wake of the 2003 Commission report. In his letter to all parties dated October 27, 2005, then CBA President Brian Tabor

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25 *Provincial Judges Ass'n of New Brunswick*, *supra* note 3, at para. 39.

26 Canada, Department of Justice, *Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits*, September 30, 1996 (the "Scott Commission") at 10.

expressed the concern that "implementation of the Commission's recommendations has been delayed to respond to the political exigencies of the day."[27] This delay has had a politicizing effect on the process of determining judicial compensation and has eroded the effectiveness of the Commission's role in the process. It also has permitted judicial salaries to fall further and further behind those of senior practitioners, who form the pool from which judges are selected.

The Government Response represents the latest in a long line of government decisions, both federally and provincially, to disregard the recommendations of judicial compensation commissions. In the absence of the unique circumstances of delay in responding to the 2003 Commission Report, which we hope will never be repeated, the CBA would have recommended that Bill C-17 not be passed. However, these circumstances cannot be ignored. The CBA recommends that Bill C-17 be amended to reflect the recommendations of the 2003 Commission with all due dispatch. If it is not possible to amend Bill C-17 without further delays, then Bill C-17 should be passed to mitigate the harm to judicial independence that has already occurred. However, if Bill C-17 is to be passed in its current form, the CBA recommends that the Standing Committee use this opportunity to comment upon the lack of legitimate reasons in the Government Response. This will provide guidance to the Government in responding to the recommendations of the next quadrennial Commission, which is likely to start its proceedings shortly.

VI. CONCLUSION

The CBA has concerns about whether the Government's reasons to depart from the recommendations of the 2003 Commission Report comply with constitutional requirements. The best outcome for judicial independence would be for Bill C-17 to be amended without delay to comport with the recommendations of the 2003 Commission. However, if the passage of Bill C-17 is necessary to prevent further delay and consequential harm to judicial independence, the CBA recommends that in the Standing Committee's report to Parliament it identify the deficiencies of the Government Response.

27 Available online: http://www.cba.org/CBA/submissions/pdf/05-45-eng.pdf.