OFFICE OF THE PRESIDENT
CABINET DU PRÉSIDENT

March 24, 2006

Chief Justice Gerard E. Mitchell
Supreme Court of Prince Edward Island
Appeal Division
42 Water Street
Charlottetown, Prince Edward Island
C1A 3K7

Dear Chief Justice:

Re: CJC Report on Alternative Models of Court Administration

Thank you for your recent letter of March 9, 2006.

I write on behalf of the Canadian Bar Association regarding the report of the Subcommittee of the Canadian Judicial Council's Administration of Justice Committee, entitled, *Project on Alternative Models of Court Administration* (the Subcommittee Report). Thank you very much for the opportunity to review the Subcommittee report and to comment on this important initiative. We appreciated the comprehensiveness of the report, and its synthesis of relevant information, including current views of those involved in court administration, the current state of Canadian law on judicial independence and innovations in other jurisdictions.

The CBA remains committed to protecting the independence of the judiciary from the executive and legislative branches. That independence is a cornerstone of our system and, by extension, of our democracy itself. The extent of judicial autonomy over court administration plays a critical role in fostering or eroding that independence. We wish to make some general comments on the Subcommittee Report, with the hope providing further specifics to the Subcommittee in the near future.

The CBA's interest in the impact of court administration on judicial independence is long-standing. The findings of the *Report of the Canadian Bar Association on The Independence of the Judiciary in Canada* dated August 20, 1985,[1] on this point continue to resonate:

> Our system of justice and the independence of the judiciary both require that the environment and the surroundings of the system be conducive to the respect due to the institution. Where judges are required to officiate in inadequate surroundings or "bargain" for adequate facilities and supplies the system suffers.

[1] The Report was chaired by Louis-Philippe de Grandpré and is hereinafter referred to as the de Grandpré Report.

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> The common element which runs through all these incidents is the failure of the executive to appreciate the relationship which should exist between the executive and the judiciary – to recognize that the judiciary must be independent of government. One way to safeguard the independence of the judiciary is to provide adequate administrative arrangements for Canada's judges and courts, thereby reducing the involvement of the government, and in particular the executive, in the operation of the courts.[2]

We read with concern that since the de Grandpré Report, it appears that certain developments have strengthened executive control over court administration even further. The Subcommittee Report states that the success of the model "has often in the past depended on the level of trust and communications that exist among specific persons occupying key decision-making positions – and their dedication and willingness to make modifications to the pure executive model,"[3] however, it indicates that these informal arrangements can no longer sustain a proper balance between the role of the executive and that of the judiciary in court administration. The reasons for this include diffused responsibility for court administration from the Attorney General to a variety of government departments and bodies,[4] that the Attorney General's willingness and capacity to represent the courts' interests in government decision-making is eroding[5], and the negative impact of litigation on the judicial-executive relationship.[6]

The de Grandpré Report noted the agreement of all Committee members that judicial independence "requires the judges to take a much more active and controlling role in court administration."[7] Recommendation 27 of the report states:

> The recommendations made by Mr. Justice Deschênes in his work *Masters in their own house*, necessary to implement the stages of consultation and decision sharing, be implemented as soon as possible.[8]

The CBA adopted this recommendation, and therefore the recommendations of Mr. Justice Deschênes under these two stages, as part of its policy.[9] Many of these recommendations are echoed in the key overall conclusions of the Subcommittee Report, including that there should be some form of limited autonomy for the judiciary within an overall budget set by the appropriate legislative authority,[10] and that for day-to-day administration, there should be a professional court administrator answerable to the Chief Justice.[11] We wholeheartedly agree with these conclusions.

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2 At pp. 38-39.

3 At p.10.

4 At p.15.

5 At pp. 4 and 20.

6 At p.18.

7 At p. 40.

8 At p. 59. References to *Maîtres chez eux/Masters in their own House*, a study prepared by Mr. Justice Jules Deschênes and sponsored by the Canadian Judicial Council dated September 1981, will hereinafter be referred to as the Deschênes report.

9 Resolution 86-07-M.

10 See, For example, Recommendation number 116 of the Deschênes report. Under the consultation and decision-making phases, there are also recommendations that call for extensive consultation between the executive and the judiciary on budgetary matters, court personnel policies, and court administration policies.

11 Recommendation 108.

Mr. Justice Deschênes also recommended that a formal body be established to facilitate the shared decision-making between the judiciary and executive.[12] Admittedly, the body envisioned by the Deschênes Report was not the sort of independent commission with power to issue binding decisions, as is recommended in the Subcommittee Report. However, we view this body as akin to judicial compensation commissions and as an improvement on the court administration model(s) articulated by Mr. Justice Deschênes. The CBA has supported the establishment and effective operation of independent judicial compensation commissions to avoid the impairment to judicial independence caused by direct negotiations between the judiciary and government, and also to prevent the politicization of the process. These principles have equal potency with respect to high-level decision-making for court administration.

We would note that the decision-making envisioned by the preferred model in the Subcommittee Report, the Limited Autonomy & Commission Model, is that the courts would have authority over all matters of court administration beyond budgetary issues. It also envisions that the courts would report directly to the legislature regarding expenditures, and make submissions to the legislature on the courts' needs. This goes beyond the judicial decision-making contemplated in the Deschênes Report for the consultation and decision sharing phases, namely, that there would be protracted negotiations with a high level of shared authority over court administration. Given the politicizing effect of ongoing, direct negotiations between the judiciary and the executive,[13] the Deschênes Report model(s) may no longer be appropriate for retention as part of CBA policy.

In conclusion, there is no question that the current executive model of court administration must change. The involvement of the judiciary must be increased, and the remaining interactions between the executive and the judiciary must be depoliticized. The judiciary must be able to obtain the resources it needs for the effective administration of justice without creating the perception that in doing so, it is beholden to the executive. We recognize that in order to be of further assistance to the CJC Subcommittee in implementing the Subcommittee Report, we must update our current policy so that we may effectively advocate for change. The CBA is committed to reviewing our policy in light of the more contemporary models of court administration contained in the Subcommittee Report. We hope to provide you with further specifics on our position and the Subcommittee Report in the near future.

Yours very truly,

(Original signed by Brian Tabor)

Brian A. Tabor, Q.C.

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12 Recommendations 100, 118-120. This voluntary body was to be composed of representatives of the executive and the judiciary.

13 See the recent decision of the Supreme Court of Canada in *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General),* [2005] 2 S.C.R. 286, 2005 SCC 44.