Submission on Judicial Compensation and Benefits

CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 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 and 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 the Executive, and approved as a public statement of the Canadian Bar Association.

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Submission on Judicial Compensation and Benefits

I. INTRODUCTION

The Canadian Bar Association (CBA) welcomes the opportunity to make submissions to assist the fourth quadrennial Judicial Compensation and Benefits Commission (the Commission) in its important work of determining fair and just judicial compensation and benefits.

The CBA's mandate includes two important objectives:

- the promotion of improvements in the administration of justice; and
- the maintenance of a high quality system of justice in Canada.

An independent judiciary is an essential ingredient of both objectives.

The Supreme Court of Canada has explained that "[i]ndependence [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."[1] The CBA has a long tradition of speaking out in defense of judicial independence, and of working actively against potential political interference in the appointment and compensation of judges in Canada.

The CBA is an independent voice vis-à-vis the work of judicial compensation commissions. Our submissions support and reinforce the two broad objectives above. The CBA does not represent any of the interested parties, namely the government or the judiciary, nor does it speak on behalf of any other external group. Rather, our submissions are intended to guide the Commission in its work, so that the process of determining judicial compensation and the substantive outcome properly and fairly reflect the constitutional imperative of appropriate judicial compensation.

The CBA's primary concern is to ensure that judicial compensation and benefits are structured and maintained to fulfill a dual purpose:

- Protecting and promoting the independence of the judiciary through the institution and maintenance of appropriate financial safeguards for its members; and

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1 *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conference des judges du Quebec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, [2005] 2 S.C.R. 286 (*Provincial Court Judges Assn. of New Brunswick*).

- Strengthening and advancing the judiciary through sufficient financial independence of its members and adequate compensation to attract the best and most qualified candidates for appointment.

The CBA, through its Judicial Compensation and Benefits Committee, has made regular submissions to the quadrennial Judicial Compensation and Benefits Commissions. The CBA has urged, and continues to urge, the government to respond to the Commission's recommendations in both a timely and substantive manner as required by the *Judges Act*.[2]

II. JUDICIAL INDEPENDENCE

Independence of the judiciary is an essential ingredient of Canadian democracy. The Supreme Court of Canada has emphasized that an independent judiciary is an integral component of federalism, protecting one level of government from encroachment into its jurisdiction by another, and serving to protect citizens against the abuse of state power.[3]

Judicial independence is considered to be "the lifeblood of constitutionalism in democratic societies."[4] It 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*."[5] [emphasis added]

The principle of judicial independence consists of three components: security of tenure; administrative independence; and financial security. Financial security embodies the three following <u>constitutional</u> requirements:

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

These three requirements preserve the principle that not only must the judiciary be independent, but it must be seen to be independent from the other branches of government. To ensure that this requirement is met, the executive, legislative and judicial branches must remain separate. This principle extends to the determination of judicial salary and benefits which is undertaken by an objective, independent commission that is beholden to neither the judiciary nor the other two branches of government. The commission process is often described as being an "institutional sieve,"[6] and "a structural separation between the government and the judiciary."[7]

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[2] *Judges Act*, R.S.C., 1985, c. J-1.

[3] *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 [*P.E.I. Reference*].

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

[5] *Ell v. Alberta*, [2003] 1 S.C.R. 857 at para. 29.

[6] *Supra* note 3 at paras. 170, 185 and 189.

[7] *Supra* note 1 at para. 14.

The independence of the judiciary is a fundamental principle for the benefit of citizens; it is not a perk for judges. Chief Justice Lamer, former Chief Justice of Canada, stated in his 1999 address to the CBA's National meeting in Edmonton, Alberta:

> An independent judiciary is the right of every Canadian. A judge must be seen to be free to decide honestly and impartially on the basis of law and the evidence, without external pressure or influence from anyone. [8]

Professor Martin Friedland recognized the parallel between financial security and judicial independence in his study for the Canadian Judicial Council entitled *A Place Apart: Judicial Independence and Accountability in Canada*:[9]

> The greater the financial security, the more independent the judge will be, and so, in my view, it is a wise investment for society to err on the more generous side. Even if economic conditions were such that a very large portion of the bar was willing to accept an appointment at a much lower salary, we would still want to pay judges well to ensure their financial independence – for our sake, not for theirs.[10]

III. PROCESS FOR REVIEW OF JUDICIAL COMPENSATION

Following the enactment of subsection 26(2) of the *Judges Act*, there have been three quadrennial commissions.[11]

In 2000, the Drouin Commission's recommendations were accepted by the government, except its recommendations concerning supernumerary status and reimbursement for the judiciary's costs. Ultimately, the recommendation on supernumerary status was accepted, but not until 2003 and it was only implemented by the government in 2006.

In 2004, the McLennan Commission made recommendations to the government which were initially accepted, but following a change in government a second response rejected the recommendations. In the end, the government implemented its own increase.

The *Judges Act* makes no provision for a government to make a second response to a commission's report. In the case of the McLennan Commission Report, a government response had already been made to the Commission within the six-month statutory timeframe. No provision in the *Act* permits a new government upon election to reject a former government's response and then issue its own response well past the timeframe required under subsection 26(7) of the *Act*.

Finally, in 2008, the Block Commission made recommendations to government which were rejected. In its response, the government stated that economic conditions made it "unreasonable to implement" the recommendations.

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8 Chief Justice Lamer (former Chief Justice of Canada), *Address to the Canadian Bar Association*, 1999 (not published).

9 Professor Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Public Works and Government Services Canada, 1995). Link: http://publications.gc.ca/pub?id=52169&sl=0.

10 *Ibid.*

11 *Supra* note 2.

The government's responses to the 2004 and the 2008 Commission Reports were issued well beyond the timeframe required under the *Judges Act*. Section 26(7) of the *Act* requires the government to respond to the Commission's Report within six months of receipt. In the case of the McLennan Commission, despite an initial government response within the statutory timeframe, the new government issued a second response 18 months after receiving the Commission's Report. The Block Commission Report was released on May 30, 2008 and the government response was released on February 11, 2009, nearly nine months after the Commission Report and well beyond the statutory timeframe for response.

The CBA believes that if the current judicial compensation review process is to succeed, all parties must respect the process and timeframes in the *Judges Act*. The timeframe in section 26(7) was established by Parliament to ensure that the government's review and response is forthcoming in a timely manner. Unexplained delay by one party is disrespectful of the other parties to the process, undermines the integrity of the commission process, and casts doubt on the degree of importance that a party places on judicial independence and the rule of law.

Process and Criteria Issues

The process for determining judicial compensation and benefits can either foster or erode the principle of judicial independence. The CBA has intervened in a number of cases dealing with judicial compensation, including the *P.E.I. Reference*;[12] and the *Provincial Court Judges' Assn. of New Brunswick*,[13] primarily to highlight the importance of the principles at stake, i.e., judicial independence, democracy and the rule of law, and to emphasize the important role the commission review process plays in preserving those principles.

The creation of judicial compensation commissions arose from the need to provide an effective and non-partisan method of reviewing and setting judicial remuneration. Under the section 26 process, the Commission must submit a report to the Minister of Justice, table the report in the House of Commons and finally, refer the Report to the Standing Committee on Justice and Human Rights. This Committee may conduct inquiries and public hearings and report its findings.

With respect to the Parliamentary Committee review of the Commission's recommendations, the Scott Commission observed that such reviews generally increase rather than decrease the likelihood of politicizing judicial compensation issues. Any links between judicial decisions, either specific or general, and compensation issues will have the deleterious effect of eroding judicial independence and should not be countenanced. Instead, we believe the Commission should caution Parliament that the consideration of its report involves special constitutional factors that risk being endangered by a politicized process and by making any links, intended or unintended, between judges' remuneration and judges' decisions.

The proper functioning of our system of justice depends on a high level of judicial competence. Judges' salaries and benefits, including the benefits for their families, must be at a level to attract the best and most qualified candidates, and to keep the best judges from leaving. They must also be commensurate with the position of a judge in our society and must reflect the respect given our courts in light of their unique role as a separate and independent branch of government.

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[12] *Supra* note 3.

[13] *Supra* note 1.

The requirement of a minimum salary level is explained in the *Report of the Canadian Bar Association Committee on the Independence of the Judiciary in Canada*:[14]

> [I]t is difficult to state precisely what is an adequate level for judges' salaries. The amount must be sufficient that neither the judge nor his dependents suffer any hardship by virtue of his accepting a position on the bench. It must also be sufficient to allow the judge to preserve the mien of his office. And it should be sufficient to reflect the importance of the office of judge...[15] [emphasis added]

The Commission process for determining fair and just judicial compensation must consider specific statutory criteria set out in s. 26(1.1) of the *Judges Act*:

(a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;

(b) the role of financial security of the judiciary in ensuring judicial independence;

(c) the need to attract outstanding candidates to the judiciary; and

(d) any other objective criteria that the Commission considers relevant.

The statutory wording does not give dominance to any criterion. It suggests that each one must be given due weight and consideration.

Once the Commission has determined the appropriate level of salary and benefits to recommend, the CBA urges it to remind Parliament that the Constitution requires the setting of judicial salaries to be carried out in an objective, dispassionate and rational manner.

IV. JUDICIAL SALARIES AND BENEFITS

None of the recommendations from the 2008 Block Commission were implemented. On an anecdotal basis, in 2010 and 2011 Canadian law firms have reported higher remuneration at all levels, including the partnership level, with a reported 62% of firms surveyed noting an increase in fiscal year 2009-2010 as well.[16]

Financial benefits are not – and should not be – the only factor aimed at attracting the most gifted and accomplished candidates for judicial appointment. That said, the appropriate gauge to determine the level of judicial salaries is that of lawyers who are senior practitioners and senior public servants, who generally form the pool from which judges are selected. Indexation to the cost of living ensures sitting judges do not experience erosion in their salaries and thereby encourages retention. But attracting candidates for judicial appointment requires judicial salaries to be competitive. To the extent that prevailing market conditions have increased relevant comparator salaries in excess of inflation, the Commission should ensure that judicial salaries are consistent with these market conditions.

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[14] *Report of the Canadian Bar Association Committee on the Independence of the Judiciary in Canada* (Ottawa: Canadian Bar Association, 1985) (the *de Grandpre Report*).

[15] *Ibid* at 18.

[16] Canadian Lawyer, June 2011, *The 2011 Canadian Lawyer Compensation Survey,* para. 6, available electronically at www.CanadianLawyermag.com.

Considering private practice comparable does not, of course, mean considering the salaries of senior practitioners from only the largest and most profitable firms. Judges are appointed from a wide cross-section of the legal community and from varied practice backgrounds. They cut across gender, age and regions, both urban and rural. The data should reflect this reality to the greatest extent possible.

Further, in comparing the compensation of lawyers in private practice, the Commission should consider forms of compensation other than salaries to which federally appointed judges are entitled. As an example, on retirement, judges are entitled to an annuity equal to two-thirds of their former salary. In private practice, most lawyers fund their own retirement through RRSPs or other investments, effectively reducing their disposable income.

Finally, we submit that the objective is not to provide judges with the same level of financial benefit that they may have enjoyed prior to appointment. Rather, it is to ensure that judges and their dependents do not experience significant economic disparity between pre-appointment and post-appointment levels. Judicial compensation and benefits must, however, be at a level that attracts the best and most capable candidates, and those who consider as part of their reward the satisfaction of serving society on the bench. Financial security is an essential component of judicial independence. [17]

The CBA also emphasizes the importance of the remaining section 26 criteria: 1) the prevailing economic conditions in Canada; 2) the cost of living, and 3) the overall economic and current financial position of the federal government. We note, however, that judicial independence is not just another important government priority: <u>It is a constitutional imperative</u>. Although competing public and government priorities may be a justified rationale to reduce what would otherwise be considered to be appropriate judicial compensation, the burden is on the government to provide conclusive evidence that these other competing fiscal obligations are of similar constitutional importance as judicial independence. .[18] It is only after the government has satisfied this burden that the Commission may consider this factor.

V. CONCLUSION

The CBA has detected a pattern, both federally and provincially, of governments' tendency to disregard the recommendations of independent commissions on judicial compensation and benefits. While we accept the basic premise that governments must work within the objective of balancing finite financial resources through numerous and widely varied programs, the importance and intent of section 26 of the *Judges Act* cannot be overstated. To the extent that governments persistently fail to embrace fully the recommendations on judicial compensation and benefits, or delay acting upon them,[19] the integrity of the process

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[17] *Supra* note 14.

[18] *Newfoundland (Treasury Board) v. N.A.P.E.* [2004] 3 S.C.R. 381 provides an example of the fiscal constraints on government that justified departing from the constitutional imperative of equality under s. 15 of the *Canadian Charter of Rights and Freedoms*.

[19] For example, the recommendations of the 2000 Judicial Compensation and Benefits Commission were finally accepted by the government after a delay of three years and only fully implemented after a further three year delay.

for setting judicial compensation will be compromised. Ultimately judicial independence may be threatened.

To summarize, the CBA urges the Commission to adopt the following principles:

1. Judicial salaries should be adequate to attract the most gifted and accomplished candidates for appointment. The Commission should ensure salaries are consistent with prevailing market conditions. It should continue to use as a "comparable" the salary range of lawyers who are senior private practitioners and senior public servants.
2. Appropriate compensation levels should ensure that judges and their dependents do not experience significant economic disparity between pre-appointment and post-appointment levels, and that the best and most capable applicants for judicial appointments are not deterred from applying.
3. We urge the Commission to remind the government that its response to the Commission's Report must comply with the timeframe in section 26(7) of the *Judges Act* (i.e. within six months of receipt). Delays in response will cast doubt on the degree of importance the government assigns to judicial compensation, judicial independence and the rule of law.
4. Before competing priorities are used as a rationale to reduce what the Commission concludes to be appropriate compensation for judges, the government must provide conclusive evidence of other pressing fiscal obligations that have constitutional importance similar to that of judicial independence.
5. Parliament should be cautioned that its review of the Commission's report involves consideration of constitutional and democratic principles, such as the independence of the judiciary from the other two branches of government and the rule of law. These considerations risk being endangered by a politicized process and by making any links between judicial remuneration and judicial decisions.

The CBA trusts that these remarks will assist the Commission in its important deliberations.