THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

Judicial and Prothonotary Compensation and Benefits

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 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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I. INTRODUCTION

The Canadian Bar Association (CBA) welcomes the opportunity to make submissions to assist the fifth quadrennial Judicial Compensation and Benefits Commission in its task of determining fair and just judicial and prothonotary compensation and benefits, pursuant to the *Judges Act*.[1]

The CBA, through its Judicial Compensation and Benefits Committee, has made regular submissions to the Judicial Compensation and Benefits Commissions. The CBA has also made submissions to Special Advisors on federal prothonotary compensation. We are pleased that prothonotary compensation now falls within the mandate of the fifth Quadrennial Commission.

The CBA's mandate includes two important objectives that guide its role in this process:

- promotion of improvements in the administration of justice; and
- 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."[2] 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 has an independent role in the work of judicial compensation commissions. Our submissions support and reinforce the two broad objectives above. The CBA does not represent or advocate on behalf of either the government or the judiciary, nor does it speak on behalf of any other external group. Rather, our submissions are intended to assist the Commission in its work, so the process of determining judicial compensation and the substantive outcome of that process properly and fairly reflect the imperative of appropriate judicial compensation.

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

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1 *Judges Act*, R.S.C., 1985, c. J-1, s. 26

2 *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).

- Protecting and promoting the independence of the judiciary through the institution and maintenance of appropriate financial security for members of the judiciary; and
- Strengthening and advancing the judiciary through sufficient financial independence of its members, and providing adequate compensation to attract the best and most qualified candidates for appointment.

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 by protecting one level of government from encroachment into its jurisdiction by another, and by 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 is a fundamental right for all citizens. The principle was well-stated by Chief Justice Antonio Lamer (as he then was) in his 1999 address to the CBA annual 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. [6]

Judicial independence comprises three components: security of tenure; administrative independence; and financial security. Financial security embodies the three following *constitutional* 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.[7]

Not only must the judiciary be independent, it must also be seen to be independent and free from interference and influence from the other branches of government and from other external sources. To ensure that this requirement of independence is met, the executive, legislative and judicial branches must remain separate. This principle extends to the

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

7 *Supra* note 3

determination of judicial salary and benefits undertaken by an objective, independent commission that is beholden to none. The commission process is often described as being an "institutional sieve,"[8] and "a structural separation between the government and the judiciary"[9].

III. PROCESS FOR REVIEW OF JUDICIAL COMPENSATION

Risk of Politicized Process

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*[10] and the *Provincial Court Judges' Assn. of New Brunswick*,[11] 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 process established in section 26 of the *Judges Act*, the Commission must submit a report to the Minister of Justice, the Minister must table the report in Parliament, and Parliament must refer the report to a committee that considers matters related to justice. The Parliamentary committee may conduct inquiries and public hearings and, if it does, must report its findings back to Parliament.

The Scott Commission[12] observed that a Parliamentary committee review of the Commission's recommendations generally increases rather than decreases 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.

The CBA urges the Commission to 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. Setting judicial salaries must be carried out in an objective, dispassionate and rational manner.

Past Quadrennial Commissions – Importance of Timeliness

Since the enactment of section 26 of the *Judges Act*, there have been four quadrennial commissions. Other than in 2012, the government failed in each process to meet legislated

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8 *Supra* note 3 at paras. 170, 185 and 189.

9 *Supra* note 2 at para. 14.

10 *Supra* note 3.

11 *Supra* note 2.

12 Scott Report (1996)

deadlines set out in section 26(7) (response to the Commission's report within a set time and implementation within a reasonable period).

In 2000, the Drouin Commission's recommendations were accepted by the government, except for the 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's recommendations were initially accepted by government, but were subsequently rejected in a second response following a change in government. In the end, the new government implemented its own increase 18 months after the Commission delivered its report. No provision in the *Judges Act* permits a new government to reject a former government's response and then issue its own response well past the deadline.

In 2008, the government rejected the Block Commission's recommendations. In its response, delivered nearly nine months after the Commission Report and well beyond the statutory timeframe for response, the government stated that economic conditions made it "unreasonable to implement" the recommendations.

In 2012, the government responded in a timely manner. The Commission delivered its report on May 15, 2012. The Minister of Justice provided the government's response to the Commission's report on October 12, 2012, one month in advance of the statutory deadline. Shortly after the response was provided, section 26(7) of the *Act* was amended[13] to reduce the timeframe for the government response from six months to four months.

The CBA believes that, if the 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 occurs in a timely manner. Unexplained delay by one party is disrespectful of the other parties and undermines the integrity of the process, casting doubt on the degree of importance placed on judicial independence and the rule of law.

These principles apply fully to the 2016 process. Under section 26(2) of the *Judges Act*, the Commission was required to commence an inquiry by October 1, 2015 and report by July 1, 2016. The appointment of the Commissioners was announced on December 18, 2015. The Commission began its inquiry on January 25, 2016. The CBA acknowledges that the general election and change of government contributed to this delay by the government.[14] Nevertheless, given the government's past record of delayed response (other than in 2012), the CBA wishes to underline the importance to the ongoing integrity of the judicial compensation process that the Commission abide by the statutory timelines (seeking necessary consents for extensions), and the government respond within the four month period required by the *Judges Act.*

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13 *Jobs and Growth Act,* S.C. 2012, c. 31, s. 212 (2)

14 Section 26 (3) of the *Judges Act* allows the Commission to postpone the date of commencement of a quadrennial inquiry with the consent of the Minister of Justice and the judiciary. CBA trusts that this consent was secured. Also, section 26(5) requires the Commission to receive the consent of the Governor in Council to submit its report after nine months following the commencement of the inquiry.

IV. JUDICIAL COMPENSATION AND BENEFITS

The Commission process for determining fair and just judicial compensation must consider the specific statutory criteria 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 statute does not give dominance to any criterion. It suggests that each one must be given due weight and consideration.

The proper functioning of our justice system depends on a high level of judicial competence. Judges' salaries and benefits must be at a level to attract and retain the best and most qualified candidates. 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 in a democratic society.

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:[15]

[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*.[16] [emphasis added]

The CBA recognizes that financial benefits are not – and should not– be the only (or even the predominant) factor aimed at attracting highly qualified and accomplished candidates for judicial appointment. But attracting candidates for judicial appointment requires judicial salaries to be competitive.

That said, the appropriate gauge for determining the level of judicial salaries is the compensation of senior practitioners in private practice and those working at senior levels in the public service, as these individuals generally comprise the pool from which judges are selected and appointed.

Indexation to the cost of living is the minimum standard that should be met to ensure that sitting judges do not experience erosion in their salaries, thereby encouraging retention.

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

16 *Ibid* at 18.

There is at least anecdotal evidence from the United States that non-competitive judicial salaries may increase attrition of experienced judges.[17]

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.

Considering private practice as a comparator 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, when comparing with compensation of lawyers in private practice, the Commission should consider the 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. However, those investments are subject to market volatility with potentially uncertain returns; that uncertainty does not attach to a judicial annuity. At the same time, lawyers in private practice may have a wider range of tax planning opportunities that are not available to judges.

Financial security in every aspect is an essential component of judicial independence.[18] However, 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 do not experience significant economic disparity between pre-appointment and post-appointment compensation levels. Judicial compensation and benefits must, therefore, 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.

The CBA also emphasizes the importance of the remaining criteria in section 26 of the *Judges Act*: prevailing economic conditions in Canada; cost of living, and overall economic and current financial position of the federal government.

Prevailing economic conditions in Canada

The existence of extraordinary economic circumstances should be cogently demonstrated and should only be used as a limited, short-term rationale to defer the responsibility of ensuring that judicial compensation is sufficient.[19]

Cost of living

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17 Pay Frozen, More New York Judges Leave Bench, New York Times, July 4, 2011

18 *Supra,* note 15

19 e.g. *Aalto v. Canada (Attorney General),* 2009 FC 861, affd. 2010 FCA 195

Judicial compensation and benefits should, at a minimum, keep pace with increases in the cost of living. The extent to which private sector or public sector lawyer compensation levels increase beyond the cost of living should also be taken into account.

Overall economic and current financial position of the federal government

Judicial independence is not just another important government priority: ***It is a constitutional imperative***. Competing public and government priorities are always present. Although the government must have latitude to strike an appropriate balance[20], it must provide a justified rationale to reduce what would otherwise be considered appropriate judicial compensation.

The burden is on the government to provide compelling evidence that other competing fiscal obligations justify infringing upon a constitutional imperative.[21] Only after the government has satisfied this burden may the Commission consider this factor.

V. PROTHONOTARY COMPENSATION AND BENEFITS

The CBA asserted in submissions to Special Advisors on Federal Court Prothonotaries' Compensation in 2008 and again in 2013[22] that principles of judicial independence should extend to judicial officers, like prothonotaries, who combine administrative functions with significant judicial decision-making responsibilities.[23]

In particular, their salaries and benefits must be at a level to attract the most qualified candidates. It must be commensurate with compensation for comparable judicial officers in other courts, such as traditional masters. And their compensation must reflect the respect with which the Federal Court is regarded, but at a level subordinate to Federal Court judges.

The CBA also urged a fixed, independent review process for setting prothonotary compensation and benefits, as a solution to prothonotaries negotiating their salary with government, a frequent litigant before them.

In 2014 the government included prothonotaries in the *Judges Act:*[24] prothonotary compensation is to be determined in future by the Judicial Compensation and Benefits Commission; conduct governed by the Canadian Judicial Council; administration of salaries and benefits assumed by the Commissioner for Federal Judicial Affairs; and training delivered through the National Judicial Institute.

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20 *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 SCR 245

21 *Newfoundland (Treasury Board) v. N.A.P.E.* [2004] 3 S.C.R. 381 provides an example of an unexpected and severe financial crisis that justified infringing on the constitutional imperative of equality under s. 15 of the *Canadian Charter of Rights and Freedoms*.

22 2008 submission; 2013 submission

23 *Supra*, note 19, para. 7

24 *Judges Act*, s. 2.1

The same principles applied in setting judicial compensation and benefits, and expressed above, should be applied when setting prothonotary compensation and benefits, recognizing that their level of compensation will be subordinate to Federal Court judges.

VI. CONCLUSION

The importance and intent of section 26 of the *Judges Act* cannot be overstated. If government declines to embrace fully the Commission's recommendations on judicial compensation and benefits, or delays acting on them, the integrity of the process 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 recommend salaries 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 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. The same principles of judicial independence apply to the consideration of prothonotary compensation and benefits. Their salaries and benefits must be at a level to attract the most qualified candidates. It must be commensurate with compensation for comparable judicial officers in other courts, such as traditional masters. And their compensation must reflect the respect with which the Federal Court is regarded, but at a level subordinate to Federal Court judges.

4. We urge the Commission to remind the government that its response to the Commission's Report must comply with section 26(7) of the *Judges Act*. Delays in response past the four month timeframe will cast doubt on the degree of importance the government assigns to judicial and prothonotary compensation, judicial independence and the rule of law.

5. The Commission may not consider reducing, what would otherwise be considered, appropriate judicial compensation because of competing financial priorities, without compelling evidence from the government that those competing priorities justify infringing upon the constitutional imperative of judicial independence.

6. Parliament should be cautioned that its review of the Commission's report involves consideration of *constitutional principles*, such as the rule of law and the independence of the judiciary from the other branches of government. 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.