



THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Submission on Judges' Compensation and Benefits

CANADIAN BAR ASSOCIATION

December 2007

TABLE OF CONTENTS

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I.	INTRODUCTION.....	1
II.	PROCESS FOR REVIEW OF JUDICIAL COMPENSATION	2
III.	JUDICIAL SALARIES AND BENEFITS.....	5
IV.	CONCLUSION.....	6

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 approved as a public statement of the Canadian Bar Association.

Submission on Judges' Salaries and Benefits

I. INTRODUCTION

The Canadian Bar Association (CBA) welcomes the opportunity to make submissions to the third quadrennial Judicial Compensation and Benefits Commission (the 2007 Commission).

Among the CBA's principal objectives are the promotion of improvements in the administration of justice and maintenance of the high quality of the justice system in Canada. Independence of the judiciary from the executive and legislative branches is a cornerstone of Canada's justice system and, by extension, of democracy itself. As the Supreme Court of Canada noted in *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*,¹ judicial independence protects citizens against the abuse of state power. It is also an integral component of federalism, protecting one level of government from encroachment into its jurisdiction by another. We recognize 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 intervened in the *PEI Reference* and also 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. Québec (Attorney General)*; *Minc v. Québec (Attorney General)*.² The CBA, through its Judicial Compensation and Benefits Committee, also makes regular submissions to federal Judicial Compensation and Benefits Commissions, and urges governments to respond to the independent Commission recommendations in a timely and substantive manner. Most recently, the CBA appeared before the Standing Committee on Justice and Human Rights, in the study of Bill C-17, amending the *Judges Act* in response to the third quadrennial Commission report.

¹ [1997] 3 S.C.R. 3 [*P.E.I. Reference*].

² [2005] 2 S.C.R. 286 [*Provincial Judges Ass'n of New Brunswick*].

The CBA's core interest 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
- 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 is an independent voice in relation to the work of judicial compensation commissions. Our sole concern is reflected in the two broad principles set out above. The CBA does not represent the interests of either of the two "parties" from which the 2007 Commission is likely to receive submissions namely, the government and the judiciary, nor those of any other external group interested in this matter. Our submission is intended to guide the 2007 Commission as it approaches its work, so that both the process of determining judicial compensation and the substantive outcome maintain the constitutional imperative of judicial independence.

II. PROCESS FOR REVIEW OF JUDICIAL COMPENSATION

An independent judiciary is a cornerstone of a democratic society. An independent judiciary is "the lifeblood of constitutionalism in democratic societies."³ "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.*"⁴

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.⁵

³ *Beauregard v. Canada*, [1986] 2 S.C.R. 56 at 70.

⁴ *Ell v. Alberta*, [2003] 1 S.C.R. 857 at para. 29.

⁵ *Provincial Judges Ass'n of New Brunswick*, *supra* note 2, at para 4.

Judicial independence has three components: security of tenure, administrative independence and financial security.⁶ The financial security of the judiciary, in turn, embodies three constitutional requirements:⁷

- 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 exist 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. This requires that the relationship be “depoliticized” through a determination of judicial salary and benefits by an objective, independent commission that is beholden to neither the judiciary nor government.⁸ The commission process is most frequently described as being an “institutional sieve”,⁹ and “a structural separation between the government and the judiciary”.¹⁰

This 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*:

[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...¹¹

Beyond this consideration, the proper functioning of our justice system 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 to the judiciary.

⁶ *Valente v. The Queen*, [1985] 2 S.C.R. 673 at pp. 694, 704; *PEI Reference*, *supra* note 1, at para. 115; and *Provincial Judges Ass'n of New Brunswick*, *supra* note 2, at para. 7.

⁷ *PEI Reference*, *supra* note 1, at para. 131-135; and *Provincial Judges Ass'n of New Brunswick*, *supra* note 2, at para. 8.

⁸ *Provincial Judges Ass'n of New Brunswick*, *supra* note 2, at para. 10.

⁹ *PEI Reference*, *supra* note 1, at para. 170; and *Provincial Judges Ass'n of New Brunswick*, *ibid.*, at para. 14.

¹⁰ *Provincial Judges Ass'n of New Brunswick*, *ibid.*, at para. 14.

¹¹ (Canadian Bar Association: Ottawa, 1985), at 18 [the de Grandpré Report].

They must also be commensurate with the position of a judge in our society and must reflect the respect with which our courts are to be regarded.

This consideration, among others, is reflected in the criteria the Commission is required to consider pursuant to section 26(1.1) of the *Judges Act*. These criteria include:

- prevailing economic conditions in Canada and cost of living;
- overall economic and current financial position of the federal government;
- the role of financial security in ensuring judicial independence;
- the need to attract outstanding candidates to the judiciary; and
- any other objective criteria that the Commission considers relevant.

After the Commission has determined an appropriate level of salary and benefits, the CBA urges it to remind Parliament that 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.

Under section 26 of the *Judges Act*, the Commission must submit a report to the Minister of Justice. The Minister must table the report in the House of Commons and, in turn, the report must be referred to the Standing Committee on Justice and Human Rights. The Standing Committee may conduct inquiries and public hearings and report its findings.

We share the Scott Commission's view that Parliamentary Committee review of the Commission's recommendations generally increases rather than decreases the likelihood of politicizing judicial compensation issues.¹² Any links between judicial decisions, either specifically or generally, and compensation issues will have the effect of eroding judicial independence and should not be countenanced. We believe the Commission should caution Parliament that its consideration of the Commission's report involves special constitutional

¹² Canada, Department of Justice, *Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits*, September 30, 1996 (the Scott Commission), at 10.

considerations, which risk being endangered by a politicized approach and by making any links between judges' remuneration and the decisions they make.

III. JUDICIAL SALARIES AND BENEFITS

The CBA acknowledges that 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 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 that judicial salaries are 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.

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

Further, in conducting the comparison with 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, upon retirement, judges are entitled to an annuity equal to 2/3 of their former salary. In private practice, most lawyers fund their own retirement by purchasing RRSP's or other investments, thereby 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:

At the same time, though, it is neither necessary nor desirable to establish judicial salaries at such a level as to match the judges' earnings before appointment to the bench. The most obvious reason for this is that such a policy would tend to attract people to the bench for purely financial reasons. The sort of person who would

accept a position on the bench because it paid well is not the sort of person who would make the best judge. Rather, the sort of person we would wish to see on the bench are those who appreciate the honour of being a judge and who see as part of their reward the satisfaction of serving society on the bench.¹³

Thus, beyond the principle mentioned in the de Grandpré Report, namely that judges and their dependents should not experience significant economic disparity between pre-appointment and post-appointment, the objective is to ensure that the compensation is sufficiently attractive to ensure that the best and most capable applicants for judicial appointments are not deterred.

As a final note on the considerations we believe should guide the Commission, we wish to comment on the section 26 requirements to consider the prevailing economic conditions in Canada and the cost of living, and the overall economic and current financial position of the federal government. 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. Before competing priorities are used as a rationale to reduce what the Commission concludes to be appropriate compensation for judges, the Government must show conclusive evidence of other pressing government fiscal obligations of similar importance to judicial independence.¹⁴

IV. 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 limited financial resources through numerous and widely varied programmes, 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

¹³ De Grandpré Report, at 18.

¹⁴ *Newfoundland (Treasury Board) v. N.A.P.E.* [2004] 3 S.C.R. 381 provides an example of the fiscal constraints upon government that justified departing from the constitutional imperative of equality under *Charter* s.15.

and benefits, or delay acting upon them,¹⁵ 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. Parliament should be cautioned that its 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.
2. To ensure that judicial salaries are adequate to attract the most gifted and accomplished candidates for judicial appointment, the Commission should ensure salaries are consistent with prevailing market conditions. It should continue to use "comparables" of lawyers who are senior private practitioners and senior public servants.
3. Appropriate compensation levels should be such that judges and their dependents do not experience significant economic disparity between pre-appointment and post-appointment, and that the best and most capable applicants for judicial appointments are not deterred.
4. Before competing priorities are used as a rationale to reduce what the Commission concludes to be appropriate compensation for judges, the Government must show conclusive evidence of other pressing government fiscal obligations of similar importance to judicial independence.

We trust that these remarks will assist the Commission in its deliberations.

¹⁵ For instance, the recommendations of the 2003 Judicial Compensation and Benefits Commission were only partially implemented after a delay of over 2 ½ years and an unprecedented reversal of the government's position in a second response to the Commission.