

**SUBMISSIONS OF THE CANADIAN BAR ASSOCIATION
(BRITISH COLUMBIA BRANCH)**

TO THE

BRITISH COLUMBIA

2007

JUDGES COMPENSATION COMMISSION

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PREFACE

The *Judicial Compensation Act* (the “Act”) requires the British Columbia 2007 Judges Compensation Commission (the “Commission”) to report to the Legislative Assembly through the Attorney General on all matters respecting the remuneration, allowances and benefits of judges and to make recommendations with respect to those matters for each of the next three fiscal years.

The Canadian Bar Association (British Columbia Branch) (the “CBA”) has been asked to make submissions to provide its perspective regarding judicial compensation for Provincial Court judges.

The CBA is a professional organization formed in 1896.

The purpose of the CBA is to:

- enhance the professional and commercial interests of our members;

- provide personal and professional development and support for our members;
- protect the independence of the judiciary and the Bar;
- promote access to justice;
- promote fair justice systems and practical and effective law reform; and
- promote equality in the legal profession and eliminate discrimination.

The CBA nationally represents approximately 35,000 members and the British Columbia Branch itself has over 6,000 members. Our members practice law in many different areas. The CBA has established 67 different sections to provide a focus for lawyers who practice in similar areas to participate in continuing legal education, research and law reform. The CBA has also established standing committees and special committees from time to time to deal with issues of special interest to the CBA.

One CBA Special Committee is the Provincial Court Judge's Pensions and Salaries Committee. The Chair of this Committee is David A. Paul, Q.C. The Committee's purpose is to promote fair processes for determining judicial compensation and to advise the CBA on matters relating to judges' pensions and salaries.

In 2004, the Committee made submissions to the Commission regarding judicial compensation.

In 2007, the Committee has prepared these Submissions.

UNIQUE ROLE OF THE CBA

The CBA has a long tradition of speaking out on behalf of the judiciary, especially regarding unfair criticism made of judges' decisions by the public. In addition, the CBA actively works against potential political interference regarding the appointment of, and compensation for, judges in Canada.

The CBA is represented on the Judicial Council of British Columbia by the President of the CBA. The CBA assists the Judicial Council in its assessment of applicants for the Provincial Court Bench by preparing confidential reports on all applicants who apply for a position with the Provincial Court. The CBA is also represented on the Advisory on Judicial Appointments for British Columbia for federally-appointed judges. By taking these actions and adopting these roles, the CBA has dedicated itself to protect the independence of the judiciary and the Bar.

In our role of protecting the independence of the judiciary, lawyers of the CBA are natural allies with the independent Bench. Lawyers work daily with judges, civil servants, clients and the public in the administration of justice. Lawyers understand the essential contributions judges make to the administration of justice. Lawyers see daily the wide range of tasks performed by judges in courtrooms across British Columbia.

The CBA welcomes the opportunity to make these Submissions to assist the Commission in performing its legal duty to determine fair and just judicial compensation.

FAIR PROCESS TO DETERMINE JUDICIAL COMPENSATION

The CBA submits that the process to determine judicial compensation be fair and in accordance with the rule of law.

Judicial Compensation Act

By the terms of the Act, the Commission must report to the Attorney General on all matters respecting the remuneration, allowances and benefits of judges or judicial justices and make recommendations with respect to those matters covering the next three fiscal years. The Act further requires the Attorney General to submit the Commission's report to the Legislative Assembly. Under the Act, the Legislative Assembly may reject one or more of the recommendations made in the report as being unfair or unreasonable, and set the remuneration, allowances or benefits to be substituted for those proposed by the rejected Commission's recommendations.

Section 5(5) of the Act requires the Commission to consider all of the following:

- (a) the current financial position of the government;
- (b) the need to provide reasonable compensation to the judges or judicial justices;
- (c) the need to maintain a strong court by attracting qualified applicants;
- (d) the laws of British Columbia; and
- (e) any other matter the commission considers relevant.

In 2004, the Judges Compensation Commission wrote in its report:

The crucial thing to remember, however, is that judges are not civil servants, whose salaries and benefits can be unilaterally adjusted by their employer. This is the vital distinction: while judges are paid from public funds, they are not government employees. They occupy a highly unusual and important position in our society. They

are, and must be seen to be, completely and totally independent of the political realm. As has been emphasized above, in fact, this Commission was established for the precise purpose of taking the politics out of relations between the judiciary and the executive.¹

The CBA supports the Commission to continue to apply the crucial factor of judicial independence to determine judicial compensation.

RECOMMENDATION #1:

The CBA supports the intent and broad purpose of the Commission to determine appropriate compensation for the Provincial Court Judges through a method that upholds the principle of judicial independence. The CBA further submits it is proper for the Commission to apply this standard to its present determinations of judicial compensation.

¹ British Columbia Judges Compensation Commission, Final Report of the 2004 British Columbia Judges Compensation Commission (2004) at page 8 (www.ag.gov.bc.ca/public/judges-compensation/FinalReport.pdf).

Constitutional Principles Applied to the Function of Judicial Compensation Commissions

The Supreme Court of Canada in *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 (the “*PEI Reference*”) (Tab A, Appendix) has set the standard for governments to follow regarding the role and function of judicial compensation commissions.

The main constitutional principles emerging from the *PEI Reference* are:

- key components of judicial independence are: security of tenure, administrative independence and financial security (para. 115);
- judicial compensation commissions must be independent, objective and effective (para. 169); and
- judicial salaries can be reduced, increased, or frozen, but not without recourse to an independent effective and objective commission (para. 133).

RECOMMENDATION #2:

The CBA recommends that the Commission follow the provisions of the Act, including those in section 5(5) and the direction imposed on it by the Supreme Court of Canada in the *PEI Reference* to ensure that the process to be followed to determine judicial compensation is fair and in accordance with the rule of law.

CURRENT FINANCIAL POSITION OF THE GOVERNMENT

Section 5(5)(a) of the Act requires the Commission to consider the current financial position of the government.

In its most recent budget released in February 2007, the government continues to have a balanced provincial budget. The government has a planned surplus of \$400 million for 2007/08, and \$150 million in both 2008/09 and 2009/10 (Tab B, Appendix).

In keeping with the requirements of the Act and the constitutional principles applicable to ensuring judicial independence through fair judicial

compensation noted in our Submissions, the government's current financial position allows for fair and reasonable judicial compensation.

RECOMMENDATION # 3:

The CBA recommends that the Commission find that the government's current financial position allows for fair and reasonable judicial compensation on the basis of:

- **the government's surplus budget released in February 2007;**
- **the requirements of the Act; and**
- **the constitutional principles applicable to ensuring judicial independence through fair judicial compensation as noted in our Submissions.**

JUDICIAL INDEPENDENCE

The CBA actively works to protect the independence of the judiciary.

Recently, Canada lost a great jurist. On April 28, 2007, the Honourable Bertha Wilson, formerly a justice of the Supreme Court of Canada and the first woman appointed to the Supreme Court, passed away in Ottawa after a prolonged illness. Among her many achievements, Justice Wilson was famous for saying of judges, and the work that they do: "We didn't volunteer".

Judges don't volunteer. Every day, they are called upon to review a wide range of matters ranging from complex Charter issues to small claims cases. So that they can do their jobs, it is essential that their judicial independence be preserved and protected.

Judicial independence has been recognized as "the lifeblood of constitutionalism in democratic societies" *per* Dickson C.J. in *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at p. 70 (Tab C, Appendix).

As the lifeblood of constitutional principles, unqualified judicial independence functions as a cornerstone of our democratic system.

Judicial independence:

requires objective conditions that ensure the judiciary's freedom to act without interference from any other entity. The principle finds explicit constitutional reference in ss. 96 to 100 of the *Constitution Act, 1867* and s. 11(d) of the *Canadian Charter of Rights and Freedoms* as per Major, J. at para. 18 in *Ell v. Alberta* [2003] 1 S.C.R. 857 (Tab D, Appendix).

In addition, as stated by the Supreme Court of Canada in the *PEI Reference*, judicial independence protects citizens against the abuse of state power.

Constitutional Principles and Determination of Judicial Compensation: The *PEI Reference*

In the *PEI Reference*, the Supreme Court of Canada sets out the constitutional principles that the Commission and governments must follow in order to preserve judicial independence in determining judicial compensation. These constitutional principles also apply to the Act to inform the factors listed in section 5(5) of the Act.

These applicable constitutional principles emerging from the *PEI Reference* are:

- salaries of Provincial Court judges may be reduced, increased or frozen, subject to prior recourse to a special process, which is independent, effective and objective, for determining judicial remuneration (para. 133);
- under no circumstances is it permissible for the judiciary to engage in negotiations over remuneration with the executive or representatives of the legislature (para. 134);
- any reduction to judicial remuneration, including *de facto* reductions through the erosion of salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge (para. 135);

- financial security is a means to the end of judicial independence, and is therefore for the benefit of the public (para. 193);
- the same principles that apply to salaries for judges apply equally to judicial pensions and other benefits (para. 136);
- judges, although they must ultimately be paid from the public purse, are not civil servants since civil servants are part of the executive, and judges, by definition, are independent of the executive (para. 143);
- if a government rejects the recommendations of a judicial compensation commission, the government must “articulate a legitimate reason” why it has chosen to depart from the recommendations of the commission (para. 183);
- if judicial review is sought after a government rejects the recommendations of a judicial compensation commission, a reviewing court must inquire into the reasonableness of the factual foundation of the claim (para. 183);
- there should be no negotiation for remuneration between the judiciary and the executive and legislature because negotiations for

remuneration from the public purse are “indelibly political”, but it is proper for Provincial Court Judges to convey their concerns and make submissions to government regarding the adequacy of current levels of remuneration (para. 134); and

- judges’ salaries must not fall below the basic minimum level of remuneration for the office of a judge (para. 135) that is “adequate, commensurate with the status, dignity and responsibility of their office” (para. 194).

Constitutional Principles Applied Since The *PEI Reference*

Since the *PEI Reference*, the Supreme Court of Canada has reaffirmed the Supreme Court’s constitutional principles set out in the *PEI Reference*.

In 2005, the Supreme Court of Canada released its decision, *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. Quebec (Attorney General), 2005 SCC 44, [2005] 2 S.C.R. 286 (the “*Bodner* decision”) (see Tab E, Appendix).

Commonly cited as the *Bodner* decision, the Supreme Court of Canada held that the principles stated in the *PEI Reference* remain valid (para. 13).

In *Bodner*, the Supreme Court of Canada reiterated principles articulated in the *PEI Reference* that:

- judicial independence is “the lifeblood of constitutionalism in democratic societies” (para. 4);
- judicial independence 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” (para. 4 citing *Beauregard, supra* at p. 70);
- judicial independence has two dimensions: first, the individual dimension, which relates to the independence of a particular judge and the second, the institutional dimension, which relates to the independence of the court the judge sits on; “Both dimensions

depend upon objective standards that protect the judiciary's role” (para. 5);

- the “judiciary must both be and be seen to be independent” (para. 6);
- “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” (para. 6); and
- key components of judicial independence are: security of tenure, administrative independence and financial security (para. 7).

Regarding the nature of compensation commissions and their recommendations as established by the *PEI Reference*, the Supreme Court of Canada stated in *Bodner* that a commission must focus on identifying the appropriate level of remuneration for the judicial office in question and address all relevant issues in a flexible manner (para. 14).

Regarding a government's response to the commission's recommendations, the *Bodner* decision requires a government to give weight to the commission's recommendations, and provide a complete response to them (para. 23). A government may depart from a

commission's recommendations, if the government provides complete and legitimate reasons and that deal with a commission's recommendations in a meaningful way that will meet the standard of rationality (para. 25).

Regarding the level of judicial review of a government's decision to not follow a commission's recommendations, the *Bodner* decision provides that the court must focus on the government's response and on whether the purpose of the commission process has been achieved. Further, the reviewing court should apply a three-stage test for determining the rationality of the government's response:

(1) Has the government articulated a legitimate reason for departing from the commission's recommendations?

(2) Do the government's reasons rely upon a reasonable factual foundation? and

(3) 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? (para. 31)

The CBA believes the *Bodner* decision operates to clarify the foundational principles set out in the *PEI Reference*. The CBA does not believe the Supreme Court of Canada's decision in *Bodner* permits a government to reject a commission's recommendations and merely replace it with a government's own recommendations or give a government the final word in determining judicial compensation. Instead, the Supreme Court of Canada has dictated in *Bodner* that a government must respect the commission process and achieve the purposes of the commission: to preserve judicial independence and depoliticize judicial remuneration (para. 31).

RECOMMENDATION # 4:

The CBA recommends that the Commission apply the applicable constitutional principles provided in the *PEI Reference* and clarified in *Bodner* in order to ensure: a depoliticized judicial compensation process and judicial independence through fair and reasonable judicial compensation as noted in our Submissions.

LAWS OF BRITISH COLUMBIA

Section 5(5)(d) of the Act requires the Commission to consider the laws of British Columbia.

The laws of British Columbia include relevant legislation such as the Act.

The laws of British Columbia also include the constitutional principles set out in the *PEI Reference*. These constitutional principles are relevant for the Commission to determine judicial compensation since they provide guidance for the proper application of the factors listed in section 5(5) of the Act that the Commission must consider in determining judicial compensation.

Other relevant law includes legislation authorizing and regulating the government's budget processes and the government's resulting budget surplus for the next three fiscal years.

RECOMMENDATION # 5:

The CBA recommends that the Commission apply the applicable laws of British Columbia, including the relevant constitutional principles, to ensure that judicial independence is protected by the fair and reasonable determination of judicial compensation.

PROVINCIAL COURT JUDGES' WORK ENVIRONMENT

In its report, the 2004 Judges Compensation Commission, cited with approval, the CBA submission regarding the judge's work environment:

Family cases are often complex, sometimes intractable, and always of profound importance to the litigants involved. Meanwhile, government cutbacks to legal aid funding for family matters have led to a large and growing legion of unrepresented family litigants. The result, as set out in the Canadian Bar Association's written submission to us:

...is more time being needed to resolve family matters.

Judges need to take more time and effort to explain the court process to self-represented litigants. Self represented litigants often find the court process complex, confusing and frustrating. The situation is also frustrating for the judges, lawyers and the clients who are paying for their lawyers to represent them in family court. To provide fair and impartial decisions in these cases of self-represented litigants, additional demands are imposed on the time, energy, professionalism and judicial expertise of the judges.²

The observations the CBA made in 2004 are equally applicable today in 2007, even more so.

² Final Report of the 2004 British Columbia Judges Compensation Commission at page 15.

Provincial Court judges remain the human face of justice in courtrooms across the Province for the vast majority of British Columbians.

Across the Province, there are 44 courthouses and 44 circuit courts. Each year, between 300,000 and 360,000 new criminal and civil cases proceed through these courts.³ The Provincial Court continues to take over 99% of the criminal cases and over 75% of civil cases filed each year.⁴

Continued government cut-backs to legal aid have resulted in more self-represented litigants in the Provincial Court than ever before.

Regarding self-represented litigants, in 2006, for the first time, the Canadian Judicial Council published a statement of principles on self-represented litigants for judges of superior courts across Canada.

While these guidelines are not binding on Provincial Court judges, they provide the public with an expectation of what the public expects a judge's responsibility in the courtroom to be:

³ Ministry of Attorney General, *2007/08 – 2009/10 Service Plan* (February 2007) at page 11 (<http://www.bcbudget.gov.bc.ca/2007/sp/pdf/ministry/ag.pdf>).

⁴ Provincial Court of British Columbia, *Annual Report 2004-5* (<http://www.provincialcourt.bc.ca/downloads/pdf/annualreport2004-2005.pdf>). See at page 12: "During the fiscal year 2004-05, the Provincial Court received 235,097 new cases as compared with 61,986 received by the Supreme Court in the same period.... Over 99% of all criminal cases in British Columbia are conducted and completed in the Provincial Court (100,758 new criminal cases in Provincial Court in 2004-05, compared to 1,081 new criminal cases in the British Columbia Supreme Court)".

1. Judges have a responsibility to inquire whether self-represented persons are aware of their procedural options, and to direct them to available information if they are not. Depending on the circumstances and nature of the case, judges may explain the relevant law in the case and its implications, before the self-represented person makes critical choices.

2. In appropriate circumstances, judges should consider providing self-represented persons with information to assist them in understanding and asserting their rights, or to raise arguments before the court.

3. Judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons.

4. The judiciary should engage in dialogues with legal professional associations, court administrators, government and legal aid organizations in an effort to design and provide for programs to assist self-represented persons.⁵

To comply with these guidelines and the public expectations that drive them, Provincial Court judges will need to give extra time, energy and sensitivity to their duties before the public.

As a result of legislative changes and proposals for law reform, the caseload of the Provincial Court has increased.

Regarding legislative changes, since September 1, 2005, the government increased the small claims limit for civil matters from \$10,000 to more than double: \$25,000. This has resulted in more cases before the Provincial Court.

Regarding law reform proposals, since 2002, the British Columbia Justice Review Task Force has studied ways to improve the justice system (the “Task Force”). The Task Force is a joint project of the Law Society of

⁵ Canadian Judicial Council, *Statement of Principles on Self-represented Litigants and Accused Persons* (September 2006) at page 3, para. 2 (<http://www.cjc-ccm.gc.ca/cmslib/general/Final-Statement-of-Principles-SRL.pdf>).

British Columbia, the Attorney General, the British Columbia Supreme Court, the British Columbia Provincial Court and the CBA.

In 2005, the Family Justice Reform Working Group of the Task Force completed a report recommending that there should be:

- a unified family court, involving both Supreme Court and Provincial Court judges hearing all family matters. Provincial Court judges would be given the same jurisdiction as Supreme Court judges over all family issues and there would be simplified procedures, specialized judges, a cooperative focus and enhanced services for families;
- a separate set of Family Rules applicable to both the Supreme and Provincial courts;
- a legal hub information centre for the public installed in courtrooms across the Province; and

- that, if family cases continue to be heard in two levels of court, the authority to award costs be extended to Provincial Court judges.⁶

Currently, the government is working to implement some of these recommendations.

Regarding the legal hub, since April 2005, the government has funded the BC Supreme Court Self-Help Centre, providing legal services to self-represented litigants.⁷ Since June 2005, a legal hub has been in operation at the Nanaimo Family Justice Services Centre. That Centre now has a new website in addition to his physical office.⁸ The government is currently conducting research that will be used to create civil hubs all across the Province. A research report is expected soon and the government will seek further consultation with the relevant stakeholders, including the Provincial Court.⁹

Regarding the unified family court proposal, if the government acts on these recommendations and provides adequate funding, this will result in

⁶ Family Justice Reform Working Group, *A New Justice System for Families and Children: Report of the Family Justice Reform Working Group to the Justice Review Task Force* (May 2005) Recommendations 1, 14, 18 and 28 (http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf).

⁷ Website available at: <http://www.supremecourtselfhelp.bc.ca/>.

⁸ Website available at: <http://www.nanaimo.familyjustice.bc.ca/>.

an increased workload for Provincial Court judges. A unified family court will require more Provincial Court judges to be appointed. It will require increased travel time for Provincial Court judges as they work around the Province at the various circuit courts envisioned by the unified family court. It will require Provincial Court judges to assume a greater jurisdiction. It will require greater flexibility and training on the part of Provincial Court judges in order to work with new rules and procedures.

RECOMMENDATION # 6:

The CBA recommends that the Commission award fair and reasonable compensation commensurate with the responsibilities of the work performed by the Judges of the Provincial Court, taking into consideration the:

- **increased demands in jurisdiction; and**
- **increased demands on the time and expertise of the judges.**

⁹ Report of the Civil Justice Reform Working Group, *The Hub Feedback and New Developments* (May 15, 2007) (http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_r1.pdf). The research report is expected to be completed in June 2007.

QUALIFIED APPLICANTS TO THE JUDICIARY

Section 5 (5)(c) of the Act requires the Commission to consider the need to maintain a strong court by attracting qualified applicants.

The CBA supports the need to maintain a strong court by attracting qualified applicants. Applicants to the court should be drawn from all areas of legal practice, including from the barrister and solicitor sides of the Bar and the private and public Bar. Applicants to the court should be skilled and experienced and be of exceptional ability.

Compensation Needed to Attract the Most Qualified Members From the Bar

The CBA submits that it is the responsibility of the government to provide British Columbians with the highest calibre of judicial resources to resolve their disputes. A key factor in determining proper compensation for Provincial Court judges is attracting candidates of the highest quality and, once appointed, motivating and retaining those individuals for the duration of their professional careers.

We submit that a marked disparity between the remuneration of lawyers and that of judges will lead able lawyers to refuse appointment to the court. The prestige of a judicial position, its job security, the option for public service and the opportunity to contribute to the legal system are not, in themselves, sufficient compensation for lawyers to go to the Bench. Salaries and benefits must be at a level to attract the best and most qualified members to the Bench. They must also be commensurate with the position of a judge in our society and must be reflective of the respect with which are courts are to be regarded.

In considering the amount of compensation, the CBA believes it is important to keep in mind that most judges are appointed during or close to their peak earning years as lawyers. It is also important to keep in mind that once appointed, judges must refrain from other forms of compensable activity. These individuals should be accorded a fair and reasonable degree of certainty regarding their financial security and that of their families.

The CBA is concerned that the current salaries and benefits of Provincial Court judges are lagging behind those of senior lawyers. These senior lawyers are those who form the pool from which judges are selected.

The matter of determining senior lawyers' incomes continues to be problematic. Basing these incomes on filed income tax returns is neither accurate nor comprehensive. Tax planning strategies available to Canadian professionals, including senior lawyers, cause the data contained in these filed income tax returns to be inaccurate and incomplete. These legal tax planning options include incorporation which permits lawyers to minimize draws in order to ensure that, from an optimum tax strategy, income remains in the corporation where it is taxed by government at a lower tax rate. Other tax planning strategies available to lawyers include: income splitting, creating trusts, and making valid deductions for a wide variety of business purposes. For the Commission to rely on these filed income tax returns as a direct comparison to judges' incomes would be improper, since these data derived from them are incomplete, inaccurate and not a true reflection of senior lawyers' true incomes with those of judges.

The CBA is concerned that as Canada's population is aging, so are the sitting judges on the Provincial Court. As a result, retirements from the Provincial Court are expected in the coming years and these judges will need to be replaced. Lawyers too, are aging and retiring as a result. That means that the available pool of qualified lawyers is smaller than in years past.

As a result of these changes and conditions, lawyers appointed to the Bench should be amongst the best the legal profession has to offer. These people will only be attracted to the Bench if fair and reasonable financial incentives are in place. In our submission, there is a real danger that desirable candidates will be lost if compensation is not within a fair and reasonable range.

RECOMMENDATION # 7:

The CBA recommends that the Commission should not accept evidence of lawyers' incomes derived from filed income tax returns to directly compare with the remuneration of judges because that data is incomplete, inaccurate and not a true reflection of senior lawyers' true incomes for comparison purposes with judges.

Necessary Constraints and Personal Sacrifices of Provincial Court Judges

Maintaining judicial independence requires many constraints and personal sacrifices for the individual judge. These necessary constraints and personal sacrifices of the judges need to be factored in determining fair and reasonable judicial compensation.

Certain constraints are properly expected of judges. For example, upon taking office, a judge must dissolve any business or financial transactions he or she had prior to appointment. Thereafter, a judge may not carry on or practise any other business, profession or occupation. In their private lives, judges are subject to further unique constraints and sacrifices. Upon taking office, judges must terminate their political affiliations, and withdraw or distance themselves from personal relationships they may have developed with former professional colleagues.

Another important consequence of these necessary sacrifices is that judges must minimize those occasions when they may exercise their constitutionally guaranteed rights of association and free expression, and subordinate their private convictions to the impartiality of the judicial role. Another serious consequence is that judges are necessarily precluded from many ordinary forms of social interaction with their community. This

isolation can breed loneliness for the judge who was likely previously accustomed to the collegial atmosphere most lawyers enjoy. Significantly, from the point of view of financial security, a further critical consequence of these constraints and sacrifices is that judges are precluded from improving their personal finances by participating in other business opportunities.

These constraints also inhibit the recruitment of the most qualified members of the Bar from applying for a position to the Bench. In our submission, compensation levels should be such as to minimize the inhibiting effects of these constraints and personal sacrifices. At the same time, government should reciprocate by providing judges evidence of their value in the form of fair and reasonable remuneration.

RECOMMENDATION # 8:

The CBA recommends that the Commission accept the evidence of the necessary constraints and personal sacrifices made by Provincial Court Judges in its determination of fair and reasonable judicial remuneration.

Compensation to Supreme Court Justices and Judges of the Provincial Court

The CBA submits that the function of the Provincial Court is as important to the people of this Province as that of the Supreme Court. Judges of the Provincial Court perform many of the same functions, work similar hours, apply the same law, and have the same relevance to British Columbians as judges of the Supreme Court. Litigants appearing before the Provincial Court are as deserving as those appearing before the Supreme Court. Litigants in both courts are entitled to the same quality of justice.

Currently, the salary of a Supreme Court Justice in British Columbia is \$252,000 per year. The salary of a Provincial Court judge is less than that at \$202,356 per year.

Both the Provincial Court and Supreme Court compete for the same pool of qualified candidates from the Bar. Because of the real differences in salary levels and benefits for judges of these courts, those who are well-qualified and suited to the Provincial Court, may very well reasonably choose to apply to the Supreme Court for financial reasons. Consequently, the difference in compensation may very well inhibit the recruitment of the best possible candidates to the Provincial Court Bench.

In our submission, the public interest is not properly served where there is a significant disparity between the remuneration for judges of the Provincial Court and the justices of the Supreme Court.

RECOMMENDATION # 9:

The CBA recommends that the Commission accept that the public interest is not properly served where there is a significant disparity between the remuneration for judges of the Provincial Court and the justices of the Supreme Court. The CBA further recommends that the Commission should take this factor into consideration in its determination of fair and reasonable judicial remuneration.

OTHER RELEVANT MATTERS

Section 5(5)(e) of the Act requires the Commission to consider any other matter the Commission considers relevant.

Pensions and Other Benefits

The CBA submits that other relevant matters for the Commission to consider include pensions and other benefits.

The CBA submits that following the *PEI Reference*, the same legal principles that apply to salaries for judges apply equally to judicial pensions and other benefits (para. 136).

As a general rule, going to the Bench is usually lawyers' last career moves. Consequently, because of the other restraints imposed on judges, their future economic circumstances and that of their families will depend almost entirely on their judicial salary, pension and other benefits.

Since judicial independence is predicated on financial security, which includes pension and other benefits, there must be some assurance of retirement security for those sitting judges. The compensation level should be sufficient to ensure that judges and their families are perceived by society to be financially secure. As well, the level of compensation and benefits should make appointment to the Bench sufficiently attractive to attract the best qualified lawyers.

RECOMMENDATION # 10:

The CBA recommends that the Commission include pensions and other benefits in its determination of judicial compensation.

Government Agreement with its Crown Counsel

In April 2007, the government and the British Columbia Crown Counsel Association ratified a 12-year labour relations agreement. The agreement covers some 420 Crown counsel. These Crown counsel are government employees.

Provincial Court judges are neither civil servants nor government employees. Although both Crown counsel and Provincial Court judges are paid from the same public purse, the CBA submits that what the government pays its Crown counsel employees is not relevant to the question of what the constitution and the rule of law require the government to pay independent Provincial Court judges.

Specifically, the CBA's concern is that the Commission is constitutionally required to conduct a process that is independent, objective, and effective. If the Commission must now consider the cost implications to the

Province because of its agreement with Crown counsel, this process is weakened. We ask: how effective can this process be if the Commission simply becomes a government agent approving “wage and price controls” instead of an objective Commission focused on its legal and constitutional mandate?

Since the government’s agreement with its Crown counsel employees extends 12 years to 2019, the potential to seriously undermine for years to come the Commission’s constitutional mandate is apparent if the Commission recommends compensation for Provincial Court judges on the basis that by doing so, it is also recommending compensation for the government’s employees or other civil servants.

The CBA submits that the Commission must be mindful of its legal duty to protect judicial independence as ordered by Supreme Court of Canada in the *PEI Reference*:

...the fact remains that judges, although they must ultimately be paid from public monies, are not civil servants. Civil servants are part of the executive; judges, by definition, are independent of the executive. The three core characteristics of judicial independence

— security of tenure, financial security, and administrative independence — are a reflection of that fundamental distinction, because they provide a range of protections to members of the judiciary to which civil servants are not constitutionally entitled (para. 143).

The CBA further submits that the Commission, in addition to protecting and preserving judicial independence, must depoliticize judicial remuneration as required by *Bodner*. As the Supreme Court of Canada warned in the *PEI Reference*:

With respect to the judiciary, the determination of the level of remuneration from the public purse is political in another sense, because it raises the spectre of political interference through economic manipulation. An unscrupulous government could utilize its authority to set judges' salaries as a vehicle to influence the course and outcome of adjudication. Admittedly, this would be very different from the kind of political interference with the judiciary by the Stuart Monarchs in England which is the historical source of the constitutional concern for judicial independence in the Anglo-American tradition. However, the threat to judicial independence would be as significant. We were alive to this danger in

Beauregard, supra, when we held (at p. 77) that salary changes which were enacted for an “improper or colourable purpose” were unconstitutional. Moreover, as I develop below, changes to judicial remuneration might create the reasonable perception of political interference, a danger which s. 11(d) must prevent in light of *Valente* (para. 145).

RECOMMENDATION # 11:

The CBA recommends that the Commission not consider the cost implications to the Province because of the government’s agreement with its Crown counsel employees. Regarding this agreement, the CBA further recommends that the Commission act on its constitutional duty to preserve judicial independence and depoliticize the setting of judicial remuneration.

Costs

The CBA submits that other relevant matters for the Commission to consider include costs.

The Provincial Court Judges Association Of British Columbia has expended significant time and expense to prepare and make its submissions before the Commission.

Like the CBA, the Provincial Court Judges Association Of British Columbia is a non-profit organization with limited funding.

Both the judicial compensation commissions in Alberta and Ontario have recommended that those governments compensate the judges associations in those provinces for their reasonable costs in preparing and making their submissions before their respective commissions. In light of the recommendations of commissions in the similar jurisdictions of Ontario and Alberta, it is only fair and reasonable that the Commission recommend that the government pay all reasonable costs paid by the Provincial Court Judges Association Of British Columbia Association to prepare and make its submissions to the Commission.

RECOMMENDATION # 12:

The CBA recommends that the Commission recommend that the government pay all reasonable costs incurred by the Provincial Court Judges Association Of British Columbia Association to prepare and make its submissions to the Commission.

ACCESS TO JUSTICE

Public Interest

The CBA submits that, following the *PEI Reference*, financial security is a means to the end of judicial independence, and is therefore for the benefit of the public (para. 193).

As a benefit to the public, financial security and the work done by the judges becomes an access to justice issue.

The importance to the general public of the work done by the Judges of the Provincial Court cannot be overstated. British Columbians are most familiar with the Provincial Court as the venue for resolving their disputes. It is the Provincial Court that hears and decides the vast majority of cases

in both the civil and criminal matters. Often, Provincial Court judges deal directly with litigants attending without legal counsel. Not surprisingly, far more British Columbians form their impression of the judicial system from the Provincial Court than from the other levels of court. The decisions of the Provincial Court judges have an enormous impact on the everyday lives of British Columbians.

In our submission, the interests of individual litigants and the public as a whole require the most capable judges possible dispensing justice in order to ensure access to justice.

We submit that the public interest is well served by the appointment of judges of the highest calibre. Good judges working fairly and efficiently enable lawyers to work more efficiently, to give worthwhile legal advice, and to assess reliably whether a case is worth fighting, and if so, how. Lawyers gain in being able to provide that service, clients gain in receiving it, and the administration of justice gains in terms of its credibility. Beyond the material advantages, our members also appreciate the moral leadership that comes from the Provincial Court Bench. The practice of litigation is often taxing to the strength of and will of our members involved in it.

In our view, appointments to the Bench from among the most capable, conscientious and energetic members of the legal profession create the strongest possible Provincial Court. As lawyers, we expect our judges of the Provincial Court to provide guidance and wise encouragement to help us do our best in providing access to justice for the public.

It is in the interests of all British Columbians that judges of the Provincial Court be paid sufficiently to ensure their financial independence. Judicial independence and security, while a favourable condition for individual judges, must be preserved, not for the sake of those judges, but in the interests of the judicial system and the public it serves. The constitutional guarantees judicial independence because it is in the public's best interest and serves to provide access to justice.

RECOMMENDATION # 13:

The CBA recommends that the Commission find that access to justice and the public interest require capable judges who are fairly and reasonably compensated in order to ensure their financial independence.

SUMMARY OF RECOMMENDATIONS

In these Submissions, the CBA has made the following recommendations:

RECOMMENDATION #1:

The CBA supports the intent and broad purpose of the Commission to determine appropriate compensation for the Provincial Court Judges through a method that upholds the principle of judicial independence. The CBA further recommends it is proper for the Commission to apply this standard to its present determination of judicial compensation.

RECOMMENDATION #2:

The CBA recommends that the Commission follow the provisions of the Act, including those in section 5(5) and the direction imposed on it by the Supreme Court of Canada in the *PEI Reference* to ensure that the process to be followed to determine judicial compensation is fair and in accordance with the rule of law.

RECOMMENDATION # 3:

The CBA recommends that the Commission find that the government's current financial position allows for fair and reasonable judicial compensation on the basis of:

- the government's surplus budget released in February 2007;
- the requirements of the Act; and
- the constitutional principles applicable to ensuring judicial independence through fair judicial compensation as noted in our Submissions.

RECOMMENDATION # 4:

The CBA recommends that the Commission apply the applicable constitutional principles provided in the *PEI Reference* and clarified in *Bodner* in order to ensure: a depoliticized judicial compensation process and judicial independence through fair and reasonable judicial compensation as noted in our Submissions.

RECOMMENDATION # 5:

The CBA recommends that the Commission apply the applicable laws of British Columbia, including the relevant constitutional principles, to ensure that judicial independence is protected by the fair and reasonable determination of judicial compensation.

RECOMMENDATION # 6:

The CBA recommends that the Commission award fair and reasonable compensation commensurate with the duties and responsibilities of the work performed by the Judges of the Provincial Court, taking into consideration the:

- increased demands in jurisdiction; and
- increased demands on the time and expertise of the judges.

RECOMMENDATION # 7:

The CBA recommends that the Commission should not accept evidence of lawyers' incomes derived from filed income tax returns to directly compare with the remuneration of judges because that data is incomplete, inaccurate and not a true reflection of senior lawyers' true incomes for comparison purposes with judges.

RECOMMENDATION # 8:

The CBA recommends that the Commission accept the evidence of the necessary constraints and personal sacrifices made by Provincial Court Judges in its determination of fair and reasonable judicial remuneration.

RECOMMENDATION # 9:

The CBA recommends that the Commission accept that the public interest is not properly served where there is a significant disparity between the remuneration for judges of the Provincial Court and the justices of the Supreme Court. The CBA further recommends that the Commission should take this factor into consideration in its determination of fair and reasonable judicial remuneration.

RECOMMENDATION # 10:

The CBA recommends that the Commission include pensions and other benefits in its determinations of judicial compensation.

RECOMMENDATION # 11:

The CBA recommends that the Commission not consider the cost implications to the Province because of the government's agreement with its Crown counsel employees. Regarding this agreement, the CBA further recommends that the Commission act on its constitutional duty to preserve judicial independence and depoliticize the setting of judicial remuneration.

RECOMMENDATION # 12:

The CBA recommends that the Commission recommend that the government pay all reasonable costs incurred by the Provincial Court Judges Association Of British Columbia Association to prepare and make its submissions to the Commission.

RECOMMENDATION # 13:

The CBA recommends that the Commission find that access to justice and the public interest require capable judges who are fairly and reasonably compensated in order to ensure their financial independence.

CONCLUSION

One of the main purposes for the CBA is to protect the independence of the judiciary.

Consequently, we urge this Commission to recommend to the government that the Provincial Court Judges be fairly and reasonably compensated in order to uphold, preserve and protect the independence of the judiciary in British Columbia.

All of which is respectfully submitted.

A handwritten signature in black ink, appearing to read "David Paul", written in a cursive style.

David A. Paul, Q.C.
Chair of Canadian Bar Association BC Branch
Provincial Court Judges Compensation and
Pension Committee

APPENDIX

SOURCE

TAB

Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 SCR 3

A

British Columbia, Balanced Budget 2007 Backgrounder (February 2007)

B

Beauregard v. Canada, [1986] 2 S.C.R. 56

C

Ell v. Alberta [2003] 1 S.C.R. 857

D

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)*, 2005 SCC 44, [2005] 2 S.C.R. 286

E