

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

TO THE

BRITISH COLUMBIA

JUDICIAL JUSTICES OF THE PEACE

2007

COMPENSATION COMMISSION

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PREFACE

The *Judicial Compensation Act* (the “Act”) requires the British Columbia Judicial Justices Of The Peace 2007 Compensation Commission (the “Commission”) to report to the Legislative Assembly through the Attorney General on all matters respecting the remuneration, allowances and benefits of judicial justices and to make recommendations with respect to those matters for each of the next 3 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.

UNIQUE ROLE OF THE CBA

The Canadian Bar Association (British Columbia Branch) (the “CBA”) has been invited to make submissions to provide its perspective regarding judicial compensation for Judicial Justices of the Peace (“JJPs”).

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 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.

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.

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 2007, this Committee is making submissions regarding judicial compensation for Provincial Court Judges. The CBA is pleased to make submissions to the Commission regarding compensation for JJPs.

Our Submissions will focus on three aspects of compensation for JJPs:

1. judicial independence;
2. the current financial position of the government; and
3. the work environment of JJPs and the need to attract qualified applicants.

Each aspect will be considered in turn.

JUDICIAL INDEPENDENCE

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

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 (see Tab A, 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 (see Tab B, Appendix).

Constitutional Principles Applied to the Determination of Judicial Compensation: The *PEI Reference*

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”*) (see Tab C, Appendix) has set the standard for governments to follow regarding the role and function of judicial compensation commissions. 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:

- 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);
- 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 equally apply to judicial pensions and other benefits (para. 136);
- judges, although they must ultimately be paid from public monies, 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) this 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 of Canada's constitutional principles set out in the *PEI Reference*.

In 2003, the Supreme Court of Canada released its decision in *Elliott*. In *Elliott*, the Supreme Court held that the principles of judicial independence that apply to judges apply equally to JJPs.

Specifically, the Supreme Court of Canada held that:

- principles of judicial independence apply to JJPs as a result of their authority to exercise judicial functions (para. 17);
- JJPs serve on the front line of the criminal justice process, and perform numerous judicial functions that significantly affect the rights and liberties of individuals (para. 24);
- JJPs are included in the definition of "justice" under s. 2 of the *Criminal Code*, R.S.C. 1985, c. C-46, and are authorized to determine judicial interim release (bail) pursuant to s. 515 of the *Code* (para. 24);

- JJPs exercise significant judicial discretion in adjudicating on judicial interim release (bail); judicial interim release impacts upon the right to security of the person under s. 7 of the Charter and the right of Canadians not to be denied reasonable bail without just cause under s. 11(e) of the Charter (para. 24);
- JJPs issue search warrants, which impact upon the right of Canadians to be secure from unreasonable search and seizure under s. 8 of the Charter; issuing search warrants requires discretion to be exercised by a judicial officer who remains independent from the state and its agents (para. 25); and
- each of the above judicial responsibilities makes clear that JJPs play an important role in assisting the provincial and superior courts in fulfilling the judiciary's constitutional mandate (para. 26).

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 D, Appendix).

Commonly cited as the *Bodner* decision, the Supreme Court of Canada held that the principles of judicial independence that apply to judges apply equally to JJPs. More specifically, the Supreme Court of Canada determined that JJPs:

- exercise an important judicial role;
- have had their functions expanded over the years; and
- require constitutional protection (para. 121).

In *Bodner*, the Supreme Court of Canada reiterated principles articulated in *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 the government's response to the commission's recommendations, the *Bodner* decision requires the government to give weight to a 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 compensation for either judges or JJPs. 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 # 1:

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

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 (see Tab E, Appendix).

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

compensation set out in our Submissions, the government's current financial position allows for fair and reasonable compensation for JJPs.

RECOMMENDATION # 2:

The CBA recommends that the Commission find that the government's current financial position allows for fair and reasonable compensation for JJPs 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 set out in our Submissions.**

WORK ENVIRONMENT AND ATTRACTING QUALIFIED APPLICANTS

Section 5(5)(a) of the Act requires the Commission to consider the need to attract qualified applicants.

JJPs are designated as judicial justices under section 30(1) of the *Provincial Court Act*.

The Chief Judge of the Provincial Court has the duty and power to supervise JJPs under section 11 of the *Provincial Court Act*.

Work Environment

The work environment for JJPs is varied and demanding.

As part of their duties and responsibilities, JJPs receive official court records such as affidavits, declarations and affirmations. JJPs issue summonses, subpoenas and warrants. Specifically, JJPs hear applications for search warrants and judicial interim release (bail). They hear these applications by video conferencing and telephone. JJPs also hear matters regarding municipal bylaws and traffic and other offences

under the *Motor Vehicle Act*, and other provincial statutes. JJPs also complete duties as assigned by the Chief Judge of the Provincial Court.

JJPs don't work regular 9 to 5 hours. They are required to provide public service 24/7, 365 days a year. As a result, JJPs work shifts, work weekends and work on statutory holidays. They often travel throughout the Province in order to fulfill their responsibilities.

The Supreme Court of Canada has described JJPs as serving on "the front line of the criminal justice process" and carry out "numerous judicial functions that significantly affect[ed] the rights and liberties of individuals." (*Ell*, para. 24). In doing so, especially at bail hearings, JJPs must explain the operation of the legal system to the public. Many of the public appearing in British Columbia's courts do so without a lawyer. Many do not speak either of Canada's official languages as a first language. Many persons are unfamiliar with the justice system and need to have the law's complex procedures and processes explained to them in a manner that they can understand. Many persons appearing before judges and JJPs come from a variety of diverse backgrounds. For many, appearing in court before a judge or JJP is stressful. As a consequence, JJPs, like judges, need to be impartial, patient, fair and compassionate in their dealings with the public.

As frontline judicial officers, JJPs, like judges, operate in a stressful, adversarial and public work environment. To meet their statutory duties, JJPs are required solve legal problems. They also resolve disputes. Many JJPs are not legally trained, although some JJPs are also lawyers. JJPs work with Provincial Court Judges and are under the supervision of the Chief Judge.

Like judges and lawyers, JJPs have ethical duties to report misconduct to the appropriate disciplinary body. Like judges and lawyers, JJPs are subject to and required to make reports about misconduct and unauthorized practice under the *Protocol between the Provincial Court and the Law Society respecting complaints* (see Tab F, Appendix).

The CBA supports the need to maintain a strong core of JJPs by attracting qualified applicants. Applicants to be JJPs should be skilled and experienced. As judicial officers, it would be beneficial for JJPs to be lawyers, since lawyers are legally trained and experienced in the adjudicative functions that form the core of the JJP duties and responsibilities.

Compensation Needed to Attract Qualified JJPs

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 JJPs is attracting candidates of the highest quality.

RECOMMENDATION # 3:

The CBA recommends that the Commission award fair and reasonable compensation commensurate with the duties and responsibilities of JJPs, including pensions and other benefits in its determinations of compensation for JJPs. The CBA recommends that it would be beneficial for lawyers to be appointed JJPs, since lawyers are legally trained and experienced in the adjudicative functions that form the core of the JJPs' duties and responsibilities.

SUMMARY OF RECOMMENDATIONS

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

RECOMMENDATION # 1:

The CBA recommends that the Commission apply the applicable constitutional principles provided in the *PEI Reference* and clarified in *Ell* and *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 # 2:

The CBA recommends that the Commission find that the government's current financial position allows for fair and reasonable compensation for JJPs 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 # 3:

The CBA recommends that the Commission award fair and reasonable compensation commensurate with the duties and responsibilities of JJPs, including pensions and other benefits in its determinations of compensation for JJPs. The CBA recommends that it would be beneficial for lawyers to be appointed JJPs, since lawyers are legally trained and experienced in the adjudicative functions that form the core of the JJPs' duties and responsibilities.

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 government that JJPs 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
<i>Beauregard v. Canada</i> , [1986] 2 S.C.R. 56	A
<i>Ell v. Alberta</i> [2003] 1 S.C.R. 857	B
<i>Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island</i> , [1997] 3 SCR 3	C
<i>Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)</i> ; <i>Ontario Judges' Assn. v. Ontario (Management Board)</i> ; <i>Bodner v. Alberta</i> ; <i>Conférence des juges du Québec v. Québec (Attorney General)</i> ; <i>Minc v. Québec (Attorney General)</i> , 2005 SCC 44, [2005] 2 S.C.R. 286 (the “ <i>Bodner</i> decision”)	D
British Columbia, <i>Balanced Budget 2007 Backgrounder</i> (February 2007)	E
Protocol Between The Provincial Court And The Law Society Respecting Complaints	F