

The Law Society of British Columbia



January 24, 2023

Sent via email: kgrant@legalanalysis.ca

The Honourable Lynn Smith, KC
Chair, 2022 Judicial Compensation Commission

Dear Honourable Lynn Smith:

**Christopher A.
McPherson, KC**
President

**RE: 2022 Judicial Compensation Commission – Submissions from the Law
Society of British Columbia**

Office Telephone
604.605.5394

Office Email
president@lsbc.org

Further to your letter of November 17, 2022, please find attached submissions from the Law Society of British Columbia to the 2022 Judicial Compensation Commission.

Sincerely,

A handwritten signature in blue ink, appearing to read "C. McPherson", with a long horizontal flourish extending to the right.

Christopher A. McPherson, KC
President, Law Society of BC

Encls.

DM3879796

845 Cambie Street, Vancouver, BC, Canada V6B 4Z9
t 604.669.2533 | f 604.669.5232
toll free 1.800.903.5300 | TTY 604.443.5700
lawsociety.bc.ca



2022 Judicial Compensation Commission

Submission of the Law Society of British Columbia

Executive Summary

As we have stated in past submissions to this Commission, the Law Society believes that a well-qualified and independent judiciary is a constitutional requirement necessary to maintain the rule of law. It is an essential element of the administration of justice, and in turn protects the rights and freedoms of all persons. The Provincial Court judiciary is an integral part of the administration of justice in the Province, and discharges an essential role in the preservation and protection of the rights and freedoms of citizens of this Province.

The Judicial Compensation Commission plays a fundamental role in the protection of judicial independence to ensure there is a process that addresses the tension that exists because judicial compensation must be paid from public funds, which fall within the general responsibility of the other two branches of government. In discharging this function, the Law Society submits that:

- (1) judges must not be analogized to the civil service;
- (2) judicial independence must be maintained, which includes a requirement that judges be compensated adequately to protect the courts from political interference through economic manipulation;
- (3) the amount of remuneration be sufficient to ensure that qualified individuals can be attracted to serve and remain serving as judges; and
- (4) while cost implications that the remuneration of judges has on government are to be considered by the Commission, caution must be given as to how determinative such considerations are.

Introduction

A well-qualified and independent judiciary is an essential element of the administration of justice, which is an unwritten constitutional principle that protects the rights and

freedoms of all persons. The Provincial Court judiciary, comprising judges and judicial justices, is an integral part of the administration of justice in the Province, and discharges an essential role in the preservation and protection of the rights and freedoms of British Columbians. Set out below is what we consider is the role of the Commission and nature of issues that it must consider in the course of its work

For the purposes of this submission, and because (subject to certain limitations in the *Provincial Court Act*) a judicial justice hearing a matter assigned by the chief judge “may exercise all the powers and jurisdiction of the court under an enactment respecting the case or matter,” each reference below to judges or the judiciary is meant to encompass as well considerations relating to the compensation of judicial justices.

Role of the Judicial Compensation Commission

Maintenance of the independence of the judicial branch of government requires a process that addresses the tension that exists due to the fact that judicial compensation must be paid from public funds, which fall within the general responsibility of the legislative and executive branches of government. In 1997, the Supreme Court of Canada held in a case (hereafter referred to as “the *PEI Reference*,”¹) that the preservation of the constitutional principle of judicial independence requires an independent commission to play a role in the determination of the remuneration of judges. The Court referred to these commissions as “an institutional sieve, to prevent the setting or freezing of judicial remuneration from being used as a means to exert political pressure through the economic manipulation of the judiciary.” The importance of Commissions has been restated in many cases.²

The role of the Commission was described in the *PEI Reference* at para 133:

“...any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective, and objective, for determining judicial remuneration, to avoid the possibility of, or the appearance of political interference through economic manipulation. What judicial independence requires is an independent

¹ *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 SCR 3 (the “*PEI reference*”)

² See for example *The Association of Justices of the Peace of Ontario/L'Association des juges de paix de l'Ontario v. Ontario*, 2016 ONSC 6001, *Newfoundland and Labrador Association of Provincial Court Judges v. Newfoundland and Labrador*, 2018 NLSC 224 including, in this province, *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)* 2015 BCCA 136

body, along the lines of the bodies that exist in many provinces and at the federal level, to set or recommend the levels of judicial remuneration.”

The essential requirements for a constitutionally valid process for setting judicial remuneration have recently helpfully been set out in *Newfoundland and Labrador (Provincial Court) v. Newfoundland*, 2022 NLSC 47 at paragraph 8.

The Commission is essential in a constitutional democracy. The establishment of judicial compensation commissions maintains the independence of the judiciary and maintains the confidence of British Columbians in the judicial process.

Judges are not civil servants

The Supreme Court of Canada made it clear in the *PEI Reference* that judges should not be analogized to the civil service:

“...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.”

Determining the compensation of judges must therefore be treated differently than the setting of compensation of others who are paid from public funds.

Judicial independence

Canada is a constitutional democracy based on the rule of law. The rule of law is a fundamental postulate of the Canadian constitutional structure³, and in turn depends to a considerable degree on the independence of the judiciary. Judicial independence itself is therefore understood and recognized legally as a constitutional principle.

Judicial independence is important to the rule of law as a principle that allows the decision of judges to be made based only upon the law and not on extraneous considerations. Judicial independence exists to ensure that justice is done between the parties on the basis of law, that citizens know that they will be treated and dealt with

³ *Roncarelli v. Duplessis* [1959] SCR 121

fairly in matters that come before the court, and that citizens generally will know that matters before the court are dealt with by reference only to law and the evidence presented.

The three key characteristics of judicial independence are security of tenure, administrative independence, and financial security.

Financial security, which falls within the Commission's role to assess, depends upon the proper remuneration for the compensation of judicial labour.

In light of the fact that judicial salaries are paid from tax revenues collected by government, it is particularly important, and the integrity of the system demands, that judges not be seen or perceived to curry favour with the legislative or executive branches of government who are often litigants in matters before them. "Financial security ... means that judges should not worry that the executive or the legislature will use their control over government finances to reduce judicial compensation. If that were the case, then judges might be reluctant to make decisions that favoured individuals or businesses over the government in cases coming before them, or it may appear that they were reluctant to do so."⁴

A certain degree of financial independence greatly assists in dispelling any impression that a judge may be tempted to curry favour with other interests as well. The 1992 British Columbia Compensation Advisory Committee quoted the Ontario Provincial Court's Committee in part as follows:

"...[I]t is an emblem of a Judge's independence that he or she be perceived by those within the larger community to be a person of means commensurate to his or her office. If a Judge is perceived to be in straitened or reduced circumstances, he or she is more likely to appear to the public to be susceptible to financial pressure or influence, whether or not that is really the case.

Consequently, the interests of the judicial system and the public that are served by the court require judicial independence and security."

The amount of compensation as recommended by this Committee must therefore be set at a level that will ensure these fundamental constitutional principles are properly reflected and considered. The remuneration recommended by this Committee must be set to reflect the need for judicial independence, and be free from political representation or considerations. The overall compensation must be adequate, [and be] commensurate

⁴ *Judicial Independence: Defending an Honoured Principle in a New Age* The Advocates Society, April, 2020, page 10..

with the status, dignity and responsibility of [the judges'] office (*PEI Reference*, para 194).

Proper judicial remuneration that protects the courts from political interference through economic manipulation. Consequently, the setting of the proper remuneration must also be void of political considerations.

Attracting and keeping a strong court

The importance to the general public of the work done by the Provincial Court cannot be overstated. The Provincial Court hears and decides the vast majority of criminal, civil and child apprehension matters in this province. The legal issues that the court must address are complex involving issues relating to the *Charter of Rights and Freedoms* and increasingly complicated revisions of the *Criminal Code* and other statutory law. Many of its decisions have enormous impact on the lives of the litigants bringing the cases. Despite that importance, judges of the Court often do not have the opportunity to reserve and reflect on their decisions due to the volume of cases they must hear. They must “get it right the first time” by giving reasons from the Bench, often must do so without the benefit of law clerks, often on the move from community to community throughout the province, and with the added pressure of increasing case loads.

The interest of the public as a whole, as well as that of the individual litigants, requires the most capable people possible dispensing justice at this level of court, as with any other. There is an obvious public interest in attracting the most qualified individuals to serve as Judges. Applicants for a judicial position must therefore not be asked to subject themselves to unreasonable financial or other sacrifices in order to serve the public by accepting a judicial appointment. Moreover, judicial remuneration ought to be reasonably commensurate with other opportunities that may be available to sitting judges in order to encourage them to remain on the pass up other opportunities for which they may be well suited, including ensuring that Provincial Court judges' salaries do not fall significantly behind that of the Judges of the Superior Court.

In our submission, therefore, the remuneration and benefits paid to Provincial Court judges must be competitive so as to encourage the most qualified members of the Bar to consider appointment to the Court for which he or she is most suited. The Courts have clearly held that judges' salaries must not fall below the basic minimum level of remuneration for the Office of Judge that is adequate, and is commensurate with the status, dignity, and responsibility of their Office.

Financial condition of the Government and Economic Factors

The Commission's recommendations may have cost implications to government. Those cost implications may, by virtue of s. 5(d) of the *Judicial Compensation Act*, be considered by the Commission. However, caution must be given as to how determinative those considerations should be, having regard to the general judicial findings in the series of cases before the Supreme Court of Canada in *Provincial Court Judges' Association in New Brunswick v. the New Brunswick (Minister of Justice)*; *Ontario Judges' Association v. Ontario (Management Board)*; *Bodner v. Alberta*; *Conference des juges du Quebec v. Quebec (Attorney General)*; *Minc v. Quebec (Attorney General)* [2005] 2 SCR 286 at para. 160.

While the constitutional guarantee of a minimum acceptable level of judicial remuneration does not shield judges from sharing the burden of difficult economic times,⁵ judges' compensation must nevertheless be set to preserve the constitutional imperatives of judicial independence.

Conclusion

We are certain the Commission is well aware of the important role that it has to discharge and that the Commission is well versed with the nature of the consideration it must give in order to reach the appropriate recommendation. We have outlined what we believe are the essential principles that the Commission must consider in reaching its recommendations. We are not, of course, in a position to make specific representations as to the particular amount of compensation that the Commission should recommend. That decision will be made by the Commission on the basis of materials and representations that it will receive during the course of its mandate.

⁵ *Provincial Court Judges Association of British Columbia v. British Columbia (Attorney General)* 2015 BCCA 136