



May 21, 2019

Sent via email: mtsurumi@legalanalysis.ca

The Honourable Thomas A. Cromwell, CC (Chair)
c/o Maia Tsurumi, Commission Secretary
Borden Ladner Gervias LLP
Suite 1300 – 100 Queen Street
Ottawa, ON K1P 1J9

Nancy G. Merrill, QC
President

Office Telephone
604.605.5394
Office Email
president@lsbc.org

Dear Mr. Cromwell:

**Re: 2019 Judicial Compensation Commission –
Submissions from the Law Society of British Columbia**

Further to your letter of April 18, 2019, please find attached submissions from the Law Society of British Columbia to the 2019 Judicial Compensation Commission.

Yours truly,

A handwritten signature in black ink, appearing to be "Nancy G. Merrill".

Nancy G. Merrill, QC
President

Encls.



2019 Judicial Compensation Commission

Submission of the Law Society of British Columbia

Executive Summary

The Law Society believes that a well qualified and independent judiciary is an essential element of the administration of justice, which 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 British Columbians.

The Judicial Compensation Commission is integral to judicial independence to ensure 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 requires 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 as judges, and (4) while cost implications that the remuneration of judges has on government can be considered by the Commission, caution be given as to how determinative such considerations are, given the general statements on the subject in cases decided by the Supreme Court of Canada, discussed below.

Introduction

The Law Society is the governing body for lawyers in British Columbia, and in that capacity regulates the more than 14,000 lawyers in the Province. In addition, the Law Society's object and duties, as stated in s. 3 of the *Legal Profession Act*, extend to upholding and protecting the public interest in the administration of justice by preserving and protecting the rights and freedoms of all persons.

The Law Society believes that a well qualified and independent judiciary is an essential element of the administration of justice, which 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 British Columbians.

We are not, of course, in a position to make specific representations as to the specific 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. We will instead set out what we consider is the role of the Commission and nature of issues that it must consider in the course of its work.

Role of the Judicial Compensation Commission

The judiciary is one of the three branches of government. The other two branches, of course, are the legislative and executive branches. No single branch of government in a constitutional democracy can override another branch, and each branch must respect the other's particular constitutional obligations. Each branch must remain independent of the other.

The need to maintain this judicial independence requires 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. Courts have decided that constitutional convention requires the existence of an independent commission for the setting of judicial salaries starting with *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”) where the Supreme Court of Canada held that the constitutional principle of judicial independence requires that an independent commission play a role in the determination of the remuneration of judges. In the PEI reference 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, including *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

The Supreme Court described the role of the Commission 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 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.”

Consequently, the role of the Commission is essential in a constitutional democracy, and it has a crucial role to play in ensuring and maintaining the confidence of British Columbians in the judicial process.

Judges are not civil servants

The Supreme Court of Canada made it clear that judges should not be analogized to the civil service 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.”

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

One of the crucial purposes in the establishment of judicial compensation commissions is to maintain the independence of the judiciary.

Only when Judges are free from the influence of government can they be seen to be free to dispense, in an even-handed and unconstrained fashion, justice as between individuals or as between individuals and the state. The faith of litigants, particularly those in conflict with some level of government or other public body, depends on Judges maintaining both the reality and the appearance of being a disinterested adjudicator in any dispute. The public confidence in the administration of justice as a whole is similarly dependent on this reality and appearance.

The Supreme Court of Canada held, in the *PEI Reference*, that “independence contributes to the perception that justice will be done in individual cases.” Judicial independence is also necessary for the maintenance of the rule of law including “the constitutional principle that the exercise of all public power must find its ultimate source in a legal role.”

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

Financial security depends upon the proper remuneration for the compensation of judicial labour. As held by the Supreme Court of Canada in *Valente v. The Queen* [1985] 2 SCR 673 at 704:

“The second essential condition of judicial independence for the purposes of s. 11(d) of the Charter is... what may be referred to as financial security. That means security of salary or other remuneration, and where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the executive in a manner that could affect judicial independence.

Judicial independence also requires that Judges be compensated adequately. The integrity of the judicial system demands that there be no suggestion that Judges would have any interest in currying favour with government or accepting an inducement from anyone. A certain degree of financial independence goes a long way to dispelling any such impression. 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 with the status, dignity and responsibility of [the judges'] office (*PEI Reference*, para 194).

The role of the Commission is therefore crucial in setting 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

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 accept unreasonable financial or other sacrifices in order to serve the public in the judiciary.

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. Many of its decisions have enormous impact on the lives of the litigants bringing the cases.

The interest of the public as a whole, as well as that of the individual litigants, therefore requires the most capable people possible dispensing justice at this level of court, as with any other.

Each level of court has unique demands on its Judges, and each court is at its strongest if the members of the court are best suited to its particular judicial work. The public interest is not well served if compensation of Provincial Court Judges falls significantly behind that of the Judges of the Superior Court, because potential judicial candidates who may be best suited (personally and/or professionally) to the Provincial Court may be persuaded for financial reasons to apply to Superior Courts rather than to the Provincial Court.

Public scrutiny of the administration of justice in the court system is often focused on the Provincial Court, which is the entry point for almost all criminal matters, and most family or other civil matters. Today, a Provincial Court judge may make a relatively straight-forward decision on a bail application and, after events intervene, find him or herself the focus of media attention for days or weeks.

The Provincial Court has jurisdiction to decide matters of utmost importance to the individuals directly concerned, and often the community as a whole. But Judges often do not have the opportunity to reserve and reflect on their decisions due to the volume of

cases they must hear. Judges in the Provincial Court must “get it right the first time” by giving reasons from the Bench. They 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.

At the same time, the legal issues that the court must address are complex. This is particular true of criminal cases, including youth court cases, which commonly involve issues relating to the *Charter of Rights and Freedoms*, and increasingly complicated revisions of the *Criminal Code* and other statutory law. Civil and family law cases are similarly growing ever more complex. The need to attract highly motivated, conscientious, and energetic judges is more apparent than ever before.

We do not believe that it is sufficient merely to attract the strongest possible judicial appointments. We believe that it can no longer be assumed that, once appointed, Judges will remain on the Bench for the remainder of their careers. There are other options available to capable and experienced professional women and men on the Bench. While, for the most part, judges are truly devoted to the contribution they make as judges, judicial remuneration must be reasonably commensurate with that contribution in order that society can reasonably expect them to pass up other opportunities for which they are well suited.

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

The purpose of the Commission is to ensure that political considerations do not interfere with the proper setting of judicial compensation, which (as stated above) is necessary in order to achieve the constitutional imperative of judicial independence.

The constitutional guarantee of a minimum acceptable level of judicial remuneration does not shield judges from sharing the burden of difficult economic times (*Provincial Court Judges Association of British Columbia v. British Columbia (Attorney General)* 2015 BCCA 136). As we commented above, judges’ compensation must be set to preserve the constitutional imperatives of judicial independence.

The Commission's recommendations may have cost implications to government with respect to other groups. 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 to how determinative those considerations must be, given the general judicial statements 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.

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 consideration it must give in order to reach the appropriate recommendation. As stated at the outset, our submissions cannot make recommendations as to actual figures with respect to the proper judicial remuneration. Rather, we have outlined what we believe are the essential principles that the Commission must consider in reaching its recommendations.