



Blake, Cassels & Graydon LLP
Barristers & Solicitors
Patent & Trade-mark Agents
199 Bay Street
Suite 4000, Commerce Court West
Toronto ON M5L 1A9 Canada
Tel: 416-863-2400 Fax: 416-863-2653

December 13, 2011

Catherine Beagan Flood
Dir: 416-863-2269
cbe@blakes.com

VIA EMAIL

Reference: 100716/16

Ms. Suzanne Labbé
Executive Director
Judicial Compensation and Benefits Commission
99 Metcalfe Street, 8th floor
Ottawa, ON K1A 1E3

Dear Ms. Labbé:

Re: 2012 Quadrennial Commission on Judicial Compensation

This is further to the Notice issued by the Judicial Compensation and Benefits Commission on December 8, 2011.

The Notice indicates that the Commission has determined that in the absence of “a change in facts or circumstance,” the Commission “intends to regard” a particular comparator, Recommendations 2, 3, 5, 6, 7, 8, 10, 11 and a portion of Recommendation 4 of the 2007 Judicial Compensation and Benefits Commission’s Report “as a settled matter of principle.” The Commission has also invited submissions regarding whether it is “necessary or advisable” for it to consider the timeliness and substance of the Government’s 2009 Response to the 2007 Commission.

With respect, the Notice is not consistent with the Commission’s constitutional or statutory mandate, or the principles of natural justice. The Commission has apparently met *ex parte*, deliberated, and determined the bulk of the issues that are the subject of its inquiry under s. 26 of the *Judges Act* prior to receiving and considering submissions from any party or from the public.

In *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*; *Ontario Judges' Assn. v. Ontario (Management Board)*; *Bodner v. Alberta*; *Conférence des juges du Québec v. Québec (Attorney General)*; *Minc v. Québec (Attorney General)*, 2005 SCC 44, [2005] 2 S.C.R. 286 at para. 17 (“*Bodner*”), the Supreme Court of Canada provided the following guidance for judicial remuneration commissions:

The commission must objectively consider the submissions of all parties and any relevant factors identified in the enabling statute and regulations. Its recommendations must result from a fair and objective hearing. Its report must explain and justify its position. [emphasis added]

In the same decision (at para. 19), the Supreme Court held that a judicial compensation commission will have had a “meaningful effect” as required by the Constitution if it is a “public and open process of recommendation and response.” The Notice does not reflect the process required by the Constitution.

22181613.3

In *Bodner*, the Supreme Court further held (at para. 14) that the purpose of a judicial compensation commission “is not simply to ‘update’ the previous commission’s report.” Rather, while a commission can consider the reports of previous commissions as part of the background and context for its inquiry, “Each commission must make its assessment in its own context.” The 2007 Commission chose not to follow several of the recommendations of the 2004 Commission, including the 2004 Commission’s determination that it is not appropriate to focus solely on the DM-3 comparator. Far from being “settled,” or a matter of “consensus,” prior Commissions’ views regarding DM-3s as a potential comparator have varied widely, as have their views on several of the 2007 recommendations. If the 2007 Commission’s intention in Recommendation 14 was to fetter the independence and objectivity of this Commission, it lacked the jurisdiction to do so. It would be an error of law for this Commission to fetter itself by following the recommendations of a prior Commission without making its own independent and objective assessment of all of the evidence and submissions presented by all participants in its public inquiry.

Indeed, at their initial meeting with the Commission on November 15, 2011, the principal parties advised the Commission that they were both of the view that, as a matter of law, this Commission must inquire into the adequacy of judicial salaries and “cannot just adopt what the previous Commission has done.”

Moreover, the fact that the Commission has indicated that it intends to adopt non-salary related recommendations of the previous Commission (Recommendations 5, 6, 7, 8 and 10), despite having been advised by counsel for the judiciary on November 15 that only salaries would be in issue during this quadrennial period, is also inconsistent with the Commission’s constitutional duty to proceed on an objective basis. Similarly, the Commission has indicated that unless there has been a change in facts or circumstances, it will recommend a salary differential for appellate judges (Recommendation 3 of the 2007 Commission), even though no party has given notice to the Government that such a differential will be requested.

Finally, with respect to the last paragraph of the Notice, the timing and substance of the Government’s 2009 response is not a subject of this inquiry. This Commission was established under s. 26 of the *Judges Act* to “to inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges’ benefits generally,” for the period of April 1, 2012 to March 31, 2016. Its mandate is prospective.

The Supreme Court has determined in the *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 S.C.R. 3 (see e.g. paras. 133, 176-77) and *Bodner* (see e.g. paras. 21, 131) that the report of a judicial compensation commission is consultative: “the Constitution does not require that commission reports be binding, as decisions about the allocation of public resources belong to legislatures and to the executive” (*Bodner*, at para. 21). A commission’s recommendations can be rejected by a government for legitimate reasons based on a reasonable factual foundation. Such a rejection is subject to a limited, deferential form of judicial review by the superior courts “which acknowledges both the government’s unique position and accumulated expertise and its constitutional responsibility for management of the

province's financial affairs" (*Bodner*, para. 30). A government's response to a judicial compensation commission is clearly not subject to review by later remuneration commissions.

Indeed, at the same time that the Government responded to the 2007 Commission, it also responded to recommendations of a Special Advisor on Federal Court Prothonotaries' Compensation. While the federally-appointed judges did not seek judicial review of the Government's decision not to implement the 2007 Commission's recommendations, the prothonotaries did seek judicial review of the Government's decision not to implement the Special Advisor's recommendations, including the timing of the Government's response. The Federal Court of Appeal held that the Government's response was constitutional in light of "the deteriorating state of the global economic situation and its impact on the finances of the Government of Canada": *Aalto v. Canada (Attorney General)*, 2010 FCA 195 at para. 15. The Supreme Court denied leave to appeal that decision. This Commission has no mandate to revisit such matters.

In light of the foregoing, the Government's submissions to the Commission will not only address the issue of "change of facts or circumstance" referenced in the Notice, but will also address the legal errors in the Notice and will set out the evidence and submissions that the Government considers relevant to the full inquiry which the Commission is required to conduct. In fairness to the Canadian Superior Court Judges Association and Canadian Judicial Council, counsel for the Government advised counsel for the judges' associations on December 9, 2011 that the Government would be submitting this letter to the Commission and that the Government intends to address all the issues raised by s. 26 of the *Judges Act* in its submissions to the Commission.

While counsel intends to make every effort to incorporate all the changes to the Government's submissions that are necessitated by the December 8 Notice in time to meet the December 20 filing deadline, given the number of approvals and translation required for such amendments, the Government may need to seek an extension of time. The Government intends to advise the Commission and counsel for the judges' associations prior to December 20 if such an extension is needed.

Yours very truly,



Catherine Beagan Flood

CBE/lpi

c: Pierre Bienvenu
Azim Hussain