Submission on

Judges' Salaries & Benefits

CANADIAN BAR ASSOCIATION

January 2000

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PREFACE

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Standing Committee on Pensions for Judges' Spouses and Judges' Salaries of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Canadian Bar Association.

Submission on
Judges' Salaries & Benefits

I. INTRODUCTION

Among the Canadian Bar Association's principal objectives are the promotion of improvements in the administration of justice and maintenance of the high quality of the justice system in Canada. Independence of the judiciary from the executive and legislative branches is a cornerstone of our system and, by extension, of our democracy itself. As the Supreme Court of Canada noted in *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island,*[1] judicial independence protects citizens against the abuse of state power. It also is an integral component of federalism, protecting one level of government from encroachment into its jurisdiction by another.

In the *P.E.I. Reference,* the Court reiterated that judicial independence is comprised of three essential aspects: security of tenure; financial security; and administrative independence. Security of tenure and financial security have two dimensions, protecting both individual judges and the courts as an institution. The institutional dimension is important, as it underscores the position of the courts as guardians of the Constitution, the rule of law, equality and the democratic process. It reflects a deep commitment in Canadian society to the separation of powers between the judiciary and the executive and legislature.

The bottom line is that judicial independence is enhanced when judges are seen to to be deciding their cases free of economic and political influences. Financial security therefore demands that the process of determining judicial compensation be depoliticized. Part of this depoliticization involves the Judicial Compensation and Benefits Commission (Commission) process. However, merely setting up a Commission and receiving a report is not sufficient. Although the Commission's recommendations are non-binding on the executive and legislature, they should not be set aside lightly. The executive and legislature must give reasons for any decision to depart from its recommendations based on a standard of simple rationality. The institutional dimension of financial security also demands that judicial remuneration not be below a minimum level because adequate remuneration reduces the potential that economic influences will affect judges' decisions. Minimum levels of remuneration thus protect and preserve judicial independence.

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[1] [1997] 3 S.C.R. 3 (the *P.E.I. Reference*).

Beyond these considerations, the proper functioning of our system depends on a high level of judicial competence. Judges' salaries and benefits, including the benefits for their families, must be at a level to attract the best and most qualified candidates to the judiciary. They must also be commensurate with the position of a judge in our society and must be reflective of the respect with which our courts are to be regarded.

These considerations, among others, are reflected in the criteria the Commission is required to consider pursuant to section 26(1.1) of the *Judges Act* (the *Act*). These criteria include:

prevailing economic conditions and cost of living;
current financial position of the federal government;
the role of financial security in ensuring judicial independence;
the need to attract outstanding candidates to the judiciary; and
any other objective criteria that the Commission considers relevant.

I. PROCESS FOR REVIEW OF JUDICIAL COMPENSATION

The CBA urges the Commission to remind Parliament that the Constitution requires the setting of judicial salaries to be objective, dispassionate and rational. The intention behind establishing judicial compensation commissions is to provide an effective and non-partisan method of reviewing and setting judicial remuneration.

Under section 26 of the revised *Act*, the Commission is required to submit a report to the Minister of Justice. The Minister must table the report in the House of Commons and, in turn, the report must be referred to the Standing Committee on Justice and Human Rights. The Standing Committee may conduct inquiries and public hearing and report its findings.

We share the Scott Commission's view that Parliamentary Committee review of the Commission's recommendations generally increases rather than decreases the likelihood of

politicizing judicial compensation issues.[2] Now that politicians' attacks on judges have become an unfortunate part of the political landscape, Committee hearings could become a forum for those who have an axe to grind with respect to particular judicial decisions or with the judiciary generally. In particular, we are concerned that some will feel the need to make direct links between judicial decisions, either specifically or generally, and compensation issues. We believe the Commission should caution Parliament that its consideration of the Commission's report involves special constitutional considerations, which risk being endangered by a politicized approach and by making any links between judges' remuneration and the decisions they make.

Having said this, it is a step forward that the Minister of Justice is now required to respond to the Commission's report within six months of receiving it. We trust that this will lend a certain dispassionate objectivity to the process of determining judicial compensation.

The Scott Commission Report notes that the history of Parliament's response to judicial compensation commission reports has usually been one of silence.[3] As noted in the *P.E.I. Reference*, silence is not enough. Parliament has to respond to a Commission proposal and that response has to be rational.

I. JUDICIAL SALARIES

> The independence and quality of the judiciary is predicated on an assurance of adequate salary while in office, and assurance of an equitable provision of retirement security.

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2 Canada, Department of Justice, *Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits*, September 30, 1996 (the "Scott Commission"), at 10.

3 Ibid. at 9-11.

All earlier federal judicial compensation commissions have carefully conducted an independent review of judges' salaries and have been consistent in their recommendation. Earlier Triennial Commissions considered various criteria, including 1975 judges' salary equivalence, private practitioner income levels and senior public servant levels, without considering any such criteria a guiding rule.

The CBA has concerns that judicial salaries are falling farther and farther behind those of senior practitioners, who form the pool from which judges are selected. Except for indexation to reflect inflation, federally appointed judges have not received a salary increase for over a decade. Indexation does not take into account that salaries for senior practitioners, as determined by the market, probably increased more than the cost of living.

As a result, the CBA recommends that judges receive a salary increase over and above indexation. To determine the appropriate level of salary, reference should be made to salaries of senior practitioners as well as senior employees in the public service.

RECOMMENDATION:

1. **The CBA recommends that judges receive a salary increase over and above indexation. To determine the appropriate level of salary, reference should be made to salaries of senior practitioners as well as senior employees in the federal public service.**

I. JUDGES' ANNUITIES

A. The Rule of 80

The CBA made submissions to the Scott Commission on one issue concerning retirement eligibility. The "Rule of 80" is a measure that balances age and years of service in determining retirement eligibility. Under section 42, annuities may be granted to a judge in any one of five circumstances:

1. where a judge has continued in judicial office for at least 15 years and has attained a combined age and years in office of not less than 80 and has resigned judicial office;
2. where a judge has continued in judicial office for at least 15 years and resigned that office, if, in the opinion of the Governor in Council, resignation is conducive to the better administration of justice or is in the national interest;
3. where a judge has become afflicted with a permanent infirmity disabling that judge from the due execution of the office of judge and resigns that office, or by reason of that infirmity is removed from office;
4. where a judge has attained the age of retirement and has held judicial office for at least 10 years; or
5. a judge of the Supreme Court of Canada has been on that Court for at least 10 years, has attained the age of 65 and has resigned.

The "Rule of 80" was made more flexible in the 1998 amendments to the *Act*. The amendments reflected the recommendation of the Scott Commission to do away with the minimum age requirement of 65.

The CBA supports this change but, as in its Scott Commission submission, would submit that an unencumbered "Rule of 80" is appropriate. The principle recognizes the varied makeup of the judicial population and the flexibility required to encourage a wide diversity of candidates to become judges.

Elimination of the minimum service requirement would give older judicial candidates incentive to join the bench. For example, we think it is appropriate that a judge who has been appointed at age 56 be entitled to full annuity benefits on reaching the age of 68 (with 12 years of service).

Although it is not the mandate of the Commission to deal with judicial appointments, the CBA does wish to express its concern that the government may treat loosened pension eligibility requirements as a disincentive to appointing younger candidates because of the potentially increased cost. We strongly object to such considerations entering into the appointment process, particularly because members of groups less represented on the bench tend now to be younger members of the bar. The failure to appoint younger candidates to the bench because of pension costs would result in less diversity on the bench, ironically defeating one of the principal purposes of loosening pension eligibility requirements.

Diversity on the bench needs to be addressed. Eighty per cent of federally appointed judges are male, despite the fact that there are now many senior female lawyers in the profession. Indeed, one-fifth of the CBA's membership consists of senior female lawyers in active practice who would satisfy the statutory preconditions to become a judge.

RECOMMENDATION:

2. **The Canadian Bar Association recommends that the *Act* be amended to provide an unencumbered "Rule of 80".**

A. Supernumerary Status

Prior to the amendments to the *Act* in 1998, a judge who reached the age of retirement could either retire or elect supernumerary status. Supernumerary judges work on at least a half-time basis. The advantage of having supernumerary judges is evident from a cost perspective. Instead of paying 2/3 of the judge's salary (i.e. the cost of a pension) for no services, the system pays full salary but gets at least one half of the normal services of an experienced judge.

While the 1998 *Act* amendments made the "Rule of 80" more flexible for retirement purposes, the strict age and service conditions for supernumerary status were retained (age 65 and 15 years service or age 70 and 10 years service). We suggest that it makes more sense to provide the option to elect supernumerary status at the same time as the option to elect retirement. Right now, an 80-factor judge without the requisite age and service is not able to make that choice. This may result in fewer judges electing supernumerary status, which would be a detriment to the system. We therefore recommend that the option to elect supernumerary status mirror retirement eligibility. Consistent with our proposal above, this would be on an unencumbered "Rule of 80". We would place a 10-year limit on supernumerary status.

RECOMMENDATION:

3. **The Canadian Bar Association recommends that the option to elect supernumerary status be based on an unencumbered "Rule of 80".**

A. Survivor Benefits for Common Law Spouses and Same-sex Partners

The CBA reiterates its concern expressed to the Scott Commission that spousal survivor benefits also apply to common law spouses and same-sex partners of judges.

All federal statutes, other than the *Act*, which include provision for survivor benefits, refer to common law spouses among the potential beneficiaries of such benefits. It would probably be contrary to section 15 of the *Canadian Charter of Rights and Freedoms* to allow discrimination against those in common-law relationships to continue.[4]

Similarly, the failure to grant survivor benefits to same-sex partners is likely contrary to section 15.[5] Amending the legislation to include those in same-sex relationships would reflect the growing legislative recognition of the equal status of such relationships in provinces such as British Columbia, Ontario and Quebec. It also includes, we understand, undertakings at the federal level.

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[4] *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Rossu v. Taylor*, Court File No. 96-16793, June 16, 1998 (Alta C.A.).

[5] *M. v. H.* [1999] 2 S.C.R. 3; *Rosenberg v. Canada* (1998), 38 O.R. (3d) 577 (C.A.); *Ontario Public Service Employees Union Pension Plan Trust Fund v. Ontario*, [1998] O.J. No. 5075 (Gen. Div.).

RECOMMENDATION:

4. **The Canadian Bar Association recommends that spousal survivor benefits also apply to common law spouses and same-sex partners of judges.**

A. Joint-and-Survivor Pensions

Many private and public pension plans allow members to elect a joint-and-survivor pension when they retire. Under this option, a member can take a reduced annuity for the joint lifetimes of the member and their spouse. The amount of the annuity is calculated actuarially so that there is no increased cost to the plan. The advantage of this option is that it allows a pension plan member the comfort of knowing their spouse will not suffer a reduction in income after the member's death.

Currently, a surviving spouse of a judge receives one half of the judge's pension and there is no joint-and-survivor option. We ask that the Commission recommend that the *Act* be amended to include a joint and survivor option. As there would be no increased cost to taxpayers, there would appear to be no reason why the *Act* should not be amended accordingly.

We also urge the Commission to recommend that those who enter spousal relationships, including common-law and same-sex relationships, after retirement be entitled to elect a joint-and-survivor pension.[6] Currently, section 44(4) prevents surviving spouses from receiving an annuity where the surviving spouse marries a judge after the judge ceases to hold office. At the same time, section 13.1 of the *Public Service Superannuation Act*, which applies to most employees of the public service, allows a member to elect a joint-and-survivor option where a spouse would not otherwise be eligible for a survivor benefit -- as, for example, where the person has become a spouse after retirement.

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[6] The Scott Commission recommended that retired judges who marry after retirement be entitled to elect a joint-and-survivor pension (p. 25).

RECOMMENDATION:

5. **The Canadian Bar Association recommends that the *Act* be amended to include a joint and survivor option.**

6. **It also recommends providing those who enter spousal relationships, including common-law and same-sex relationships, after retirement with the option to elect a joint-and-survivor pension.**

I. CONCLUSION

The objectives of the Canadian Bar Association include the preservation of the independence of the judiciary and the legal profession.

It is our belief that the failure of governments to implement the recommendations of previous judicial compensation commissions has defeated the intent of section 26 of the *Act*, has compromised the integrity of the process for setting judicial compensation, and ultimately threatens judicial independence.

We urge this Commission to recommend that the judicial compensation review process be amended with a view to ensuring the preservation of the independence of the judiciary in Canada.

I. SUMMARY OF RECOMMENDATIONS

The Canadian Bar Association recommends that:

1. **judges receive a salary increase over and above indexation. To determine the appropriate level of salary, reference should be made to salaries of senior practitioners as well as senior employees in the public service;**

2. **the *Act* be amended to provide an unencumbered "Rule of 80";**

3. **the option to elect supernumerary status be based on an unencumbered "Rule of 80";**

4. **spousal survivor benefits also apply to common law spouses and same-sex partners of judges;**

5. **the *Act* be amended to include a joint and survivor option; and**

6. **providing those who enter spousal relationships after retirement with the option to elect a joint-and-survivor pension.**