



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
BARREAU CANADIEN

Judicial Compensation and Benefits Commission

CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 40,000 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 Judicial Issues Subcommittee, with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Policy Committee and approved as a public statement of the CBA.

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Judicial Compensation and Benefits Commission

I. INTRODUCTION

The Canadian Bar Association (CBA) welcomes the opportunity to make submissions to assist the seventh quadrennial Judicial Compensation and Benefits Commission in its task of determining fair and just judicial and prothonotary compensation and benefits, pursuant to the *Judges Act*.¹

The CBA's mandate includes two important objectives that guide its role in this process:

- promotion of improvements in the administration of justice; and
- maintenance of a high-quality system of justice in Canada.

An independent judiciary is an essential ingredient of both objectives.

The Supreme Court of Canada has explained that “[i]ndependence [of the judiciary] 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.”² The CBA has a long tradition of speaking in defense of judicial independence and of working actively against potential political interference in the appointment and compensation of judges in Canada.

The CBA has an independent role in the work of judicial compensation commissions. Our submissions support and reinforce the two broad objectives above. The CBA does not represent or advocate on behalf of either the government or the judiciary, nor does it speak on behalf of any other external group. Rather, our submissions are intended to assist the Commission in its work, so the process of determining judicial compensation and the substantive outcome of that process properly and fairly reflect the imperative of appropriate judicial compensation.

¹ *Judges Act*, R.S.C., 1985, c. J-1, s. 26

² *Provincial Court Judges’ Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges’ Assn. v. Ontario (Management Board); Bodner v. Alberta; Conference des juges du Quebec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, [2005] 2 S.C.R. 286 (Provincial Court Judges Assn. of New Brunswick).

The CBA's primary concern is to ensure that judicial compensation and benefits are structured to fulfill a dual purpose:

- Protecting and promoting the independence of the judiciary through the institution and maintenance of appropriate financial security for members of the judiciary; and
- Strengthening and advancing the judiciary through sufficient financial independence of its members and providing adequate compensation to attract the best and most qualified candidates for appointment.

II. JUDICIAL INDEPENDENCE

Independence of the judiciary is an essential ingredient of Canadian democracy. The Supreme Court of Canada has emphasized that an independent judiciary is an integral component of federalism by protecting one level of government from encroachment into its jurisdiction by another, and by serving to protect citizens against the abuse of state power.³

Judicial independence is “the lifeblood of constitutionalism in democratic societies.”⁴ It 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.*”⁵ [emphasis added]

The principle of judicial independence is a fundamental right for all citizens. The principle was well-stated by then-Chief Justice Antonio Lamer in his 1999 address to the CBA annual meeting in Edmonton, Alberta:

An independent judiciary is the right of every Canadian. A judge must be seen to be free to decide honestly and impartially on the basis of law and the evidence, without external pressure or influence from anyone.⁶

Judicial independence comprises three components: security of tenure; administrative independence; and financial security. Financial security embodies the three following *constitutional* requirements:

- Judicial salaries can be maintained or changed only by recourse to an independent commission;
- No negotiations are permitted between the judiciary and the government; and
- Salaries may not fall below a minimum level.⁷

³ *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 [P.E.I. Reference].

⁴ *Beauregard v. Canada*, [1986] 2 S.C.R. 56 at 70.

⁵ *Ell v. Alberta*, [2003] 1 S.C.R. 857 at para. 29.

⁶ Chief Justice Lamer, *Address to the Canadian Bar Association*, 1999 (not published).

⁷ *Supra* note 3

Not only must the judiciary be independent, it must also be seen to be independent and free from interference and influence from the other branches of government and from other external sources. To ensure that this requirement of independence is met, the executive, legislative and judicial branches must remain separate. This principle extends to the determination of judicial salary and benefits undertaken by an objective, independent commission that is beholden to none. The commission process is often described as being an “institutional sieve,”⁸ and “a structural separation between the government and the judiciary.”⁹

III. PROCESS FOR REVIEW OF JUDICIAL COMPENSATION

A. Risk of Politicized Process

The process for determining judicial compensation and benefits can either foster or erode the principle of judicial independence. The CBA has intervened in cases dealing with judicial compensation, including the *P.E.I. Reference*,¹⁰ *Provincial Court Judges’ Assn. of New Brunswick*,¹¹ and, most recently, *BC (AG) v. Provincial Court Judges’ Association of British Columbia* and *NS (AG) v. Judges of the Provincial Court and Family Court of Nova Scotia*¹², primarily to highlight the importance of the principles at stake, i.e., judicial independence, democracy and the rule of law, and to emphasize the important role the commission review process plays in preserving those principles.

The creation of judicial compensation commissions arose from the need for an effective and non-partisan method of reviewing and setting judicial remuneration. Under the process established in section 26 of the *Judges Act*, the Commission must submit a report to the Minister of Justice, the Minister must table the report in Parliament, and Parliament must refer the report to a committee that considers matters related to justice. The Parliamentary committee may conduct inquiries and public hearings and, if it does, must report its findings back to Parliament.

The Scott Commission¹³ observed that a Parliamentary committee review of the Commission’s recommendations generally increases rather than decreases the likelihood of politicizing judicial compensation issues. Any links between judicial decisions, either specific

⁸ *Supra* note 3 at paras. 170, 185 and 189.

⁹ *Supra* note 2 at para. 14.

¹⁰ *Supra* note 3.

¹¹ *Supra* note 2.

¹² 2020 SCC 20 and 2020 SCC 21

¹³ Scott Report (1996)

or general, and compensation issues will have the deleterious effect of eroding judicial independence and should not be countenanced.

The CBA urges the Commission to caution Parliament that the consideration of its report involves special constitutional factors that risk being endangered by a politicized process and by making any links, intended or unintended, between judges' remuneration and judges' decisions. Setting judicial compensation must be carried out in an objective, dispassionate and rational manner.

IV. JUDICIAL COMPENSATION AND BENEFITS

The Commission process for determining fair and just judicial compensation must consider the specific statutory criteria in s. 26(1.1) of the *Judges Act*:

- (a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
- (b) the role of financial security of the judiciary in ensuring judicial independence;
- (c) the need to attract outstanding candidates to the judiciary; and
- (d) any other objective criteria that the Commission considers relevant.

The statute does not give dominance to any criterion. It suggests that each one must be given due weight and consideration.

The proper functioning of our justice system depends on a high level of judicial competence. Judges' salaries and benefits must be at a level to attract and retain the best and most qualified candidates. They must also be commensurate with the position of a judge in our society and must reflect the respect given our courts in light of their unique role as a separate and independent branch of government in a democratic society.

The requirement of an adequate salary level is explained in the *Report of the Canadian Bar Association Committee on the Independence of the Judiciary in Canada*:¹⁴

[I]t is difficult to state precisely what is an adequate level for judges' salaries. The amount must be sufficient that neither the judge nor his dependents suffer any hardship by virtue of his accepting a position on the bench. It must also be sufficient to allow the judge to preserve the mien of his office. And it should be sufficient to reflect the *importance of the office of judge*.¹⁵ [emphasis added]

¹⁴ *Report of the Canadian Bar Association Committee on the Independence of the Judiciary in Canada* (Ottawa: Canadian Bar Association, 1985) (de Grandpre Report).

¹⁵ *Ibid* at 18.

A. Financial Security and the Need to Attract Outstanding Candidates to the Judiciary

The CBA recognizes that financial benefits are not – and should not – be the predominant (and certainly not the only) factor aimed at attracting outstanding candidates for judicial appointment. But attracting candidates for judicial appointment requires judicial salaries to be competitive with the other options available to candidates in our professional world. The CBA also notes that, alongside the importance of competitive judicial salaries, there is a pressing need to address the broader issue of underfunding within the justice system. Insufficient financial resources impact not only the ability to attract and retain outstanding candidates but also the capacity of courts to function efficiently. The underfunding of the system can exacerbate delays, reduce access to justice, and contribute to the overall strain on the judiciary. Therefore, ensuring that judicial compensation is competitive must be viewed as part of a broader effort to secure a well-resourced and effective justice system that can uphold its critical role in Canadian society.

The CBA believes that the appropriate gauge for determining the level of judicial salaries is the compensation of senior lawyers in private practice and those at senior levels in the public service, as these individuals generally comprise the pool from which judges are selected and appointed and are their professional peers.

To the extent that prevailing market conditions have increased relevant comparator salaries in excess of inflation, the Commission should ensure that judicial salaries are consistent with these market conditions. The Turcotte Commission noted at paragraph 215 that its mandate was not to match judicial salaries to private sector levels, but rather “to determine whether there is a failure to attract outstanding candidates to the judiciary because of too great a gap between judicial compensation and private practice compensation”. There was a dearth of data available to the Turcotte Commission. Based on the evidence and submissions before it, the Turcotte Commission did not see compelling evidence that there was an inability to attract outstanding candidates to the judiciary.

As a result of the Turcotte Commission’s recommendation 8(5), the current Commission has (for the first time) the benefit of data on the income levels of private sector lawyers that includes the income levels of self-employed lawyers practicing through professional corporations. The Government’s submissions and the Joint Submissions of the Canadian Superior Courts Judges Association and the Canadian Judicial Council set out their respective detailed analyses of the private sector data. Although the private sector data demonstrates that there is a gap between judicial compensation and private sector compensation, there is no

direct evidence as to whether that gap is deterring “outstanding candidates” (from the private sector) from applying for judicial positions. The Turcotte Commission made several recommendations regarding data collection, but those recommendations did not extend to obtaining data directly from private sector lawyers. The Commission may wish to consider whether collecting data from private sector lawyers would be helpful to future commissions. If so, the Commission may provide guidance on the questions to be asked, and the method of data collection. Considering private practice as a comparator does not, of course, mean considering the compensation of senior practitioners from only the largest and most profitable firms in large cities. Judges are appointed from a wide cross-section of the legal community and from varied practice backgrounds and locations. They cut across gender, age and regions, both urban and rural. The data should reflect this reality, to the greatest extent possible. Further, when comparing compensation for judges and associate judges with that of lawyers in private practice, the Commission should consider the total compensation to which federally appointed judges are entitled. As an example, on retirement, judges are entitled to an annuity equal to two-thirds of their former salary. In private practice, many lawyers fund their own retirement through RRSPs or other investments, effectively reducing their disposable income. However, those investments are subject to market volatility with potentially uncertain returns; that uncertainty does not attach to a judicial annuity. At the same time, lawyers in private practice may have a wider range of tax planning opportunities that are not available to judges.

On that point, public sector lawyers may have more certainty around retirement planning, through pensions. However, their salaries are often significantly lower than their peers in private practice. Finally, in-house counsel have a wide variety of compensation packages depending on the size and financial capacity of their employer. All of which is to say that the compensation of lawyers in Canada covers a broad range and includes, in different circumstances, a variety of benefits that can create some financial security over time.

Financial security in every aspect is an essential component of judicial independence. However, the objective is not to provide judges with the same level of financial benefit they may have enjoyed prior to appointment, particularly given the range of income to which a judge may have been entitled in their prior professional practice. Rather, it is to ensure that judges do not experience significant, and discouraging, economic disparity between pre-appointment and post-appointment compensation levels. Judicial compensation and benefits must, therefore, be at a level that attracts outstanding candidates and those who consider as part of their reward the satisfaction of serving society on the bench.

The CBA believes it is important to recognize the sacrifices judges make to control their financial well-being upon appointment to the bench. Once appointed, judges must focus solely on the discharge of their duties and are not permitted to supplement their income, through additional employment or other means. Judges rely on the government's willingness and duty to maintain reasonable judicial compensation for the rest of their lives. Without confidence that the process of determining judicial compensation will consider their financial security as a high priority, outstanding candidates may be discouraged, thereby reducing the pool of highly qualified applicants who apply to the bench.

The CBA also emphasizes the importance of the remaining criteria in section 26 of the *Judges Act*: prevailing economic conditions in Canada, including cost of living, overall economic and current financial position of the federal government. Furthermore, in our view, the need to attract outstanding candidates includes the importance of supporting diversity on the bench.

B. Prevailing economic conditions in Canada

Giving due consideration to the prevailing economic conditions in Canada is important to ensure that candidates who seek appointment to the bench are confident that, if selected, they will be adequately compensated, financially secure, and well able to discharge their duties with no threat to their independence.

The existence of extraordinary economic circumstances should be cogently demonstrated and should be used only as a limited, short-term rationale to defer the responsibility of ensuring that judicial compensation is sufficient.¹⁶

C. Cost of living

Judicial compensation should, at a minimum, keep pace with increases in the cost of living.

Escalating judicial salaries annually based on the Consumer Price Index, or another appropriate and reliable industry index, is the minimum standard to ensure that sitting judges do not experience erosion in their salaries. Without financial accountability, retention of qualified and experienced judges could be compromised. There is at least anecdotal evidence from the United States that non-competitive judicial salaries may increase attrition of experienced judges.¹⁷

¹⁶ e.g. *Aalto v. Canada (Attorney General)*, 2009 FC 861, affd. 2010 FCA 195

¹⁷ *Pay Frozen, More New York Judges Leave Bench*, New York Times, July 4, 2011

The extent to which private sector or public sector lawyer compensation increases beyond the cost of living should also be taken into account when determining the annual escalation for judicial compensation.

D. Overall economic and current financial position of the federal government

Judicial independence is not just another important government priority. *It is a constitutional imperative.* Competing public and government priorities are always present. Although the government must have latitude to strike an appropriate balance,¹⁸ the burden is on the government to give compelling evidence that other competing fiscal obligations justify infringing upon a constitutional imperative¹⁹ Only after the government has satisfied this burden may the Commission consider this factor and reduce what would otherwise be appropriate judicial compensation.

E. Supporting Diversity on the Bench

Fair and just judicial compensation also serves a further important objective criterion: enhancing diversity on the bench.

The judiciary must reflect the Canadian population, including women, Black, Indigenous and People of Colour (BIPOC), disabled persons, persons of all gender and sexual identities, and members of other under-represented groups (collectively, “diverse”). Without diversity, the bench erodes its credibility among all Canadians and lacks first-hand knowledge of the racism and systemic discrimination these communities face. Appointing candidates to the judiciary from diverse groups would offer perspectives grounded in lived experience and thereby enrich the Canadian judiciary.

The CBA has long called for the governments to put into action a commitment to diversity in leadership by appointing more diverse candidates to the courts. The Office of the Commissioner for Federal Judicial Affairs Canada periodically publishes updates on the demographic statistics on diversity in the judiciary. As of February 1, 2024, 1.86% (22 out of 1180) of federal judicial appointees identified as Indigenous, and 6.44% (76 out of 1180) identified as racialized (the current questionnaire uses the term “visible minority”).

¹⁸ *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 SCR 245

¹⁹ *Newfoundland (Treasury Board) v. N.A.P.E.* [2004] 3 S.C.R. 381 is an example of an unexpected and severe financial crisis that justified infringing on the constitutional imperative of equality under s. 15 of the *Canadian Charter of Rights and Freedoms*.

Many diverse lawyers are involved in organizations that support and promote their members in various sectors, including the legal profession and the judiciary. For some outstanding candidates, the decision to apply to the bench means stepping back from some personal involvements and loyalties. Diverse lawyers may or may not be willing to give up their role in promoting, advocating for, and supporting their communities' endeavours for a career on the bench. Reasonable compensation can create confidence so they can step away from these commitments without regret and demonstrate leadership for their communities, and the rest of Canada, by becoming a judge.

With fair and just compensation, the federal government will ensure it is casting its net as wide as possible in seeking candidates for the bench. The number of diverse candidates will expand to include more lawyers who have overcome systemic barriers to find success in private or public practice and who bring their lived experience to their duties on the bench.

V. ASSOCIATE JUDGES OF THE FEDERAL COURT: COMPENSATION AND BENEFITS

The CBA asserted in submissions to Special Advisors on Federal Court Prothonotaries' Compensation in 2008 and again in 2013²⁰ that principles of judicial independence should extend to judicial officers, like associate judges of the Federal Court (formally known as Prothonotaries), who combine administrative functions with significant judicial decision-making responsibilities.²¹

Salaries and benefits of associate judges of the Federal Court must be at a level to attract the most qualified candidates. It must be commensurate with compensation for comparable judicial officers in other courts, such as traditional masters (also known as associate judges in certain superior courts). And their compensation must reflect the respect with which the Federal Court is regarded, but at a level subordinate to Federal Court judges.

The same principles applied in setting judicial compensation and benefits, as expressed above, should be applied when setting compensation and benefits of associate judges of the Federal Court, recognizing that their level of compensation will be subordinate to Federal Court judges.

²⁰ [2008 submission](#); [2013 submission](#)

²¹ *Supra*, note 19, para. 7

VI. CONCLUSION

The importance and intent of section 26 of the *Judges Act* cannot be overstated. If government declines to embrace fully the Commission's recommendations on judicial compensation and benefits, or delays acting on them, the integrity of the process for setting judicial compensation will be compromised. Ultimately, judicial independence may be threatened.

To summarize, the CBA urges the Commission to adopt the following principles:

1. Judicial salaries should be reasonable and responsive to economic conditions, to attract the most outstanding candidates for appointment. The Commission should recommend salaries consistent with prevailing market conditions. It should continue to use as a "comparable" the salary range of lawyers who are senior private practitioners and senior public servants as representative of the legal peers of the appointed justices.
2. Appropriate compensation levels should ensure that judges do not experience significant economic disparity between pre-appointment and post-appointment levels and that the most capable applicants for judicial appointments are not deterred from applying.
3. The same principles of judicial independence apply to the compensation of associate judges of the federal court. Their salaries and benefits must be at a level to attract the most qualified candidates, commensurate with compensation for comparable judicial officers in other courts. Their compensation must reflect the respect with which the Federal Court is regarded, but at a level subordinate to Federal Court judges.
4. Judicial compensation should be sufficient to attract the widest pool of outstanding candidates and, by extension, expand the number of outstanding candidates from diverse groups. Applying for judicial appointment must represent leadership and inclusion to these candidates so the bench reflects the diversity of Canadian society.
5. The Commission may not consider reducing what would otherwise be considered appropriate judicial compensation because of competing financial priorities, without compelling evidence from the government that those competing priorities justify infringing on the constitutional imperative of judicial independence.
6. Parliament should be cautioned that its review of the Commission's report involves consideration of *constitutional principles*, such as the rule of law and the independence of the judiciary from the other branches of government. These considerations risk being endangered by a politicized process and by making any links between judicial remuneration and judicial decisions.

The CBA submits these remarks to assist the Commission in its important deliberations.