



THE CANADIAN
BAR ASSOCIATION
Alberta Branch

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**SUBMISSION OF THE CANADIAN BAR ASSOCIATION
TO THE 2017 JUSTICES OF THE PEACE COMPENSATION COMMISSION**

Canadian Bar Association - Alberta Branch

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TABLE OF CONTENTS

Heading	Page
Preface	2
I. Introduction	3
II. Judicial Independence	4
III. Process	5
IV. Examining the JPs' Role in Context	6
Scope of a JP's Work	6
Dealing with Self-Represented Parties	6
Shift Work and a Maximum 10-Year Term	7
Public Perception	7
V. Economic Considerations	7
Pensions and other Benefits	7
Market Conditions and Financial Constraints	8
VI. Conclusions	8

PREFACE

The CBA is a professional, voluntary organization which was formed in 1896, and incorporated by a Special Act of Parliament on 15 April 1921. Today, the Association represents over 35,000 lawyers, judges, notaries, law teachers and students across Canada. The Alberta Branch of the CBA was formed in 1915, and today consists of almost 5,300 members.

The CBA is the essential ally and advocate of all members of the legal profession: it is the voice of all members of the profession; it is the premiere provider of personal and professional development and support to all members of the legal profession; it promotes fair justice systems, facilitates effective law reform, promotes equality in the legal profession and is devoted to the elimination of discrimination; the CBA is a leading edge organization committed to enhancing the professional and commercial interests of a diverse membership and to protecting the independence of the judiciary and the Bar.

The mandate of the Canadian Bar Association is to:

- Improve the law;
- Improve the administration of justice;
- Improve and promote access to justice;
- Promote equality in the legal profession and in the justice system;
- Improve and promote the knowledge, skills, ethical standards and well-being of members of the legal profession;
- Represent the legal profession nationally and internationally; and
- Promote the interests of its members.

Through the work of its sections, committees and task forces at both the national and branch levels, the CBA is seen as an important and objective voice on issues of significance to both the legal profession and the public. The Canadian Bar Association has branches in each of the provinces and territories.

The Canadian Bar Association is also affiliated with international associations, including the Commonwealth Law Association, International Bar Association and the *Union internationale des avocate(e)s*. Membership in these groups provides the Association with input on recent developments in the legal profession on a broad scale.

I. INTRODUCTION

The Canadian Bar Association – Alberta Branch (identified as “CBA” or “CBA Alberta” hereafter) welcomes the opportunity to make submissions to assist the 2017 Justices of the Peace Compensation Commission (“2017 JPCC”) in performing its legal duty to determine fair and just judicial compensation and benefits. We understand that the 2017 JPCC is considering the appropriate remuneration for Justices of the Peace (“JPs”) of the Provincial Court of Alberta for the four-year period from April 1, 2017 to March 31, 2021.

As part of our continuing commitment to the fundamental principle of independence of the judiciary which is a prerequisite for the proper functioning of the administration of justice within the Province of Alberta, we make this submission as we have made other submissions to similar commissions dealing with similar issues in the past. Specifically, we had the privilege to make submissions to the 2013 Justices of the Peace Compensation Commission during the last process in Alberta.

The CBA recognizes the process for determining compensation of JPs and the benefit of protecting the independence of that process. In this respect, the CBA supports a principled approach which ensures that the compensation and benefits for JPs are properly structured and maintained in accordance with the prevailing economic conditions in Alberta, while *also* recognizing:

- The unique and expanding nature of the roles that JPs play and the impact their decisions have on the lives of all Albertans, particularly many from our most vulnerable and marginalized communities;
- The significant challenges posed to the retention of JPs owing to their shift work, a statutorily fixed 10-year term, and their current level of compensation;
- The need to ensure that JPs are provided with the appropriate working conditions, compensation and other benefits so that only the best and most qualified candidates are appointed.

The CBA’s core interest is to ensure that judicial compensation and benefits are structured and maintained to fulfil a dual purpose:

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

The CBA is an independent voice in relation to the work of judicial compensation commissions. Our sole concern is reflected in the two broad principles set out above. The CBA does not represent the interests of either the Alberta Justices of the Peace or the Minister of Justice and Attorney General in and for the Province of Alberta. The CBA’s

submission is intended to guide the 2017 JPCC as it approaches its work so that the process of determining judicial compensation and benefits and the substantive outcome maintain the constitutional imperative of judicial independence.

II. JUDICIAL INDEPENDENCE

Among the primary objectives of CBA Alberta are promoting positive reforms to the administration of justice and maintaining the highest quality justice system in the Province of Alberta. A judiciary independent from the executive and legislative branches of government is critical and constitutes the cornerstone of our system of justice and democracy.

In the case of *Reference Re: Remuneration of Judges in the Provincial Court of Prince Edward Island* [1997] 3 S.C.R. 3 (the “*PEI Reference*”) the Supreme Court of Canada recognized that judicial independence is a safeguard that protects the public against the abuse of power and is fundamental in protecting the jurisdiction of one level of government from being encroached upon by another.

Since the *PEI Reference*, the Supreme Court of Canada has reaffirmed the Supreme Court’s constitutional principles set out in the *PEI Reference*. In 2005, the Supreme Court of Canada released its decision, *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 Quebec (Attorney General); Minc v Quebec (Attorney General)*, 2005 SCC 44, [2005] 2 S.C.R. 286. Commonly cited as the *Bodner* decision, the Supreme Court of Canada held that the principles stated in the *PEI Reference* remain valid (para. 13). In *Bodner*, the Supreme Court of Canada reiterated principles articulated in the *PEI Reference* that:

- Judicial independence is “the lifeblood of constitutionalism in democratic societies” (para. 4);
- Judicial independence 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” (para. 4 citing *Beauregard, supra* at p. 70);
- Judicial independence has two dimensions: first, the individual dimension, which relates to the independence of any particular judge and the second, the institutional dimension, which relates to the independence of the court the judge sits on. Both dimensions depend upon objective standards that protect the judiciary’s role” (para. 5);
- The “judiciary must both be and be seen to be independent” (para. 6);
- “Judicial independence 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” (para. 6); and

- Key components of judicial independence are: security of tenure, administrative independence and financial security (para. 7).

Albertans must be certain that JPs are seen to be making decisions free of economic and political influences. They must have comfort in the knowledge that a JP has no outside influence in doing what is right and what is just and nothing to gain by political interference. The public confidence in the administration of justice demands that JPs remain independent. Providing adequate compensation (salaries and benefits at appropriate levels) is an integral part of ensuring their independence.

III. PROCESS

With respect to the role exercised by compensation commissions and their recommendations as established by the *PEI Reference*, in the *Bodner* decision, the Supreme Court of Canada stated that a commission must focus on identifying the appropriate level of remuneration for the judicial office in question and address all relevant issues in a flexible manner (para. 14). The *Bodner* decision requires a government to give weight to the commission's recommendations and provide a complete response (para. 23). While government may depart from a commission's recommendations, it must provide complete and legitimate reasons that deal with a commission's recommendations in a meaningful way that will meet the standard of rationality (para. 25).

The CBA submits that the *Bodner* decision clarifies the foundational principles set out in the *PEI Reference*. The CBA does not believe the Supreme Court of Canada's decision in *Bodner* permits a government to reject a commission's recommendations and merely replace it with a government's own recommendations or give a government the final word in determining judicial compensation. Rather, *Bodner* established that a government must respect the commission process and achieve the purposes of the commission namely, to preserve judicial independence and depoliticize judicial remuneration (para. 31).

Judicial independence has three components, namely security of tenure, administrative independence, and financial security. The third component, financial security, in turn embodies three constitutional requirements:

1. Judicial salaries can be maintained or changed only through recourse to an independent commission;
2. No negotiations are permitted between judiciary and government; and
3. Judicial salaries may not fall below a minimum level.

The CBA submits that in order to attract the best candidates for appointment as a JP, fill vacant JP positions, and retain JPs once appointed, the 2017 JPCC must, in determining JP compensation, recognize: (1) the broad scope of a JP's work; (2) the additional work required by JPs when dealing with self-represented parties; (3) the difficult work conditions of JPs, particularly with respect to shift work and a maximum ten-year term limit; (4) that public perception of JPs as exercise judicial functions commensurate with

judges in other levels of court; (5) that benefits and pensions must also be considered; and (6) Alberta's market conditions and financial constraints.

The level of competence exhibited by the JPs in the Provincial Court of Alberta is essential in shaping both the administration of justice and in the public's perception of the administration of justice in Alberta. However, only the best candidates will apply to serve as JPs where they are sufficiently compensated. JPs don't volunteer. Unless there is an appropriate level of remuneration and benefits, economic realities dictate that quality lawyers will neither apply for nor accept appointments.

IV. EXAMINING THE JPs' ROLE IN CONTEXT

Scope of a JP's work

JPs conduct their work in the Calgary and Edmonton courthouses and at various circuit points across the Province. Pursuant to section 3(1) of the *Justice of the Peace Regulation*, JPs preside over a broad range of provincial and municipal offences. Except where a JP's jurisdiction is limited by section 3(2) of the *Justice of the Peace Regulation* in respect of mostly constitutional questions or the determination of treaty rights, JPs largely exercise the same decision making function as that of Provincial Court judges sitting in any courtroom: the entering of guilty pleas, determining appropriate sentencing, hearing various court applications, and the conduct of trials (often multiple trials), on any particular docket day. JPs have the jurisdiction to impose fines which are set by the applicable statute or bylaw offence and can impose terms of imprisonment of up to 2 years.

JPs conduct judicial interim release hearings pursuant to Part XVI of the *Criminal Code* which involves determining whether there are grounds to detain an accused prior to their trial or whether to release them on conditions. This function requires JPs to demonstrate an extensive knowledge of criminal law and render decisions that often attract considerable public scrutiny. JPs also conduct youth bail applications which requires them to apply the *Youth Criminal Justice Act* and understand sentencing principles and procedures that apply to young people. Bail hearings conducted before JPs often involve technical and complex argument advanced by Duty Counsel (always present unless declined by an accused) and Crown Counsel in an often-adversarial setting.

Pursuant to jurisdiction granted pursuant to the *Criminal Code*, JPs are also responsible for dealing with preliminary criminal matters and emergency matters in the Calgary and Edmonton offices, including taking pleas and assessing penalties on outstanding warrants for various offences, administrative releases, the issuing various forms of warrants and other orders and emergency subpoenas, warrants for arrest, search warrants, blood warrants, production orders, emergency protection orders and child apprehension orders.

Dealing with Self-Represented Parties

A unique challenge for JPs is the prevalence of self-represented parties who appear before them. Indeed, the 2000 Justice of the Peace Compensation Commission (at page

26 of its report) recognized the skill level required of JPs when dealing with self-represented parties who have no previous court appearance, are self-represented, and are not familiar with the court process. This reality places the additional burden on JPs to ensure trial fairness for self-represented parties and often requires JPs to engage as much time educating self-represented parties about the court process as hearing from the self-represented parties themselves regarding the matter being adjudicated.

Shift Work and a Maximum 10-year Term

Compounding this heavy work load is the requirement that JPs perform shift work and in Calgary, must fill overnight shifts. Requiring JPs to perform shift work is a work arrangement which other judges don't experience and has a detrimental impact on any JP wanting to balance their professional and family home life. This was recognized at pages 19-20 of the 2013 JPCC report which acknowledged that Alberta is the only provincial jurisdiction that offers 24/7 service and is a significant barrier to recruitment. A further burden placed on JPs is that pursuant to section 7(1) of the *Justices of the Peace Act*, JPs are limited to a maximum term of appointment of ten years with subsequent "cooling off" restrictions that prevents them from seeking employment with the Province of Alberta and other Provincial agencies for six months.

Public Perception

There is no doubt that most Albertans who appear in, or make use of, our judicial system have their first and only experience with the judicial process in Traffic Court. Not surprisingly, many more citizens form their impression of the judicial system from the JPs than from other levels of Court. The decisions of a JP have an enormous impact on the everyday lives of Albertans, often amongst our most marginalized and vulnerable communities.

While most Albertans regard JPs and Provincial Court judges as equal members of the judiciary, it would not be helpful to have a "two-tiered" perception with respect to the level of competence or quality of the judiciary within the Provincial Court. Parties appearing before a JP in Traffic Court or on any matter in the Hearing Office are as deserving of the same quality of justice as those appearing in other courts.

The CBA submits that the public perception is that a judge is a judge, irrespective of the color of the sash that they wear. There is a danger that if there is a widening in disparity of remuneration between JPs and Provincial Court judges, over time a perception of a "two-tiered" justice system will become entrenched. Such a perception would not be acceptable as JPs would be perceived as not having the same stature and respect as their other judicial brethren.

V. ECONOMIC CONSIDERATIONS

Pensions and other Benefits

The CBA submits that following the *PEI Reference*, the same legal principles that apply to salaries for judges apply equally to judicial pensions and other benefits (para. 136).

Furthermore, when it comes to attracting the best candidates, pensions and other benefits such as holiday pay and the number of special leave days and education days are just as important as salary.

As a rule, joining the Bench is a lawyer's last career move. Consequently, because of the restraints imposed on JPs, their future economic circumstances (and that of their families) will depend almost entirely on their judicial salary, pension and other benefits. Since judicial independence is predicated on financial security, there must be an assurance of retirement security for JPs. The compensation level should be sufficient to ensure that JPs and their families are perceived by society to be financially secure. As well, the level of compensation and benefits should make appointment to the Bench sufficiently attractive to interest the best qualified lawyers.

Market Conditions and Financial Constraints

The CBA submits that Alberta's current and projected financial situation allows for fair and reasonable compensation and benefits for JPs.

The CBA accepts that JPs are paid from the government purse and that the competing demands on public monies can mitigate the amount that might otherwise be paid for judicial salaries.

However, judicial independence is not just a government priority. It is, for the reasons expressed above, a constitutional imperative. Before the competing priorities are used as a rationale to reduce what the 2017 JPCC concludes to be appropriate compensation for JPs, the Government must show conclusive evidence of other pressing government fiscal obligations of similar importance to judicial independence.

VI. CONCLUSIONS

The CBA respectfully submits that salaries and benefits should reflect the significant role that JPs play in shaping both the administration of justice and the public perception of the system of justice in Alberta. They should also reflect the importance of having quality lawyers serving as JPs by providing a level of salary and benefits sufficient to attract prominent members of the legal community.

The CBA asserts that the expertise which JPs are required to master over a broad range of subject areas, the challenging working conditions which JPs must work under and the skills required by JPs to deal with self-represented parties require the 2017 JPCC to carefully consider the appropriate level of compensation and benefits that would attract the best and brightest candidates.

Salaries and benefits must also reflect the personal and professional sacrifices which are undertaken by accepting an appointment, including the severing of all ties with their professional practice, withdrawing from any political activities, exercising a higher standard of care and discretion in the community, and withdrawal from community, charitable and personal organizations and relationships. The reality is that JPs are isolated from their former business colleagues, clients, former partners, associates, and

from their friends and acquaintances. To the extent it can, salary and benefits must compensate for that.

The level of compensation must reflect the fact that JPs are faced with making difficult and controversial decisions, which are increasingly being scrutinized by the public and the media, against which JPs are for the most part, defenceless because of their office. JPs almost daily face tough decisions, decisions which affect the lives, liberty and security of individuals. The quality of those decisions will be maintained only if the quality of the JPs making them is maintained, which, in part, will be ensured by establishing salaries and benefits required to attract and keep the best lawyers and which are mandated by the stature and prominence of the position.

To conclude, the CBA urges the 2017 JPCC to adopt the following principles:

- The Legislature should be cautioned that its consideration of the 2017 JPCC report involves special constitutional considerations, which risk being endangered by a politicized approach and by making any links between the JPs' remuneration and the decisions they make.
- To ensure that judicial salaries are adequate to attract the most gifted and accomplished candidates for judicial appointment, the 2017 JPCC should ensure salaries are consistent with prevailing and predicted market conditions. It should continue to use "comparables" of lawyers who are senior private practitioners and senior public servants.
- Appropriate compensation levels should be such that JPs and their dependents do not experience significant economic disparity between pre-appointment and post-appointment, and that the best and most capable applicants for judicial appointments are not deterred.
- Before competing priorities are used as a rationale to reduce what the 2017 JPCC concludes to be appropriate compensation for JPs, the Government would need to show conclusive evidence of other pressing government fiscal obligations of similar importance to that of judicial independence.
- To the extent that the Government does not implement the 2017 JPCC's recommendations for compensation for JPs, the integrity of the process for setting judicial compensation is compromised. Ultimately, judicial independence may be threatened and access to justice impaired. We state this noting that there have been times when both Provincial and Federal government have chosen not to implement the recommendations of independent compensation commissions without providing adequate reasons.

We trust these submissions will assist the 2017 JPCC in its deliberations.

Under s. 12(8) of the *Justices of the Peace 2017 Compensation Commission Regulation*, we note that the Commission may “grant leave to any member of the public to make oral submissions”. We accordingly request such leave, to affirm and supplement our written submissions, and as well to respond to any questions from the Commission, counsel for the Government of Alberta, or counsel for the Society of the Justices of the Peace in Alberta.

Submitted this 30th day of January, 2020, by the Canadian Bar Association, Alberta Branch.



Ola Malik
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