

BY E-MAIL

May 7, 2021

Martine Turcotte, Chair
Margaret Bloodworth and Peter Griffin,
 Commissioners
 Judicial Compensation and Benefits Commission
 8th Floor
 99 Metcalfe Street
 Ottawa, ON K1A 1E3

RE: Response to Reply Submissions of the Government of Canada

Dear Ms. Chairperson, Commissioner Bloodworth & Commissioner Griffin:

This Reply is organized as follows:

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A. The Government of Canada’s position:

1. The Office of the Chief Justice of the Court Martial Appeal Court of Canada (“CMACC”) makes this submission as Reply to the Government of Canada’s request that this Honourable Commission “decline to hear submissions” from the CMACC.¹

¹ [Reply Submissions of the Government of Canada](#) at para. 85. See generally paras. 81-85.

B. CMACC’s submission has an appropriate statutory foundation:

2. The issues raised by the Office of the Chief Justice of the CMACC fit squarely within the parameters of the Commission’s mandate.

3. The proposed amendments to ss. 31.1 and 28 the *Judges Act* are connected to “other amounts payable under this Act” and to “the adequacy of judges’ benefits generally”. This is the language used at s. 26(1) of the *Judges Act* and which forms the basis of the Commission’s mandate.²

4. In particular, the Office of the Chief Justice of the CMACC has raised issues pertaining to supernumerary status and control of scheduling.

C. Control of scheduling is a matter pertaining to “judges’ benefits generally”:

5. The Chief Justice, or Associate Chief Justice, of the CMACC Chief Justice’s ‘source court’ may assert power to control the CMACC’s schedule, which compromises the operational independence of the CMACC in various respects.

6. The ability of the Chief Justice of CMACC to control his or her scheduling is a “benefit” that fits within the mandate of this Honourable Commission: without appropriate consideration of the amendments proposed by the Chief Justice, tangible employment benefits are threatened, including:

- access to relevant continuing education courses;
- vacation time; and
- full participation in the Canadian Judicial Council.

Education courses:

7. While there is almost no criminal law in the Federal Court or Federal Court of Appeal, the mandate of the Chief Justice of CMACC includes a substantial criminal law focus. At present, the Chief Justice may potentially be required to obtain the permission of the Chief

² *Judges Act*, RSC 1985, c J-1, s. [26\(1\)](#).

Justice or Associate Chief Justice of his or her ‘source court’ to participate in necessary criminal law training.

Vacation time:

8. Under the current structure, the Chief Justice or Associate Chief Justice of any ‘source court’ (i.e. the Federal Court, Federal Court of Appeal, or a Superior Court) may potentially influence and control the vacation schedule of the Office of Chief Justice of the CMAcc. This may result in a loss of earned vacation time for a Chief Justice of the CMAcc, a benefit which falls within the mandate of this Honourable Commission.

Canadian Judicial Council:

9. Because the Chief Justice of the CMAcc does not have complete control over his or her scheduling, he or she may also be of less practical use to the Canadian Judicial Council than a Chief Justice should be. If the Chief Justice of CMAcc may require permission (from the Chief Justice or Associate Chief Justice of his or her source court) to sit, for example, on a 3-week inquiry committee, they are also less likely to be asked.

D. This Honourable Commission may make recommendations pertaining to the supernumerary status of CMAcc judges:

10. Determining on which Court a former Chief Justice of the CMAcc may serve as a supernumerary judge is an issue which directly affects his or her compensation. The issue relates to the adequacy of the Chief Justice’s “benefits” as a member of the Canadian judiciary and to “other amounts payable” under the *Judges Act*.

Practical concern associated with the current scheme:

11. Section 31.1 of the *Judges Act* currently provides that, upon providing notice to the Minister of Justice, a Chief Justice of the CMAcc is to perform “only the duties of a judge of the court on which they serve...hold only the office of a judge and shall be paid the salary annexed to the office of a judge”.³

³ *Judges Act*, RSC 1985, c J-1, s. [31.1](#).

12. There is an issue regarding the meaning of “judge” in the context of s. 31.1. The Chief Justice of the CMAAC could be a Federal Court Judge, Federal Court of Appeal Judge, or a Superior Court Judge.

13. This Honourable Commissions can make recommendations as to whether s. 31.1 of the *Judges Act* should continue to yield three potential outcomes, each with its own duties and potential levels of compensation for an outgoing Chief Justice.

Loss of supernumerary opportunity:

14. Unlike a Federal Court Judge, Federal Court of Appeal Judge, or a Superior Court Judge, the Office of Chief Justice of CMAAC’s primary responsibilities are to the CMAAC. As such, where an election to become a supernumerary judge results in a permanent transfer from Chief Justice of the CMAAC to the Federal Court, this would mark a significant change in his or her benefits of employment not otherwise contemplated by those making that election in other courts.

15. These realities may impair the Chief Justice’s ability to make an election pursuant to s. 31.1 of the *Judges Act*. Accordingly, this Honourable Commission may make recommendations to address the effect that s. 31.1 produces – namely, a possible loss of supernumerary opportunity for the Chief Justice of CMAAC (or, indeed, any CMAAC judge).

E. The CMAAC’s submission is consistent with past recommendations of this Honourable Commission:

16. There is precedent, in the form of previous Reports of the Commission, which confirms that “structural” concerns may be raised in this forum. For example, the previous iteration of this Honourable Commission recommended that the Government of Canada and the Chief Justice of the Federal Court of Canada “consider the possibility of allowing prothonotaries to elect supernumerary status under the *Judges Act* or of creating a senior prothonotary program for those eligible for retirement.”⁴[TAB A]

⁴ Report and Recommendations Submitted to the Minister of Justice of Canada (June 30, 2016).

17. As regards the CMACC itself, this Honourable Commission explicitly recognized that the Chief Justice of CMACC “should receive the same compensation and benefits as other chief justices.”⁵ [TAB B]

18. Importantly, Recommendation 11 provided that the Chief Justice should receive “compensation and allowances equal to those of other superior court chief justices, including an annuity based on the Chief Justice’s salary in cases where he or she has stepped down to a puisne judge position.”⁶ [TAB C]

19. The submission of the Office of Chief Justice of CMACC herein is merely seeking to clarify the contours of this Honourable Commission’s prior recommendation. If this Commission had jurisdiction to make Recommendation 11, should it not similarly have jurisdiction to preserve allowances to which the Chief Justice is now entitled?

20. The Office of Chief Justice of the CMACC proposes that this Honourable Commission make further recommendations which appropriately contemplate the legislative structure which affect the CMACC’s “benefits” and “other amounts payable” under the *Judges Act*.

21. For example, in order to fully appreciate the issues raised by the Office of Chief Justice, appropriate consideration should be given to the provisions of the *National Defence Act*⁷ which define the current membership of the CMACC.

22. The Fourth Quadrennial Commission referred to the decision of the Supreme Court of Canada in *Bodner*.⁸ [TAB D] In that decision, the Court clarified that “[a]ll relevant issues may be addressed” by a Commission exercising the significant constitutional functions set out in *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.*⁹

⁵ Report and Recommendations Submitted to the Minister of Justice of Canada (June 30, 2016).

⁶ Report and Recommendations Submitted to the Minister of Justice of Canada (June 30, 2016).

⁷ [National Defence Act, RSC 1985, c N-5.](#)

⁸ Report and Recommendations Submitted to the Minister of Justice of Canada (May 15, 2012).

⁹ *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 CanLII 317](#) (SCC).

23. By way of illustration, this Honourable Commission has previously made recommendations affecting statutes other than the *Judges Act*. For example, this Commission has recommended that relevant regulations under the *Income Tax Act* be amended to afford judges the opportunity to contribute to RRSPs at the time they cease making contributions to the judicial annuity scheme.¹⁰ **[TAB E]**

24. The Second Quadrennial Commission made further recommendations that the Government amend the *Judges Act* and the *Income Tax Act*, as necessary, to allow the transfer of a portion of a former spouses' lump-sum settlements to RRSPs.¹¹ **[TAB F]**

25. Previous Reports of this Honourable Commission have, *inter alia*,

- explored the “Evolution of the Structure” of particular courts;¹² **[TAB G]**
- provided comments on “*Ex officio* Membership and the Nature of Judicial Appointments”;¹³ and **[TAB H]**
- addressed “The Exercise of Appellate Functions by Trial Courts and Judges”.¹⁴ **[TAB I]**

26. Each of these fundamental topics is raised in the submission of the Office of Chief Justice of the CMAcc. If these topics could be addressed in the previous Reports of this Honourable Commission, on what principled basis can Government want them excluded now?

27. The Third Quadrennial Commission made recommendations which are directly comparable to the recommendations proposed by the Office of Chief Justice of the CMAcc herein.¹⁵ **[TAB J]**

¹⁰ Judicial Compensation and Benefits Commission Report (May 31, 2000).

¹¹ Second Quadrennial Commission - Final Report (May 31, 2004).

¹² Report of the Third Quadrennial Judicial Compensation and Benefits Commission (May 30, 2008).

¹³ Report of the Third Quadrennial Judicial Compensation and Benefits Commission (May 30, 2008).

¹⁴ Report of the Third Quadrennial Judicial Compensation and Benefits Commission (May 30, 2008).

28. Importantly, for example, the Commission recommended that the *Judges Act* be amended so that senior judges of the territorial courts and who elect supernumerary status receive the same treatment with regard to their retirement annuities as do chief justices who elect supernumerary status.

29. Moreover, the Commission recommended that the *Judges Act* be amended “so that a judge appointed to a court of appeal who subsequently accepts appointment to a trial court, and receives the salary of a trial court judge, receives a retirement annuity based on the salary of his or her former position as a judge of a court of appeal.”¹⁶ [TAB K]

30. The Fourth Quadrennial Commission made very similar recommendations.¹⁷ [TAB L]

F. The value of independence in fact and public perception:

31. In *Bodner*, the Supreme Court of Canada confirmed that judicial independence includes the need to maintain independence both in fact and in public perception.¹⁸ If the Quadrennial Commission declines jurisdiction to consider issues raised by the CMAAC, and, importantly, declines jurisdiction at the behest of the Government of Canada, what should reasonable observers think (or speculate) about the state of Canada’s independent judiciary?

G. Relief sought:

32. The Office of Chief Justice of the CMAAC respectfully asks:

- that the Government of Canada’s request be denied;

¹⁵ Report of the Third Quadrennial Judicial Compensation and Benefits Commission (May 30, 2008).

¹⁶ Report of the Third Quadrennial Judicial Compensation and Benefits Commission (May 30, 2008).

¹⁷ Report and Recommendations Submitted to the Minister of Justice of Canada (May 15, 2012).

¹⁸ *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 (CanLII), [2005] 2 SCR 286 at para. 1; 5-8. [*Bodner*].

- that the Office of Chief Justice of the CMAACC be given full rights of participation; and
- that this Honourable Commission considers its submissions in making recommendations.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of May, 2021.

Yours very truly,

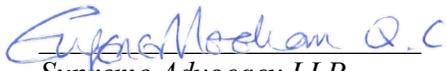

Supreme Advocacy LLP
per Eugene Meehan, Q.C. &
Cory Giordano

TABLE OF AUTHORITIES**Cases**

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 CanLII 317](#) (SCC)

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 (CanLII), [\[2005\] 2 SCR 286](#).

Other

Judicial Compensation and Benefits Commission Report (May 31, 2000).

[Reply Submissions of the Government of Canada](#).

Report of the Third Quadrennial Judicial Compensation and Benefits Commission (May 30, 2008).

Report and Recommendations Submitted to the Minister of Justice of Canada (May 15, 2012).

Report and Recommendations Submitted to the Minister of Justice of Canada (June 30, 2016).

Second Quadrennial Commission - Final Report (May 31, 2004).

Statutory Provisions

Judges Act, RSC 1985, c J-1, s. [26\(1\)](#) and [31.1](#).

[National Defence Act](#), RSC 1985, c N-5.