JUDICIAL COMPENSATION AND BENEFITS COMMISSION

SUBMISSION
of the
CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION
and the
CANADIAN JUDICIAL COUNCIL
in response to
THE GOVERNMENT OF CANADA'S
MOTION DATED MARCH 8, 2016

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OVERVIEW

1. The quadrennial process contemplated by the *Judges Act* is a public process. Paragraphs 46 to 49 and Exhibit B of the judiciary's principal Submission dated February 29, 2016 relate to the first step in this process, and concern a fundamental difference that arose between the Government and the judiciary as to the ability of a party to nominate to the Commission someone who has had a direct involvement, on behalf of a party, in a previous Commission and in discussions about possible reform to the Commission process.

2. It was entirely appropriate for the judiciary to raise this important process issue, and the Government has failed to discharge the heavy burden to justify striking an extract and a series of exhibits from the judiciary's Submission, or excluding them from the public record.

I. INTRODUCTION

3. This submission to the Judicial Benefits and Compensation Commission (the "**Commission**") is made on behalf of the Canadian Superior Courts Judges Association (the "**Association**") and the Canadian Judicial Council (the "**Council**") in response to the Government of Canada's Motion, by letter dated March 8, 2016 (the "**Motion**"), requesting that the Commission strike paragraphs 46 to 49 and Exhibit B of the judiciary's Submission or, in the alternative, that the judiciary's revised submission filed on March 2, 2016 be considered the judiciary's principal Submission and that Exhibit B be marked as a confidential exhibit.

4. For the reasons set out below, the Association and the Council submit that the Commission should refuse the Government's request set out in the Motion.

5. The Government raises three grounds in support of its request to the Commission. The Association and the Council address each ground in turn below. However, it is necessary first to correct the Government's mischaracterization of the judiciary's stated concerns with the Government's initial nominee and the judiciary's reasons for bringing this question to the attention of the Commission.

II. THE JUDICIARY'S STATED CONCERNS WITH THE GOVERNMENT'S INITIAL NOMINEE AND ITS REASONS FOR PLACING THIS QUESTION BEFORE THE COMMISSION

6. In its Motion, the Government states that the judiciary's statements in paragraphs 46 to 49 and Exhibit B "impugn the former Deputy Minister's professionalism and reputation". The Government goes on to contend that "[i]ndirectly, the judiciary challenges the former Deputy Minister's judgement and questions his ability to remain impartial." These statements are demonstrably incorrect and are contradicted by the very correspondence that the Government would want the Commission to exclude.

7. Far from impugning the professionalism and reputation of the Government's initial nominee, the judiciary went out of its way to note that it held this individual in the highest regard and that its concerns related solely to his direct involvement, on behalf of the Government, in a prior Commission and in bilateral discussions between the parties concerning possible reform to the Commission process.

8. This can be seen throughout the relevant correspondence, beginning with the very first letter on this issue addressed to the Government by counsel for the judiciary on June 12, 2015:

> [The former Deputy Minister] has had a very distinguished career in Canada's public service and he enjoys our clients' utmost respect. This respect was only reinforced during the many direct discussions and interactions that took place between our clients and [the former Deputy Minister], while he was Deputy Minister and acting as representative of the Government in these discussions, in relation to possible reforms to the Quadrennial Commission process. Thus, the source of the judiciary's concern relates in no way to the person of [the former Deputy Minister].
>
> The concern results from [the former Deputy Minister's] involvement as Deputy Minister in the Government of Canada's participation in the proceedings of [a past Commission], and from his role as the Government's representative in discussions with the judiciary regarding issues of Quadrennial Commission reform. [...]

9. The judiciary reiterated the point in subsequent correspondence. For example, in response to the Government's letter of June 26, 2015, which expressed the Government's "confidence in [its initial nominee], who has an exceptional reputation as an individual of the utmost integrity and competence", counsel for the judiciary wrote, in a letter dated June 27, 2015:

> Our clients agree with the Government of Canada that [the former Deputy Minister] enjoys an exceptional reputation as an individual of the utmost integrity and competence. As emphasized in my letter of June 12, 2015, that is not the source of the concern expressed by the judiciary.

10. In a subsequent letter dated July 8, 2015, counsel for the judiciary wrote the following:

> The Government's response suggests that having accepted [the former Deputy Minister's] reputation for integrity and competence, the judiciary cannot then question his qualification on the basis of his involvement on behalf of one of the parties in the previous Commission process. Your letter goes as far as to state that the judiciary's expression of concern is "wholly inconsistent" with its stated respect for [the former Deputy Minister's] career in the public service and personal qualities.
>
> With respect, it is well-recognized that decision-makers may be disqualified from participating in certain matters, including matters in which they have had some previous involvement as party or as counsel, without their integrity or competence being questioned in any way. There is no inconsistency in the judiciary's position. [emphasis added]

11. In the same letter, counsel elaborated on the nature of the judiciary's concerns, and it is readily apparent that they were totally unrelated to the former Deputy Minister's professionalism, integrity, or competence:

> This is where the Government's and the judiciary's respective understanding of independence and impartiality differ most.
>
> [The Government's initial nominee] was the Government of Canada's most senior advisor in respect of [a] previous Commission process. As suggested in your letter, he would, in that capacity, have been responsible for providing legal and policy advice to the Government and would thus have played a role in defining both the Government's positions and the instructions to be provided to the Government's counsel before the Commission. Presumably, [that person] also played a role in defining the Government's response to the Commission's recommendations.
>
> This is precisely the type of prior involvement in a matter that typically disqualifies a decision-maker on the basis that it may give rise to a reasonable apprehension of bias – irrespective of that person's reputation for personal integrity or recognised ability to set aside previously held views. In this regard, the recurring nature of the issues arising in the Commission process cannot be ignored. [emphasis added]

12. On July 8, 2015, the judiciary informed its own nominee of the existence of a difference between the Government and the judiciary in relation to the Government's initial nominee, in words that made it plain that the judiciary's concerns related solely to the involvement of the Government's nominee in a previous Commission process:

> While the judiciary has the utmost respect and consideration for [the Government's nominee], his role as Deputy Minister of Justice and Deputy Attorney General during the course of [a] previous Commission process is the source of significant concern for the judiciary. This concern explains the delay in confirming your nomination.

13. In the Motion, the Government states that the effect of the inclusion of paragraphs 46 to 49 and Exhibit B "whether intentionally or not, is [to] imply bad faith and cast the Government's actions in a negative light."

14. The correspondence filed as Exhibit B also belies this imputed motive. Moreover, this same correspondence reveals that the Government was given advance notice that this

question would, in the normal course, be brought to the attention of the Commission, for reasons that were clearly articulated at the time and that remain equally valid today:

> [...] The Quadrennial Commission process is a public process. All submissions and hearings are public. Moreover, and as stated by the Block Commission, the Quadrennial Commission is the "guardian" of the commission process and must "actively safeguard" the constitutional requirements of independence, objectivity, and effectiveness of the Commission.
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> It follows from the foregoing that our exchange of correspondence concerning the nomination of [the Government's initial nominee] would be disclosed to Commission members regardless of its outcome at the nomination stage, as part of the parties' background submissions to the Commission on process. Furthermore, it is critical that the views expressed by the parties (and, in relation to this issue, by the judiciary) as regards the requirement of independence and impartiality on the part of members of the Commission be publicly accessible. Disclosure might also be relevant for all three Commission members and for the public to understand the reasons for any delay that may have been encountered in the constitution of the Commission.

15. In sum, and to correct the Motion, the judiciary never attacked the integrity or professionalism of the Government's initial nominee. Second, there is no basis for the Government's questioning of the judiciary's motive in placing this important issue before the Commission, and in subjecting it to the scrutiny of the Canadian public.

III. THE MOTION

A. Burden

16. It bears emphasizing what the Government's Motion in effect seeks to achieve. The Government is asking the Commission to "strike" paragraphs from the submission of a party required by statute to participate in a constitutionally mandated public process. The Government is also asking the Commission to expunge from the public record formal correspondence exchanged by the principal parties to this public process concerning the ability of an individual to serve as a member of the Commission. Little need be said in

support of the proposition that a party presenting such a request bears a heavy burden indeed.

17. Moreover, even if the Commission, at this early stage of the process, were confident enough to form the view that there is no substantive merit to the points the judiciary is seeking to make in paragraphs 46 to 49 — unlikely as this hypothesis may be, it is respectfully submitted that the Commission should still dismiss the Motion, on the grounds that the Commission presides over a public process and that parties making submissions to the Commission should be given leeway in seeking to assist the Commission to discharge its mandate.

18. This point having been made at a principled level, it is manifest that the grounds advanced by the Government are unavailing. Each is addressed below.

B. Relevance

19. The Government submits that the Commission should strike the impugned paragraphs of the judiciary's submission as being "not relevant to any question before this Commission". The Government adds that the correspondence at Exhibit B "pre-dates the constitution of this Commission and relates to discrete events that have no bearing on this Commission's process."

20. These submissions conflate three distinct notions: (1) the establishment of the Commission; (2) the constitution of the Commission, immediately following its establishment and subsequent to the 4-year term of its initial members; and (3) the scope of the quadrennial inquiry that the Commission is required to conduct.

21. Parliament established the Commission in 1998, pursuant to s. 26(1) of the *Judges Act*:

> 26(1) The Judicial Compensation and Benefits Commission is hereby established to inquire into the adequacy of the salaries and other

amounts payable under this Act and into the adequacy of judges' benefits generally.

22. While the members of the Commission have changed over time, and interested parties for the sake of convenience refer to "previous Commissions", the Commission itself is a constitutional body established by statute that has remained in place since 1998. The only events that "pre-date" the establishment of the Commission are events that occurred prior to 1998, for example events related to the Triennial Commissions.

23. The constitution of the Commission is dealt with in ss. 26.1(1) and (3). It is clear from the provisions of s. 26.1(1) that the parties' nomination of their respective nominees on the Commission is an integral part of the process contemplated by the statute, and hence is public in nature just like other steps of the Commission process:

> 26.1(1) The Judicial Compensation and Benefits Commission consists of three members appointed by the Governor in Council as follows:
>
> (a) one person nominated by the judiciary;
>
> (b) one person nominated by the Minister of Justice of Canada; and
>
> (c) one person, who shall act as chairperson, nominated by the members who are nominated under paragraphs (a) and (b).

24. When the Government conveyed the name of the former Deputy Minister to the judiciary as its nominee under s. 26.1(1)(b), it did so as part of the statutory process, not as part of some prior confidential vetting stage.

25. As regards the scope of the Commission's quadrennial inquiry, it should be recalled that the Government unsuccessfully argued before the Block and Levitt Commissions that the Commission should not concern itself with process issues. When it submits in the Motion that paragraphs 46 to 49 and Exhibit B "are not relevant to any question before

this Commission", the Government is making the same quasi-jurisdictional argument that previous Commissions have found unavailing.

26. For example, the Association and the Council submitted to the Block Commission their concerns with the Government's Second Response to the McLennan Report (as set out at paragraphs 24 to 32 of Appendix A to the Association and the Council's principal Submission to this Commission). This question, which was a process issue, concerned the Government's response to the previous Commission's report. The Block Commission rejected the Government's argument that it did not have jurisdiction to comment on the Second Response:

> 28. The judiciary [...] raised a number of concerns before us relating to the Commission process. The Government, in response, submitted that such questions were not properly before us and should be the subject of direct discussions between the parties. [...]
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> [...]
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> 33. The Government has suggested that process concerns should be addressed by one of two means: direct discussions between the judiciary and Government or, in certain instances, review by the courts. In our view, the former is inadvisable; the latter is an option that must be carefully weighed.
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> [...]
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> 37. The parties nevertheless require access to a forum where concerns related to process can legitimately be raised. It is our view that Quadrennial Commissions, by virtue of their independence and objectivity, are well-placed to serve as that forum and to offer constructive comments on process issues as they arise. While the structure and mandate of the Commission are outlined in statute, any question of process that affects the independence, objectivity or effectiveness of the Commission is properly within its mandate. It is entirely appropriate and arguably imperative that the Commission serve as guardian of the Quadrennial Commission process and actively safeguard these Constitutional requirements.
>
> 38. In addition, although "each commission must make its assessment in its own context", Commissions can and have offered their suggestions for future Commissions concerning ways of enhancing the effectiveness of the current process. Both the Drouin and McLennan Commissions addressed relevant process issues in their reports and we have similarly

done so at the end of our report, offering several suggestions relating to enhancing the effectiveness of the process. There is however one process issue which we wish to address at the outset because of its importance, namely the question of the Government's response to the McLennan Commission's report.

27. The Levitt Commission also dismissed the Government's argument that it could not comment on process issues:

> 87. At the public hearings, the Government spoke to the question of the Commission's jurisdiction to address procedural issues. The Government took the position, in effect, that the Commission's mandate is limited to a black-letter reading of section 26 of the *Judges Act* and, accordingly, that any matter falling outside such a reading should be regarded as being beyond the jurisdiction of the Commission.
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> 88. This position is at variance with the conclusion of all prior Commissions and with the view of this Commission. Each Quadrennial Commission has an important role to play in overseeing the evolution of the Quadrennial Commission process and, in so doing, actively safeguarding the constitutional requirements. [...]

28. Paragraphs 46 to 49 and Exhibit B relate to the first step in the quadrennial process contemplated by the statute. They concern a fundamental difference that arose between the Government and the judiciary as to the ability of a party to nominate to the Commission someone who has had a direct involvement, on behalf of a party, in a previous Commission and in discussions about possible reform to the Commission process. As a result of this difference, the constitution of this Commission was delayed. These facts are of interest to the Commission and the public at large and, as such, they cannot be said to be irrelevant.

29. The Commission is the guardian of the Commission process. The Block Commission made it clear that the parties should air their concerns about process issues before the Commission, rather than resort to litigation. The Association and the Council have accordingly raised their concerns with the Government's initial nominee with this Commission, pointing out in their Submission that "the judiciary considers it essential

that the position it adopted as to the requirements of independence and impartiality on the part of Commission members be made public, so as to inform future nominations" (para. 49). It was entirely appropriate for them to do so, particularly in light of the Government's reaffirmation, after its initial nominee declined to serve, that its initial nominee was an "appropriate nominee"[1].

C. The Judiciary's Submission is Not Prejudicial to the Former Deputy Minister

30. The public identification of the former Government's initial nominee will not have any negative impact on this individual's reputation. To the contrary, excluding the correspondence at Exhibit B from the public record would actually mislead the public into thinking that the judiciary had in fact impugned the former Deputy Minister's reputation.

31. As set out above, the Government's allegation in the Motion that the judiciary has questioned the Deputy Minister's professionalism and reputation is incorrect and contradicted by the correspondence at Exhibit B.

32. What this correspondence shows is that the judiciary holds the former Deputy Minister in high esteem but was concerned that the former Deputy Minister's prior role in the Commission process was incompatible with the position of serving as a member on the Commission. The correspondence also shows that the former Deputy Minister declined to serve once apprised of the judiciary's concerns. The former Deputy Minister acted properly.

[1] Letter dated July 13, 2015 from Government's counsel to counsel for the judiciary, at p. 1.

D. No Expectation of Privacy or Confidentiality in Relation to a Party's Nomination to the Commission

33. The Government argues that Exhibit B, should it form part of the record, would have an adverse impact on candour and trust between the parties. The Association and the Council agree that the existence of a relationship of trust and confidence between the parties is critical. The judiciary also agrees that where communications take place with an expectation of confidentiality or non-disclosure, the parties should respect that expectation.[2] However, there could not have been any expectation of confidentiality or non-disclosure with regard to the correspondence exchanged between the parties following the Government's nomination of its initial nominee.

34. The Government did not put the former Deputy Minister's name forward to see what the judiciary thought of the potential nomination. The correspondence at Exhibit B was not part of a vetting exercise between the parties. Rather, the Government formally put forward the former Deputy Minister's name as its nominee pursuant to s. 26.1(1)(b) of the *Judges Act*. From that point on, the parties were engaged in a public process insofar as that nomination was concerned.

35. The correspondence at Exhibit B forms the record of the judiciary's formal expression of concern with the Government's nomination of the former Deputy Minister. If the Government's initial nominee had not declined to serve, and the judiciary had elected to challenge the nomination in court, the correspondence at Exhibit B would necessarily have formed part of the court record. It is difficult to imagine any basis on which the Federal Court would have struck this correspondence or entertained a motion to put the correspondence under seal.

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[2] As the Government appropriately pointed out in the Motion, the Association and the Council have recognized, at para. 35 of their Submission, the need to preserve candour in discussions between the parties and to protect expectations of non-disclosure.

36. The former Deputy Minister may have had some expectation of privacy when first approached about a potential nomination. However, there could not have been any expectation of privacy once consent to be nominated was given.

37. Government nominations in Canada are rightly done in an open and transparent manner. Any nominee would expect appropriate scrutiny of his or her nomination, and verification of his or her ability to serve.

38. As paragraphs 46 to 49 and Exhibit B concern a formal step in the Commission process and the ability of a party's nominee to serve on the Commission, neither the Government nor its initial nominee could have had a reasonable expectation of confidentiality or non-disclosure in respect of the facts mentioned therein.

IV. ORDER SOUGHT

39. The Association and the Council respectfully request that the Commission refuse the Government's request set out in the Motion.

The whole respectfully submitted on behalf of the Canadian Superior Courts Judges Association and the Canadian Judicial Council.

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