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COURT OF APPEAL FOR ONTARIO

MOLDAVER, SIMMONS AND LANG JJ.A.

B E T W E E N :	)	
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	)	
ONTARIO DEPUTY JUDGES ASSOCIATION	)	**Janet E. Minor and Arif Virani for the appellant**
	)	
Applicant (Respondent)	)	
	)	
- and -	)	
	)	
THE ATTORNEY GENERAL OF ONTARIO	)	**P. David McCutcheon and Tanya Munro for the respondent**
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	)	
Respondent (Appellant)	)	**Heard: April 11, 2006**
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	)	

On appeal from the judgment of Justice Michael R. Dambrot of the Superior Court of Justice dated November 16, 2005, reported at (2005), 18 C.P.C. (6th) 324.

BY THE COURT:

[1] This appeal raises the issue of whether the Attorney General of Ontario ("AG") is required, as a matter of constitutional law, to establish an independent commission to address remuneration for the Deputy Judges of the Ontario Small Claims Court, a branch of the Superior Court of Justice. Currently, Deputy Judges' remuneration is established

by regulation made by the Lieutenant Governor in Council, often referred to as an Order-in-Council.

[2] The application judge held that the Deputy Judges' salaries have eroded to the extent that they now fall below the basic minimum acceptable remuneration required for their office. He further held that the principle of judicial independence, particularly its financial security component, requires the government to establish an independent commission to make recommendations on the Deputy Judges' remuneration.

[3] The AG concedes that Deputy Judges are entitled to judicial independence. The AG appeals on the basis that the current Order-in-Council process complies with the financial security requirement in a manner appropriate to the Deputy Judges' office. Accordingly, the AG argues, as a matter of constitutional law, an independent commission is not required.

[4] With respect, we do not accept that the current Order-in-Council process passes constitutional muster. Like the application judge, we believe that an independent body is required to address the remuneration of Deputy Judges. The nature of that body, however, is a different matter. In that regard, there is room for flexibility. No single model is mandated; what is required is a process that is independent, effective and objective.

Facts

[5] The Small Claims Court, a branch of the Superior Court of Justice, has jurisdiction over civil claims up to $10,000, although that jurisdiction increases to $20,000 where the case involves both a $10,000 claim and a $10,000 counterclaim.

[6] The judicial complement of the Small Claims Court is comprised of two full-time judges and four supernumerary judges of the former Provincial Court (Civil Division) as well as approximately 390 Deputy Judges. The full-time and supernumerary judges are appointed until retirement and may only be removed from office by order of the Lieutenant Governor of Ontario on the address of the Legislative Assembly. As with all judges of the Provincial Court, the remuneration of the judges of the former Provincial Court (Civil Division) is established by regulation following delivery of a report from the Provincial Judges' Remuneration Commission. Currently, supernumerary judges of the former Provincial Court (Civil Division) receive a *per diem* of $995.39 for a full sitting day in Small Claims Court.

[7] Deputy Judges, who are practising or retired lawyers, are appointed to the Small Claims Courts by a Regional Senior Judge ("RSJ") of the Superior Court pursuant to s. 32 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43. Their initial appointments are made with the approval of the Attorney General for a three-year term. Subsequent renewals are made by the RSJ for one or more three-year terms. Deputy Judges may be removed from

office by the RSJ where the RSJ determines that the Deputy Judge's conduct warrants that sanction.

[8] Fewer than a dozen of the Deputy Judges decide a significant percentage of Toronto cases; the court, and not the government, determines the resulting significant sitting schedules for those few judges. On average, however, Deputy Judges sit one day per month.

[9] Pursuant to s. 53(1)(b.1) of the *Courts of Justice Act*, the remuneration of Deputy Judges is set by regulation made by the Lieutenant Governor in Council. In the 11-year period between 1971 and 1982, the *per diem* compensation of Deputy Judges was increased on seven occasions, increasing from $50 per day to the current level of $232 per day. That rate has remained unchanged for the past 24 years, despite its erosion by inflation. At the same time, the Small Claims Court has experienced significant increases in both workload and jurisdiction.

The Application Judge's Decision

[10] The application judge concluded that an independent remuneration commission for Deputy Judges is required for two reasons. First, relying on *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*PEI Reference*"), he held at para. 51 that the current rate of remuneration falls below a minimum acceptable standard:

> [T]he remuneration of Deputy Judges is so obviously inadequate and so disgracefully eroded that no great leap in logic is required to conclude, as I do, there is a danger, however speculative, that members of the judiciary could be tempted to adjudicate cases in a particular way in order to secure a higher salary from the executive or the legislature or to receive benefits from one of the litigants.

[11] Second, he held at para. 55 that an independent commission is the mechanism required to protect the financial security of all judges, including Deputy Judges:

> While it cannot be doubted that the principle of judicial independence must be applied flexibly to different types of decision-makers, I see no warrant in the pronouncements of the Supreme Court for the idea that recourse to an independent commission to consider judicial remuneration is an exceptional, Cadillac protection applicable only to "important" judges. When the Supreme Court says that it is an essential component of judicial independence that any

> changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective and objective, I take it at its word.

[12] While the application judge acknowledged that there can be flexibility in establishing the precise contours of the process for determining judicial remuneration, he did not accept that determining Deputy Judges' judicial remuneration by way of Order-in-Council, without more, could be viewed as an independent, effective and objective process (at para. 56):

> But I fail to see how determining Deputy Judges' remuneration by way of Order-in-Council, without more, can conceivably be viewed as an independent, effective and objective process for determining judicial remuneration. It is obviously neither independent nor objective, and it is hard to imagine how it could conceivably be characterized as effective. In this case, it is no process at all. And given the absence of any increase in the remuneration of Deputy Judges since 1982, if it is a process, it is a moribund one.

Attorney General's Submissions

[13] Although the AG concedes that the principle of judicial independence applies to the office of Deputy Judges, he argues that the requirements for ensuring judicial independence are flexible. According to the AG, the highest level of protection does not apply to every type of judge; there is a sliding scale or spectrum of protection and the Deputy Judges fall at the low end of this scale.

[14] To support this argument, the AG points to the limited jurisdiction of the Small Claims Court and its lack of criminal jurisdiction, including jurisdiction to hear cases engaging s. 11(d) of the *Charter of Rights and Freedoms*. The AG also contends that there is no basis for extending a high level of financial security, such as that provided by a remuneration commission, to Deputy Judges who do not enjoy a high level of security of tenure. Further, argues the AG, there is no basis for requiring a high level of financial security for the purpose of protecting judicial independence. On this issue, the AG asserts that the part-time nature of the Deputy Judges' work attenuates or eliminates the risk of economic manipulation of individual judges. For these reasons, the AG submits that the Order-in-Council process satisfies the financial security component of the principle of judicial independence and that the application judge erred in reaching a contrary conclusion.

Issues:

[15] This appeal raises four issues:

(1) Did the application judge err in holding that Deputy Judges are entitled to the same level of financial security as full-time judges?

(2) Did the application judge err in holding that the Order-in-Council process fails to comply with the constitutional requirements for financial security?

(3) Did the application judge err in imposing a commission without providing the government with the opportunity to consider other options?

(4) Did the application judge err in finding that the salaries of the Deputy Judges fall below a constitutionally acceptable minimum level?

Analysis

1. Did the application judge err in holding that Deputy Judges are entitled to the same level of financial security as full-time judges?

[16] In our view, the application judge made no error in concluding that the Deputy Judges are entitled to an independent, objective, effective process for determining their judicial remuneration.

[17] As we have indicated, the AG concedes the application of the principle of judicial independence to these judges. As set out in the *PEI Reference*, judicial independence embodies the three core characteristics of financial security, security of tenure and administrative independence, as well as the two dimensions of individual and institutional independence: see *PEI Reference* at paras. 115 and 118; *R. v. Valente*, [1985] 2. S.C.R. 673.

[18] Financial security is at issue in this case. As the Supreme Court said about financial security in *Valente* at para. 40:

> The essence of [financial] security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence.

[19] Both the individual and the institutional dimensions of judicial independence apply to financial security. The Supreme Court explained the nature of the two dimensions. Regarding the individual dimension, it was stated in *Valente* and reiterated in the *PEI Reference*, that judicial salaries must be established so that they do not "affect the independence of the individual judge": *Valente* at para. 43; *PEI Reference* at para. 121. Individual independence refers to the liberty of the individual judge to decide discrete

cases free from external interference or influence: *Beauregard v. Canada*, [1986] 2 S.C.R. 56 at para. 21. A concern arises about individual independence if a judge could be perceived as being subject to potential manipulation in the eyes of the "reasonable and informed person".

[20] In this case, individual independence is not the primary issue, given that most Deputy Judges sit on a part-time basis. Their judicial remuneration is not their primary source of income, except for those few who agree to sit on a more frequent basis. The institutional dimension, however is critical to this case.

[21] The institutional or collective dimension of judicial independence, which attaches to the court as an institution, is a natural outgrowth of the commitment to the separation of powers between and among the legislative, executive, and judicial branches of government. Fundamental to this separation of powers is the depoliticization of the relationship between the legislative and executive branches on the one hand and the judicial branch on the other: see *PEI Reference* at paras. 123-30.

[22] The Supreme Court in the *PEI Reference* identified three components of the institutional dimension of financial security: (1) any changes to or freezes in judicial remuneration require prior recourse to a process that is independent, effective, and objective to "avoid the possibility of, or the appearance of, political interference through economic manipulation" (para. 133); (2) the judiciary is not to negotiate remuneration with the executive or legislature (para. 134); and (3) reductions to salary, including erosion by inflation, cannot take judicial compensation below a basic minimum level (para. 135).[1]

[23] The AG argues that the Deputy Judges are entitled only to a low level of protection for their financial security and that the present Order-in-Council regime meets the applicable constitutional standard. The AG contends that the protections relating to financial security are directed "at avoiding the possibility that judges may adjudicate disputes in the government's favour in order to advance their personal positions."

[24] The AG's argument, however, overlooks the institutional dimension of financial security, which flows from the "constitutional imperative that, to the extent possible, the relationship between the judiciary and the other branches of government be depoliticized" [emphasis in original]: *PEI Reference* at para. 131. Establishing judicial remuneration is an inherently political exercise requiring government allocation of limited resources from the public purse. This process is complicated by the fact that judges are prohibited from negotiating with the government about their remuneration.

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[1] See also *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 at para. 8 ["*Bodner*"].

[25] Moreover, when the government fails completely to address judicial remuneration, the entire process is in danger of becoming highly politicized. Such a danger became manifest in this case when a group of Toronto Deputy Judges withdrew their services for a one month period in 2005. This withdrawal illustrates how the lack of an independent remuneration process can politicize the issue of financial security and why depoliticization of judicial remuneration is essential to the maintenance of the separation of powers.

[26] The force of the rationale behind the institutional dimension of financial security is not diminished by the fact, emphasized by the AG, that Deputy Judges sit on a part-time basis and have limited jurisdiction. Deputy Judges, who preside in the busiest court in Ontario, are an integral part of the justice system. We recognize, of course, that the court's caseload does not include criminal matters, the court possesses only a limited jurisdiction for committal, and it rarely hears *Charter* issues. Nevertheless, although the role of the Small Claims Court is more limited in the Canadian constitutional structure than that of the superior and provincial courts, that role is important in protecting the rule of law, preserving the democratic process, protecting the values of the Constitution and maintaining public confidence in the administration of justice. As the application judge stated at paras. 18 and 20:

> Deputy Judges can hear a wide range of cases and have broad jurisdiction over proceedings involving the *Canadian Charter of Rights and Freedoms*, defamation, creditors' rights, intellectual property claims, estate litigation, and medical practice, among others.
>
> …
>
> Deputy Judges carry out judicial functions for large numbers of litigants contesting significant sums of money. The Small Claims Court is the busiest court in Ontario and the court that citizens are most likely to encounter.

[27] The caseload assumed by Deputy Judges is extensive both in quantum of cases and in jurisdiction of subject matter. Even though Deputy Judges sit part-time, when sitting, they fully assume the judicial role. They are perceived as judges by the many litigants who turn to the Small Claims Court for the resolution of their disputes. To those litigants, there is no apparent reason to distinguish between the Deputy Judge presiding over their case and a judge of the former Provincial Court (Civil Division). The protection of the independence of both types of judges is equally important in order to preserve public confidence in the system.

[28] Accordingly, we do not accept that the part-time nature of Deputy Judges' judicial role or the nature of the Small Claims Court's jurisdiction diminishes the requirement for an independent body to address their remuneration.

[29] In this case, an independent body is necessary to avoid the politicization of the relationships between the three branches of government. Accordingly, the application judge did not err in coming to this conclusion.

2. Did the application judge err in holding that the Order-in-Council process fails to comply with the constitutional requirements for financial security?

[30] Even though an independent body is necessary to meet the requirements of judicial independence, the process to be established may vary "in accordance with the nature of the court or tribunal and the interests at stake": *Ell v. Alberta*, [2003] 1 S.C.R. 857 at para. 30. See also *R. v. Généreux*, [1992] 1 S.C.R. 259 at 284-85.

[31] While clearly there is room for flexibility in designing the appropriate process, that process must involve an independent, objective and effective body to make recommendations with regard to judicial compensation. In our view, the application judge was correct in his conclusion that the Order-in-Council process now in place does not satisfy the essential ingredients of being an independent, objective and effective body.

[32] As already noted, the remuneration of Deputy Judges is set by Order-in-Council, which is the product of Cabinet acting through the Lieutenant Governor in Council on the recommendation of the Minister or the Attorney General. The Minister is directly responsible for any proposal to the Lieutenant Governor in Council. Thus, the Order-in-Council process provides no separation whatsoever between the remuneration of Deputy Judges and the political process. Rather, the process is purely political; it is a government process, not one independent of government.

[33] Further, the process is not objective because the government has a direct political interest in the outcome. This lack of objectivity is evidenced by the government's refusal to provide any rationale for the freeze in the Deputy Judges' judicial remuneration, other than to say that the issue is one for the government alone to decide.

[34] Finally, the process can hardly be said to be effective when there has been no determination of whether the 24-year old *per diem* rate remains appropriate.

[35] Clearly, the current Order-in-Council process does not satisfy the requirements of independence, effectiveness and objectivity.

3. Did the application judge err in imposing a commission without providing the government with the opportunity to consider other options?

[36] The application judge required the AG to provide the Deputy Judges with recourse to a commission. We do not read the application judge's reasons as requiring a full-scale commission in the public hearing sense. The use of the word "commission" does not imply formal hearings, the calling of evidence, commission counsel, interveners, business premises, publication or any of the other accoutrements common to public or judicial commissions.

[37] As the Supreme Court said in the *PEI Reference* at para. 133, the use of the word "commission" is simply a term of convenience to mean any body interposed between the judiciary and the other branches of government. The only requirement is that the proposed entity be independent, effective and objective. The body chosen would produce a report to the government. Its recommendations, while non-binding, would not be set aside lightly, but rather would be considered in light of the parameters discussed in the *PEI Reference* at paras. 133, 179-85; and *Bodner, supra*, at paras. 18-21.

[38] Since the Order-in-Council process does not meet constitutional standards and the establishment of a full commission may not be required to meet those standards, we sought alternative proposals from counsel. Counsel for the AG put forward the option of appointing an independent single remuneration consultant to make recommendations on the appropriate remuneration. Counsel for the Deputy Judges Association appeared receptive to this proposal. Another possible option would link judicial remuneration for Deputy Judges with the remuneration provided for an objectively-chosen comparator group. Moreover, we were advised that a law dean has been appointed to produce a report, which is to be released next month, that will include a consideration of options relating to judicial remuneration. Thus, we are persuaded that there are viable options available.

[39] In our view, the choice of process is, at first instance, for the AG, subject to the caveat that the process chosen must meet the criteria of being independent, effective and objective. Accordingly, we conclude that the choice of process, at this juncture, remains with the government.

4. Did the application judge err in finding that the salaries of the Deputy Judges fall below a constitutionally acceptable minimum level?

[40] In light of our conclusion, there is no need to decide whether the current rate of compensation for Deputy Judges meets a minimum acceptable level. As argued by the Attorney General, the court should avoid deciding constitutional issues unless necessary to determine the case before it: *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy*, [1995] 2 S.C.R. 97 at 111-12; P. Hogg, *Constitutional Law of*

Canada, v. 2 (Scarborough: Thomson Canada, 1997) at pp. 56-20.1 to 56-21. We agree. We therefore set aside those aspects of the application judge's order dealing with the constitutional minimum.

Conclusion

[41] A constitutionally acceptable remuneration process must be established. With respect to timing, we recognize the desire to avoid further delay. It has already been six months since the release of the application judge's decision. Based on the submissions of counsel in oral argument, it would appear feasible to establish a process in a timely fashion. We therefore order the AG to establish an independent, effective and objective process within four months of the release of these reasons.

[42] In the result, we would allow the appeal in part. The Attorney General shall have four months to create an independent, effective and objective process for determining the judicial remuneration of Deputy Judges.

[43] If the parties are unable to agree on the costs of the application below and of this appeal, they may make brief written submissions within twenty days.

RELEASED: "MJM" "May 25, 2006"

"M.J. Moldaver J.A."
"J.M. Simmons J.A."
"S.E. Lang J.A."