

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)	
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ONTARIO DEPUTY JUDGES ASSOCIATION)	P. David McCutcheon, Tanya Munro, for the Applicant
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)	Applicant
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- and -)	
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HER MAJESTY THE QUEEN in right of Ontario and THE ATTORNEY GENERAL OF ONTARIO)	Janet E. Minor and Arif Virani, for the Respondents
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)	
)	Respondents
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)	HEARD: September 26, 2005

2005 CanLII 42263 (ON SC)

M. Dambrot J.

[1] The Deputy Judges of the Ontario Small Claims Court are paid \$232 per day. This rate has not been increased since 1982. They are concerned that they lack sufficient financial security and sufficient administrative support and services to ensure their judicial independence. As a result, through their association (“ODJA”), they bring this application, seeking an order requiring the respondents to establish an independent remuneration commission and to establish suitable standards for their administrative support.

BACKGROUND

A Brief History of the Small Claims Court

[2] The Small Claims Court has deep roots in this province. In 1792, the Government of Upper Canada established, as part of its general reorganization of the court system, a local civil court called the Court of Requests. The Court of Requests tried civil matters up to forty shillings,

presumably not a great sum of money even then, and was presided over by Justices of the Peace. The Court was reorganized in 1833 to permit laymen who held commissions from the Lieutenant Governor also to serve on the Court. By 1840, there were 1143 Commissioners serving in the Courts of Request throughout the province, with a monetary jurisdiction of ten pounds and the authority to fine parties up to two pounds, and imprison them for up to six days.

[3] In 1841, as a result of public dissatisfaction with the practices of Commissioners, the system was revised. The Court of Requests was renamed the Division Court, and all Division Courts were presided over by District Court Judges appointed from the ranks of barristers.

[4] In 1852, Junior Judges of the County Courts (that is, judges second in seniority to the most senior judges in the County Courts) were authorized to preside over Division Courts in their county. In 1857, County Court Judges were given authority to appoint barristers as deputy judges for renewable one month terms to preside over Division Court in cases of illness or absence, or where no Junior Judge was available. The one month term of a deputy judge was extended to two months in 1950.

[5] In the 1961-62 term, the Lieutenant Governor in Council was authorized for the first time to appoint Division Court judges, to sit exclusively in the Division Court. Every Division Court then had to be presided over by a Division Court Judge or a judge or junior judge of a County Court.

[6] By 1965, the monetary jurisdiction of the Court was \$400, except in northern Ontario, where it was \$800. The Court heard all civil matters within its monetary jurisdiction except those relating to title to land, estates, libel and slander, suits against justices of the peace and requests for prerogative remedies. In 1969, in response to a recommendation made in the Royal Commission Inquiry into Civil Rights (“the McRuer Report”) the power of the Division Court to commit persons to jail for failure to obey a judge’s order to pay a debt was repealed. The power to commit for failure to obey a summons or be sworn, or for disturbing the court process was retained.

[7] In 1970, the Division Court was renamed the Small Claims Court, and its monetary jurisdiction was increased to \$1,000. The province maintained the jurisdiction to appoint judges to the court, now called Small Claims Court Judges. Barristers continued to serve as deputy judges for two-month renewable terms.

[8] By 1985, the Small Claims Court had become known as the Provincial Court (Civil Division), with a monetary jurisdiction of \$3,000 in Toronto, and of \$1,000 elsewhere. Deputy judges could not hear cases where a claim was for more than \$1000.

[9] In 1990, the Provincial Court (Civil Division) was abolished, and the Court was reconstituted as a branch of the Ontario Court (General Division), now the Superior Court. The Court consisted of the Chief Justice of the Superior Court, and such other Superior Court Judges as the Chief Justice might designate. The Province could also appoint deputy judges for three-

year renewable terms. By 2001, the monetary jurisdiction of the Court had been increased to \$10,000.

Composition of the Current Small Claims Court

[10] There are two remaining full-time judges and four remaining part-time judges of the former Provincial Court (Civil Division) presiding in the Small Claims Court. There are approximately 390 deputy judges currently presiding in the Court. Over 50% of the deputy judges have served on the Court for more than three years; over 40% of them have served for seven years or more; over 30% of them have served for ten years or more.

Attributes of the Small Claims Court and Deputy Judges

[11] Deputy Judges are judges by history, appointment, function and jurisdiction. They are referred to as “Your Honour” by virtue of a Ministry of the Attorney General directive. They swear the same oath of office as every other judge of a court in Ontario. They have judicial immunity. Proceedings of the Small Claims Court commence with a formal opening read by the Clerk. The Small Claims Court is a court of record.

[12] Appeal rights from the predecessors of the Small Claims Court have existed since 1880. Currently appeals lie to the Divisional Court. New evidence is not heard on appeal. Appeals are not trials *de novo*.

[13] Deputy Judges have tenure. They are currently appointed to the Small Claims Courts of Ontario by a Regional Senior Judge of the Superior Court of Justice with approval of the Attorney General for a term of three years. A Regional Senior Judge of the Superior Court of Justice may renew the appointment of a Deputy Judge for one or more three-year terms. As I have already noted, more than 40% of Deputy Judges have presided for more than seven years.

[14] The applicant characterizes the appointment process for Deputy Judges as being similar to the appointment process for Provincial Court Judges. On the other hand, the respondents correctly noted that the appointment process for Deputy Judges has significant distinctions from the process for the appointment of Provincial Court Judges. While there is no statute prescribing a minimum level of experience for Deputy Judges, the *Courts of Justice Act* expressly precludes the appointment of a Provincial Court Judge unless a candidate has been a member of a provincial or territorial bar for at least ten years. In addition, Provincial Court Judges are appointed pursuant to a process that requires recommendations from the Judicial Appointments Advisory Committee. There is no similar mechanism in place for Deputy Judges. Finally, Provincial Court Judges are appointed for a permanent term until retirement, while Deputy Judges are appointed for a three-year term which may be renewed at the discretion of the Regional Senior Judge.

[15] There is a statutory complaints process in place to deal with Deputy Judges. The applicant asserts that this complaints process is similar to the process respecting Superior Court Judges and members of the Ontario Court of Justice. The respondents correctly point out,

however, that there are significant differences. In the case of Deputy Judges, following the recommendation of a committee of inquiry, a Deputy Judge may be removed from office by the Regional Senior Judge alone, once the Regional Senior Judge concludes that the Deputy Judge's conduct warrants sanction. Superior and provincial court judges, on the other hand, enjoy significantly greater security of tenure. The former may only be removed from office by the Governor General of Canada, on the address of the Senate and House of Commons. Removal of the latter requires an order of the Lieutenant Governor of Ontario on the address of the Legislative Assembly.

[16] In the 1987 Zuber report, The Hon. T.G. Zuber recommended that the use of Deputy Judges be eliminated over a transition period, until a reorganization of the court permitted Provincial Court Judges to preside over all civil matters. The recommendation was not implemented. Instead, in 1995, by amendment to the *Courts of Justice Act*, the Deputy Judges Council was established to review and approve continuing education and standards of conduct for Deputy Judges of the new Small Claims Court and to make recommendations on matters affecting Deputy Judges. The Applicant has made submissions to the Deputy Judges Council requesting the establishment of a Small Claims Court Remuneration Commission.

[17] The government has provided funding for the Deputy Judges Council, and for the training of Deputy Judges, including participation in the Caswell seminars. The 1996 Ontario Civil Justice Review, co-chaired by the Hon. R. A. Blair, recommended judicial training in consultation with the National Judicial Centre.

[18] 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 malpractice, among others. Deputy Judges also exercise a form of equitable jurisdiction, which adds to their role and responsibilities as judicial officers. The Small Claims Court can hear and determine all questions of law and fact and may make orders considered just and agreeable to good conscience.

[19] I have noted that the Small Claims Court has jurisdiction for monetary claims up to \$10,000. But a defendant may also issue a defendant's claim in Small Claims Court to a maximum of \$10,000, bringing the total possible amount in dispute in one claim to \$20,000. This represents a ten-fold increase since 1982. While the government does not acknowledge it, in all likelihood the monetary jurisdiction of the Small Claims Court will continue to expand. The government is correct, however, in saying that any changes to the Small Claims Court's monetary jurisdiction are subject to the limit imposed by s.96 of the *Constitution Act, 1867*, which prevents a province from endowing an inferior court with any jurisdiction exercised exclusively by the superior court at confederation.

[20] 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. Litigants in Small Claims Court are increasingly represented by counsel and contend with increasingly complex legal issues. At the same time,

Deputy Judges must make accommodations for parties who are not represented. Deputy Judges determine legal issues that emerge from facts presented by parties unfamiliar with legal concepts and bring their legal expertise to bear in resolving those issues. Deputy Judges accommodate litigants from time to time by hearing cases beyond regular hours so that litigants will not have to take additional time off work to attend court on additional dates.

Remuneration of the Deputy Judges

[21] Deputy Judges are paid a per diem allowance of \$232 for their services. This amount was originally set by Order-in-Council in 1982. They have not received a pay increase since that time despite an increase in workload, jurisdiction, responsibility and cost of living. It is hard to resist the claim made by the applicant that the rate paid to Deputy Judges is not commensurate with the role of Deputy Judge as judge, or the status of the court. Some comparisons are apposite. I note in particular that supernumerary former Provincial Court judges who continue to sit in Small Claims Court perform the same work as Deputy Judges and receive a per diem rate of \$995.39 for a full day, and \$447.70 for a half day.

[22] Comparisons of rates of remuneration can be difficult and deceptive, and I take the remaining comparisons made by the parties into account with caution. It is a fact, however, that unlike the long period of silence after 1982, during the period from 1971 to 1982 the remuneration of Deputy Judges was regularly reviewed and revised. It appears that the rate of remuneration was increased nine times in that eleven-year period. It rose more than 400%. The applicant makes a fair argument that during that period, there was a close relationship between the per diem allowance paid to Deputy Judges and the rate paid to Small Claims (or Provincial) Court Judges. From 1977 to 1982, the remuneration paid to a Deputy Judge was between 75% and 100% of the remuneration paid to Small Claims (or Provincial) Court Judges on a per diem basis. Today it is on the order of 25%.

[23] Remuneration Commissions exist to address the remuneration issues for all judges in Ontario other than Deputy Judges, and most other judges throughout Canada. With respect to judicial officers remunerated by the Province of Ontario, a commission process for Provincial Court Judges has been in place since 1981, and for justices of the peace since 1993. Despite numerous requests made by ODJA to the Ontario Government to institute a Small Claims Court Judges' Remuneration Commission, Deputy Judges do not have a commission.

Administrative Independence of the Small Claims Court

[24] ODJA has also raised a concern that Deputy Judges lack administrative independence. They note that Deputy Judges do not have clerical and research services, sitting dates are often fixed in advance by court administration without consultation, and Deputy Judges are not advised of the reasons for non-renewal of appointments.

The Government's Response to Requests for a Small Claims Court Judges' Remuneration Commission

[25] The ODJA, supported by the Ontario Bar Association, the County District Law Presidents Association and other professional organizations, has made numerous efforts to have the respondents address its concerns about remuneration and administrative independence. The respondents have been unresponsive to these repeated requests.

[26] Concerns about the adequacy of security, access to research materials and support, and the per diem rate of remuneration contributed to the genesis and formation of the ODJA. The ODJA has written numerous letters to the Attorney General, who is responsible for proposals to the Lieutenant Governor in Council concerning judicial remuneration, in an attempt to have the concerns of the Deputy Judges addressed. The Attorney General has not acted upon the ODJA's requests.

[27] Associate Chief Justice Cunningham, in his capacity as Chair of the Deputy Judges Council and Associate Chief Justice of the Superior Court of Justice, sent a letter dated January 23, 2004, to the respondents encouraging a review of the compensation issue for Deputy Judges. In the letter Associate Chief Justice Cunningham stated that Deputy Judges are "the face of justice" who hear "complex and diverse matters". While Justice Cunningham was clear in stating that he did "not wish to engage in any negotiations over remuneration, because such attempts would be fundamentally at odds with the convention of judicial independence", he did urge the Attorney General to initiate an ongoing process for the review of Deputy Judges' remuneration. The respondents have not acted on Justice Cunningham's urging.

[28] The Ontario Bar Association ("OBA") wrote to the respondents in April 2004 with concerns about the level of compensation for Deputy Judges. The OBA stated:

How can the Deputy Judges feel or be seen as independent when their payment is a pittance that has not been raised in ages and when they are given almost no administrative support or resources with which to adequately perform their tasks? Quite frankly, the meagreness of their compensation and resource package is an embarrassment to the profession and should be of particular embarrassment to your Ministry.

[29] The OBA supports the Deputy Judges in their request for remuneration review and enhanced administrative support. The OBA requested that the Attorney General act quickly and equitably to deal with Deputy Judges concerns. The Attorney General has not acted upon the OBA's request.

[30] The County and District Law Presidents Association ("CDLPA") also supports the ODJA. The CDLPA has formally asked the respondents to deal with the issue of Deputy Judges' remuneration and the appointment of a separate and independent Small Claims Court Judges Remuneration Commission. The respondents have not acted upon the CDLPA's request.

[31] Despite the support of the OBA and CDLPA, the comments of the Chair of the Deputy Judges Council, comments in the legislature regarding the "abysmal" compensation paid to

Deputy Judges and many assurances from the Attorney General in 2004 that this matter was under active review, the respondents have not addressed the Deputy Judges' concerns. The government has not established an independent remuneration commission or taken any other steps to address the concerns about the remuneration of Deputy Judges.

THE ISSUES

[32] The applicant raises the following four issues:

1. whether Deputy Judges of the Small Claims Court have sufficient financial security to meet the legal test for judicial independence;
2. whether Deputy Judges of the Small Claims Court have sufficient administrative support and services to meet the legal test for judicial independence;
3. whether Deputy Judges are entitled to the creation of an independent remuneration commission; and
4. whether Deputy Judges are entitled to an Order requiring the respondent to establish and maintain suitable standards for administrative support and facilities for Deputy Judges.

[33] I will follow this characterization of the issues, modified only slightly.

1. Do The Deputy Judges of the Small Claims Court Have Sufficient Financial Security to Meet the Legal Test for Judicial Independence?

Judicial Independence in General

[34] Judicial independence has long been recognized as a pillar of the Canadian judicial system and has been called "the lifeblood of constitutionalism in democratic societies". The basis for the principle of judicial independence can be found in the common law and the Constitution. This principle is enshrined in the *Constitution Act, 1867*, section 11(d) of the *Canadian Charter of Rights and Freedoms* and is recognized as an unwritten Constitutional principle of law. Judicial independence exists "for the benefit of the judged, not the judges."¹

¹ Reference re: *Pay Reduction Act (P.E.I.) s. 10*, [1997] 3 S.C.R. 3 at paras. 83-84; *Beauregard v. Canada*, [1986] 2 S.C.R. 56 at 70-73; *Ell v. Alberta*, [2003] 1 S.C.R. 857 at 868-872, 873; *Bodner v. Alberta*, [2005] S.C.J. No. 47 at para. 4; *R. v. Lippé*, [1991] 2 S.C.R. 114, at 136-137

[35] The guarantee of judicial independence contains three conditions: security of tenure, financial security and institutional independence. The Supreme Court of Canada has recognized these conditions of judicial independence and the requirement for judicial separation of powers.²

[36] Historically, the principle of judicial independence was confined to the superior courts. As the result of the expansion of judicial duties beyond that realm, it is now accepted that all courts fall within the principle's embrace.³ The constitutional underpinnings of judicial independence apply to all courts in our country, without regard to the level of the court or the type of case it hears.

[37] In *Mackin v. New Brunswick (Minister of Finance)*⁴, Gonthier J. emphasized that the right to an independent judiciary is not only a right enjoyed by a party subject to the threat of criminal proceedings. It is also a fundamental element underlying the very operations of the administration of justice. In other words, judicial independence functions as a prerequisite for giving effect to a litigant's rights including the fundamental rights guaranteed in the *Charter*.

[38] The Attorney General does not deny that persons appearing before Deputy Judges of the Small Claims Court of Ontario are entitled to the protection of judicial independence.

Financial Security

[39] In *Valente v. the Queen*, Le Dain J. summarized the financial security component of judicial independence as follows⁵:

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.

[40] In *Reference re: Pay Reduction Act (P.E.I.) s.10*⁶, Lamer C.J.C. explained that the essential components of financial independence all flow from the constitutional imperative that, to the extent possible, the relationship between the judiciary and the other branches of government be depoliticized. He then listed three essential components. These are:

² *Valente v. the Queen*, [1985] 2 S.C.R. 673; *Reference re: Pay Reduction Act (P.E.I.) s. 10*, *supra*, at para. 115; *Ell v. Alberta*, *supra*, at para. 28; *Bodner v. Alberta*, *supra*, at para. 7

³ *Reference re: Public Sector Pay Reduction Act (P.E.I.) s. 10*, *supra*, at para. 106; *Ell v. Alberta*, *supra*, at para. 20

⁴ [2002] 1 S.C.R. 405 at para. 71

⁵ *Valente v. the Queen*, *supra*, at para. 40

⁶ *Reference re: Public Sector Pay Reduction Act (P.E.I.) s. 10*, *supra*, at paras. 131-135

1. Any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective and objective, for determining judicial remuneration, to avoid the possibility of, or the appearance of, political interference through economic manipulation. While the recommendations of such commissions need not be binding, they should not be set aside lightly.
2. Under no circumstances is it permissible for the judiciary to engage in negotiations over remuneration with the executive or members of the legislature.
3. Any reductions to judicial remuneration, including *de facto* reductions through the erosion of judicial salaries by inflation, cannot take those salaries below a basic level of remuneration that is required for the office of a judge. Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation.

[41] The Supreme Court recently reaffirmed that these are essential requirements of the financial security component of judicial independence, in these terms⁷:

First, judicial salaries can be maintained or changed only by recourse to an independent commission. Second, no negotiations are permitted between the judiciary and the government. Third, salaries may not fall below a minimum level.

[42] It is the position of the applicant that the Deputy Judges of the Small Claims Court do not have sufficient financial security to meet the legal test for judicial independence because their salaries do not meet a minimum acceptable level, and because their salaries have been maintained without recourse to an independent commission. I will consider each of these claims in turn.

Have the Salaries of the Deputy Judges of the Small Claims Court Fallen Below a Minimum Acceptable Level?

[43] Lamer C.J.C. expanded on this component of financial security at paragraph 193 of *Reference re: Public Sector Pay Reduction Act (P.E.I.) s.10*, where he stated:

I have no doubt that the Constitution protects judicial salaries from falling below an acceptable minimum level. The reason it does is for financial security to protect the judiciary from political interference through economic manipulation, and to thereby ensure public confidence in the administration of justice. If salaries are too low, there is always the danger, however speculative, that members of the

⁷ *Bodner v. Alberta, supra*, at para. 8

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.

[44] The Chief Justice went on to observe, at paragraph 195, that the Court did not address in their decision the question of what the minimum acceptable level of judicial remuneration is, and would answer that question when the need arises. He noted, however, that the Court has the expertise to adjudicate on rights with a financial component.

[45] The applicant says that in this case, the need to answer the question arises. The real value of the salaries of Deputy Judges has been so eroded as a result of inflation since 1982 that they fall below a minimally acceptable level for judicial independence. Their salaries have not kept pace with increases for other judicial officers, including provincial court judges, even though the duties and responsibilities of Deputy Judges have continued to expand. The salary of Deputy Judges is so low that it jeopardizes the independence, and the perception of independence of Deputy Judges.

[46] I agree.

[47] The respondents go to great pains to refute what I consider to be obvious. In essence, they make three arguments. They say:

1. There is no evidence to suggest that public confidence in the office of deputy judge is waning, or that members of the public perceive a threat of economic manipulation by government.
2. The concern about salaries falling below an acceptable minimum is, at its core, a concern about improper attempts to curry favour with the government, or a particular litigant, where they appear before the court as a party. This concern applies with reduced force in the context of deputy judges, because of the part-time nature of their office. Practising lawyer adjudicators are not reliant on their per diems for all, or even a significant portion of their annual income. As such, the concern that salaries falling below a perceived “minimum” may prompt deputy judges to curry favour with the government or a specific litigant is not germane.
3. Third, the per diem compensation awarded to deputy judges is consistent with the remuneration provided to other analogous officers. Assessment Officers who resolve disputes between lawyers and clients respecting solicitor’s bills have received a per diem of \$200 since April 1990. The per diem for Board Members of the Criminal Injuries Compensation Board has been \$135, including \$17/hr preparatory work and travel, since January 1990.

[48] With respect to the first of these arguments, I do not think that the judgment of the Supreme Court in *Reference re: Public Sector Pay Reduction Act (P.E.I.) s.10* contemplates that in advancing a claim of this nature, the applicant would be expected to find evidence that public confidence in the office of deputy judge is waning, or that members of the public perceive a threat of economic manipulation by government. I do not think it is necessary to wait for the Small Claims Court to begin to crumble before a constitutional claim of this nature can be justiciable. If the remuneration is low enough, a Court can conclude that 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.”

[49] The better way to approach the issue is to consider the rate of remuneration itself, and the period during which it has been allowed to erode, and then compare it to the remuneration paid other judicial officers remunerated by Ontario who do the same work or work of roughly equivalent importance and difficulty.

[50] As I have already mentioned, Deputy Judges are paid a per diem allowance of \$232 for their services. On any objective standard, this is a paltry sum. This amount was originally set by Order-in-Council in 1982. There has not been a pay increase since that time despite an increase in workload, jurisdiction, responsibility and cost of living. Supernumerary former Provincial Court judges who continue to sit in Small Claims Court perform the same work as Deputy Judges and receive a per diem rate of \$995.39 for a full day, and \$447.70 for a half day. Without more, I conclude that this rate of remuneration falls below a minimum acceptable standard.

[51] It would undoubtedly be difficult to evaluate a claim such as this if the call were a close one. It is hard to know precisely at what rate of remuneration judicial independence becomes imperiled. But the 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.

[52] With respect to the second argument, I acknowledge that the concern that I have just mentioned applies with reduced force in the context of deputy judges, because of the part-time nature of their office. But I cannot agree that the concern is “not germane.” As I have already noted, of the approximately 390 deputy judges currently presiding in the Court, over 50% of them have served on the Court for more than three years; over 40% of them have served for seven years or more; and over 30% of them have served for ten years or more. While many Deputy Judges sit infrequently, many others devote a substantial part of their time to presiding in court. It cannot fairly be said that the Deputy Judges, as a group, are simply providing part time *pro bono* service leaving them immune from improper influence. I readily accept that a somewhat diminished rate of remuneration might be acceptable for the Deputy Judges given their part-time office. But that is very far from an apt characterization of their current

circumstance. It is not necessary that the judicial independence of every Deputy Judge be compromised in order to conclude that as a group, it is.

[53] With respect to the third argument, I find it entirely unconvincing. The Deputy Judges are judges, not “officers.” Without intending to undervalue in any way the important work done by Assessment Officers and Members of the Criminal Injuries Compensation Board, the Deputy Judges of the Small Claims Court are the face of justice to the majority of ordinary citizens seeking to vindicate their claims to civil justice. For many, these are the only judges they will ever appear before in their lives. The fair adjudication of their claims will be crucial to their view of the fairness of our system of justice. The importance of the contribution of Deputy Judges to the administration of justice does not bear trivialization. Finally, it may well be that Assessment Officers and Members of the Criminal Injuries Compensation Board are inadequately remunerated. I do not say that they are, but a comparison to their remuneration alone is not terribly helpful.

Have the Salaries of the Deputy Judges Been Maintained without Recourse to an Independent Commission?

[54] Obviously they have. But the respondents argue that because the principle of judicial independence is applied flexibly to different types of decision-makers, the particular mechanisms required as a constitutional minimum will depend upon the specific context of the court or tribunal in question, and that an independent remuneration commission is not necessary for Deputy Judges of the Small Claims Court. While at its most strict application, the constitutional principle of judicial independence requires judges’ compensation to be established through a remuneration commission process, the respondents argue that it does not require a remuneration commission for adjudicators, such as deputy judges, who are situated at the far end of the spectrum of judicial officers. The Attorney General submits that the current mechanism for determining deputy judges’ remuneration by way of Order-in-Council is appropriate, and complies with the requirements of judicial independence applicable to this level of adjudicator.

[55] I cannot agree with this submission. 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. Wherever the Deputy Judges are situated on the “spectrum of judicial officers,” they are judges and must be treated as judges.

[56] The respondents also submit that the current mechanism for determining Deputy Judges’ remuneration by way of Order-in-Council is appropriate, and complies with the requirements of judicial independence applicable to this level of adjudicator. I agree that there can be flexibility in establishing the precise contours of the process for determining judicial remuneration, and that

the nature of the judicial function in question may be a consideration in shaping those contours. 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.

My Conclusion on the Question of Whether the Deputy Judges of the Small Claims Court Have Sufficient Financial Security to Meet the Legal Test for Judicial Independence

[57] For the reasons I have outlined, I conclude that the salaries of the Deputy Judges of the Small Claims Court have fallen below a minimum acceptable level, and that those salaries have been maintained without recourse to an independent commission. As a result, I am of the view that they do not have sufficient financial security to meet the legal test for judicial independence.

2. Do The Deputy Judges of the Small Claims Court Have Sufficient Administrative Support and Services to Meet the Legal Test for Judicial Independence?

[58] Without in any way intending to denigrate the serious concerns raised by the applicant in relation to administrative support and services, I am not satisfied that the shortcomings in this area lead to the conclusion that judicial independence is sufficiently undermined to raise any constitutional issue. I would urge the respondents to address this issue, but I will not order them to do so.

3. Are the Deputy Judges Entitled To The Creation Of An Independent Remuneration Commission?

[59] For the reasons already stated, I conclude that the Deputy Judges are entitled to the creation of an independent remuneration commission. I agree with the respondents, however, that I should not dictate with precision the form that the commission should take, the powers that it should have or its precise role in the determination of judicial remuneration. It is sufficient for me to order that the respondents shall, within six months of the release of this judgment, provide recourse to the Deputy Judges of the Small Claims Court to a commission for determining judicial remuneration that is independent, efficient and objective. While the recommendations of such commission need not be binding, they should not be set aside lightly. In the initial deliberation of the Commission, and in the initial consideration of its recommendations by the government, my conclusion that the salaries of the Deputy Judges of the Small Claims Court

fallen below a minimum acceptable level shall be taken into account. For the same reason, the work of the commission and the response of the government shall be expedited.

4. Are the Deputy Judges Entitled to an Order Requiring the Respondents to Establish and Maintain Suitable Standards for Administrative Support and Facilities For Deputy Judges?

[60] While I would hope that the respondents would do exactly what the applicant asks me to order, for the reasons already stated, I am not satisfied that the applicants are entitled to such an order.

DISPOSITION

[61] I order that:

1. The respondents shall, within six months of the release of this judgment, provide recourse to the Deputy Judges of the Small Claims Court to a commission for determining judicial remuneration that is independent, efficient and objective.
2. While the recommendations of such commission need not be binding, they should not be set aside lightly.
3. In the initial deliberation of the Commission, and in the initial consideration of its recommendations by the government, my conclusion that the salaries of the Deputy Judges of the Small Claims Court have fallen below a minimum acceptable level shall be taken into account.
4. For the same reason, the work of the commission and the response of the government shall be expedited.
4. The parties may address the issue of costs in writing if necessary. The applicant shall serve and file its submissions within 15 days of the release of this judgment. The respondents shall serve and file their response within 15 days of receipt of the applicant's submissions. The applicant will have five days to provide a brief reply.

M. Dambrot J.

Released: November 16, 2005

COURT FILE NO.: 05-CV-285447PD
DATE: 20051116

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ONTARIO DEPUTY JUDGES

Applicant

- and -

**HER MAJESTY THE QUEEN in right of
Ontario and THE ATTORNEY GENERAL OF
ONTARIO**

Respondents

REASONS FOR JUDGMENT

M. Dambrot J.

Released: November 16, 2005