Brief to the Law Amendments Committee
on Bill 103 – Amendments to the *Justices of the Peace Act*

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on behalf of the Nova Scotia Presiding Justices of the Peace Association
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I write on behalf of the Nova Scotia Presiding Justices of the Peace Association (the "Association"), an organization representing the Province's Presiding Justices of the Peace ("PJPs"). We are concerned that Bill 103 diminishes judicial independence in Nova Scotia. I would like to begin with a few remarks about judicial independence: what it is and why it is important. I will then provide a brief overview of what PJPs do, and make four points in relation to the judicial independence implications of Bill 103.

What is Judicial Independence and Why is it Important?

The Supreme Court of Canada has rendered a number of decisions addressing judicial independence. I will draw on three of those cases to summarize the basic principles.

In *The Queen v Beauregard*, [1986] 2 SCR 56, the Supreme Court of Canada explained the concept of judicial independence this way:

> 21. Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider--be it government, pressure group, individual or even another judge--should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence. Nevertheless, it is not the entire content of the principle. ...Today, however, the principle is far broader.

In *Ref re Remuneration of Judges of the Prov. Court of P.E.I.*, [1997] 3 SCR 3 the Supreme Court held that the protection of judicial independence requires the creation of an "institutional sieve" (para 170) between the judiciary and government:

> 166 The imperative of protecting the courts from political interference through economic manipulation is served by interposing an independent body — a judicial compensation commission — between the judiciary and the other branches of government. The constitutional function of this body is to depoliticize the process of determining changes or freezes to judicial remuneration. (emphasis in original)
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> ...

287 I summarize the major principles governing the collective or institutional dimension of financial security:

1. It is obvious to us that governments are free to reduce, increase, or freeze the salaries of provincial court judges, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class.

2. Provinces are under a constitutional obligation to establish bodies which are independent, effective, and objective, according to the criteria that I have laid down in these reasons. Any changes to or freezes in judicial remuneration require prior recourse to the independent body, which will review the proposed reduction or increase to, or freeze in, judicial remuneration. Any changes to or freezes in judicial remuneration made without prior recourse to the independent body are unconstitutional.

3. As well, in order to guard against the possibility that government inaction could be used as a means of economic manipulation, by allowing judges' real wages to fall because of inflation, and in order to protect against the possibility that judicial salaries will fall below the adequate minimum guaranteed by judicial independence, the commission must convene if a fixed period of time (e.g. three to five years) has elapsed since its last report, in order to consider the adequacy of judges' salaries in light of the cost of living and other relevant factors.

4. The recommendations of the independent body are non-binding. However, if the executive or legislature chooses to depart from those recommendations, it has to justify its decision according to a standard of simple rationality — if need be, in a court of law.

5. Under no circumstances is it permissible for the judiciary to engage in negotiations over remuneration with the executive or representatives of the legislature. However, that does not preclude chief justices or judges, or bodies representing judges, from expressing concerns or making representations to governments regarding judicial remuneration.

In *Bodner v Alberta*, 2005 SCC 44 the Supreme Court of Canada again considered judicial independence in the context of judicial remuneration. The Court summarized the principles in this way:

4 The basis for the principle of judicial independence can be found in both our common law and the Canadian Constitution; see *Beauregard v.*

Canada, 1986 CanLII 24 (SCC), [1986] 2 S.C.R. 56, at pp. 70-73; *Ell v. Alberta*, [2003] 1 S.C.R. 857, 2003 SCC 35 (CanLII), at paras. 18-23. Judicial independence has been called "the lifeblood of constitutionalism in democratic societies" (*Beauregard*, at p. 70), and has been said to exist "for the benefit of the judged, not the judges" (*Ell*, at para. 29). Independence is necessary because of the judiciary's role as protector of the Constitution and the fundamental values embodied in it, including the rule of law, fundamental justice, equality and preservation of the democratic process; *Beauregard*, at p. 70.

5 There are two dimensions to judicial independence, one individual and the other institutional. The individual dimension relates to the independence of a particular judge. The institutional dimension relates to the independence of the court the judge sits on. Both dimensions depend upon objective standards that protect the judiciary's role: *Valente*, at p. 687; *Beauregard*, at p. 70; *Ell*, at para. 28.

6 The judiciary must both be and be seen to be independent. Public confidence depends on both these requirements being met: *Valente*, at p. 689. "Judicial independence serves not as an end in itself, but as a means to safeguard our constitutional order and to maintain public confidence in the administration of justice": *Ell*, at para. 29.

7 The components of judicial independence are: security of tenure, administrative independence and financial security; see *Valente*, at pp. 694, 704 and 708; the *Reference*, at para. 115; *Ell*, at para. 28.

8 The *Reference*, at paras. 131-35, states that financial security embodies three requirements. 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.

9 The *Reference* arose when salaries of Provincial Court judges in Prince Edward Island were statutorily reduced as part of the government's budget deficit reduction plan. Following this reduction, numerous accused challenged the constitutionality of their proceedings in Provincial Court alleging that the court had lost its status as an independent and impartial tribunal. Similar cases involving Provincial Court judges in other provinces were joined in the *Reference*. Prior to the *Reference*, salary review was between Provincial Court judges, or their association, and the appropriate minister of the provincial Crown. Inevitably, disagreements arose.

10 The often spirited wage negotiations and the resulting public rhetoric had the potential to deleteriously affect the public perception of judicial

> independence. However independent judges were in fact, the danger existed that the public might think they could be influenced either for or against the government because of issues arising from salary negotiations. The *Reference* reflected the goal of avoiding such confrontations. Lamer C.J.'s hope was to "depoliticize" the relationship by changing the methodology for determining judicial remuneration (para. 146).
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> 11 Compensation commissions were expected to become the forum for discussion, review and recommendations on issues of judicial compensation. Although not binding, their recommendations, it was hoped, would lead to an effective resolution of salary and related issues. Courts would avoid setting the amount of judicial compensation, and provincial governments would avoid being accused of manipulating the courts for their own purposes.
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> 12 Those were the hopes, but they remain unfulfilled. In some provinces and at the federal level, judicial commissions appear, so far, to be working satisfactorily. In other provinces, however, a pattern of routine dismissal of commission reports has resulted in litigation. Instead of diminishing friction between judges and governments, the result has been to exacerbate it. Direct negotiations no longer take place but have been replaced by litigation. These regrettable developments cast a dim light on all involved...

The *Bodner* decision also makes the important point that the commission process is not interest arbitration, nor is it judicial decision-making (para 14). Members of the judiciary are not provincial employees. Neither they, nor their association, can bargain with the government over remuneration. The commission process is a unique, constitutionally mandated process.

The principles of judicial independence apply equally to PJPs and require that PJP remuneration be addressed through a commission or similar body. See *Ell v Alberta*, 2003 SCC 35 (para 17-31); *Bodner v Alberta*, 2005 SCC 44 (para 121); *Nova Scotia Presiding Justices of the Peace Association v Nova Scotia,* 2013 NSSC 40 (para 87).

While all of Nova Scotia's PJPs are appointed on a part-time basis, the part-time nature of PJP work does not reduce the requirement for institutional financial independence. In *Ontario Deputy Judges Association v Ontario*, (2006) 80 OR (3d) 481 the Ontario Court of Appeal held that part-time deputy judges are entitled to the same level of financial security – an independent, objective, effective process for determining their remuneration - as full-time judges. (para 16)

The *PEI Judges Reference* concluded that non-binding commission recommendations are constitutionally permissible, but "should not be set aside lightly..." (para 133) A non-binding process was referred to as a "constitutional minimum." The constitutionality of

non-binding commission recommendations is currently under challenge in Nova Scotia, see: *Nova Scotia Provincial Judges' Association* v *Nova Scotia (Attorney General)*, 2018 NSSC 13.

The Role of Presiding Justices of the Peace

PJP qualifications and experience are similar to the qualifications and experience of Provincial Court Judges. Nova Scotia has eight PJPs who work out of the Justice of the Peace Centre in Dartmouth, all of whom are lawyers with more than 20 years at the bar. All have served as PJPs since the Justice of the Peace Centre was created 17 years ago. There are also two PJPs who hear summary offence trials in Sydney.

PJPs are appointed on a part-time basis but for those based at the JP Centre, it is a significant commitment averaging 20 hours per week or 50% of full-time work. Some PJPs work more than this, some less. When not presiding, some PJPs engage in other work that is not incompatible with their PJP duties, including teaching and the practice of law (though not criminal law). Others devote themselves solely to their PJP duties.

PJPs have played an important role in Nova Scotia's criminal justice system since the inception of the Justice of the Peace Centre in 2002. A PJP is on duty in Nova Scotia 24 hours per day, 7 days a week, 365 days a year. Between 9:00 a.m. and 9:00 p.m. daily, there is at least one PJP working at the JP Centre in Dartmouth. Between 9:00 p.m. and 9:00 a.m. nightly, there is a PJP on call at home. PJPs preside at eight night court sessions per week in HRM and travel throughout Nova Scotia to sit in Provincial Court as required.

In *Ell v. Alberta* 2003 SCC 35 at para 26 the court cited Professor Mewett on the importance of the role that justices of the peace play in the criminal justice system:

> ... the Justice of the Peace is the very person who stands between the individual and the arbitrary exercise of power by the state or its officials. It is essential that an independent person be the one to determine whether process should issue, whether a search warrant should be granted, whether and on what terms an accused should be released on bail and so on. This is a fundamental principle... [that] must be zealously preserved.

The duties of a PJP are set out in s. 7 of the regulations made pursuant to the *Justices of the Peace Act*, RSNS 1989, c 244. The primary duties include:

Considering Search and Arrest Warrants

PJPs consider more than 2,000 search warrant applications each year, mostly under the *Criminal Code, Controlled Drugs and Substances Act*, and *Summary Proceedings Act*.

Presiding at Judicial Interim Release Hearings via Tele-Bail and in Court

PJPs conduct approximately 1,400 – 1,600 tele-bail matters each year. These involve arraignments of accused persons brought before the court after 3:00 p.m. and when the courts are closed, language elections under s.530 of the *Criminal Code*, and either tele-bail consent releases of accused persons on undertakings and recognizances or adjournments for contested bail hearings. While PJPs have the jurisdiction to conduct contested bail hearings, these rarely take place in the tele-bail context. PJPs also provide occasional coverage for these matters during daytime hours in Provincial Court when no Provincial Court Judge is available.

Applications under the *Domestic Violence Intervention Act*

PJPs have heard more than 3,400 applications (about 200 per year) for Emergency Protection Orders (EPOs) under the *Domestic Violence Intervention Act* and the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (*FHORMIRA*) or band-specific provisions applicable on First Nations reserves. EPO hearings are *ex parte* telephone hearings typically involving self-represented applicants.

Presiding in Summary Offence Court

PJPs preside over eight weekly night court sessions in Halifax and travel to other areas of the province (including Truro, Shubenacadie, Kentville, Bridgewater, Antigonish, and Sydney) to preside over summary offence trials (primarily *Motor Vehicle Act, Liquor Control Act*, *Protection of Property Act*, peace bond applications under s.810 of the *Criminal Code*, and some by-law cases.)

Points Re: Bill 103

The four points the Association would like to make to the Law Amendments Committee on Bill 103 are:

(1) Non-binding commission recommendations diminish judicial independence by politicizing the judicial compensation process.

(2) The PJP commission should have the same scope to make recommendations as the commission for Provincial and Family Court Judges;

(3) The statutory prohibition on PJPs receiving benefits should be repealed and the question left to the commission;

(4) There should be a housekeeping amendment to address appointment of a PJP commission in the event that the Chair of the Provincial Court Judges' commission is unable or unwilling to act.

I will briefly elaborate on each point.

(1) Non-binding commission recommendations diminish judicial independence by politicizing the judicial compensation process.

Nova Scotia created a binding commission process to address remuneration for Provincial and Family Court Judges. This process worked well for many years and avoided the prospect of litigation between judges and government. Nova Scotia made commission recommendations for Provincial and Family Court Judges non-binding in 2016.

In their 2016 submissions to the Law Amendments Committee, the Canadian Association of Provincial Court Judges ("CAPCJ") referred to binding recommendations as the "gold standard of Judicial Independence" and cautioned that a change to non-binding recommendations would diminish judicial independence in Nova Scotia: "Only where recommendations are binding is there an absence of even the hint of politicization in the commission or commission process." (pp 4-5) CAPCJ also pointed out that Nova Scotia's binding commission recommendations had not resulted in excessive judicial salaries. At the time of CAPCJ's submissions, Nova Scotia Provincial and Family Court Judges had the second-lowest salaries among provincial/territorial judges in Canada.

The Nova Scotia government is now engaged in litigation with the Judges of the Provincial Court and Family Court of Nova Scotia over the constitutionality of the change to non-binding recommendations, as well as the government's rejection of the most recent commission's salary recommendations.

Rejected commission recommendations have also led to litigation between judges and governments in Manitoba, British Columbia, New Brunswick, Newfoundland and Labrador, and Quebec.

The constitution requires an effective judicial compensation commission process. An effective commission process depoliticizes the setting of judicial compensation, discourages litigation, is cost-effective, ensures timely implementation or review of commission recommendations, protects the structural separation of the branches of government, and promotes public confidence in the judiciary. A binding process meets each of these objectives.

(2) The PJP commission should have the same scope to make recommendations as the commission for Provincial and Family Court Judges.

In *Nova Scotia Presiding Justices of the Peace Association v Nova Scotia (Attorney General)*, 2013 NSSC 40, the Nova Scotia Supreme Court concluded that the lack of a commission on PJP compensation was unconstitutional as there was "no forum for discussions, review, and recommendation on issues of justices' remuneration… [nor] the

percentage, the exclusion of benefits, or the calculation of the hourly rate [for PJPs]." (paras 112-115)

That is still true. In response to the court's decision, the province enacted sections 11A-L of the *Justices of the Peace Act*, which created a commission process, but limited the commission's recommendation power to only two points:

> **Commission report**
> 11B (1) The commission shall inquire into and prepare a report containing recommendations with respect to
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> (a) the hourly rate to be paid to presiding justices of the peace; and
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> (b) the annual adjustments to the hourly rate in respect of cost-of-living increases.
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> (2) The hourly rate referred to in subsection (1) must be a percentage of the per diem payment made to judges not receiving salaries as recommended by the tribunal pursuant to clause 21E(1)(b) of the Provincial Court Act.

There is still no forum for determining any other matter relating to PJP remuneration.

In contrast, section 21A of the *Provincial Court Act* empowers the commission for Provincial and Family Court Judges to "recommend the salaries and benefits for judges..." and provides specifics in section 21E(1).

The Association is concerned that the current, narrow process is inadequate to the constitutional task of providing an effective forum for consideration of PJP remuneration.

(3) The statutory prohibition on PJPs receiving benefits should be repealed and the question left to the commission.

In *Nova Scotia Presiding Justices of the Peace Association v Nova Scotia (Attorney General)*, 2013 NSSC 40 the Court noted:

> [62] The justices receive no remuneration in the form of any benefit. There is no vacation, pension, sick leave, maternity leave, incidental allowance, or insurance for life, health, dentistry, or disability. Their remuneration is tied to a Provincial Court judge's salary without adjustment for a Provincial Court judge's benefits.

This absence was enshrined in legislation by the 2013 amendments to the *Justices of the Peace Act* prior to the first PJP judicial compensation commission:

11B(3) A presiding justice of the peace is not entitled to any benefits.

This statutory prohibition on benefits of any kind leaves PJPs without a forum in which to raise matters of significant concern. The question of benefits should be a subject for the commission, as should all other aspects of PJP remuneration, in the same manner as for Provincial and Family Court Judges.

(4) There should be a housekeeping amendment to address appointment of a PJP commission in the event that the Chair of the Provincial Court Judges' commission is unable or unwilling to act.

Section 11A(2) of the *Justices of the Peace Act* provides that the chair of the Provincial Court Judges' compensation commission shall be the commission for PJPs, but it does not provide for a situation where that person is unable or unwilling to act. The relevant section is restricted to the first commission (which rendered its report in 2014):

> 11A(3) Where the chair of the commission is unable or unwilling to be the <u>first</u> commission, the Dean of the Schulich School of Law at Dalhousie University shall appoint the <u>first</u> commission. (emphasis added)

In addition to amending the *Act* to make the process in section 11A(3) available anytime the chair of the commission is unable or unwilling to act, it would be appropriate to include a provision that the Dean appoint the commission "after consultation with the Minister and the Association," similar to the mechanism in the *Provincial Court Act*.

Thank you for considering these points.