

**Judicial Compensation and
Benefits Commission**



**Commission d'examen de la
rémunération des juges**

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May 30, 2008

The Honourable Robert Douglas Nicholson
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8

Dear Minister:

Pursuant to the provisions of Section 26.(2) of the *Judges Act*, I am pleased to submit the report and recommendations of the third Judicial Compensation and Benefits Commission.

Yours truly,

Sheila Block
Chair

Encl.

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Report of the Third Quadrennial Judicial Compensation and Benefits Commission

CHAPTER 1

INTRODUCTION

1. The third Quadrennial Judicial Compensation and Benefits Commission (the ‘Quadrennial Commission’ or ‘Commission’) was established in October, 2007 with the appointment by the Governor in Council of its three members: Chairperson Sheila R. Block, and Commissioners Wayne McCutcheon and Paul M. Tellier, P.C., C.C., Q.C.¹ As provided in the federal *Judges Act*, R.S.C. 1985, c. J-1 (as amended) (*Judges Act*), the Commission’s mandate is to inquire into the adequacy of judicial compensation and benefits for all federally-appointed judges. Its term extends over a four-year period, terminating on August 31, 2011. The principal obligation of the Commission is to conduct an inquiry into the adequacy of judicial compensation and benefits and to provide the Minister of Justice with its recommendations in report form within nine months of the date of the commencement of the inquiry.² This report fulfills that obligation.

The Quadrennial Commission Process

2. The Quadrennial Commission process reflects the Constitutional requirement that in order to preserve the independence of the judiciary, judicial compensation must be determined by a body that is independent of the executive and legislative branches.³ This

¹ A copy of the October 12, 2007 press release announcing the appointments is found at Appendix A along with a short biography of each of the Commissioners. The Commissioners wish to express their gratitude to Kate Wilson, M.A., LL.B., B.C.L., who provided them with invaluable assistance and unfailing support in the discharge of their mandate. The Commissioners also thank their Executive Director, Jeanne Ruest, for her sound advice and her unstinting dedication in keeping all parties informed and the Commission process running smoothly.

² *Judges Act*, ss. 26(2).

³ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at paras. 125, 170 [*PEI Reference*].

requirement was articulated by the Supreme Court of Canada in 1997 in *Reference Re Remuneration of Judges* (the ‘*PEI Reference*’),⁴ and the current Commission process is a direct response to that articulation.

Judicial Independence

3. It is worth briefly considering the concept of judicial independence, since this principle is central to the work of the Commission. As the late Chief Justice of Canada, Antonio Lamer once observed, the fundamental nature of the principle of judicial independence makes it difficult to understand and arguably to articulate. Judicial independence is so much a part of our legal culture, like the rule of law or the presumption of innocence, that there is a tendency to take it for granted. However, in order “to keep these fundamental principles alive and current — contemporary truths not shibboleths”, we must periodically review them and remind ourselves of their roots.⁵

4. It is however difficult to overstate the importance of judicial independence as a key element in the maintenance of a healthy democracy. One need only consider those societies where judicial independence has not been as jealously guarded to be reminded of its importance. Even in societies such as ours, with a strong history of judicial independence, complacency poses an unacceptable risk; judicial independence must be actively safeguarded in order to be maintained and protected from possible infringement.

5. In Canada, judicial independence is an unwritten constitutional principle,⁶ whose origins can be traced to the *Act of Settlement* passed by the English Parliament in 1701, which enshrined a guarantee of security of tenure for the English judiciary.⁷ The articulations of this principle are found in the preamble to the *Constitution Act, 1867*, which provides that the Canadian Constitution shall be “similar in Principle to that of the United Kingdom”, as well as section 99(1) of the Constitution, which is closely modelled

⁴ *PEI Reference, ibid.*

⁵ Remarks by the Rt. Honourable Antonio Lamer, P.C., Chief Justice of Canada, to the Council of the Canadian Bar Association Annual Meeting (August 20, 1994) at 3-4 [unpublished].

⁶ *PEI Reference, supra* note 3 at para. 83.

⁷ *Act of Settlement* (U.K.), 12 & 13 Will. 3, c.2, s.3, para 7.

on the *Act of Settlement*.⁸ Section 11(d) of the *Canadian Charter of Rights and Freedoms* articulates judicial independence in the criminal context by making express the right to a hearing by “an independent and impartial tribunal” for any person charged with a criminal offence.⁹ These articulations do not exhaust the principle of judicial independence; instead they represent elaborations of the principle in particular contexts.¹⁰

6. Judicial independence can be understood at both an individual and collective level. Individual independence has been described as the “historical core” of judicial independence, and defined as “the complete liberty of individual judges to hear and decide the cases that come before them”.¹¹

7. The institutional independence of the judiciary enables courts to fulfill a second and distinctly constitutional role:

[It] arise[s] out of the position of the courts as organs of and protectors ‘of the Constitution and the fundamental values embodied in it — rule of law, fundamental justice, equality, preservation of the democratic process...

The institutional independence of the courts emerges from the logic of federalism, which requires an impartial arbiter to settle jurisdictional disputes between the federal and provincial orders of government. Institutional independence also inheres in adjudication under the Charter, because the rights protected by that document are rights against the state.¹²

8. In order to achieve judicial independence, judges, both individually and collectively, must be free to operate without interference from the parties that appear before them (including the state) and from the executive and legislative branches. Not only must this independence exist in fact; equally important is that the public perceive that it exists.

⁸ *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, preamble and ss. 99(1) [*Constitution Act, 1867*]. *PEI Reference*, *supra* note 3 at para. 106; *Valente v. the Queen*, [1985] 2 S.C.R. 673 at para. 26 [*Valente*].

⁹ *Canadian Charter of Rights and Freedoms*, s. 11, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁰ *PEI Reference*, *supra* note 3 at para. 83.

¹¹ *Ibid.* at para. 123.

¹² *Ibid.* at paras. 123-124.

9. As the Supreme Court outlined in the *PEI Reference*, judicial independence has three core characteristics: security of tenure, administrative independence and financial security.¹³ These characteristics may focus on either the individual or collective dimension of judicial independence, or, in the case of financial security, may address both.¹⁴

10. The collective or institutional dimension of financial security requires that politicization of the relationship between the executive and legislative branches and the judiciary be avoided. In practice, this requirement has three primary implications:

- 1) Changes to judicial remuneration should not be made without recourse to an independent, effective and objective process for determining judicial remuneration;
- 2) The judiciary must not engage in negotiations concerning remuneration with the executive or legislative branches; and
- 3) There is a minimum level below which judicial salaries cannot be reduced.¹⁵

11. Section 100 of the *Constitution Act, 1867*, provides that the salaries, allowances and pensions of superior court judges shall be fixed and provided by Parliament. Parliament discharges this obligation through the *Judges Act*, which also provides for the salaries, allowances and pensions of judges of the federal courts (the Supreme Court of Canada, the Federal Courts, and the Tax Court of Canada).

12. In order to avoid infringing the principle of judicial independence, before Parliament can modify judicial salaries for any federally-appointed judges, it must have recourse to an “independent, effective and objective process for determining judicial remuneration” — the Quadrennial Commission process. The Commission acts as an

¹³ *PEI Reference*, *supra* note 3 at para. 115, citing *Valente*, *supra* note 8 at paras. 27, 40, 47.

¹⁴ *PEI Reference*, *ibid.* at paras. 119-121.

¹⁵ *Ibid.* at paras. 133-135.

“institutional sieve” to prevent the setting of judicial remuneration “from being used as a means to exert political pressure through the economic manipulation of the judiciary”.¹⁶

13. The Quadrennial Commission process is the third iteration of a process adopted for the determination of judicial compensation and benefits. Prior to the *PEI Reference*, between 1982 and 1996, judicial compensation recommendations were made through a Triennial Commission process, established under the *Judges Act*. Despite the efforts of five separate Commissions, this process was largely perceived as a failure: the process did not impose on Government any obligation to respond to the Commission’s recommendations and the majority of the recommendations made were ignored and therefore not implemented. In turn, the Triennial Commission process had replaced the practice of having judicial salaries and benefits reviewed by advisory committees, a process which was not seen as sufficiently independent by the judiciary.¹⁷

14. The *PEI Reference* not only confirmed the need for the establishment of a commission process but provided important guidance as to what form such a process should take. As the Drouin Commission outlined in the first Quadrennial Commission report, a compensation commission should possess the following characteristics:

Members of compensation commissions must have some kind of security of tenure, which may vary in length;

The appointments to compensation commissions must not be entirely controlled by any one branch of government;

A commission’s recommendations concerning judges’ compensation must be made by reference to objective criteria, not political expediencies;

It is preferable that the enabling legislation creating the commission stipulate a non-exhaustive list of relevant factors to guide the commission’s deliberations;

The process of compensation commissions must be employed before implementation of any changes or freezes to judicial compensation;

To guard against the possibilities that government inaction might lead to a reduction of judges’ real salaries because of inflation, compensation commissions

¹⁶ *Ibid.*, at para. 170.

¹⁷ Report of the Judicial Compensation and Benefits Commission, submitted to the Minister of Justice of Canada, May 31, 2000, at 2 [Drouin Report].

must convene at least every three to five years to ensure the adequacy of judges' salaries and benefits over time;

The reports of the compensation commissions must have a "meaningful effect on the determination of judicial salaries". Thus, while the report of a compensation commission need not be binding, at a minimum the responsible legislative or executive authority must formally respond to the report within a specified time; and

Finally, the executive or the legislature, as applicable, must be prepared to justify any decision rejecting one or more of the recommendations in a compensation commission's report, if necessary, in a court of law.¹⁸

15. The design and adoption of a specific process however was left to individual governments.¹⁹ The Quadrennial Commission process incorporates the above elements in the following manner:

Each member of the Commission holds office during good behaviour and may be removed for cause at any time by the Governor in Council. Members hold office for a term of four years (sections 26.1(2) and (3) *Judges Act*).

The Commission consists of three members appointed by the Governor in Council: one person nominated by the judiciary; one person nominated by the Minister of Justice of Canada; and one person, who shall act as Chairperson, nominated by the other two members (section 26.1(1) *Judges Act*).

The Commission commences its inquiry on September 1 of every fourth year after 1999, and must submit a report containing its recommendations to the Minister of Justice within nine months after the date of commencement (section 26(2) *Judges Act*).

The Minister of Justice must respond to a report of the Commission within six months after receiving it (section 26(7) *Judges Act*).

In conducting its inquiry, the Commission must consider the non-exhaustive list of objective criteria set out in the *Judges Act* (section 26 (1.1) *Judges Act*).

The result therefore is a statutory process which is nevertheless governed by the constitutional requirements which led to its enactment.

Commissioner Independence

16. It is important to underline that while the process for the nomination of members provides that the judiciary and the federal Government each nominate one member in

¹⁸ *Ibid.* at 5.

¹⁹ *PEI Reference*, *supra* note 3 at para. 167.

order to ensure that the Commission's composition is representative of the parties²⁰ and that these two members in turn nominate a Chairperson, all three members function entirely independently of the parties who nominated them.²¹ We adopt the statement of the McLennan Commission that "[t]he members of the Commission owe no allegiance to those who appointed them and the Commission has acted completely independently throughout the process."²²

Mandate

17. As noted earlier, the mandate of the Quadrennial Commission is to inquire into

- a) the adequacy of the salaries and other amounts payable under the *Judges Act*; and
- b) the adequacy of judges' benefits generally.²³

18. In conducting its inquiry, the Commission must consider the following criteria:

- a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
- b) the role of financial security of the judiciary in ensuring judicial independence;
- c) the need to attract outstanding candidates to the judiciary; and
- d) any other objective criteria that the Commission considers relevant.²⁴

19. As the Supreme Court has directed, these criteria have served as the guide to our deliberations.²⁵ The specific importance of each of these criteria will be discussed in more detail in later sections of the report.

²⁰ *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*; *Ontario Judges' Assn. v. Ontario (Management Board)*; *Bodner v. Alberta*; *Conférence des juges du Québec v. Québec (Attorney General)*; *Minc v. Québec (Attorney General)*, [2005] 2 S.C.R. 286 at para. 16 [*Bodner*].

²¹ For this Commission, the judiciary nominated Mr. Tellier and the Government nominated Mr. McCutcheon; these nominees then nominated Ms. Block as Chair of the Commission.

²² Report of the Judicial Compensation and Benefits Commission, submitted to the Minister of Justice of Canada, May 31, 2004, at 3 [McLennan Report].

²³ *Judges Act*, s. 26.

²⁴ *Ibid.*, s. 26.

²⁵ *PEI Reference*, *supra* note 3 at para. 173.

20. The term of the Commission is also relevant to an understanding of the scope of our mandate. Our inquiry is prospective in nature and must assess the adequacy of judicial compensation over a four-year period, aware that the next Commission will not present its recommendations until the spring of 2012.

Precedential Value of Previous Quadrennial Commissions

21. As noted above, this is the third Quadrennial Commission. As such, we have had the benefit of the work undertaken by the first and second Commissions, the Drouin and McLennan Commissions. While we are not bound by the conclusions reached by previous Commissions — “each Commission must make its assessment in its own context”²⁶ — they nevertheless form an important part of the background and context that a Commission should consider and we have given careful consideration to both reports and to the lessons learned during earlier iterations of this process.²⁷ Later in our report, we also offer suggestions as to how the Commission process might further build on the work of previous Commissions while respecting the independence of future Quadrennial Commissions.²⁸

Process Followed by this Commission

22. The membership of the Commission was announced on October 12, 2007.²⁹

23. In November, we issued a public notice which was posted on the Quadrennial Commission website, and which appeared in newspapers across the country providing a preliminary timetable for our inquiry and inviting written submissions from interested parties on any of the questions within our mandate.³⁰

²⁶ *Bodner*, *supra* note 20 at para. 15.

²⁷ *Ibid.*

²⁸ See *infra* “Enhancing the Efficiency of Future Commissions”.

²⁹ The press release confirming the appointments appears at Appendix A.

³⁰ Online: <http://www.quadcom.gc.ca/pg_Notices.en.php>.

24. Initial written submissions were received in December 2007, copies of which were posted on our website. Comments on, or replies to the first round of submissions were made by the end of January 2008.³¹

25. Requests to appear before the Commission were received by January 22, 2008. Public hearings were held on two separate dates. The first day of hearings was held on Monday March 3, 2008 at the premises of the Canadian International Trade Tribunal. A second day of hearings was held on March 13, 2008 at the premises of the Canadian Human Rights Tribunal.³²

26. In addition to the various submissions received, as noted earlier, we carefully reviewed the reports of the Drouin and McLennan Quadrennial Commissions as well as the Government responses to them. We also reviewed the reports of the various Triennial Commissions which preceded the Quadrennial Commission process.³³ We considered the reports of the Advisory Committee on Senior Level Retention and Compensation.³⁴ We also considered the relevant jurisprudence, including the various decisions of the Supreme Court dealing with judicial independence and in particular its decisions in the *PEI Reference* and in *Bodner*, the latter decision having been released after the tabling of the McLennan Commission report.³⁵

27. Throughout our inquiry, we maintained open channels of communication with the principal parties, seeking clarifications or additional information when necessary in order to assist in our work.

³¹ A list of all submissions received by the Commission appears at Appendix B.

³² A list of all parties who appeared before the Commission is found at Appendix C. Transcripts of these public proceedings are available for review through the Commission office.

³³ The five Triennial Commissions were the Lang Commission (1983), the Guthrie Commission (1987), the Courtois Commission (1990), the Crawford Commission (1993) and the Scott Commission (1996).

³⁴ The Advisory Committee on Senior Level Retention and Compensation has released nine reports; its first report was released in January 1998.

³⁵ The McLennan Commission's report was submitted to the Minister of Justice on May 31, 2004 and the Supreme Court's reasons in *Bodner* were released on July 22, 2005. McLennan Report, *supra* note 22; *Bodner*, *supra* note 20.

Safeguarding the Integrity of the Commission Process

28. The judiciary, as represented by the Canadian Superior Courts Judges Association and the Canadian Judicial Council ('Association and Council'), 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. We wish to address the question of our jurisdiction to deal with what can broadly be termed 'process issues' and then to specifically address one of the process concerns raised in this instance.

29. As is evident from the origins of the Quadrennial Commission process, there has been a long struggle to achieve a process which meets all three criteria enunciated by the Supreme Court: independent, objective and effective. The current process replaced the Triennial Commission process, which was widely perceived as lacking effectiveness; it, in turn, had replaced an advisory committee process which was not considered sufficiently independent.

30. Process issues figured prominently in every Triennial Commission report. In fact, by the time of the fifth Triennial Commission, the Government expressly sought the assistance of the Commission in recommending how some of the perennial process concerns might be addressed.³⁶ Arguably, concerns over the integrity of the Triennial Commission process were at the root of its demise.

31. Unlike its predecessors, the Quadrennial Commission process benefits from the explicit guidance of the Supreme Court in the *PEI Reference* and more recently in *Bodner* regarding implications of the constitutional requirement of an independent, objective and *effective* Commission. We are all the beneficiaries of this judicial 'road map' and, although the selection of a particular process and various elements of process design were specifically left to individual governments, the process remains one governed by the Constitutional requirements enunciated in those decisions.

³⁶ Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits, chaired by David W. Scott, Q.C., September 30, 1996 at 1 [Scott Report].

32. The fact that the Quadrennial Commission is structured in order to address some of the process concerns that plagued previous Commissions does not mean that Quadrennial Commissions will no longer be confronted by process issues or that they should no longer comment on them when they do arise. On the contrary, the Quadrennial Commission process is still in its relative infancy, and history suggests that process issues will continue to arise as the process matures.

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.

34. Although the Supreme Court has indicated that the prohibition against direct negotiations with Government relates to issues of remuneration and does not necessarily prohibit other types of negotiations,³⁷ in many instances, negotiations relating to the process of establishing judicial compensation may be difficult to clearly separate from the forbidden negotiations on the merits. In the *PEI Reference*, the Court suggested that it would be acceptable for governments and the judiciary to engage in negotiations relating to what form a compensation commission should take.³⁸ This example of a process negotiation was acceptable precisely because it was a discussion of process issues in the abstract, entirely divorced from any discussion of the merits of particular recommendations. Where concerns arise that relate to a particular iteration of the process however, we would suggest that negotiations between the parties are more likely to infringe the prohibition. It might require unreasonable parsing to distinguish process concerns relating to implementation for example, from the recommendations issued by a particular Commission.

³⁷ *PEI Reference*, *supra* note 3 at para. 191.

³⁸ *Ibid.*

35. The Supreme Court's decisions in the *PEI Reference* and in *Bodner* make clear that the judiciary can approach the courts for the purpose of seeking judicial review of Government decisions relating to questions of judicial remuneration.³⁹ It is equally clear however, that this option is available as a last resort and that its use has serious implications.⁴⁰ As the Supreme Court indicated in *Bodner*, litigation on these questions "casts a dim light on all involved".⁴¹ The Court also expressed its hope that courts would rarely be involved in these questions;⁴² not only does litigation between the judiciary and the executive branch risk creating strains between the parties, it also runs the real risk of affecting the public perception of the judiciary and the judicial system.

36. In addition, the Supreme Court's focus in *Bodner* on articulating a standard against which Government responses to Commission recommendations could be reviewed, suggests that the type of review contemplated as a last resort was a review of the substance of the Government response rather than a review related to issues of Commission process.⁴³

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.

³⁹ *Ibid.* at para. 180; *Bodner*, *supra* note 20 at para. 28.

⁴⁰ As the Supreme Court indicated in the *PEI Reference*, "Litigation, and especially litigation before this Court, is a last resort for parties who cannot agree about their legal rights and responsibilities. It is a very serious business. In these cases, it is even more serious because litigation has ensued between two primary organs of our constitutional system - the executive and the judiciary - which both serve important and interdependent roles in the administration of justice." *PEI Reference*, *ibid.* at para. 7.

⁴¹ *Bodner*, *supra* note 20 at para. 12.

⁴² *Ibid.* at para. 28.

⁴³ *Ibid.* at paras. 28-44.

38. In addition, although “each commission must make its assessment in its own context”,⁴⁴ 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 reports⁴⁵ and we have similarly done so at the end of our report, offering several suggestions relating to enhancing the effectiveness of the process.⁴⁶ 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.

Government Response to the McLennan Report

39. The McLennan Commission issued its report on May 31, 2004, as required by the *Judges Act*. The Government issued its response to that report on November 20, 2004, within the time frame provided under the *Judges Act*. In May 2005, the Government introduced legislation based on its response to the McLennan Report. However, the Government Bill died on the order paper when Parliament was dissolved in November 2005.

40. A new Government was elected in January 2006. Four months into office, the then Minister of Justice issued a second response to the McLennan Report on May 29, 2006. Two days later, it tabled a bill reflecting that second response, a bill which received Royal Assent in December 2006.

41. The Association and Council expressed considerable concern in their submissions (both written and oral) regarding the issuance of a second response in principle and regarding its particular effect in this instance:

The *Judges Act* does not contemplate multiple government responses. The Association and Council are firmly of the view that multiple responses undermine the cardinal constitutional requirement of effectiveness and are inconsistent with the Supreme Court’s rationale for requiring of government that it formally respond, with diligence, to a commission report.

⁴⁴ *Ibid.* at para. 15.

⁴⁵ See “Reflections on Process”, Drouin Report, *supra* note 17 at 113-118; see also “Recommendations for Improvements”, McLennan Report, *supra* note 22 at 89-93.

⁴⁶ See *infra* “Enhancing the Efficiency of Future Commissions”.

The Association and Council submit that the Second Response was, in essence, the expression of a newly elected Government's disagreement, for political reasons, with a previous government's formal response to the McLennan Report. While the original Response was issued under, in accordance with, and within the time-limit set out in the *Judges Act*, the Second Response has no status whatsoever under the *Judges Act* or the constitutional process expounded in the *PEI Reference*.⁴⁷

42. Without commenting on the substance of the second Government response, we wish to express our concern with the issuance of more than one response in principle. As the Association and Council note, such a practice is not provided for under the current process. Not only does the issuance of a second response not conform to the current process, it also has significant Constitutional implications.

43. Apart from concerns about whether a second response may have the effect, real or perceived, of threatening the apolitical nature of the Commission process, it also has the very real effect of introducing an additional step and therefore additional delay in a process that imposes strict timelines on all parties involved. In this case, the second response was issued 18 months after the first response, and 18 months after the expiry of the legislative deadline for responding to a Commission report under the *Judges Act*. Although the Government tabled draft legislation almost immediately after issuing the second response, this still resulted in an additional four-month delay which could have been avoided had the new Government moved to re-introduce legislation reflecting the first response upon being elected.

44. The Commission acknowledges the potential challenges of advancing a legislative agenda faced by a minority government. This does increase the possibility that legislation tabled to enact the Government responses to Commission recommendations could die on the order table, as occurred in November 2005. Should this occur again in the future, we submit that the integrity of the Commission process is only maintained if the newly-elected Government proceeds with the process of implementation, even where the election has resulted in a change of Government. Any deviation from the process as currently outlined raises questions about whether a Commission's recommendations have

⁴⁷ Submission of the Association and Council, December 14, 2007 at paras. 45-46 [A&C Submission].

had a meaningful effect on the legislative outcome and risks undermining the integrity of the Commission process.

45. While the Commission's effectiveness is most important in the context of the preservation of judicial independence, on a related note, the perceived effectiveness of the Commission is likely to influence the ability of the parties to convince nominees to accept appointment to future Commissions. Advisory committees, Triennial Commissions and Quadrennial Commissions have been populated by individuals who considered it an honour to serve the public interest in this capacity; the current Commission is no exception. However, continuing to attract suitable members for future Commissions will depend to a large extent on the ability to assure them that they will be participating in a process that is independent, objective and effective.

Serving the Public Interest

46. We have heeded the Supreme Court's instructions that the Commission process "is neither adjudicative interest arbitration nor judicial decision making".⁴⁸ Our recommendations concerning judicial remuneration are made with the aim of preserving and enhancing judicial independence, an aim we recognize is pursued, not as an end in itself, but rather as a means of achieving a set of goals which are essential to a fundamental societal interest: maintaining public confidence in the impartiality of the judiciary and maintaining the rule of law.⁴⁹ In presenting our report, we take the first step in this important process as provided for under the legislation; we look forward to receiving the Government's response to our recommendations and rely on the good faith of Government and of Parliament in acting with due dispatch to turn that response into legislative action.

⁴⁸ *Bodner, supra* note 20 at para. 14.

⁴⁹ *PEI Reference, supra* note 3 at paras. 9-10, 173, 193.

CHAPTER II

JUDICIAL SALARIES

1) **Salary for *Puisne* Judges**

47. Under Section 100 of the *Constitution Act, 1867*, the Parliament of Canada has the responsibility to establish and provide for the compensation of all Superior Court judges.

Section 100 provides as follows:

The Salaries, Allowances, and Pensions of the Judges of the Superior, District and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

48. Section 101 of the Constitution, which grants the federal Government authority to create a General Court of Appeal for Canada (the Supreme Court) and any additional courts for the better administration of the laws of Canada (the Federal Courts and the Tax Court of Canada), indicates that the federal Government is also responsible for the maintenance of any courts so created, including the remuneration of judges appointed to them.

49. The process set out in the *Judges Act* sets salaries for this full range of federally-appointed judges. As mentioned earlier, section 26(1.1) of that Act directs that in conducting its inquiry, the Commission shall consider:

- a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
- b) the role of financial security of the judiciary in ensuring judicial independence;
- c) the need to attract outstanding candidates to the judiciary; and
- d) any other objective criteria that the Commission considers relevant.

50. We have addressed the first three of these factors in the following sections of this report. The fourth factor is raised later in the report under the headings “Salary

Differential between Appellate and Trial Court Judges” and “Salary Levels of Other Judges”.

Prevailing Economic Conditions in Canada, Including the Cost of Living, and the Overall Economic and Current Financial Position of the Federal Government

51. The Government, in its submissions to the Commission, makes reference to the Economic Statement tabled by the Minister of Finance on October 30, 2007. In the Government’s view, this Statement

... demonstrates the continued robustness of the Canadian economy, but also notes that recent turbulence in global financial markets, stemming largely from developments in the U.S. housing sector and mortgage markets, and the rapid appreciation of the Canadian dollar have led to increased uncertainty regarding ... near-term growth in Canada and abroad.⁵⁰

52. The Government notes that inflation (based on the Consumer Price Index) “is projected to increase by 2.3% in 2007 and 2.2% in 2008. However, the GST reduction effective January 1, 2008 is likely to result in a downward revision of this projection. Inflation for 2009 to 2012 is forecast at 2.0%”.⁵¹

53. In applying this economic information, the Government takes the position that:

... the Commission must undertake its analysis in light of Canada’s economic position and the overall state of the Government’s finances and [the] economic and social priorities of its mandate. Secondly, any increases in judicial compensation must be reasonable and justifiable in light of the expenditure priority that the Government has accorded to attracting and retaining professionals of similarly high, indeed outstanding, qualities and capacity within the federal public sector.”⁵²

54. The Association and Council share the Government’s view regarding the general economic conditions in Canada. However, the Association and Council take issue with the Government’s contention that the Commission should consider the economic, social and expenditure priorities of the Government. In their view, the Commission cannot, under the prevailing economic conditions criterion, “be influenced by a reference to other social and economic priorities of the Government to justify a compensation level that

⁵⁰ Submission of the Government of Canada, December 14, 2007, at para. 20 [Government Submission].

⁵¹ *Ibid.* at para. 21.

⁵² *Ibid.* at para. 18.

would compromise other statutory criteria, and, in particular, the third criterion: the need to attract outstanding candidates to the judiciary.”⁵³

55. The Association and Council also refer to the submission of the Canadian Bar Association in making their case that government priorities would normally include judicial compensation. The Canadian Bar Association makes the following comment on how it thinks the Commission should be guided when it considers the prevailing economic conditions criterion:

The CBA accepts that judges are paid from the government purse and that the competing demands on public monies can mitigate the amount that might otherwise be paid for judicial salaries. The CBA further accepts that a dollar spent on judicial salaries or benefits is a dollar that cannot be spent on another priority (or not collected). However, judicial independence is not just a government priority. It is, for the reasons expressed above, a constitutional imperative. Before competing priorities are used as a rationale to reduce what the Commission concludes to be appropriate compensation for judges, the Government must show conclusive evidence of other more pressing government fiscal obligations of similar importance to judicial independence.⁵⁴

56. At the public hearing held by the Commission on March 3, 2008, the Canadian Bar Association reiterated its view that the Commission is not required to consider government priorities beyond the consideration of the Government’s ability to pay the salaries recommended by the Commission. If the Commission were to consider government priorities, in the view of the Canadian Bar Association, it would place the Commission in a “highly politicized process”.⁵⁵

57. We agree with the views expressed by the Canadian Bar Association. The Government’s contention that the Commission must consider the economic and social priorities of the Government’s mandate in recommending judicial compensation would add a constitutionally questionable political dimension to the inquiry, one that would not be acceptable to the Supreme Court, which has warned that commissions must make their

⁵³ Reply Submission of the Association and Council, January 28, 2008, at para. 7 [A&C Reply Submission].

⁵⁴ Submission of the Canadian Bar Association, December 2007, at 6 [emphasis added] [CBA Submission].

⁵⁵ Presentation of the Canadian Bar Association, Transcript of the March 3, 2008 Quadrennial Commission Public Hearing at 230.

recommendations on the basis of “objective criteria, not political expediencies”.⁵⁶ In its written and oral submissions to us, the Government has not raised any pressing fiscal obligations that would influence our recommendations. The Government notes in its 2008 Budget that “[t]he Canadian economy has been expanding for 16 consecutive years and our economic fundamentals are strong”.⁵⁷ It further notes that “[f]rom a position of economic strength, Canada is well prepared to successfully respond to the current period of economic uncertainty arising from the slowdown of the U.S. economy and the ongoing global financial market turbulence.”⁵⁸

58. With regard to the Government’s contention that any increases in judicial compensation must be reasonable and justifiable in light of the expenditure priority that the Government has accorded to attracting and retaining professionals of similarly high qualities and capacity within the federal public sector, we find no such requirement in the statutory criteria that the Commission must consider. In fact, were the Commission required to justify compensation increases in this way, it would make the Commission accountable to the Government and allow the Government to set the standard against which increases must be measured. This would be an infringement on the Commission’s independence. Since the maintenance of the financial security of the judiciary requires that judicial salaries be modified only following recourse to an independent commission, any measure that would have the effect of threatening or diminishing the Commission’s independence would conflict with this constitutional requirement.

⁵⁶ *PEI Reference*, *supra* note 3 at para. 173.

⁵⁷ Department of Finance Canada. “Responsible Leadership”, The Budget Plan 2008, tabled in the House of Commons by the Honourable Jim Flaherty, February 26, 2008 at 9. Online: <<http://www.budget.gc.ca/2008/pdf/plan-eng.pdf>>.

⁵⁸ *Ibid.* at 10.

The Role of Financial Security of the Judiciary in Ensuring Judicial Independence

59. Judicial independence is essential to maintaining public confidence in the administration of justice, and financial security is an essential element in ensuring that independence. The Supreme Court has identified three components of financial security:

- 1) the requirement of an independent, objective and effective commission;
- 2) the avoidance of negotiations between the judiciary and the executive; and
- 3) the requirement that judicial salaries not fall below a minimum level.⁵⁹

60. The first two components are met through the establishment of this Commission and through the effective functioning of the process whereby the Commission's recommendations are dealt with by Parliament objectively and expeditiously. With regard to a minimum salary level, as previous commissions have noted, there is no simple way to determine this level. Section 55 of the *Judges Act* precludes judges from engaging in any form of occupation or business other than their judicial duties. Their only salary is that fixed by Parliament.

61. What, then, should be the minimum salary for judges, described by the Courtois Commission as "individuals of outstanding character and ability"?⁶⁰ The Canadian Bar Association proposes that:

... the proper functioning of our justice system depends on a high level of judicial competence. Judges' salaries and benefits, including the benefits for their families, must be at a level to attract the best and most qualified candidates to the judiciary. They must also be commensurate with the position of a judge in our society and must reflect the respect with which our courts are to be regarded.⁶¹

62. We believe that this is a succinct description of the considerations to take into account in ensuring that judicial salaries do not fall below a minimum level and that underlie the statutory criteria that must be considered by this Commission in its inquiry into the adequacy of judicial compensation.

⁵⁹ *PEI Reference*, *supra* note 3 at paras. 131-135.

⁶⁰ Report and Recommendations of the 1989 Commission on Judges' Salaries and Benefits, chaired by E. Jacques Courtois, Q.C., March 5, 1990 at 10 [Courtois Report].

⁶¹ CBA Submission, *supra* note 54 at 3-4 [emphasis added].

63. In its submission, the Government states that:

*A puisne judge salary rose 41% between March 31, 2000 and April 1, 2007, rising from \$178,100 to its current level of \$252,000. There can be no serious suggestion that judicial salaries have fallen below an acceptable minimum.*⁶²

64. The Association and Council respond that the Government's position does not take into account that judicial compensation has fallen behind that of DM-3s and notes that DM-3s:

*... saw their total average compensation rise by 69% between the period of April 1, 1997 and April 1, 2007, while judicial compensation rose by 52% during this same period, hence widening the gap between the two groups.*⁶³

65. We considered these positions as part of our overall deliberations on judicial salaries.

The need to attract outstanding candidates to the judiciary

66. The Association and Council take the position that it is "axiomatic that there is a correlation between the ability to attract talented individuals and adequate compensation".⁶⁴ They go on to note that the majority of appointees come from private practice, and they support the view of the McLennan Commission that

*...it is in the public interest that senior members of the Bar should be attracted to the Bench, and senior members of the Bar are, as a general rule, among the highest earners in private practice.*⁶⁵

67. The Government submits that there is no shortage of qualified candidates for the Bench:

*Since 2003, 229 judges have been appointed from a pool of 1,186 recommended candidates, a ratio of five to one. This qualified pool ... demonstrates that outstanding candidates are attracted to the superior courts at the current compensation levels.*⁶⁶

⁶² Government Submission, *supra* note 50 at para. 29.

⁶³ A&C Submission, *supra* note 47 at para. 10.

⁶⁴ *Ibid.* at para. 78.

⁶⁵ *Ibid.* at para. 83, citing the McLennan Report, *supra* note 22 at 32.

⁶⁶ Government Submission, *supra* note 50 at para. 37.

68. The Government goes on to state that the current level of judicial compensation is not causing a retention problem:

Between 1997 and November 23, 2007, a mere eight judges elected to retire from judicial office before they were eligible to receive an annuity benefit. Even assuming some judges decide to take early retirement because of dissatisfaction with compensation (and there are many other possible reasons for electing early retirement), during this period only 12 judges opted for the pro-rated, early retirement annuity.⁶⁷

69. Finally, the Government notes that “it is important to recognize that judicial candidates should not be regarded as being exclusively, or even primarily, motivated by considerations of salary”.⁶⁸ It refers to a survey conducted in Great Britain that found that “[m]ost judges took up a judicial post because of the challenge or to achieve ambitions (42 %), because the work was considered interesting and provid[ed] greater job satisfaction (24 %), or to contribute to society and the development of the law (19 %).⁶⁹ Interestingly, the reasons given by barristers as to why they would accept a judicial post were somewhat different from those of the judges. The most commonly mentioned reasons were:

- The challenge or to achieve ambitions (25 %)
- To contribute to society and the development of the law (22 %)
- Judicial pension (20 %)
- Natural career progression (19 %)
- Because the work was considered interesting and would provide job satisfaction (18 %)
- The ability to utilise skills and experience (18 %).⁷⁰

70. We accept that remuneration is not the only motivation for candidates to seek a judicial appointment and that for many candidates, judicial salary, pension and benefits

⁶⁷ *Ibid*, at para. 38.

⁶⁸ *Ibid*. at para. 66.

⁶⁹ Ipsos Public Affairs. “Survey of Pre-Appointment Earnings of Recently Appointed Judges and Earnings of Experienced Barristers”, commissioned by the Office of Manpower Economics (U.K.), June 2005, Government Submission, Appendices Volume II, Tab 20 at 3-4.

⁷⁰ *Ibid*, at 4.

are already attractive. However, for judicial appointments to be attractive to the full range of candidates, including senior members of the Bar, adequate compensation must remain an important consideration.

71. The current situation in the United States is instructive. The American College of Trial Lawyers reports that:

Since 1969, as the real wages adjusted for inflation earned by the average U.S. worker have increased approximately 19%, federal judicial salaries have decreased by 25%. Starting salaries for new law school graduates at top tier law firms now equal or exceed what we pay district court judges. Our federal judges make less than many law school professors and a fraction of what most could make in private practice.⁷¹

72. The report goes on to note that:

During the Eisenhower administration, approximately 65% of federal judicial appointments were filled from the private sector, 35% from the public sector. Since then, the %ages have gradually inverted: currently, more than 60% of judicial appointments come from the public sector.⁷²

73. In contrast, between April 1, 2004 and March 31, 2007, 78% of new Canadian judges came from private practice.⁷³

74. In the United States, according to the American College of Trial Lawyers, judicial salaries are not only proving to be a barrier to attracting the best possible candidates for the Bench, but are resulting in retention problems whereby judges are leaving the Bench well before normal retirement age.

75. While Canadian judges are far from facing a situation similar to that of American judges, we agree with the conclusion of the McLennan Commission that:

Judicial salaries and benefits must be set at a level such that those most qualified for judicial office, those who can be characterized as outstanding candidates, will not be deterred from seeking judicial office.⁷⁴

⁷¹ American College of Trial Lawyers, "Judicial Compensation: Our Federal Judges Must Be Fairly Paid", March 2007, at 1. Online:<<http://www.actl.com>>.

⁷² *Ibid*, at 5.

⁷³ Government Submission, *supra* note 50 at para. 32.

⁷⁴ McLennan Report, *supra* note 22 at 15.

76. It is not sufficient to establish judicial compensation only in consideration of what remuneration would be acceptable to many in the legal profession. It is also necessary to take into account the level of remuneration required to ensure that the most senior members of the Bar will not be deterred from seeking judicial appointment. To do otherwise would be a disservice to Canadians who expect nothing less than excellence from our judicial system — excellence which must continue to be reflected in the calibre of judicial appointments made to our courts.

Salary Increases Proposed by the Association and Council

77. The Association and Council arrive at their proposed salary increases through a comparison of judicial salaries with the remuneration of the most senior deputy ministers (DM-3s and DM-4s) and lawyers in the private sector. In the case of deputy ministers, they examine the mid-point salaries and averages salaries of DM-3s and DM-4s, as well as their average at-risk pay. In the case of lawyers in the private sector, they note that for the period April 1, 2004 to March 31, 2007, 78% (110/141) of judges were appointed from the private Bar.⁷⁵ To obtain data about private-sector lawyers' income in Canada, the Association commissioned Navigant Consulting, Inc. ('Navigant'). Navigant found that "lawyers' income in the private sector at the 75th percentile for Canada as a whole in 2006 was \$366,216."⁷⁶ The Government, as discussed below under the heading "Lawyers in Private Practice Comparator", does not accept the methodology or results of the Navigant study.

78. The Association and Council propose the following salary increases: "3.5% as of April 1, 2008 and 2.0% as of each of April 1, 2009, 2010, and 2011, the whole exclusive of statutory indexing."⁷⁷ The Association and Council explain that:

The current salary of *puisne* judges is \$252,000 and, as of April 1, 2008, will be increased by statutory indexing of, as currently estimated, 2.4% to \$258,048.⁷⁸ If the proposed 3.5% increase were awarded, total remuneration would be \$266,868 as of April 1, 2008. With an annual 2% increase thereafter and estimated annual

⁷⁵ A&C Submission, *supra* note 47 at para 123.

⁷⁶ *Ibid*, at para. 132.

⁷⁷ *Ibid*, at para. 136.

⁷⁸ The actual increase in statutory indexing (Industrial Aggregate) effective April 1, 2008 is 3.2%.

statutory indexations in subsequent years of 2.6%, 2.8%, and 3%, respectively, the salary of *puisne* judges at the end of this Commission's mandate would be \$307,170.⁷⁹

Salary Increases Proposed by the Government

79. In developing its proposal, the Government takes the position that “the most relevant comparator group is that of the most senior federal public servants (EX 1-5; DM 1-4; Senior LA [lawyer cadre])”.⁸⁰ The Government uses this range of comparators since the McLennan Commission “noted that many officials in this broad spectrum of senior government officials and not just those at the DM-3 level, potentially have a level of experience and capacity comparable to that of candidates for appointment to the Bench”.⁸¹

80. The Government then goes on to develop its proposal for judicial salary increases based on the %age increases provided to the EX/DM community over the past four years. It finds these increases important because

...they provide an indication of the financial capacity of the Government to compensate and the priority the Government accords to compensat[ing] senior professionals of high ability who have chosen service in the public interest over the private sector”.⁸²

The Government excludes what it terms at-risk pay from consideration because deputy ministers serve at the pleasure of the Governor in Council while judges have security of tenure, and because at-risk pay is dependent upon the achievement of specific commitments and must be earned annually while judges receive a guaranteed salary which is not dependent upon the attainment of performance objectives.

81. Additionally, the Government provides information about the pre-appointment income of judges between 1995 and May 18, 2007. The McLennan Commission was troubled by the difficulties in obtaining information on the income of lawyers in private practice. It strongly recommended that:

⁷⁹ A&C Submission, *supra* note 47 at para. 137.

⁸⁰ Government Submission, *supra* note 55 at para. 47.

⁸¹ *Ibid.*, citing the McLennan Report at 28-29.

⁸² *Government Submission ibid.*, at para. 49.

...some joint method (in conjunction with the Government and the Association and Council) be sought to provide an appropriate and common information and statistical base, the accuracy of which can be accepted by both parties as reliable. The information base is particularly important with respect to the income of self-employed lawyers and could be expanded to get some appreciation as to the incomes of those lawyers who are appointed to the judiciary.⁸³

82. The Government and the Association and Council have not been able to agree on the methodology to be used in providing the information sought by the McLennan Commission. However, the Government did obtain information on the income of lawyers in private practice and on the pre-appointment income of judges.

83. The Government retained the actuary and compensation expert, Haripaul Pannu, to review the data produced by the Canada Revenue Agency ('CRA') on the income of self-employed lawyers for 2002 through 2005. Mr. Pannu determined that the age-weighted income of self-employed lawyers in 2005 (most recent tax data year) is \$183,128 at the 65th percentile and \$251,176 at the 75th percentile.⁸⁴

84. Additionally, the Government obtained information from the CRA on the income levels of lawyers appointed to the judiciary ('Pre-Appointment Income data' or 'PAI data'). The Government engaged Mr. Pannu to analyze and report on this information ('Pre-Appointment Income study' or 'PAI study').

85. Mr. Pannu's PAI study reveals the following:

- 62 % of appointees who had been self-employed lawyers received a significant increase in income upon their appointment to the Bench.
- 19 % of all appointees were earning less than half of a judicial salary.
- Among the 69 % of appointees who had been self-employed prior to appointment, 38 % had pre-appointment incomes that exceeded judicial salaries, and 5% had incomes that were more than 275 % of a judicial salary.⁸⁵

⁸³ McLennan Report, *supra* note 22 at 92.

⁸⁴ Book of Additional Documents of the Government of Canada, Tab 11 [Government Book of Additional Documents].

⁸⁵ Reply Submissions of the Government of Canada at para. 21 [Government Reply Submissions].

86. The Government concludes that the “pre-appointment income study demonstrates that current judicial salaries are not a disincentive to attracting significant numbers of judges who enjoyed high pre-appointment incomes”.⁸⁶

87. The Government proposes “an increase of 4.9 % in the first year (2008-09), inclusive of indexation under the Industrial Aggregate (projected to be 2.4 % on April 1, 2008)”.⁸⁷ The Government notes that:

An increase of 4.9 % will raise a *puisne* judge salary to \$264,300. This will result in a 48 % increase since the first Quadrennial Commission cycle began. The Government further proposes the continuation of annual indexing in the following three years (2009-10 to 2011-12). The Industrial Aggregate annual adjustments are projected to be 2.6 % in 2009-10, 2.8 % in 2010-2011 and 3.0 % in 2011-12. The overall cost of the Government proposal from the years 2008-09 to 2011-12 is approximately \$29.6 million.⁸⁸

88. The Association and Council take great exception to the PAI study. They are concerned that they were not properly informed of the Government’s intention to conduct this study; that they were not consulted on the methodology to be used; that the data, while aggregated, was gathered on sitting judges who had not provided their consent; and that there were numerous defects undermining the data.

The Association and Council submit that the Commission should decline to consider the PAI data on the basis that the Government ought to have disclosed to the judiciary that it would be seeking to collect this data for use before the Commission, so as to give the judiciary an opportunity to comment on the proposed data collection and the methodology applied by the CRA.⁸⁹

The Association and Council are also concerned that the data is not prospective in nature. It reveals what individuals earned before appointment, not the future earning prospects that they would take into account in deciding whether to accept a judicial appointment.

⁸⁶ *Ibid.* at para. 23.

⁸⁷ Government Submission, *supra* note 50 at para. 70. The actual increase in statutory indexing (Industrial Aggregate) effective April 1, 2008 is 3.2%.

⁸⁸ *Ibid.*, at para. 71 [footnote omitted].

⁸⁹ Supplementary Reply Submission of the Canadian Superior Court Judges Association and the Canadian Judicial Council to the Judicial Compensation and Benefits Commission in Respect of the CRA Pre-Appointment Income Data of Judges, February 12, 2008 at para. 17 [A&C Supplementary Reply Submission].

89. We appreciate that an attempt was made to obtain information considered relevant to the Commission's inquiry. We regret that the collection of this data was a source of acrimony between the parties. Both parties have expended significant resources on this matter. However, we are not in a position to judge whether there were appropriate consultations between the parties in obtaining the information. We are also not in a position to judge whether the information obtained is accurate. In any case, the information provided to us only served to confirm that some appointees earn less prior to appointment and some earn more.

90. We do not believe that a snapshot of appointees' salaries prior to appointment is particularly useful in helping to determine the adequacy of judicial salaries. Such a study does not tell us whether judicial salaries deter outstanding candidates who are in the higher income brackets of private practice from applying for judicial appointment. A study that revealed this information would be more helpful in determining the adequacy of judicial salaries. Ideally, this information would be obtained through a targeted survey of individuals who were at the higher end of the earnings scale and who could be objectively identified as outstanding potential candidates for judicial appointment. We acknowledge however the difficulties inherent in the design and implementation of any such survey. Such information might also be indirectly obtained through an analysis of whether the number of high-earning appointees to the Bench is increasing or decreasing over time.

91. Should similar information be sought in the future, we urge the Government and the Association and Council to consult on the design and execution of such studies to ensure that future commissions are provided with information that both parties agree is reliable and useful.

Compensation Comparators

92. Throughout our inquiry into the "adequacy" of judicial salaries, we have been guided by the statutory criteria in the *Judges Act*. We have carefully considered the positions of the Government and of the Association and Council. We have reviewed the

reports of past Commissions, and we have undertaken our own analysis of the information available to us.

93. Our deliberations have led us to use two comparator groups in arriving at our recommendations on judicial salaries: deputy ministers at the third level (DM-3) and lawyers in private practice.

DM-3 Comparator

94. The previous five Triennial Commissions on Judges' Salaries and Benefits considered judicial salaries in relation to those of deputy ministers, as did the previous two Quadrennial Commissions.

95. The Lang Commission concluded that in determining judicial remuneration "the most appropriate basis for comparison is with salaries or incomes of members of the legal profession of comparable experience, and with the salaries of senior deputy ministers".⁹⁰

96. The Guthrie Commission noted that:

As a result of 1975 amendments to the *Judges Act*, the salary level of superior court puisne judges was made roughly equivalent to the mid-point of the salary range of the most senior level (DM-3) of federal deputy minister. This was not intended to suggest equivalence of factors to be considered in the salary determination process, for no other group shares with the judiciary the necessities of maintaining independence and of attracting recruits from among the best qualified individuals in a generally well-paid profession. In 1975, judicial salary equivalence to senior deputy ministers was generally regarded, however, as satisfying all of the criteria to be considered in determining judicial salaries. At that level, a sufficient degree of financial security was assured and there were few financial impediments to recruiting well-qualified lawyers for appointment to the bench.⁹¹

97. The Commission went on to conclude that the 1975 judicial salary scale was satisfactory for that year and recommended a new salary be established by applying a formula including the Industrial Aggregate Index.⁹²

⁹⁰ Report and Recommendations of the 1982 Commission on Judges' Salaries and Benefits, chaired by Otto Lang, P.C., Q.C., April 6, 1983 at 3 [Lang Report].

⁹¹ Report and Recommendations of the 1986 Commission on Judges' Salaries and Benefits, chaired by H. Donald Guthrie, Q.C., February 27, 1987 at 8 [Guthrie Report].

⁹² *Ibid.*

98. The Courtois Commission believed that the DM-3 salary range mid-point “reflects what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges”.⁹³

99. Similarly, the Crawford Commission believed that “an appropriate benchmark by which to gauge judicial salaries is rough equivalence with the mid-point of the salary range of the most senior level of federal public servant, the Deputy Minister 3, commonly referred to as DM-3.”⁹⁴

100. The Scott Commission, however, stated that “[a] strong case can be made for the proposition that the comparison between DM-3’s and judges’ compensation is both imprecise and inappropriate.”⁹⁵ The Commission did not focus on the comparison to DM-3 compensation. Rather, it addressed what it considered “a far more significant aspect of judicial compensation, specifically the relationship between judicial income and income at the private Bar from which the candidates for judicial office are largely drawn.”⁹⁶ In discussing DM-3 equivalence, the Scott Commission interpreted the work of previous Triennial Commissions and the Courtois Commission by concluding that:

... Triennial Commissions subsequent to the 1975 amendments to the *Judges Act* have endorsed this measure of equivalence, not as a precise measure of “value”, but as one that appeared to them to: ‘...reflect what the market place expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges’.⁹⁷

101. The Drouin Commission agreed with the substance of this observation and concluded that “rough equivalency between the overall remuneration of DM-3s and the salary level of judges is both proper and desirable in the public interest”.⁹⁸

⁹³ Courtois Report, *supra* note 60 at 10.

⁹⁴ Report and Recommendations of the 1992 Commission on Judges’ Salaries and Benefits, chaired by Purdy Crawford, March 13, 1993 at 11 [Crawford Report].

⁹⁵ Scott Report, *supra* note 36 at 14.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.* at 13, citing the Courtois Report, *supra* note 60 at 10.

⁹⁸ Drouin Report, *supra* note 17 at 32.

102. The McLennan Commission also accepted the proposition that the relationship between judicial and DM-3 compensation is “a reflection of ‘what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges’ ”.⁹⁹ However, the Commission did not base its recommendations on a direct comparison to DM-3 compensation. It looked at compensation of all deputy ministers, other Governor in Council appointees and private sector lawyers.¹⁰⁰

103. The DM-3 level, as can be seen, has been a comparator for nearly every previous commission, and we believe, like the Courtois Commission, that this “reflects what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges”.¹⁰¹ The EX/DM community proposed by the Government as a comparator would be a significant departure from the DM-3 comparator used by previous commissions. The salary increases provided to the EX/DM community may provide an indication of the “priority the Government accords to compensate senior professionals of high ability who have chosen service in the public interest over the private sector”,¹⁰² but it does not provide the single, consistent benchmark that is provided by the DM-3 level and the remuneration associated with that level.

104. With regard to the DM-4 level that was introduced a few years ago, further to the recommendations of the Advisory Committee on Senior Level Retention and Compensation, we note that only deputy ministers in two positions are paid at this level. In its second report, the Advisory Committee expressed its belief that certain deputy minister positions were significantly larger in scope than others and raised the possibility of another DM level. The Committee stated that:

[D]etermination of the need for this additional level is important to ensure equity with the CEOs of some of the larger Crown corporations and to ensure the

⁹⁹ McLennan Report, *supra* note 22 at 25.

¹⁰⁰ *Ibid.* at 30-31.

¹⁰¹ Courtois Report, *supra* note 60 at 10.

¹⁰² Government Submission, *supra* note 50 at para. 49.

retention of critical expertise in the deputy minister community”.¹⁰³

In its subsequent report, the Committee did recommend the creation of a DM-4 level. This recommendation “ensures greater equity between the most senior deputy ministers and the CEOs of some of the larger Crowns and sends an important message in terms of the government’s willingness to attract and retain qualified and experienced staff”.¹⁰⁴

105. Since only two deputy ministers are paid at the DM-4 level, and this level appears to be reserved for exceptional circumstances and positions of particularly large scope, we see no justification at this time to use it as a comparator in determining the adequacy of judicial salaries. Therefore, like the Courtois Commission and other Commissions before us, we used the mid-point of the DM-3 salary range as the senior public service reference point in our deliberations on judicial compensation.

106. We also used the mid-point of the DM-3 salary range because it is an objective, consistent measure of year over year changes in DM-3 compensation policy. Average salary and performance pay may be used to demonstrate that judges’ salaries do retain a relationship to actual compensation of DM-3s. However, average salary and performance pay are not particularly helpful in establishing trends in the relativity of judges’ salaries to the cash compensation of DM-3s. They do not provide a consistent reflection of year over year changes in compensation. The DM-3 population is very small, varying between eight and ten people over the past few years, and average salaries and performance pay fluctuate from year to year. A person who has been promoted recently has a lower salary than one who has been in a position for many years. Turnover could cause significant changes in the averages over time. Similarly, a few very high performers or low performers in a year could significantly affect the average performance pay.

¹⁰³ Advisory Committee on Senior Level Retention and Compensation, Second Report, March 2000 at 9-10. Online: < http://www.psagency-agencefp.gc.ca/reports-rapports/rep-rap-menu_e.asp>.

¹⁰⁴ Advisory Committee on Senior Level Retention and Compensation, Third Report, December 2000 at 41. Online: < http://www.psagency-agencefp.gc.ca/reports-rapports/rep-rap-menu_e.asp>.

107. In considering the DM-3 salary range mid-point as a comparator, we included performance pay. Like both the Drouin Commission and the McLennan Commission before us, we are of the view that it is necessary to consider all of the compensation elements in developing our recommendations.

108. We were not persuaded that performance pay should be excluded from our considerations because deputy ministers do not enjoy the same security of tenure as judges or because performance pay must be earned each year. Performance pay is an integral component of deputy ministers' cash compensation, and it has been growing in recent years as a percentage of their cash compensation. For a DM-3, it has increased from a maximum of 20% of salary in 2005 to a maximum of 27.4% in 2007. We also noted that performance awards, like salary, are pensionable. DM-3s on average have received more than one half of the performance pay for which they were eligible. In the four years from 2003-04 to 2006-07, DM-3s earned on average 59% of the performance pay for which they were eligible.¹⁰⁵ To exclude performance pay from consideration would not accurately reflect the normal income of DM-3s.

109. The Government, itself, recognizes the importance of including performance pay in its calculations when determining the salaries of other federal office holders such as members of the GCQ Group (which includes heads and members of administrative tribunals), for whom, like judges, performance pay would be inappropriate. When determining the remuneration of office holders paid in the GCQ Group the Government adds a percentage of the maximum performance pay for which office holders in the GC Group are eligible to the GCQ salary ranges. In this way, members of the GCQ Group receive compensation comparable to their counterparts classified at the same level in the GC Group. This policy was established pursuant to the advice of the Advisory Group on Senior Level Retention and Compensation:

The Committee looked at how best to develop a compensation structure for the majority of the appointees who are not eligible for performance pay, given the quasi-judicial and regulatory nature of their responsibilities. We concluded that the approach followed should be similar to that used for the position of the Governor of the Bank of Canada, another position where performance pay is not appropriate.

¹⁰⁵ Government Submission, Appendices Volume II, Tab 13.

For that position, two thirds of maximum at-risk pay was added to the job rate. As noted earlier, this tends to be the average at-risk payment, and the Committee is comfortable adjusting the job rates for positions with quasi-judicial responsibilities accordingly.¹⁰⁶

110. For example, the 2007 maximum salary for a GC-9 is \$239,800. In addition, the person can earn a performance award up to 21.3% of salary. A GCQ-9 has a maximum salary of \$276,500 and is not eligible for performance pay.¹⁰⁷ The GCQ-9 maximum salary, therefore, represents the maximum salary of the GC-9 plus an amount equal to 72% of the maximum performance award that the GC-9 can earn.

111. We used one half of the performance pay for which a DM-3 is eligible in our considerations. This, we believe, is a conservative position. As well, similar to the mid-point of the salary range, this reference point is an objective, consistent measure that does not vary over time like average performance pay does.

Lawyers in Private Practice Comparator

112. We found ourselves faced with the same difficulties as the McLennan Commission in obtaining reliable data on the income of lawyers in private practice. The Government provided information obtained from the CRA and analyzed by Mr. Pannu. The Association and Council provided information obtained through a survey of private sector lawyers conducted by Navigant. The Association and Council have expressed serious concerns about the methodology used by Mr. Pannu, and the Government has expressed serious concerns about the methodology used by Navigant.

113. Mr. Pannu determined that the age-weighted income of self-employed lawyers in 2005 was \$251,176 at the 75th percentile.¹⁰⁸ The Government's view is that this income compares very favourably with the 2005 judicial salary of \$237,400. If one adds the value

¹⁰⁶ Advisory Committee on Senior Level Retention and Compensation, Fourth Report, March 2002 at 30-31. Online:<http://www.psagency-agencefp.gc.ca/reports-rapports/rep-rap-menu_e.asp>.

¹⁰⁷ Privy Council Office. "Salary Ranges and Maximum Performance Pay for 2007 for Governor in Council Appointees". Online:< <http://www.pco-bcp.gc.ca>>.

¹⁰⁸ Government Book of Additional Documents, *supra* note 84 at Tab 11.

of the judicial annuity to this, a value the Government calculates to be 24.6 % of salary, the judicial salary would equate to self-employed income of \$295,777.¹⁰⁹ This amount is significantly greater than the income that Mr. Pannu determined self-employed lawyers were earning. Mr. Pannu did find two major metropolitan centres where the incomes of self-employed lawyers exceeded that of a judicial salary plus the pension value: Calgary with an income of \$326,348 at the 75th percentile, and Toronto with an income of \$393,790.¹¹⁰

114. Navigant, on the other hand, found that lawyers' income in the private sector in Canada at the 75th percentile in 2006 was \$366,216.¹¹¹ If one assumes a value of 24.6 % for the judicial annuity, the 2006 judicial salary of \$244,700 would equate to self-employed income of \$304,896. This amount is significantly less than the income that Navigant found lawyers in the private sector were earning. Navigant did find five provinces however, where lawyers' income at the 75th percentile was less than the judicial salary plus the pension value: New Brunswick at \$264,286, Newfoundland and Labrador at \$275,000, Nova Scotia at \$291,667, Prince Edward Island at \$300,000 and Saskatchewan at \$192,857. It found five provinces and the territories where lawyers' income at the 75th percentile was greater than the judicial salary plus the pension value: British Columbia at \$341,304, Alberta at \$415,789, Manitoba at \$309,091, Ontario at \$437,500, Quebec at \$356,522 and the Northwest Territories, Nunavut and the Yukon at \$316,667.¹¹²

115. We do not repeat here the lengthy arguments from both parties as to why the methodology used by the other party is flawed. We are satisfied that there are lawyers in private practice whose incomes greatly exceed those of judges, whether the value of the

¹⁰⁹ Government Submission, *supra* note 50 at para. 65.

¹¹⁰ Haripaul Pannu, "Report on the Earnings of Self-Employed Lawyers", Government Submission, Appendices Volume II, Tab 10 at 8.

¹¹¹ A&C Submission, *supra* note 47 at para. 132.

¹¹² Navigant Consulting, Inc., A Review of Canadian Private-Sector Lawyer Income, December 13, 2007, at 14.

judicial annuity is included or not. We are fortunate that many appointees to the Bench do not appear to be primarily motivated by income in accepting judicial appointments.

116. The issue is not how to attract the highest earners; the issue is how to attract outstanding candidates. It is important that there be a mix of appointees from private and public practice, from large and small firms and from large and small centres. However, there is no certainty that if the income spread between lawyers in private practice and judges were to increase markedly that the Government would continue to be successful in attracting outstanding candidates to the Bench from amongst the senior members of the Bar in Canada.

Recommendation Concerning Salary for *Puisne* Judges

117. We carefully considered the submissions provided to us, and we paid great heed to the factors enumerated in section 26(1.1) of the *Judges Act* in arriving at our recommendations on judicial salaries.

118. At this time, taking into account the overall remuneration of judges and DM-3s, we believe that a judicial salary with rough equivalence to the mid-point of the DM-3 salary range, plus one half of maximum performance pay, will provide the necessary financial security to ensure judicial independence and will serve to attract outstanding candidates to the judiciary. This level of remuneration takes into account the prevailing economic conditions in Canada, including the cost of living and the overall economic and current financial position of the federal government. It respects the historical level of remuneration for *puisne* judges and should not act as a deterrent to high-earning individuals in private practice who are prepared to consider public service. This is the level of remuneration that the Government accords to its senior public servants of “outstanding character and ability, which are attributes shared by deputy ministers and judges”. It recognizes the role that the judiciary plays in our democracy, including its role as protector of the Constitution and of the values embodied in it.

119. In 2007, judges were paid 91 % of the DM-3 salary range mid-point plus one half of maximum performance pay. The judges' salary was \$252,000, while the DM-3 salary range mid-point plus one half of performance pay was \$276,632.¹¹³

120. What compensation increase is required, then, to bring the salary of *puisne* judges to rough equivalence with the DM-3 salary range mid-point plus one half of maximum performance pay? To achieve this outcome, it is our view that the Government's proposed 4.9 % increase inclusive of statutory indexing should be implemented effective April 1, 2008 and that in each subsequent year the salary of *puisne* judges should be increased by statutory indexing plus 2 % as proposed by the Association and Council.

Recommendation 1

The Commission recommends that:

The salary of *puisne* judges should be set at \$264,300 effective April 1, 2008, inclusive of statutory indexing effective that date; and

The salary of *puisne* judges should be increased by statutory indexing effective April 1, 2009, 2010 and 2011 plus an additional 2 % effective each of those dates, not compounded (*i.e.*, the previous year's salary should be multiplied by the sum of the statutory indexing and 2 %).

2) Payment of Interest on Retroactive Salary Increases

121. The Association and Council seek the payment of interest on retroactive salary adjustments. They note that the statute by which the last salary increase was implemented:

...was adopted on December 14, 2006 and the increased salary was paid in January 2007. The McLennan Commission issued its recommendations in May 2004. The Government therefore took 2 1/2 years to implement an increase.¹¹⁴

¹¹³ This amount consists of a salary range mid-point of \$243,300 and performance pay of \$33,332, which is one half of the maximum 27.4 % for which DM-3s were eligible.

¹¹⁴ A&C Submission, *supra* note 47 at para. 141.

122. The Association and Council are of the view that “[i]nterest is the only way to compensate for the benefit lost during the period of delayed implementation”.¹¹⁵

123. The Government rejects the recommendation of the Association and Council that interest be paid on retroactive salary increases. The Government notes that “the implementation of its Response to the McLennan Commission recommendations was the subject of a unique confluence of circumstances in the course of the democratic process that is not likely to be repeated”.¹¹⁶ It also notes that “judges are assured the significant continued financial security of annual statutory indexing adjustments while the legislation makes its way through the process”.¹¹⁷ Nevertheless, the Government indicates that it is ready to “work with representatives of the judiciary in developing policy options that might result in a more expeditious implementation of Commission recommendations accepted by the Government.”¹¹⁸

124. We do not support the payment of interest on retroactive salary adjustments. It is our view that such payments are unnecessary to the maintenance of an adequate judicial salary; that they would not materially contribute to the financial security of the judiciary in ensuring judicial independence or to the attraction of outstanding candidates to the judiciary. We do, however, encourage the parties to pursue the development of policy options that might expedite the implementation of Commission recommendations.

Recommendation 2

The Commission recommends that:

Interest should not be paid on retroactive salary adjustments to federally-appointed judges.

¹¹⁵ *Ibid*, at para. 143.

¹¹⁶ Government Reply Submissions, *supra* note 85 at para. 56.

¹¹⁷ *Ibid*, at para. 58.

¹¹⁸ *Ibid*, at para. 7.

3) **Salary Differential between Appellate and Trial Court Judges**

125. We were presented with a request that judges appointed to courts of appeal receive a salary differential as compared to those appointed to trial courts. This is the fourth time that such a request has been made to a Triennial or Quadrennial Commission, but the question has yet to be considered on its merits.

Past Requests for a Differential

126. A request for a salary differential in favour of appellate judges was first advanced by the judges of the Quebec Court of Appeal in a submission to the Scott Commission. The submission was received as the Scott Commission's report was in the final stages of preparation and was therefore received too late to be given serious consideration.¹¹⁹ The Scott Commission did however underline that the question was one which would require "very careful assessment":

While some interesting points, in substance, in favour of the concept are advanced, a very persuasive case would have to be made to depart from the present regime which assumes that the burden of judicial office, while different in nature as between the trial and appellate court levels of our courts, nonetheless requires an equivalent discipline and dedication on the part of the judges at both court levels. The cultural impact on the system in the event of such differentiation would have to be very carefully weighed.¹²⁰

127. Before the Drouin Commission, the appellate judges of six courts of appeal (Alberta, Saskatchewan, Manitoba, Ontario, Quebec and New Brunswick) supported the request for a differential. The Commission also received a submission from a *puisne* judge of a court of appeal opposing the request. The Government also opposed the request. The Association and Council remained neutral on the question.

128. The Drouin Commission concluded that it did not have before it sufficient information to be able to properly consider the question. It suggested that additional information in the following areas would be helpful:

¹¹⁹ Scott Report, *supra* note 36 at 30.

¹²⁰ *Ibid.*

- Data concerning the current workloads and responsibilities of trial and appellate courts across the country;
- The history of salary differentials in other comparable jurisdictions; and
- Consideration of potential constitutional issues raised by the parties.

The Commission concluded by indicating that it would be willing to consider the matter in further detail if it were made the subject of a referral to it pursuant to the *Judges Act* before the expiry of its term, but no such referral was made.¹²¹

129. Four years later, the McLennan Commission received a submission made on behalf of 74 of the 142 federally-appointed appellate judges. The request had what the Commission characterized as “an irregular constituency”: it received the support of approximately 50 % of appellate judges, but did not include support from two of the country’s provincial courts of appeal (one of which expressly opposed the request). The Government once again opposed the proposal. The Association and Council maintained its neutral position.¹²²

130. Notwithstanding the fact that it described the submission as “compelling”, the McLennan Commission concluded that there was no evidence before it that the implementation of a differential would impact either the financial security of the judiciary (and therefore its independence) or the ability to attract outstanding candidates to the country’s courts of appeal. The Commission also appeared to conclude that the implementation of a differential would be tantamount to “re-design[ing] the court system in Canada”, most likely a reference to concerns raised before it that the implementation of a differential would risk infringing provincial authority over the structure of the courts under section 92 (14) of the Constitution. Accordingly, in the absence of any ability to tie the request to the factors listed in section 26 of the *Judges Act*, the McLennan Commission considered that it was obliged to refuse to recommend that a differential in favour of appellate judges be implemented.¹²³

¹²¹ Drouin Report, *supra* note 17 at 51-52.

¹²² McLennan Report, *supra* note 22 at 53-54.

¹²³ *Ibid.* at 54-55.

Submissions Received

131. The request for a differential in favour of appellate judges presented to this Commission was coordinated by the Honourable Joseph R. Nuss of the Quebec Court of Appeal and was submitted on behalf of 99 of the then 141 judges of Canadian courts of appeal (approximately 70 % of appellate judges).¹²⁴

132. We also received 18 submissions opposing the request. Some were made on behalf of particular courts and others were made on an individual basis. The Honourable James K. Hugessen of the Federal Court of Canada and the Honourable Gordon L. Campbell of the Supreme Court of Prince Edward Island each made oral submissions at the public hearing.

Positions of the Parties

133. There was consensus among the parties that the Commission had the jurisdiction to consider the request. The question of a differential was acknowledged as being one related to judicial compensation, and therefore within the mandate of the Commission (at least on a *prima facie* basis). For the judges opposed to the request, including Justices Campbell and Hugessen, it was submitted that such a recommendation would exceed the jurisdiction and mandate of the Commission for several reasons, most importantly however because it would involve a restructuring of the court system and therefore fall within provincial authority over court structure under section 92(14) of the *Constitution Act, 1867*. In a similar vein, it was suggested that the recommendation would have the effect of creating two classes of superior court judges where at present only one exists.¹²⁵

134. The Government indicated that the Commission would have the jurisdiction to make such a recommendation, as long as it was able to support the recommendation with reference to the section 26 criteria. In such a scenario, the Government raised a number of

¹²⁴ At the time the submission was made, there were 141 federally-appointed appeal judges in Canada, with three vacancies, all at the Federal Court of Appeal. An additional appointment was made to that court in February 2008. Online: < <http://www.justice.gc.ca/eng/index.html>>.

¹²⁵ Submission of Justice James K. Hugessen, January 9, 2008 at para. 10.

issues it termed “Practical Difficulties” and indicated that implementation of a differential would not be possible without the federal government first engaging in consultation with the provinces.

135. On the merits, although we address many of the specific arguments raised in the course of our analysis below, the general positions for and against the granting of a differential can be summarized as follows. According to those judges who favour the implementation of a differential, a differential is warranted in order to recognize the unique role and responsibilities of judges of provincial courts of appeal, in much the same way as the unique role of the Supreme Court of Canada is recognized by means of a differential. A differential is required in order to ensure the adequacy of the remuneration of appellate judges under section 26 of the *Judges Act* and is justified with reference to the objective criterion of the role and responsibilities of judges appointed to courts of appeal.

136. While much opposition to the awarding of a differential focuses on the jurisdictional and Constitutional obstacles identified above, it was also suggested that the proposal cannot be linked to any of the criteria under section 26, including to any relevant objective criterion under paragraph (d). Furthermore, any attempt to distinguish trial courts and courts of appeal relates to differences between the institutions and not the judges appointed to them. Perhaps most importantly, it is submitted that the implementation of a salary differential would have a strongly divisive effect among members of the judiciary and would threaten the collegiality which has historically been the hallmark of the relationship between trial and appellate courts across the country.

Analysis

137. We have reached the conclusion that the granting of a differential in favour of appellate judges would not involve a restructuring of the court system and would not infringe upon provincial authority under section 92 (14) of the Constitution. We have reached this conclusion based on the way in which superior courts have evolved over time and on the basis of the scope of the federal powers relating to appointment and to

remuneration of superior court judges under sections 96 and 100 of the Constitution. As we outline below, we have also concluded that a differential is justified and indeed warranted under section 26 of the *Judges Act* in order to ensure that judges of courts of appeal are adequately compensated within the meaning of that section.

Evolution of the Structure of Superior Courts

138. The structure of the provincial superior courts has evolved considerably over the last hundred years. At the beginning of the twentieth century, most Canadian jurisdictions did not have separate courts of appeal. The appellate function was only beginning to evolve and the practice in many jurisdictions was for several *puisne* judges of the superior court to sit *en banc* for the purpose of hearing appeals. While this generally involved avoiding having a judge sit on appeal of his own decision, this was by no means a universal prohibition.

139. Although some jurisdictions, such as Nova Scotia, retained the *en banc* system for many decades, the beginning of the last century saw a trend towards the formalizing of the appellate function in superior courts and the creation of a separate appeal division, as occurred for example in Alberta in 1921.

140. An overlapping development was the creation in some jurisdictions of a separate court of appeal, to which s.96 judges would be specifically appointed. This trend slowly played out over the course of the last century to the point where only two jurisdictions in Canada still retain appeal divisions instead of separate courts. In each of those jurisdictions, Newfoundland & Labrador and Prince Edward Island, we have been informed that legislation has been drafted which would create a separate court of appeal.¹²⁶ Within the next few years therefore, the already strong trend may become a uniform state of affairs across the country. This structural evolution has had a corresponding impact on the function and level of responsibility assumed by courts of

¹²⁶ Comments with Respect to Documents Received by the Commission Regarding the Submission for a Salary Differential for Judges of Courts of Appeal, submitted by 99 judges of Courts of Appeal, January 28, 2008 at 5-6 [Pro-Differential Judges Reply Submission].

appeal across the country and by the judges appointed to those courts. We will discuss this impact in our analysis of the factors under section 26 of the *Judges Act*.

141. Although the aforementioned trend was generally acknowledged, it was suggested to us by one of the intervenors that it was nevertheless inappropriate to rely on this trend because the power over the structure of superior courts is a matter of provincial jurisdiction and the provinces could therefore decide to revert to the *en banc* system if they wished, thereby eliminating the structural basis for any differentiation between trial and appellate judges.¹²⁷

142. While we agree that it would be within provincial authority to contemplate and effect such a reorganization, we see no sign that any jurisdiction is planning to do this. As noted above, any signs of change continue to point towards increased separation between the trial and appellate functions. Furthermore, were the trend to move in the other direction in the future, such a change could be addressed by a future Quadrennial Commission. We note in passing that similar arguments would have applied to the implementation of a differential in favour of Chief Justices, since their roles and responsibilities are determined by virtue of provincial authority. This potential for provincial legislative action was not seen as a sufficient obstacle to prevent the implementation of a differential in their favour.

***Ex officio* Membership and the Nature of Judicial Appointments**

143. In several Canadian jurisdictions, a judge of the superior trial court is *ex officio* a member of the court of appeal.¹²⁸ In some jurisdictions, judges of the court of appeal are also *ex officio* members of the trial court.¹²⁹ It was submitted before us that these provincial decisions regarding *ex officio* status might act as a bar to the implementation of a salary differential. Under this argument, the *ex officio* status provisions would prevent any kind of distinction between trial and appellate judges, whose Orders in Council

¹²⁷ Presentation of Justice Campbell, Transcript of the March 13, 2008 Quadrennial Commission Public Hearing at 316.

¹²⁸ See *e.g.*, Alberta's *Court of Appeal Act*, R.S.A. 2000, c.C-30, ss.3(3).

¹²⁹ See *e.g.*, Saskatchewan's *Court of Appeal Act*, S.S. 2000, Chapter C-42.1, ss. 5(1).

confirming appointment even include reference to the *ex officio* membership where applicable.

144. We are not persuaded that such a bar exists. While the *ex officio* status of judges in several jurisdictions does have practical implications which we will address below, we do not consider that it prevents the federal government from differentiating between the remuneration paid to trial judges and those on courts of appeal. The process of appointment, while it acknowledges *ex officio* status where it exists, is nevertheless a process of appointment to a particular court. When a judge is elevated from a trial court to a court of appeal, the *ex officio* confirmation on his or her original Order in Council does not suffice to make the new appointment a reality. A second Order in Council is required in order to effect the elevation, even where the individual concerned is already an *ex officio* member of the appellate court. Just as the federal appointment process clearly differentiates between appointment to a trial court and to a court of appeal, so too can the federal process for setting judicial remuneration. In fact, where such differences exist and have been brought to our attention, our mandate suggests that we are required to give them due consideration.

145. It was also brought to our attention that salary differentials have previously existed in several provinces between trial and appellate judges. In 1920, the *Judges Act* provided that superior court judges across Canada should be paid the same salary, regardless of whether they were appointed to the trial court or court of appeal. This amendment removed differentials between trial and appeal judges in Manitoba, British Columbia and Saskatchewan.¹³⁰ The fact that such differentials previously existed suggests that the federal Government is competent in principle to legislate in this area.

Evaluating the Request under Section 26

146. Our evaluation of the request for a differential must take place in accordance with section 26 of the *Judges Act*. First, the question must be one tied to the adequacy of judicial compensation or benefits. In this case, do we consider that appellate judges are

¹³⁰ Pro-Differential Judges Reply Submission, *supra* note 127 at 9.

adequately compensated if they receive the same level of remuneration as trial judges? In order to answer this question, we turn to the factors listed in section 26 (1.1).

147. The McLennan Commission concluded that there was “no evidence” before it which linked the request for a differential to either the financial security of the judiciary or to the ability to attract outstanding candidates. Before us, neither of these criteria was the subject of significant emphasis. The analysis therefore turns on the identification of an objective criterion under paragraph (d) “any other objective criterion that the Commission considers relevant”.

148. As noted earlier, the Drouin Commission had suggested that information regarding the workload of trial and appellate judges would help a future Commission undertake its analysis of the request. We agree with those judges who support a differential that such a comparison would be of limited utility and value and do not feel that it is necessary in order to properly deal with the request. Furthermore, we recognize the onerous work demands placed on all judges, whether appointed to trial courts or to courts of appeal.¹³¹

149. As discussed below, we do however believe that there is a substantive difference in the role and responsibilities of the judges who are appointed to appellate courts and that this difference constitutes a relevant objective criterion within the meaning of paragraph (d) of section 26 (1.1).

150. With the evolution in court structure described above came an evolution in the role and responsibilities of an appellate court and of the judges appointed to it. We can now identify two essential functions of a court of appeal:

- 1) Correcting injustices or errors made at first instance; and
- 2) Stating the law.

151. A court of appeal’s primary function is the correction of injustices or errors made at first instance. The focus of this role is on the correction of errors of law. The standard of

¹³¹ *Ibid.* at 8.

review on a question of law is that of correctness, with the consequence that, on a question of law, an appellate court is free to replace the opinion of the trial judge with its own.¹³² Appellate courts rarely interfere with findings of fact and there are constraints on their power to do so.

152. This error-correcting role discharges the court's obligations with regard to the first of its client groups, the litigants before it. It also discharges part of the court's obligations towards a second client group, the general public, by upholding the principle of universality, which "requires appellate courts to ensure that the same legal rules are applied in similar situations".¹³³

It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined.¹³⁴

Courts of appeal are therefore not only burdened with correcting injustices that relate to a particular case, but of correcting errors that arise from the incorrect application of the law by a court of first instance. Courts of appeal not only create the decisions which are binding on trial courts; they ensure that those decisions are consistently and correctly applied by the lower courts.

153. A second, intimately related function of a court of appeal is to state the law. As with the upholding of the principle of universality, this function requires the court to address its decisions beyond the particular litigants before it, to a broader audience that includes all potential future litigants as well as all courts which will be bound by the resulting decision. This responsibility imposes particular burdens on the reviewing court:

The call for universality, and the law-setting role it imposes, makes a considerable demand on a reviewing court. It expects from that authority a measure of expertise about the art of just and practical rule-making, an expertise that is not so critical for the first court. Reviewing courts, in cases where the law requires settlement, make law for future cases, as well as for the case under review.¹³⁵

¹³² *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 8.

¹³³ *Ibid.* at para. 9.

¹³⁴ *Woods Manufacturing Co. v. The King*, [1951] S.C.R. 504 at 515, cited in *Housen v. Nikolaisen*, *supra* note 132 at para. 9.

¹³⁵ *Woods Manufacturing Co. v. The King*, *ibid.* at 5, cited in *Housen v. Nikolaisen*, *ibid.* at para. 9.

In *Housen v. Nikolaisen*, having just cited the above passage with approval, the Supreme Court summarized the difference in functions in the following manner:

Thus, while the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application.¹³⁶

154. The impact of appellate work therefore extends far beyond the individual litigants in a particular case. Appeal decisions are binding not only on the parties, but on all future cases, unless the appeal decision is overturned at the Supreme Court. Appeal reasons must therefore be drafted in the awareness that they are unlikely to benefit from further review for error.

155. In addition to being binding law within the province, the decisions of provincial and territorial courts of appeal have considerable persuasive value in other Canadian jurisdictions. This expands the likely audience for decisions of courts of appeal and illustrates the breadth of impact of such decisions.

156. The advent of the Charter has affected the role of courts at all levels, but has imposed on appeal courts in particular an expanded role in the interpretation and development of the law. When one combines this function with the fact that very few decisions of provincial courts of appeal are appealed to the Supreme Court, it becomes clear that provincial courts of appeal play a central role in the settlement and development of the law.¹³⁷ This includes the role appellate courts play in hearing references on constitutional questions — questions which may be particularly complex and controversial. In fact, courts of appeal have been responsible for settling the law nation-wide in several key areas in the past two decades, including on the question of same-sex marriage and on language rights.

¹³⁶ *Housen v. Nikolaisen*, *ibid.*

¹³⁷ For example, in Ontario, fewer than 3% of decisions are appealed to the Supreme Court of Canada; in Quebec, the number is as low as 1%. Online: <<http://www.ontariocourts.on.ca/coa/en/>> and <http://www.tribunaux.qc.ca/mjq_en/c-appel/index-ca.html>.

Institutions versus Individuals

157. It was submitted to us that, even if we were to recognize a distinct role for courts of appeal, that institutional role would not imply any distinction between the judges appointed to trial courts and appeal courts. The differences being underlined by those in favour of a differential all relate to the institution and should not impact questions of remuneration which must be evaluated on an individual basis. We are not persuaded that judges of courts of appeal can be so separated from the role they are expected to play and the various responsibilities they take on when they accept appellate appointment. While the roles and responsibilities are those associated with the institution, they must be carried out by the individual judges who accept appointment to it. We would underline that a similar argument could be raised regarding the Supreme Court of Canada, where the unique nature of the role of that institution has been asserted as a justification for the implementation of special retirement provisions for its individual judges.

158. In evaluating to what extent the role of the institution ‘rubs off’ on the individual judges appointed to it, it is also interesting to consider recent trends for appointment to the Supreme Court of Canada. The vast majority of judges appointed to the Supreme Court have come from courts of appeal across the country. In the case of the few judges who were not elevated from courts of appeal, the appointments came from private practice or from the public sector. At a minimum, this suggests that there is something in the work of appellate courts which prepares judges for the unique nature of service at the Supreme Court of Canada.

The Exercise of Appellate Functions by Trial Courts and Judges

159. Arguments were made before us relating to the fact that trial judges are from time to time called upon to exercise what can best be classified as appellate functions. For example, in some jurisdictions, trial judges sit on sentencing appeals. In Ontario, all Superior Court judges are also judges of the Ontario Divisional Court, which is an appellate court and is a branch of the Superior Court of Justice. The Divisional Court is the main forum for judicial review of government action in Ontario. It also hears

statutory appeals from administrative tribunals and civil appeals for claims not exceeding \$50,000 as provided for under the *Courts of Justice Act*.¹³⁸

160. We would however distinguish these examples of the exercise of appellate functions in several ways. The scope of the exercise of the appellate function, even in the case of the Divisional Court, is limited. The ceiling imposed on which civil appeals can be heard by the Divisional Court is reflective of the intention that larger cases will make their way directly to the Court of Appeal. Furthermore, the decisions of trial courts exercising appellate functions, and of the Divisional Court in Ontario, remain subject to appeal to the relevant court of appeal. These decisions are less likely to represent the ‘final word’ on important questions of general application.

161. It is the combination of the functions exercised and the relative importance of the cases in which those functions are exercised which justifies a differential. We would not for example equate the appellate work of provincial courts of appeal with that of the Supreme Court of Canada, even though partial functional analogies may be drawn. Similarly, while we recognize that trial judges do exercise appellate functions in certain circumstances, we do not consider that these appellate functions can be equated with those assumed on a regular basis by judges of provincial courts of appeal.

Practical Considerations

162. A number of what can be termed practical concerns were raised before us. While none in our estimation constitutes an obstacle to the implementation of a differential, all merit consideration and some may need to be addressed as part of the implementation process.

Ad hoc participation by trial judges on courts of appeal

163. Provincial legislation governing court structure in most Canadian jurisdictions provides Chief Justices of courts of appeal (and in some cases of trial courts) with

¹³⁸ *Courts of Justice Act*, R.S.O. 1990, Chapter C.43, s.19. See also online: <<http://www.ontariocourts.on.ca/scj/en/divct/index.htm>>.

considerable flexibility with regard to staffing arrangements, within the limits permitted by the federal power of appointment. The fact that in several jurisdictions, judges of the trial court are *ex officio* judges of the court of appeal is a key aspect of this flexibility. Chief Justices of courts of appeal frequently have the ability to ask the Chief Justice of the trial court that a judge be provided to the court of appeal for the purpose of sitting on a particular panel.¹³⁹ This kind of *ad hoc* participation by trial judges provides flexibility in cases of illness, conflict or delayed appointment.¹⁴⁰ While this flexibility is required in order to ensure the smooth functioning of courts of appeal, its use in most jurisdictions is infrequent. In several jurisdictions, the creation of supernumerary positions has also provided courts of appeal with an alternate means of dealing with situations of conflict or illness and has accordingly reduced the reliance on the *ad hoc* participation of trial court judges in appeal hearings.

164. The Government suggested that, if we recognized that a differential was required in order to provide adequate remuneration, then our only option would be to recommend the abolition of the *ad hoc* arrangements, something which is clearly within provincial jurisdiction as a matter pertaining to the structure of the courts. If we concluded that a differential is required in principle, then the Government submitted that it would not be acceptable to have a trial judge sit on appeal without receiving the appellate differential during the corresponding period, even if the time spent sitting on appeal were very brief. It was also submitted that the enactment of a threshold for triggering a form of ‘acting pay’ for trial judges sitting on appeals would be problematic, because Chief Justices considering which judge to nominate for an appeal would then logically consider not only which judge was most suitable for the task at hand, but would also attempt to avoid suggesting judges who had already sat enough days on appeals to qualify for the salary differential.

¹³⁹ See *e.g.*, Ontario’s *Courts of Justice Act*, R.S.O. 1990, Chapter C.43, ss.4(1).

¹⁴⁰ Pursuant to Quebec’s *Courts of Justice Act*, the Chief Justice of the Court of Appeal can certify to the Governor General his opinion that the administration of justice would be promoted by the appointment to the Court of Appeal of an assistant judge from among the judges of the Superior Court during the absence of a judge of a court of appeal, where it appears probable that such absence will continue for a term or more. Note how this more formal, longer-term arrangement requires contact with the Governor General. *Courts of Justice Act*, R.S.Q. c. T-16, s.12.

165. We do not agree that the options are limited in these ways. This is not the first time that the Government has had to contemplate the practical implications of the implementation of a differential. The differential in favour of Chief Justices poses similar challenges. Most provincial legislation governing court structure includes provision for the temporary replacement of the Chief Justice if she or he is unable to act for reason of illness, etc. The question of whether and when to award the corresponding differential to the individual who replaces a Chief Justice provides a useful analogy. The *Judges Act* does not provide for any adjustment of salary for an acting Chief Justice but does provide that the individual will receive the representational allowance assigned to the Chief Justice. The salary of an acting Chief Justice remains that of a *puisne* judge, despite the temporary assumption of the role and responsibilities of the head of a court. In keeping with this legislative decision, we are of the view that the concept of ‘acting pay’ should also be rejected for those trial judges who serve as *ad hoc* judges of the court of appeal.

Courts of mixed composition

166. Our attention was drawn to the composition of certain Canadian courts, in particular the courts of appeal of the territories and the Court Martial Appeal Court. In the case of the territorial courts, although these courts are permanent courts of appeal and perform functions analogous to the provincial courts of appeal, the unique confluence of remote locations and the much smaller populations that these courts serve has necessitated more flexibility of composition. Appointments to the territorial courts of appeal are made from among the judges of the supreme courts of the territories and from the judges of the courts of appeal of various provinces. The Court Martial Appeal Court presents a similar challenge: its membership is made up of “designated judges” from among the judges of the Federal Court of Appeal, Federal Court and from superior courts of criminal jurisdiction. An appeal could therefore be heard by a judge of the Federal Court of Appeal alongside a judge of the Federal Court and a judge of the Quebec Superior Court. It could be said of these courts that *ad hoc* sittings by trial judges on appeals are a permanent feature of the way they function. We would however distinguish between appointment to a court of appeal on what is effectively a part-time basis, as

occurs in the above examples, and full-time appointment to a provincial court of appeal. In both of the above examples, the salaries of the judges sitting on territorial appeal courts and on the Court Martial Appeal Court (including that of its Chief Justice) are determined with reference to their primary appointments; this should continue to be the case following the implementation of a differential in favour of full-time appellate judges. Should the nature of appointments to any of these courts change in the future, so that appointment to either a territorial court of appeal or to the Court Martial Appeal Court could be said to be a judge's primary appointment, it would be necessary for the scope of application of the salary differential in favour of appellate judges to be adjusted accordingly.

The Cultural Impact of a Salary Differential

167. A large number of trial judges have expressed the concern that the implementation of a salary differential between trial judges and appellate judges would be divisive. Even before a differential was seriously considered, the Scott Commission had warned that “the cultural impact on the system” of the introduction of a differential would have to be very carefully weighed.¹⁴¹ We are alive to this concern and wish to underline that in recommending the adoption of a differential we do not in any way wish to undermine or diminish the value of the important work undertaken by trial judges across the country. We agree with the analogy offered with the awarding of a differential to judges of the Supreme Court of Canada: just as that differential should not be taken to diminish the value of the work done by judges on courts of appeal, this differential must not be taken to diminish the contribution of the judges of our trial courts.

168. Although we gave careful consideration to the objections raised by judges of trial courts across the country, we have concluded that the implementation of a differential is required in order to ensure adequate remuneration for judges of both levels of court, according to their respective roles and responsibilities, as they have evolved over time.

¹⁴¹ Scott Report, *supra* note 36 at 30.

169. The strong trend towards the separation of trial courts and courts of appeal has had the impact we have described above on the related functions assigned to judges of each level of court. In some jurisdictions, this is reflected in the express distinction made between trial judges and appeal judges in terms of rank and precedence, further confirmation of the effect the growing institutional and functional separation has had on the individual judges appointed to each court.¹⁴²

170. While judges at all levels may have differing views about the merits of a system that promotes distinctions between trial and appellate courts and judges, we felt obliged, according to the terms of our mandate, to recognize that such distinctions now firmly exist and that they warrant recognition within the context of judicial remuneration.

Recommendation Concerning Salary Differential in Favour of Appellate Judges

171. As discussed above, those judges who support a salary differential propose a differential equal to 6.7% of the salary paid to trial court judges. This amount was proposed on the basis that it constitutes roughly one third of the difference between the current salary of a *puisne* judge and that of the judges of the Supreme Court of Canada. The Government opposes the payment of any salary differential, and the Association and Council maintain a position of neutrality on the matter. Because the submissions of the Government and of the Association and Council did not include a detailed discussion of the question of quantum, we invited the parties to provide additional comments on this issue, particularly in relation to the proposal of a 6.7 % differential. The Government's response to this request focussed on the impact that such a differential would have on existing differentials (a question we deal with separately below) but did not provide assistance in terms of how an adequate differential might be calculated. In the absence of a full discussion by the parties regarding the appropriate differential to ensure an adequate salary for judges appointed to courts of appeal, we have attempted to strike an appropriate balance by recognizing the role and responsibility of judges appointed to

¹⁴² See *e.g.*, Nova Scotia's *Judicature Act*, R.S.N.S. 1989, c. 240, s.22; see also British Columbia's *Court of Appeal Act*, R.S.B.C. 1996, c.77, ss.4(3), which provides that "the justices of the Court of Appeal have rank and precedence, after the Chief Justice of the British Columbia, the Chief Justice of the Supreme Court and the Associate Chief Justice of the Supreme Court, over all other judges of the courts of British Columbia and have rank and precedence among themselves according to the seniority of their appointment."

courts of appeal without diminishing the value and importance of work of judges appointed to trial courts. We therefore recommend that the differential for *puisne* judges appointed to courts of appeal should be an amount equal to 3 % of the salary paid to *puisne* judges of trial courts, an amount which we believe will ensure the adequacy of the remuneration of judges serving on both courts.

Recommendation 3

The Commission recommends that:

A salary differential should be paid to *puisne* judges appointed to provincial courts of appeal and to the Federal Court of Appeal, and that the salary of *puisne* judges appointed to these courts should be set at \$272,200 effective April 1, 2008, inclusive of statutory indexing effective that date.

4) Salary Levels of Other Judges

172. The Association and Council propose that “the salary differentials between *puisne* judges, chief justices and associate chief justices, justices of the Supreme Court of Canada, and the Chief Justice of Canada be maintained in the same proportion as currently exists”.¹⁴³

173. The Government does not take issue with this proposal.

174. For many years a relatively constant differential has been maintained between the salaries of *puisne* judges and chief justices, associate chief justices and justices of the Supreme Court of Canada. We agree that there should be a differential. It is our view that the additional responsibilities of these judges, which in the case of associate chief justices and chief justices include administrative responsibilities, are objective criteria that are relevant to our inquiry into the adequacy of judicial salaries, in accordance with

¹⁴³ A&C Submission, *supra* note 47 at para. 148.

section 26(1.1)(d) of the *Judges Act*. To ensure the continuing adequacy of these salaries, we believe that the differentials should be maintained in the same proportion as in the past. However, further to our recommendation that a salary differential should be paid to *puisne* judges of courts of appeal, it is necessary to determine on which salaries these other differentials should now be based.

175. The salary of associate chief justices and chief justices of trial courts should continue to be established in relation to the salary of *puisne* judges appointed to those courts. In the case of associate chief justices and chief justices of courts of appeal, the salary should now be established in relation to the salary of *puisne* judges appointed to those courts.

176. With regard to the Supreme Court of Canada, it is our view, as expressed above, that this court occupies a unique position within the Canadian judicial system. We strongly believe that in order for compensation for members of this Court to remain adequate, it should be established in relation to the appeal courts. Therefore, the salary of the Justices of the Supreme Court of Canada and the Chief Justice of Canada should be established in relation to the salaries of *puisne* judges of the courts of appeal.

Recommendation 4

The Commission recommends that:

Salary differentials should continue to be paid to the Chief Justice of Canada, the justices of the Supreme Court of Canada, the chief justices and associate chief justices of the trial courts and courts of appeal;

The salary differential for the chief justices and associate chief justices of the trial courts should be established in relation to the salary of the *puisne* judges appointed to the trial courts;

The salary differential for the chief justices and associate chief justices of the courts of appeal should be established in relation to the salary of the *puisne* judges appointed to the courts of appeal;

The salary differential of the Chief Justice of Canada and the justices of the Supreme Court of Canada should be established in relation to the salaries of *puisne* judges appointed to the courts of appeal; and

The salaries should be set as of April 1, 2008 inclusive of statutory indexing, at the following levels:

Supreme Court of Canada

Chief Justice of Canada \$349,800

Justices \$323,800

Federal Court of Appeal and Courts of Appeal

Chief Justices \$298,300

Associate Chief Justices \$298,300

Federal Court, Tax Court and Trial Courts

Chief Justices \$289,700

Associate Chief Justices \$289,700

CHAPTER III

JUDICIAL ANNUITIES

Annuity for Senior Judges of the Territorial Courts

177. Section 43(1) of the *Judges Act* allows a chief justice to relinquish the office of chief justice and elect supernumerary status. A former chief justice then holds the office of a supernumerary judge and is paid as a *puisne* judge, but on retirement receives an annuity based on the salary of a chief justice. Similarly, section 43(2) of the *Judges Act* allows a chief justice who is not yet entitled to elect supernumerary status to elect to cease to perform his or her duties and to perform only the duties of a *puisne* judge and receive the salary of a *puisne* judge. Again, the retirement annuity of the former chief justice is based on the salary of a chief justice.

178. The senior judges of the territorial courts are not included in sections 43(1) and (2) of the *Judges Act*. The Association and Council are proposing that the senior judges should be included in these sections since they receive the same salary as chief justices and are “in every other respect the same as the chief justices or associate chief justices of the provincial superior courts”.¹⁴⁴ The Association and Council have also informed us that the Yukon and the Northwest Territories have created the position of supernumerary judge.¹⁴⁵

179. The Government acknowledges that “Senior Judges of the territorial superior trial courts should enjoy the benefits conferred in sections 42(1) and 43(2) of the *Judges Act* that currently benefit only chief justices and associate chief justices”¹⁴⁶ but does not support the proposal for the following reasons:

¹⁴⁴ A&C Submission, *supra* note 52 at para. 155.

¹⁴⁵ Presentation of the Association & Council, Transcript of the March 3, 2008 Quadrennial Commission Public Hearing at 86-87.

¹⁴⁶ Government Reply Submissions, *supra* note 91 at para. 63.

However, subsections 43(1) and (2) are contingent on not just Federal but also Territorial Government support and legislative action. Currently, the Senior Judge is defined as the judge with the greatest seniority on the Court. Therefore, it is not legally possible for the judge to “step-down” and allow the next junior judge in line to assume those functions. There are also consultations required to ensure that the territories have taken the necessary legislative steps to ensure that there is a position, whether a vacancy or additional office into which the Senior Judge can be appointed.¹⁴⁷

180. We agree that senior judges should receive the same treatment with regard to their retirement annuities as chief justices. This is required in order to ensure the adequacy of the benefits provided to senior judges by maintaining their equivalency with the benefits provided to chief justices. Since the relevant territorial legislation now provides for supernumerary status, there is no obstacle to amending the *Judges Act* in order to allow for a senior judge who elects supernumerary status to nevertheless receive an annuity based on his or her salary as senior judge. We recognize however that a senior judge wishing to step down from that position but who is not yet eligible to elect supernumerary status is not currently able to do so under relevant territorial legislation. Amendments would be required in each territory to modify the definition of senior judge so that the position was not automatically assigned to the judge with the greatest seniority and to ensure that an additional office of *puisne* judge was ‘set aside’ for any senior judge wishing to resume the position of *puisne* judge. If such amendments were made by any of the territories, in order to ensure the continuing adequacy of the benefits provided to senior judges, it would be important for the federal government to then amend the *Judges Act* to ensure that the annuity of a former senior judge who elected to continue serving as a *puisne* judge was calculated based on his or her salary as senior judge.

¹⁴⁷ *Ibid.* at para. 65.

Recommendation 5

The Commission recommends that:

The *Judges Act* be amended so that senior judges of the territorial courts who elect supernumerary status receive the same treatment with regard to their retirement annuities as do chief justices who elect supernumerary status.

Recommendation 6

The Commission recommends that:

Should measures be taken by the territorial governments to allow a senior judge, not yet entitled to elect supernumerary status, to elect to cease to perform his or her duties as a senior judge and to perform only the duties of a *puisne* judge and receive the salary of a *puisne* judge, that the *Judges Act* be amended so that the retirement annuity of a former senior judge is based on the salary of a senior judge.

Annuity for Trial Judges who Previously Served on Courts of Appeal

181. During oral submissions, it was suggested to us that we should consider the impact that the implementation of a salary differential in favour of appellate judges would have on judges of courts of appeal who might decide, at some point in their judicial careers, to leave a court of appeal in order to accept appointment to a trial court.¹⁴⁸ In our view, this situation can be helpfully compared to that of a chief justice who elects to step down from that office in order to resume duties as a *puisne* judge. While that judge ceases to receive the differential accorded to chief justices upon assuming the duties of a *puisne* judge, his or her annuity upon retirement will nevertheless be calculated on the basis of the salary of a chief justice. In our view, the current flexibility which allows a judge of a court of appeal to accept an appointment to a trial court should be supported,

¹⁴⁸ Submission of Justice James K. Hugessen, January 9, 2008 at para. 8.

and we recommend that the *Judges Act* be amended in order to ensure that in such circumstances, a judge's annuity will nevertheless be determined on the basis of the salary she or he received as a judge of a court of appeal.

Recommendation 7

The Commission recommends that:

The *Judges Act* be amended so that a judge appointed to a court of appeal who subsequently accepts appointment to a trial court, and receives the salary of a trial court judge, receives a retirement annuity based on the salary of his or her former position as a judge of a court of appeal.

CHAPTER IV

ALLOWANCES

Relocation Allowance upon Retirement

182. The *Judges Act* provides for the payment of a retirement removal allowance to judges of the Supreme Court, the Federal Courts, the Tax Court and the territorial courts. The Association and Council propose that this allowance be extended to judges of the provincial superior courts and courts of appeal, since:

...statutes such as the *Court of Appeal Act* and *Court of Queen's Bench Act* in Alberta, the *Queen's Bench Act* in Saskatchewan, the *Court of Queen's Bench Act* in Manitoba, the *Courts of Justice Act* in Quebec, the *Judicature Act* in New Brunswick, and the *Judicature Act* in Nova Scotia all contain residency requirements for superior court judges in those jurisdictions.¹⁴⁹

183. We were provided with no evidence that the provision of a retirement removal allowance to judges of the provincial superior courts and courts of appeal is necessary for the financial security of the judiciary in ensuring judicial independence or for the attraction of outstanding candidates to the judiciary. Nor was the submission made that the provision of such an allowance was necessary on the basis of any other objective criterion under section 26(1.1)(d). Consequently, we do not support the removal allowance being extended to judges of the provincial superior courts and courts of appeal.

We agree with the position of the Government:

The Removal Allowance provisions for judges of the federally constituted courts reflect the fact that these are national courts whose judges are required to reside in the National Capital Region. The specific removal allowance reflects a desire to ensure that judges are attracted from all regions of the country to these national courts by minimizing the personal cost of such a decision. Similarly, the allowance recognizes that the pool of qualified candidates for the territorial superior courts is made up of lawyers from across Canada who are likely to need to relocate from their community to take up office. The Removal Allowance in effect removes what might otherwise be a financial disincentive for qualified candidates considering an appointment to these courts.¹⁵⁰

¹⁴⁹ A&C Submission, *supra* note 47 at para. 152.

¹⁵⁰ Government Reply Submissions, *supra* note 85 at para. 61.

Recommendation 8

The Commission recommends that:

A retirement removal allowance should not be paid to judges of the provincial superior courts and courts of appeal.

Representational Allowance

184. Section 27(6) of the *Judges Act* provides that the judges listed in that section are ...entitled to be paid, as a representational allowance, reasonable travel and other expenses actually incurred by the judge or the spouse or common-law partner of the judge in discharging the special extra-judicial obligations and responsibilities that devolve on the judge...

185. The allowances were last increased effective April 1, 2000. The Association and Council are of the view that the allowances are no longer adequate and are asking that they be increased by approximately 20%. In addition, the Association and Council are requesting that the representational allowance for Ontario regional senior judges be extended to the senior family law judge.

186. The Government “does not accept that these increases are necessary to ensure adequacy of judicial compensation”.¹⁵¹ However, the Government raises no issue with regard to providing the senior family law judge with a representational allowance.

187. The following chart provides the history of the amounts paid as representational allowances.

¹⁵¹ *Ibid.* at para. 67.

Representational Allowances - History¹⁵²

	1979	1985	2000	2004
	\$	\$	\$	\$
Chief Justice – Supreme Court of Canada	5,000	10,000	18,750	
Justices – Supreme Court of Canada	2,500	5,000	10,000	
Chief Justice – Federal Court of Appeal and Chief Justice of a province	3,500	7,000	12,500	
Other Chief or Associate Chief Justices	2,500	5,000	10,000	
Regional Senior Judges in Ontario				5,000

188. The usage rate of the allowances is high, as can be seen from the following chart:

Representational Allowances – Usage¹⁵³

Fiscal Year	% of Judges Who Spent 95% or More of Annual Allocation	% of Judges Who Spent Full Annual Allocation	% of Annual Allocations Spent by <u>All</u> CJs & ACJs
1995-96	62	41	89
1996-97	71	41	84
1997-98	71	42	87
1998-99	59	34	84
1999-00	76	56	86
2000-01	7	2	57
2001-02	41	24	79
2002-03	40	33	85
2003-04	57	40	87
2004-05	60	44	89
2005-06	63	47	88

¹⁵² Information provided by the Office of the Commissioner for Federal Judicial Affairs.

¹⁵³ *Ibid.* This chart does not include the justices of the Supreme Court of Canada.

189. There has been no increase in the representational allowances since April 1, 2000. The rise in the Consumer Price Index for the eight-year period between March 2000 and March 2008, using the most current information available, is 18.8 %. Many judges already use the maximum amount available. Therefore, we find that a 20 % increase in the allowances is reasonable when compared to the 100 % increase in the allowances in the six years between 1979 and 1985 and to the near doubling of the allowances in the 15 years between 1985 and 2000.

190. Further to section 26.(1) of the *Judges Act* which states that the Commission shall inquire into “the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges’ benefits generally”, we support an increase in the representational allowances to ensure their adequacy.

Recommendation 9

The Commission recommends that:

Effective April 1, 2008, representational allowances be increased to \$22,500 for the Chief Justice of Canada, \$15,000 for the Chief Justice of the Federal Court of Appeal and the chief justices of the provinces, \$12,000 for justices of the Supreme Court of Canada, \$12,000 for other chief justices and associate chief justices and senior judges, and \$6,000 for Ontario regional senior judges.

Recommendation 10

The Commission recommends that:

The senior family law judge in Ontario be paid the same representational allowance as the other regional senior judges in the province.

CHAPTER V

COSTS FOR THE JUDICIARY TO PARTICIPATE IN THE COMMISSION'S INQUIRY

191. Section 26.3 of the *Judges Act* provides that identified representatives of the judiciary participating in an inquiry of the Commission are entitled to be paid two-thirds of their costs on a solicitor-client basis, as assessed by the Federal Court.

192. The Association and Council urge the Commission to make the following recommendation:

That the Government should reimburse 100 % of the disbursements and two-thirds of the legal fees of the judiciary.

Alternatively,

That by way of exception to the formula set out in s. 26.3(2) of the *Judges Act*, the fees and expenses of Navigant Consulting, Inc. in connection with the survey of Canadian private-sector lawyers' income be reimbursed in full to the Association.¹⁵⁴

193. The Association and Council note that the Drouin Commission recommended that the Government pay 80 % of the total representational costs of the Association, but that the Government amended the *Judges Act* to provide for payment of only 50 % of judicial representational costs. The Association and Council further note that the McLennan Commission recommended that the Government pay 100 % of the disbursements and two-thirds of the legal fees incurred by the judiciary. The McLennan Commission reasoned that “[w]e do not believe that the participation of the judiciary should become a financial burden on individual judges”.¹⁵⁵ The Government subsequently amended the *Judges Act* to read as it does today.

194. The Government is of the view that “full reimbursement of disbursements would remove a necessary incentive for the judiciary to be prudent in relation to [the] incurring

¹⁵⁴ A&C Submission, *supra* note 47 at para. 194.

¹⁵⁵ McLennan Report, *supra* note 22 at 88.

of significant expenses for expert witnesses and other disbursements”.¹⁵⁶ With regard to the reimbursement of the full cost of the Navigant Survey, the Government reiterates its view that the results of the survey are unreliable and asserts that:

[T]he Survey was undertaken without consultation with the Government and indeed rejecting the Government’s request to contribute to the survey design based on Government officials’ earlier experience.¹⁵⁷

195. The Government, therefore, is of the view that it would not be reasonable for the Commission to recommend the reimbursement of the full cost of the survey.

196. We believe that it is within our jurisdiction to make a recommendation on this matter, since section 26.(1) of the *Judges Act* states that the Commission shall inquire into “the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges’ benefits generally”. Since there are no limitations placed on the judiciary with regard to the work it undertakes to prepare submissions for the Commission, we find that reimbursement of two-thirds of the costs is adequate. We believe that the payment of full costs is not essential to the financial security of the judiciary in ensuring judicial independence or to the attraction of outstanding candidates to the judiciary. In our view, this matter could best be dealt with by the Association and Council and the Government working together cooperatively to design, conduct and fund surveys they consider would be of assistance to the Commission. If such studies were done jointly, the Government could fund the entire cost, as appropriate.

Recommendation 11

The Commission recommends that:

The provisions in the *Judges Act* relating to the reimbursement of the judiciary’s costs for participating in the Quadrennial Commission process remain unchanged.

¹⁵⁶ Government Reply Submissions, *supra* note 85 at para. 70.

¹⁵⁷ *Ibid.* at para. 71.

CHAPTER VI

ENHANCING THE EFFICIENCY OF THE COMMISSION PROCESS

197. As indicated earlier, we wish to offer several comments on what could broadly be termed ‘process issues’, in the sense that they relate to the efficient functioning of the Commission. In doing so, we are mindful of the fact that “[e]ach commission must make its assessment in its own context”.¹⁵⁸ The following observations are offered in the spirit of sharing lessons learned with the parties and with future Commissions.

198. Although each new Commission does far more than merely “update” the work of the previous Commission,¹⁵⁹ given the tight timelines in which the Commission operates, and given the fact that each Commission operates knowing that the next Commission will be constituted four years hence, an attempt should be made to avoid ‘re-inventing the wheel’ with every term. This is relevant both to questions of process and to the merits of the Commission’s inquiry.

Compensation Expertise

199. This Commission benefited tremendously from the fact that one of the Commissioners had extensive experience in the area of compensation, in this case within the public sector. While the specific area of judicial compensation is *sui generis* and accordingly poses unique challenges, having a ‘resident compensation expert’ has nevertheless been invaluable. This area of expertise is sufficiently central to the work of the Commission that it may be appropriate for the parties to consider compensation expertise in making their nominations to future Commissions. And, while it may not be reasonable to expect that the Commission will always have such expertise in its midst, it may be appropriate for future Commissions to consider early on in their term whether it is

¹⁵⁸ Bodner, *supra* note 20 at para. 15.

¹⁵⁹ *Ibid.*, at para. 14.

an area with which they would like outside expert assistance as provided for under section 26.2 of the *Judges Act*.

Recommendation 12

The Commission recommends that:

Should a future Commission not include a member with experience in the area of compensation, the Commission strongly consider engaging external expert assistance in this area.

Continuity in Staffing Arrangements

200. We have greatly benefited from continuity in the staffing of the Quadrennial Commission. Jeanne Ruest, who joined the Commission as Executive Director during the McLennan Commission, graciously agreed to serve in the same capacity for the current Commission. The fact that the individual at the helm of the Commission brought prior institutional knowledge to the role ensured the smooth running of the various aspects of the Commission process, from the issuing of the original public notice to the finalizing of this report. While such continuity will not always be possible, where a change of staff occurs, it is crucial that the Commission be able to rely on ‘already in place’ processes to allow for the smooth transfer of institutional knowledge between departing and incoming Commission staff.

Recommendation 13

The Commission recommends that:

While continuity of Commission staffing cannot always be ensured, processes be established to allow for the efficient transfer of institutional knowledge between departing and incoming Commission staff.

Consensus around Particular Issues

201. A review of the reports of the various Triennial Commissions and of the Drouin and McLennan Commissions shows that there has been considerable variety in the nature of the questions raised before Commissions. Some issues however, have been raised repeatedly. Where consensus has emerged around a particular issue during a previous Commission inquiry, such as the relevance of the DM-3 as a comparator, “in the absence of demonstrated change”, we suggest that such a consensus be recognized by subsequent Commissions and arguably reflected in the approach taken to the question in the submissions of the parties.

Recommendation 14**The Commission recommends that:**

Where consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of demonstrated change, such consensus be taken into account by the Commission and reflected in the submissions of the parties.

Documentation Submitted by the Parties

202. Efficiencies can be introduced in other areas as well. For example, we are not persuaded that the documentation prepared by the parties needs to be as voluminous as that produced before this Commission. For example, it would be helpful if the parties would consider producing a joint statement of facts for future Commissions. In the final analysis, for a variety of reasons, some of the data produced by the parties was of limited assistance to the Commission. We realize that the parties were to some extent responding to requests for additional information voiced by previous Commissions.¹⁶⁰ In the future, if there is to be a data set similar to the one produced in this instance relating to the incomes of lawyers in the private sector, in order to be truly helpful to the Commission in the time allotted, the data set should be produced cooperatively.

¹⁶⁰ Drouin Report, *supra* note 17 at 116-117; McLennan Report, *supra* note 22 at 91-93.

Recommendation 15

The Commission recommends that:

The parties consider ways of streamlining the materials produced for future Commissions and, where production of a data set and accompanying analysis is warranted, that such work be undertaken cooperatively.

Cooperative Working Relationships

203. This brings us to our last observation, which is that the relationship between the Association and Council and the Government must be one of cooperation. An adversarial relationship is counter-productive and is not appropriate given the nature of the Commission process. In order to yield the best results, there is no question that the Commission process relies on the good faith effort of both principal parties to approach the process in a spirit of cooperation, so that all involved can be said to truly serve the public interest. We recognize that counsel to the principal parties have, to a large extent, approached this work in that spirit. We encourage them to continue to improve this cooperation which is vital to this important process.

204. We thank all counsel and those who made submissions to the Commission for their assistance and their courtesy.

CHAPTER VII

CONCLUSION

205. As we indicated at the outset, the primary responsibility of each Commission is to conduct an inquiry into the adequacy of judicial compensation and benefits and to submit a report containing recommendations on these questions to the Minister of Justice within nine months of the commencement of the Commission's inquiry. The Commission's term extends well beyond that initial deadline however, and does not expire until the end of August, 2011. During the remainder of our term, we remain available should the Minister of Justice decide to exercise his power under section 26(4) of the *Judges Act* to make a reference to us on any of the issues contained in this report or on any other issues relating to the adequacy of judicial compensation and benefits.

206. With the assistance of the parties and of all those who participated in the Commission process, we have conducted what we believe to have been an open and thorough inquiry into the above issues and have made every effort to ensure that this is reflected in the resulting report. We look forward to receiving the Minister of Justice's response to our report in the coming months.

Sheila Block
Chair

Paul Tellier, P.C., C.C., Q.C.
Commissioner

Wayne McCutcheon
Commissioner

LIST OF RECOMMENDATIONS

Recommendation 1

The Commission recommends that:

The salary of *puisne* judges should be set at \$264,300 effective April 1, 2008, inclusive of statutory indexing effective that date; and

The salary of *puisne* judges should be increased by statutory indexing effective April 1, 2009, 2010 and 2011 plus an additional 2% effective each of those dates, not compounded (*i.e.*, the previous year's salary should be multiplied by the sum of the statutory indexing and 2%).

Recommendation 2

The Commission recommends that:

Interest should not be paid on retroactive salary adjustments to federally-appointed judges.

Recommendation 3

The Commission recommends that:

A salary differential should be paid to *puisne* judges appointed to provincial courts of appeal and to the Federal Court of Appeal, and that the salary of *puisne* judges appointed to these courts should be set at \$272,200 effective April 1, 2008, inclusive of statutory indexing effective that date.

Recommendation 4

The Commission recommends that:

Salary differentials should continue to be paid to Chief Justice of Canada, the Justices of the Supreme Court of Canada, the chief justices and associate chief justices of the trial courts and courts of appeal;

The salary differential for the chief justices and associate chief justices of the trial courts should be established in relation to the salary of the *puisne* judges appointed to the trial courts;

The salary differential for the chief justices and associate chief justices of the courts of appeal should be established in relation to the salary of the *puisne* judges appointed to the courts of appeal;

The salary differentials of the Chief Justice of Canada and the Justices of the Supreme Court of Canada and the should be established in relation to the salaries of *puisne* judges appointed to the courts of appeal; and

The salaries should be set as of April 1, 2008 inclusive of statutory indexing, at the following levels:

Supreme Court of Canada

Chief Justice of Canada	\$349,800
Justices	\$323,800

Federal Court of Appeal and Courts of Appeal

Chief Justices	\$298,300
Associate Chief Justices	\$298,300

Federal Court, Tax Court and Trial Courts

Chief Justices	\$289,700
Associate Chief Justices	\$289,700

Recommendation 5

The Commission recommends that:

The *Judges Act* be amended so that senior judges of the territorial courts who elect supernumerary status receive the same treatment with regard to their retirement annuities as do chief justices who elect supernumerary status.

Recommendation 6

The Commission recommends that:

Should measures be taken by the territorial governments to allow a senior judge, not yet entitled to elect supernumerary status, to elect to cease to perform his or her duties as a senior judge and to perform only the duties of a *puisne* judge and receive the salary of a *puisne* judge, that the *Judges Act* be amended so that the retirement annuity of a former senior judge is based on the salary of a senior judge.

Recommendation 7**The Commission recommends that:**

The *Judges Act* be amended so that a judge appointed to a court of appeal who subsequently accepts appointment to a trial court, and receives the salary of a trial court judge, receives a retirement annuity based on the salary of his or her former position as a judge of a court of appeal.

Recommendation 8**The Commission recommends that:**

A retirement removal allowance should not be paid to judges of the provincial superior courts and courts of appeal.

Recommendation 9**The Commission recommends that:**

Effective April 1, 2008, representational allowances be increased to \$22,500 for the Chief Justice of Canada, \$15,000 for the Chief Justice of the Federal Court of Appeal and the chief justices of the provinces, \$12,000 for *puisne* judges of the Supreme Court of Canada, \$12,000 for other chief justices and associate chief justices and senior judges, and \$6,000 for Ontario regional senior judges.

Recommendation 10**The Commission recommends that:**

The senior family law judge in Ontario be paid the same representational allowance as the other regional senior judges in the province.

Recommendation 11**The Commission recommends that:**

The provisions in the *Judges Act* relating to the reimbursement of the judiciary's costs for participating in the Quadrennial Commission process remain unchanged.

Recommendation 12**The Commission recommends that:**

Should a future Commission not include a member with experience in the area of compensation, the Commission strongly consider engaging external expert assistance in this area.

Recommendation 13**The Commission recommends that:**

While continuity of Commission staffing cannot always be ensured, processes be established to allow for the efficient transfer of institutional knowledge between departing and incoming Commission staff.

Recommendation 14**The Commission recommends that:**

Where consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of demonstrated change, such Consensus be taken into account by the Commission and reflected in the submissions of the parties.

Recommendation 15**The Commission recommends that:**

The parties consider ways of streamlining the materials produced for future Commissions and, where production of a data set and accompanying analysis is warranted, that such work be undertaken cooperatively.

Appendix A



FOR THE MEDIA



JUDICIAL COMPENSATION AND BENEFITS COMMISSION APPOINTMENTS

OTTAWA, October 12, 2007 - Minister of Justice and Attorney General of Canada, the Honourable Rob Nicholson, P.C., Q.C., M.P. for Niagara Falls, today announced the appointments of Sheila R. Block, Paul M. Tellier, P.C., C.C., Q.C., and Wayne McCutcheon to the Judicial Compensation and Benefits Commission. All appointments are effective until August 31, 2011.

Sheila R. Block of Toronto is appointed Chairperson.

Ms. Block graduated in law from the University of Ottawa and was admitted to the Ontario Bar in 1974.

Ms. Block is currently a partner at the law firm of Torys and is chair of Torys' Toronto litigation practice. She has appeared as counsel at all levels of court in Ontario; before the Federal Court and the Supreme Court of Canada; and before arbitration and other tribunals.

Paul M. Tellier, P.C., C.C., Q.C., of Montreal is appointed a member as recommended by the judiciary.

Mr. Tellier graduated from the universities of Ottawa and Oxford, England and was admitted to the Quebec Bar in 1963.

Mr. Tellier is a Director of several companies, is Strategic Advisor to Société Générale, a global bank, and is co-chair of the Prime Minister's Advisory Committee on the Public Service. He has served as the Clerk of the Privy Council, President and Chief Executive Officer of the Canadian National Railway Company and of Bombardier Inc.

Wayne McCutcheon of Ottawa is appointed a member as recommended by the Minister of Justice of Canada.

Mr. McCutcheon obtained his B.A., B. Ed. and M.A. from the University of Saskatchewan.

Mr. McCutcheon worked as a public servant for 32 years in various positions at the National Archives and National Library, the Treasury Board Secretariat, and the Privy Council Office. At the time of his retirement from the public service in 2005, he was serving as Deputy Secretary to the Cabinet, Senior Personnel and Special Projects at the Privy Council Office.

Sheila Block

Ms. Block is currently a partner at the law firm of Torys, where she is a senior trial and appellate counsel with a broad civil litigation practice and is the chair of Torys' Toronto litigation practice. She has appeared as counsel at all levels of court in Ontario, before the Federal Court and the Supreme Court of Canada, and before arbitration and other tribunals. Ms. Block is a former chair of Torys' Executive Committee.

Ms. Block's recognitions include the 2008 Advocates' Society Medal, the 2006 Law Society Medal awarded by the Law Society of Upper Canada and the 2006 Award for Excellence in Civil Litigation from the Ontario Bar Association.

Ms. Block has spoken and written extensively on advocacy and civil litigation. She has also taught advocacy for the National Institute for Trial Advocacy in Canada, the United States, England, Scotland, New Zealand and El Salvador, as well as for the UN War Crimes Tribunal in Rwanda and the Special Court in Sierra Leone. Ms. Block has taught an intensive advocacy course at the University of Toronto Law School and has taught in the LL.M program in litigation offered by the Osgoode Hall Law School.

Ms. Block holds directorships in the Harold G. Fox Education Fund, the Children's Aid Foundation, and the Touching Tiny Lives Foundation. She is a former director of the Canadian Civil Liberties Association and The Trillium Foundation.

Ms. Block graduated in law from the University of Ottawa and was admitted to the Ontario Bar in 1974.

Wayne McCutcheon

Mr. McCutcheon was Deputy Secretary to the Cabinet, Senior Personnel and Special Projects, Privy Council Office – a leadership position in human resources management for the Public Service of Canada, with particular responsibilities for human resource management policies and services for Governor in Council appointees. These appointees include deputy ministers, chief executive officers and directors of Crown corporations, and heads and members of agencies, boards and commissions.

Mr. McCutcheon joined the Public Service in 1973 as an Administrative Trainee with the Public Service Commission and pursued a career in human resources management. He spent the early part of his career with the National Archives and National Library, leaving in 1986 as Assistant Director of Human Resources to accept a position in the Personnel Policy Branch of the Treasury Board Secretariat. He joined the Privy Council Office in 1991 as a Senior Compensation and Classification Advisor with what was then the Senior Personnel Secretariat. Within this Secretariat, he subsequently served as Assistant Director of Appointments, Recruitment and Succession Planning, Director of Appointments and Compensation, Director General of Senior Personnel, Assistant Secretary to the Cabinet and Deputy Secretary to the Cabinet.

Mr. McCutcheon obtained his B.A., B. Ed. and M.A. from the University of Saskatchewan.

Paul Tellier, P.C., C.C., Q.C.

Paul M. Tellier was President and Chief Executive Officer and Director of Bombardier Inc. in 2003 and 2004. Prior to this, Mr. Tellier was President and Chief Executive Officer and a Director of the Canadian National Railway Company (CN), a position he held for 10 years.

From August 1985 until he took up his post at CN in 1992, Mr. Tellier was Clerk of the Privy Council and Secretary to the Cabinet of the Government of Canada, the top public servant in the country. In addition to that position, Mr. Tellier also served in many positions in the public sector, including as Deputy Minister of Indian Affairs and Northern Development in 1979 and as Deputy Minister of Energy, Mines and Resources in 1982.

He is a graduate of the universities of Ottawa and Oxford, England, and was admitted to the Québec Bar in 1963.

Mr. Tellier is a director of several corporations including Alcan, Bell Canada Enterprises (BCE), Bell Canada and Telesat Canada, GM Canada and McCain Foods Ltd. He is Chairman of Global Container Terminals Inc. (GCT). He is also Strategic Advisor to Société Générale, a global bank headquartered in France.

In 1995, he co-chaired the United Way Campaign of Greater Montreal. He was appointed Companion of the Order of Canada in 1993. Throughout his career, Mr. Tellier received many awards including Canada's Outstanding CEO of the Year in 1998, and Canada's Most Respected CEO, according to a KPMG/Ipsos-Reid survey in 2003. He joined the McGill Desautels Faculty Management Advisory Board in September 2006.

Recently, Mr. Tellier was appointed a member of the Independent Panel on Canada's Future Role in Afghanistan. The Panel's report and recommendations were transmitted to the Prime Minister in January 2008.

Appendix B

Initial Letters and Submissions Sent to the 2007-2008 Quadrennial Commission

1. Submission from the Government of Canada represented by the Department of Justice of Canada
2. Combined submission from the Canadian Superior Courts Judges Association and the Canadian Judicial Council
3. Submission from a Group of Appellate Judges in favour of a salary differential for judges of Courts of Appeal
4. Letter from the Honourable Donald G. H. Bowman, Chief Justice, Tax Court of Canada
5. Letter from the Honourable Donald I. Brenner, Chief Justice, Supreme Court of British Columbia
6. Letter from the Honourable J. Derek Green, Chief Justice, Supreme Court of Newfoundland and Labrador, Trial Division
7. Letter from the Honourable Gordon L. Campbell, Supreme Court of Prince Edward Island, Trial Division
8. Submission from the Canadian Bar Association
9. Letter from Mr. Lawrence Pierce, Pierce Law Group
10. Letter from Mr. Ian Bailey
11. Letter from Ms. Kirsten Connor
12. Letter from Mr. Gary Crozier
13. Brief from Mr. Harold Geltman

Reply Briefs and Letters to the Initial Submissions

Reply Submission from the Government of Canada, represented by Justice Canada, and a

Supplementary Reply Submission from the Government of Canada, represented by Justice Canada

Combined Reply Submission from the Canadian Superior Courts Judges Association and the Canadian Judicial Council, and a

Supplementary Reply Submission from the Canadian Superior Courts Judges Association and the Canadian Judicial Council

Comments with Respect to Documents Received by the Commission Regarding the Submission for a Salary Differential for Judges of Courts of Appeal

Comments from the Ontario Superior Court Judges' Association

Various letters sent to the Commission on the subject of a salary differential for appellate court judges:

Chief Justices:

- the Honourable Joseph P. Kennedy, Supreme Court of Nova Scotia
- the Honourable Jacqueline Matheson, Supreme Court of Prince Edward Island, Trial Division
- the Honourable David D. Smith, Court of Queen's Bench of New Brunswick
- the Honourable François Rolland, Superior Court of Quebec
- the Honourable Heather Forster Smith, Superior Court of Justice of Ontario
- the Honourable Robert D. Laing, Court of Queen's Bench of Saskatchewan
- the Honourable Allan H. Wachowich, Court of Queen's Bench of Alberta

Other judges:

- the Honourable James K. Hugessen, Federal Court of Canada
- the Honourable James P. Adams, Supreme Court of Newfoundland and Labrador, Trial Division
- the Honourable Gordon L. Campbell, Supreme Court of Prince Edward Island, Trial Division
- the Honourable Walter R. E. Goodfellow, Supreme Court of Nova Scotia
- the Honourable Jules Allard, Superior Court of Quebec

- the Honourable Douglas Rutherford, Superior Court of Justice of Ontario
- the Honourable Ronald L. Berger, Court of Appeal of Alberta
- the Honourable Ronald S. Veale, Supreme Court of the Yukon Territory

Letter from Ms. Yiu Kwun Wai

Appendix C

Judicial Compensation and Benefits Commission

Public Hearings - March 3, 2008 List of Participants

Representing the Judicial Compensation and Benefits Commission

- Ms. Sheila Block
Chair of the Commission
- Mr. Paul Tellier
Commissioner
- Mr. Wayne McCutcheon
Commissioner
- Ms. Jeanne Ruest
Executive Director

Representing the Government of Canada

- Mr. Neil Finkelstein
Counsel
Blake, Cassels & Graydon LLP
- Ms. Cathy Beagan Flood
Counsel
Blake, Cassels & Graydon LLP
- Ms. Judith Bellis
General Counsel
Judicial Affairs, Courts and Tribunal Policy
Justice Canada
Observer
- Ms. Karen Cuddy
Counsel
Judicial Affairs, Courts and Tribunal Policy
Justice Canada
Observer

Representing the Canadian Superior Courts Judges Association and the Canadian Judicial Council:

- Mr. Yves Fortier
Counsel
Ogilvy Renault

- Mr. Pierre Bienvenu
Counsel
Ogilvy Renault

- Mr. Azim Hussain
Counsel
Ogilvy Renault
Observer

- The Honourable J. Michael MacDonald
Chief Justice of the Province of Nova Scotia
Chair, Judicial Salaries and Benefits Committee
Canadian Judicial Council
Observer

- The Honourable Pierre Dalphond
Quebec Court of Appeal
Vice-President, Canadian Superior Courts Judges Association
Observer

- The Honourable Stephen Goudge
Court of Appeal of Ontario
Chair, Compensation Committee
Canadian Superior Courts Judges Association
Observer

- The Honourable Ted C. Zarzechny
Court of Queen's Bench for Saskatchewan
Vice-Chair, Compensation Committee
Canadian Superior Courts Judges Association
Observer

- Mr. Frank McArdle
Executive Director
Canadian Superior Courts Judges Association
Observer

Representing the Canadian Bar Association

- Mr. J. Guy Joubert
First Vice-President
Canadian Bar Association

- Ms. Tamara Thomson
Director
Legislation and Law Reform
Canadian Bar Association

Judicial Compensation and Benefits Commission

Public Hearings - March 13, 2008

List of Participants

Representing the Judicial Compensation and Benefits Commission

- Ms. Sheila Block
Chair of the Commission
- Mr. Paul Tellier
Commissioner
- Mr. Wayne McCutcheon
Commissioner
- Ms. Jeanne Ruest
Executive Director

Representing the Government of Canada

- Mr. Neil Finkelstein
Counsel
Blake, Cassels & Graydon LLP
- Ms. Cathy Beagan Flood
Counsel
Blake, Cassels & Graydon LLP
- Ms. Judith Bellis
General Counsel
Judicial Affairs, Courts and Tribunal Policy
Justice Canada
Observer

Representing judges in favour of a salary differential for judges of Courts of Appeal

- The Honourable Joseph R. Nuss
Québec Court of Appeal
Submission Coordinator
- Maître Roger Tassé
Counsel
Gowling Lafleur Henderson LLP

Judges opposing a salary differential for judges of Courts of Appeal

- The Honourable James K. Hugessen
Federal Court of Canada
- The Honourable Gordon L. Campbell
Supreme Court of Prince Edward Island
Trial Division

Representing the Canadian Superior Courts Judges Association and the Canadian Judicial Council

- Maître Pierre Bienvenu
Counsel
Ogilvy Renault
- The Honourable David H. Jenkins
Chief Justice of the Province of Prince Edward Island
President, Canadian Superior Courts Judges Association
Observer
- The Honourable Stephen Goudge
Court of Appeal of Ontario
Chair, Compensation Committee
Canadian Superior Courts Judges Association
Observer
- Mr. Frank McArdle
Executive Director
Canadian Superior Courts Judges Association
Observer