JUDICIAL COMPENSATION AND BENEFITS COMMISSION

SUBMISSIONS

of the

CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

L. Yves Fortier, C.C., Q.C.
Pierre Bienvenu
Ogilvy Renault, S.E.N.C.
1981 McGill College Avenue
Suite 1100
Montréal, Quebec H3A 3C1

December 15, 2003

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I. INTRODUCTION

1. These submissions to the 2003 Judicial Compensation and Benefits Commission (the "**Commission**") are made on behalf of the Canadian Superior Courts Judges Association (the "**Association**") and the Canadian Judicial Council (the "**Council**").

2. The Association is the successor of the Canadian Judges Conference, which was founded in 1979 and incorporated in 1986. Its objects include:

(a) the advancement and maintenance of the judiciary as a separate and independent branch of government;

(b) liaison with the Council to improve the administration of justice and to complement its functions through conferences and various educational programs;

(c) taking such actions and making such representations as may be appropriate in order to assure that the salaries and other benefits guaranteed by section 100 of the *Constitution Act, 1867*, and provided by the *Judges Act*[1] are maintained at levels and in a manner which is fair and reasonable and which reflect the importance of a competent and dedicated judiciary;

(d) seeking to achieve a better public understanding of the role of the judiciary in the administration of justice;

(e) monitoring and, where appropriate, seeking to enhance the level of support services made available to the judiciary in cooperation with the Council; and

(f) addressing the needs and concerns of supernumerary and retired judges.

3. Over 90% of Canada's 1056 federally appointed judges are members of the Association.

4. The Council was established by Parliament in 1971. It consists of the Chief Justice of Canada and the Chief Justices and Associate Chief Justices of the provincial and territorial

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1 R.S. 1985, c. J-1, as amended.

superior courts, the Federal Court of Appeal, the Federal Court, the Tax Court of Canada and the Court Martial Appeal Court of Canada.

5. The objects of the Council, which are set out in section 60 of the *Judges Act,* are to promote and improve efficiency, uniformity and quality of judicial service in superior courts. The Council also deals with complaints and disciplinary matters concerning federally appointed judges.

6. As part of its mandate to improve the quality of judicial service, the Council has established a Judicial Salaries and Benefits Committee. The Council, aided by that Committee, and the Association have made joint submissions, written and oral, to each of the five Triennial Commissions and to the first Quadrennial Judicial Compensation and Benefits Commission (the "**Drouin Commission**").

7. The Association and the Council have worked closely together in preparing these submissions on behalf of federally appointed judges. The recommendations sought from this Commission by the federal judiciary have been approved in principle by the Compensation Committee and Table Officers of the Association, and by the Judicial Salaries and Benefits Committee and the Executive Committee of the Council.

II. BACKGROUND

8. Judicial independence is a sacred principle of our legal tradition. This principle, whose historical origins can be traced back to the *Act of Settlement, 1701,*[2] is incorporated in the Constitution of Canada through the preamble and the judicature sections of the *Constitution Act, 1867* and section 11 (d) of the *Canadian Charter of Rights and Freedoms.*

9. Judicial independence and judicial compensation are intimately connected. In *Reference Re Provincial Court Judges*[3] ("***PEI Reference Case***"), the Supreme Court of Canada confirmed that financial security, both in its individual and institutional dimensions, is, with security of

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2 (U.K.), 12-13. Will. III, c. 2.

3 [1997] 3 S.C.R. 3.

tenure and administrative independence, one of the three core characteristics of judicial independence.[4]

10. Under section 100 of the *Constitution Act, 1867*, the Parliament of Canada has the duty to fix the compensation of superior, district and county court judges. The process for determining this compensation is provided in the *Judges Act*.

11. Prior to 1981, advisory committees reviewed judges' salaries and benefits. As noted by the Drouin Commission, this process was unsatisfactory to the judiciary because judges felt that the process was tantamount to petitioning the Government to fulfill its constitutional obligations.[5]

12. In 1982, the Triennial Commission process was established. Its objective was to depoliticize the determination of judicial salaries and benefits in order to preserve judicial independence. It is widely acknowledged that the Triennial Commission process was a failure. The salary recommendations of successive Triennial Commissions were ignored or left unimplemented. An insidious effect of this historical state of affairs is that in order to rectify the inadequacy of judicial salaries, one-time salary increases that may appear overly generous are required. This phenomenon likely restrained the Drouin Commission in its salary recommendations.

13. Acting upon the constitutional imperative enunciated by the Supreme Court of Canada in the *PEI Reference Case,* Parliament amended the *Judges Act* in 1998 and established the Quadrennial Commission, the first of which, the Drouin Commission, reported on May 31, 2000.

14. The Government's response to the *Drouin Report* marked an improvement as compared to previous Government responses to Triennial Commission reports. Nevertheless, in some respects it has been a source of concern for the Association and Council.

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4 At paras. 115-122.

5 *Drouin Report* (2000) at 2.

15. By way of example, the Drouin Commission recommended that, effective April 1, 2000, judges have the right to elect supernumerary status for a period not exceeding ten years upon attaining eligibility for a full pension (Recommendation 8). In her response to the *Drouin Report*, the Minister of Justice indicated that the Government was not prepared to accept Recommendation 8 at that time. The reasons given included the need to consult the provinces and territories, the fact that the Supreme Court of Canada would soon consider, in the *Mackin* case, important constitutional issues relating to the status of supernumerary judges, and, more generally, the need for better information concerning the contribution of supernumerary judges.

16. The judgment of the Supreme Court of Canada in *Mackin* was released on February 14, 2002.[6] As for the intended consultations with the provincial and territorial governments, it was expected that they would be carried out in a timely fashion. Regrettably they were not. Only on August 19, 2003, was the judiciary advised that the Government had decided to accept Recommendation 8. Moreover, the Government took the position that the necessary amendments to the *Judges Act* would only be made as part of the overall package of amendments that would follow the Government's response to the report of this Commission, likely in the Spring of 2005.

17. Under such a timetable, a recommendation made by the Drouin Commission to be effective April 1, 2000 would not become effective until more than five years later. In the meantime, judges who are eligible to take advantage of this recommendation are deprived of its benefit. Unlike a delay in the implementation of a salary recommendation, the delay in implementing Recommendation 8 cannot be remedied retroactively.

18. The foregoing comments are made not to overshadow what the judiciary acknowledges has been an improvement to the judicial compensation commission process, but merely to underscore that this process can and must continue to be improved if it is to attain the objective of determining adequate judicial salaries and benefits in a depoliticized fashion.

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6 *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405.

III. THE COMMISSION'S MANDATE

19. The mandate of the Commission is set out in section 26 of the *Judges Act,* which reads, in part, as follows:

> *Commission*
>
> 26(1) The Judicial Compensation and Benefits Commission is hereby established to inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges' benefits generally.
>
> *Factors to be considered*
>
> (1.1) 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.

20. The *Judges Act* does not equate "adequacy" of judicial salaries and benefits with the minimum necessary to guarantee the financial security of judges. Nor is the Quadrennial Commission to determine at what point financial security is undermined with a view to recommending a salary merely above that mark. Rather, it is submitted that the Commission must inquire into the adequacy of salaries and benefits with the dual purpose of ensuring public confidence in the independence of the judiciary and attracting outstanding candidates to the Bench.

21. The Drouin Commission observed that "[t]he determination of compensation for judges is grounded in the constitutional imperative that the independence of the judiciary be fostered and maintained."[7] This, the Drouin Commission noted, "means that the evaluation of judicial salaries,

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7 *Drouin Report* (2000) at 13.

and benefits, must begin with recognition of the special role in Canada occupied by judges and the unique responsibilities they bear."[8] The Drouin Commission went on to say:

> For our purposes, their role and responsibilities require that they be paid a salary and be provided with benefits that are adequate to ensure them a reasonable standard of living, both prior to and after retirement, in relation to their position and duties in our society, in order that they might continue to function impartially and fearlessly in the advancement of the administration of justice.[9]

22. The reports of successive Triennial Commissions and that of the Drouin Commission contain repeated statements of certain principles, and attest to the consistent application of certain benchmarks intended to give effect to those principles. Because the fundamental mandate of these commissions has always been the same - to inquire into, determine and make recommendations as to the adequacy of judicial salaries and benefits - there is precedent value in the principles expressed and the benchmarks applied by previous judicial compensation commissions.

23. One of these principles is that there should be rough equivalence between judicial salaries and the remuneration of the most senior level of deputy ministers within the Government, the benchmark to determine the latter being the midpoint of the salary range plus the at-risk component of the compensation of deputy ministers at the DM-3 level. The Association and Council submit that in fulfilling its mandate, this Commission should apply this principle and this benchmark.

IV. ISSUES

24. At the preparatory hearing held by the Commission on October 29, 2003, counsel for the two principal parties, the judiciary and the Government, agreed that the main issue to be addressed by this Commission is that of judicial salaries. In addition, the Association and Council advised that they would be seeking recommendations from the Commission in respect of

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8 *Ibid.*

9 *Ibid.*

a number of other items in order justifiably to improve the circumstances or conditions of certain judges, and, in the case of incidental allowances, all judges.

25. Neither of the two principal parties before the Commission seeks any change to the current judicial annuity regime, except to provide for the division of judicial annuity following conjugal breakdown. The federal judiciary has indicated to the Government that it agrees in principle with such a division. Judges were given the assurance by the Government that they would be offered the opportunity to have a meaningful input as to the means to effect such a division, and it is hoped that the federal judiciary and the Government can make joint submissions on this subject to this Commission.[10]

26. Some members of the judiciary from Quebec have expressed the concern that the amendment to the *Judges Act* to provide for division of judicial annuity following conjugal breakdown ought not to render nugatory past renunciations to the division of matrimonial property made possible by provincial law. More specifically, the *Act to amend the Civil Code of Québec and other legislation in order to favour economic equality between spouses*[11] permitted already-married couples, during an eighteen-month window between July 1, 1989 and December 31, 1990, to exclude themselves from the application of the division-of-property provisions of the *Civil Code of Québec* by expressing through a notarial deed their wish not to be subject to those provisions, in whole or in part.

27. As regards other benefits, the Government has assured the judiciary that the health and dental benefits available to judges are the most favorable available to any category of persons paid by the Government of Canada; therefore, judges do not propose to seek to enhance them at this time.

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10 On December 11, 2003, the Department of Justice sent to the Association a copy of the Report on Division of Judicial Annuity following Conjugal Breakdown prepared by Mr. David Crane, of Hay Group, and was advised that this report would form part of the Government's submissions to this Commission. The Association will review the report and provide the Government and the Commission with its comments in due course.

11 S.Q. 1989, c. 55, s. 42.

A. JUDICIAL SALARIES

1. Overview

28. An increase in the salaries of federally appointed judges is necessary in order to bridge the gap that persists and threatens to widen between judicial salaries and the remuneration of the relevant comparator group of the most senior deputy ministers within the Government of Canada.

29. The Association and Council are therefore seeking, effective April 1, 2004, a salary for puisne judges in an amount equal to the midpoint of the current remuneration of deputy ministers at the DM-3 level, the traditional comparator group of senior civil servants who have long been considered to possess the same characteristics of skill, integrity, talent and leadership required of judges.[12]

2. The *Judges Act* criteria

(i) The economic conditions in Canada and the financial position of the federal Government

30. The first statutory criterion to be considered under subsection 26 (1.1) of the *Judges Act* is "the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government".

31. Canada is the only G7 country that has maintained a budgetary surplus for the last several years. In 2002-2003, the federal Government recorded a fiscal surplus of $7 billion, marking the sixth consecutive budget surplus. According to the Organisation for Economic Co-operation and Development and the International Monetary Fund, when all levels of government are taken together, Canada was the only G7 nation to record a surplus in 2002.[13]

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12 On the basis of the information presently available to the federal judiciary, the midpoint of the remuneration of DM-3s (*i.e.* the midpoint of the base salary plus average at-risk awards) is currently $253,880 per annum if the at-risk percentage for the fiscal year 2002-2003 is applied to the midpoint of the base salary of DM-3s as of April 1, 2003. Appendix "A" to these submissions contains an explanation as to how this midpoint is calculated, as well as a comparison between judicial salaries and the remuneration of DM-3s from 1993 to present.

13 Government of Canada, *The Economic and Fiscal Update - Overview* (2003) at 4.

32. Despite significant adverse occurrences in Canada in 2003, among them SARS, mad cow disease, widespread power outage in Ontario, restrictions to the U.S. lumber market and forest fires in British Columbia, the performance of the Canadian economy remains strong. The Canadian dollar is at its highest value in years relative to the U.S. dollar. The federal debt has been reduced by $52.3 billion during the past six years and the debt-to-GDP ratio, an important measure of fiscal health, has declined by almost twenty-five percentage points to roughly 44% from its peak in 1995-96.[14]

33. Employment appears exceptionally robust and, in the main, Canadians are optimistic as to their prospects for the future. Canada has enjoyed one of the world's best records on job creation. Three million more Canadians are now working than in 1993. The standard of living of Canadians has grown by 20% in the last six years, faster than that of any other G7 country.

34. There is no suggestion from the federal Government that budgetary surpluses will not continue for the future. The Government of Canada recently published the following average private-sector projections of the federal Government's budget surpluses over the next five years:

2004-05: $3.0 billion

2005-06: $3.0 billion

2006-07: $4.0 billion

2007-08: $6.0 billion

2008-09: $9.5 billion.[15]

35. *The Economist,* a leading public affairs, business and finance magazine, was recently shining a favourable spotlight on Canada, reporting that the country has changed for the better over the past decade:

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14 *Ibid.*

15 *Ibid.* at 5.

> Deficits have been left far behind and the public debt slashed. Since the late 1990s, Canada's economy has outperformed the rest of the rich world. It no longer depends only on lumber, mining, oil and cars. [16]

36. In sum, the prevailing economic conditions in Canada and the overall economic and current financial position of the Government are strong.

(ii) The role of financial security in ensuring judicial independence

37. The second criterion to be considered by the Commission is "the role of financial security of the judiciary in ensuring judicial independence". In relation to this factor, the Drouin Commission stated:

> We strongly affirm the importance of an independent judiciary, and we recognize the role that financial security plays as a fundamental component of independence as set out in the second enumerated factor under subsection 26(1.1).[17]

38. In the *PEI Reference Case,* Chief Justice Lamer sought to demonstrate the link between financial security for judges and the concept of the separation of powers. He said:

> What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be depoliticized. [...]
>
> [...]
>
> The depoliticized relationships I have been describing create difficult problems when it comes to judicial remuneration. On the one hand, remuneration from the public purse is an inherently political concern, in the sense that it implicates general public policy. [...]
>
> On the other hand, the fact remains that judges, although they must ultimately be paid from public monies, are not civil servants. Civil servants are part of the executive; judges, by definition, are independent of the executive. The three core characteristics of judicial independence - security of tenure, financial security, and administrative independence - are a reflection of that fundamental distinction, because they provide a

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16 "Canada's New Spirit" *The Economist* (27 September 2003) at 13.

17 *Drouin Report* (2000) at 8.

> range of protections to members of the judiciary to which civil servants are not constitutionally entitled.[18]

39. The role and responsibilities of judges are *sui generis,* as the Government acknowledged in its submissions to the Drouin Commission.[19] Indeed, judges occupy a unique position in our society and that uniqueness must be considered by the Commission in all of its manifestations. Those include the following:

- Federally appointed judges are the only persons in Canadian society whose compensation, by constitutional requirement, must be set by Parliament. Once a judge accepts appointment, he or she becomes entirely dependent on Parliament in respect of salaries and benefits.

- Judges are prohibited from negotiating any part of their compensation arrangement with the party who pays their salaries, a restriction that applies to no other person or class of persons in Canada.

- Judges are prohibited by the *Judges Act* - with good reason - from engaging in any other occupation or business beyond their judicial duties. It follows that judges cannot supplement their income by embarking upon other endeavours.

- Judges' compensation cannot be tied to performance or determined by commonly used incentives such as bonuses, stock options, at-risk pay, etc.

- Finally, there is no concept of promotion or merit in the discharge of judicial duties and there is no marketplace by which to measure the performance or compensation of judges.

(iii) The need to attract outstanding candidates to the judiciary

40. The Drouin Commission expressed the view that this statutory criterion required consideration of the relationship between the incomes of private practitioners and judicial

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18 *PEI Reference Case*, *supra* at paras. 140, 142, 143 [emphasis in original].

19 As cited in the *Drouin Report* (2000) at 13.

salaries.[20] Clearly, income differentials are among the factors that encourage or discourage applications for appointment from outstanding candidates.

41. The Scott Commission considered the relationship between judicial salaries and private sector income to be very important. Indeed, the Scott Commission characterized the statutory indexing of judges' salary as:

> a statutory mechanism for ensuring that there will be, to the extent possible, a constant relationship, in terms of degree, between judges' salaries and the incomes of those members of the Bar most suited in experience and ability for appointment to the Bench. The importance of the maintenance of this constant cannot be overstated. It represents, in effect, a social contract between the state and the judiciary. [21]

(iv) Other objective criteria

42. Amongst the "other objective criteria" that the Commission will no doubt wish to consider in its determination of judicial salaries is the evolution of the role and responsibilities of Canadian judges in recent years. The following observations of the Drouin Commission are still apposite today:

> There are increasing, and ever-shifting, demands placed upon the Judiciary. As a result of the introduction of the *Charter*, the growth in litigation in Canada, the complexity of the matters which actually proceed before the courts, and intensified public scrutiny of judicial decisions, the process and requirements of "judging" have become more onerous at both the trial and appellate levels.[22]

43. Judicial decisions at all levels continue to be the focus of attention by the media and the public, and judges are repeatedly called upon to adjudicate on sensitive and contentious matters of a socio-political nature, a trend that has been accentuated by the continued willingness of Parliament and the provincial legislatures to leave many controversial issues for determination by the courts. A vivid illustration of this phenomenon can be found in the role played by Canadian courts in respect of the difficult issue of same-sex marriage.

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20 *Drouin Report* (2000) at 35.

21 *Scott Report* (1996) at 14.

22 *Drouin Report* (2000) at 17.

3. The comparators

44. In considering the adequacy of judicial salaries, three principal comparators have been relied upon by the judiciary and the Government, and by past judicial compensation commissions. They are:

- The remuneration of the most senior level of deputy ministers within the federal Government;
- The incomes of senior lawyers in the private practice of law in Canada; and
- The salaries paid to judges, particularly senior judges, in other jurisdictions such as England, Australia, New Zealand and the United States of America.

The Association and Council address these comparators in reverse order, which they submit should be their ascending order of importance for this Commission.

(i) Judges' salaries in other jurisdictions

45. The Association and Council invited the Drouin Commission to take account of the prevailing salary levels of judges in other jurisdictions. Although the Drouin Commission noted that the salary level of judges in other jurisdictions often exceeded judicial salaries in Canada, it made the following cautionary observation:

> Care must be taken, however, not to assess these figures out of context. The utility and reliability of comparisons between judicial salaries in other jurisdictions and those in this country are questionable on the basis of the information now available to us. This is so, in our view, because of variations between economic and social conditions in Canada and the other identified jurisdictions, fluctuating exchange rates, significantly different income tax structures, differing costs of living and the absence of information concerning the retirement benefits of judges in the other identified jurisdictions.[23]

The Guthrie Commission had likewise questioned the usefulness of this comparator.[24]

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23 *Drouin Report* (2000) at 48.

24 See *Guthrie Report* (1987) at 10.

46. The Drouin Commission thus concluded its consideration of this comparator:

> Without further, and more detailed, information regarding the process for setting judicial salaries in other jurisdictions, the nature and extent of the responsibilities of the judges in those jurisdictions suggested to be comparable to Canada, and the overall total compensation scheme applicable to judges in the other identified jurisdictions, we are unable to place significant reliance on data concerning judges' salaries in other jurisdictions.[25]

47. The Association and Council acknowledge the difficulties noted in the *Drouin Report*. While information about salaries paid to senior judges in other jurisdictions might be helpful in the future, the judiciary recognizes that a study would need to be undertaken to ensure that such information is both reliable and comparable. Not having undertaken such a study, the Association and Council do not, for the purposes of this Commission, intend to rely upon the salaries of judges in other jurisdictions.

48. The difficulties noted by the Guthrie and Drouin Commissions in respect of this comparator underscore the need to consider comparators that take into account socio-economic factors in Canada. That is the case when judicial salaries are compared with the incomes of the senior practising Bar in Canada and the remuneration of senior deputy ministers.

(ii) Incomes of lawyers in the private practice of law in Canada

49. The incomes of private practitioners have been considered by all judicial compensation commissions as an important comparator in the setting of adequate judicial salaries. As noted earlier in these submissions, this comparator has particular relevance in view of the third criterion provided in subsection 26(1.1) of the *Judges Act,* namely, "the need to attract outstanding candidates to the judiciary."

50. Lawyers in private practice have long been the primary source of candidates to the Bench. The Drouin Commission noted that in the years 1990 to 1999, 73% of those appointed to the Bench came from the private Bar, a proportion that increases to 82% if judges elevated from

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25 *Drouin Report* (2000) at 48.

the provincial or territorial Bench are excluded from the calculation.[26] Based on information recently provided to Justice Canada by the Judicial Appointments Secretariat, approximately 70% of appointees during the period from January 1, 1997 to November 14, 2003 came from private practice.[27] While judges from other occupational backgrounds continue to be appointed, it has been and will probably continue to be the case that the overwhelming majority of judges come from the private Bar.

51. The *Judges Act* speaks of the need to attract "outstanding" candidates to the judiciary. What matters, therefore, is not to count the numbers of applications for appointment but, rather, to create conditions that will encourage applications from outstanding candidates. While there are no doubt exceptions, the income derived from private practice by lawyers whom one would categorize as "outstanding" will frequently exceed the judicial salary. The Association and Council submit that Quadrennial Commissions must be forward-looking in establishing judicial salaries so as to ensure that outstanding candidates will be willing to seek judicial appointment throughout the four-year period covered by a Commission's salary recommendations.

52. More than 50% of the federally appointed judiciary serves in large urban centres. In order to ensure that outstanding candidates from the private Bar will continue to seek judicial appointments, judicial salaries must be fixed taking into account the higher level of earnings that such practitioners enjoy as well as the higher cost of living that prevails in such centres.

53. Income is of course not the only measure of the quality of candidates from the Bar. It is also clear that the judicial annuity is a substantial benefit to judges which is not enjoyed by private practitioners. In addition, as the Lang Commission noted some twenty years ago, there is indeed real value to be placed upon the opportunity for public service which is offered to members of the judiciary.[28] Nevertheless, judicial compensation, including judicial annuities, remains a factor of significant importance in the need to attract outstanding candidates to the

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26 *Drouin Report* (2000) at 36-37.

27 Information provided to Justice Canada by the Judicial Appointments Secretariat, Table 3: Appointees' Predominant Occupation, reproduced in Appendix "F" to these submissions.

28 See *Lang Report* (1983) at 2-3.

judiciary. In sum, the income level of senior lawyers in the private practice of law in Canada should continue to serve as a comparator by this Commission, and judicial salaries must be at a level sufficient to ensure that outstanding practitioners will continue to be prepared to consider judicial appointment.

54. This Commission was advised at the preparatory hearing of October 29, 2003, that the Association and Council would be filing a report concerning the incomes of Canadian lawyers based on income tax data to be obtained from the Canada Customs and Revenue Agency ("**CCRA**"). As counsel for both parties anticipated, however, delays encountered in obtaining accurate data from CCRA have made it impossible for the Association and Council to file this report with the present submissions. It is hoped that the Commission can be provided with additional information and submissions from the parties on this comparator as part of the parties' reply submissions, due on January 23, 2004.

(iii) Remuneration of the most senior level of deputy ministers within the Government

55. As noted earlier in these submissions, from the advent of the Triennial Commission process to the most recent Quadrennial Commission, judicial salaries have been compared with the remuneration of the most senior level of deputy ministers within the Government. With time, what started as a benchmark has matured into the principle that there should be a rough equivalence between the salaries of federally appointed puisne judges and the midpoint of the remuneration of DM-3s, until recently the most senior level of deputy ministers within the federal Government.

56. Until the Crawford Commission reported on March 31, 1993, continual reference was made to the 1975 amendments to the *Judges Act* which had made the salary level of puisne judges roughly equivalent with the midpoint of the salary range of the most senior level of deputy ministers. Triennial Commissions prior to the Crawford Commission referred to that standard as "1975 equivalency", and each of them successively recommended salary increases for judges seeking to achieve that level.

57. In its submission to the Crawford Commission, in 1993, the Government argued that:

> Despite the historically lower salaries of judges as compared with senior deputy ministers, the government has indicated to the judges that a rough

> equivalence between judicial salaries and the midpoint of the DM-3 salary scale would be considered appropriate. Support for this sort of rough parity between judges and top-level public servants is found in comparative figures from other common-law countries that are most like Canada.
>
> 1975 was a long time ago, and much has changed in the meantime, not the least of which has been our economy. There seems to be little point in trying to tie judicial salaries to some arbitrary level set so long ago and in very different circumstances. Therefore, the government thinks it would be better to do away with both the concept and the terminology of 1975 equivalence, and instead deal with judicial salary levels on the basis that there should be a rough equivalence to the DM-3 midpoint.[29]

58. The Crawford Commission appears to have accepted that submission and found that "1975 equivalency" was no longer a particularly helpful benchmark as a determinant of judges' salaries. Instead, the Crawford Commission concluded that an appropriate benchmark was rough equivalence with the midpoint of the salary range of the most senior level of federal public servant, the DM-3.

59. Past commissions were of course fully appreciative of the fact that use of this comparator for the purpose of setting judges' salaries does not amount to equating judges to public servants.[30] The Crawford Commission noted that rough parity of this nature between judges and top level public servants finds support in the comparative salary figures from a number of other common law democracies.[31]

60. While making clear that no one comparator should be determinative, the Drouin Commission endorsed the principle of a relationship between judicial salaries and the remuneration of DM-3s. It stated:

> While we agree that the DM-3 comparator should not be determinative of our recommendations concerning judicial salaries, in our view, it is an appropriate and useful comparator at this time. More particularly, we have concluded that the important aspect of the DM-3 comparator, for the purposes of our inquiry, is the maintenance of a relationship between

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29 As cited in the *Drouin Report* (2000) at 28 [emphasis added].

30 See *e.g. Drouin Report* (2000) at 31-32, and *Crawford Report* (1993) at 11.

31 *Ibid.*

> judges' salaries and the remuneration of those senior federal public servants whose skills, experience and levels of responsibilities most closely parallel those of the Judiciary. We agree with the substance of the observation by both the Courtois and Scott Commissions (1990 and 1996) that the relationship between the remuneration of DM-3s and judges should be maintained, not as a precise measure of "value" but as a reflection of "*what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges.*" [32]

61. There are no circumstances or reasons that would justify this Commission to reach a different conclusion. The conclusion was valid then and it remains valid today.

62. It is noted that while previous judicial compensation commissions, including the Drouin Commission, have often referred to the notion of rough equivalence with the midpoint of the salary range of DM-3s, the correct expression of the principle is rough equivalence with the midpoint of the salary range of *the most senior level of deputy minister.*[33] That is because from 1975 until early 2001 the most senior level of deputy minister was the DM-3 and, therefore, the two formulations of the principle were synonymous.

63. Since the *Drouin Report* was submitted to the Minister of Justice on May 31, 2000, a higher level of deputy minister was created, the DM-4. The judiciary has been advised by the Government that the DM-4 level was created on the recommendation of the Advisory Committee on Senior Level Retention and Compensation (the "**Strong Committee**"), in recognition of the Government's view that certain DM-3 positions were larger in scope and clearly at a higher level of responsibility. According to the Government, it was felt that the creation of a more senior level, restricted to a very small number of people, would ensure equity with chief executive officers of some of the larger Crown corporations, and allow the Government to retain what was perceived as critical expertise at that level.

64. The judiciary has been informed that only two deputy ministers are currently paid at the DM-4 level. They are: the Clerk of the Privy Council and Secretary to the Cabinet, and the Deputy Minister of Finance.

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32 *Drouin Report* (2000) at 30-31 [underlining added].

33 See *e.g. Guthrie Report* (1987) at 8.

65. As mentioned earlier in these submissions, judicial salaries have traditionally been compared with the midpoint of the salary range of the most senior level of deputy minister. The application of this benchmark would justify comparing judicial salaries either with the midpoint of the salary range of DM-4s, or, alternatively, with the midpoint of the salary range of the DM-3 and DM-4 levels taken together as a single category.

66. The creation of the DM-4 category is recent and its composition appears still to be in a state of flux. The Association and Council understand that initially, only the Clerk of the Privy Council and Secretary to the Cabinet was paid at this level, and that the Deputy Minister of Finance was only subsequently elevated from the DM-3 to the DM-4 level. The Association and Council do not know whether it is intended that, in the future, other civil servants will be paid at the DM-4 level.

67. In this period of transition, the judiciary is prepared to accept that this Commission compare judicial salaries with the midpoint of the remuneration (including at-risk pay) of DM-3s. However, the Association and Council expressly reserve their right to rely on the DM-4 compensation level as the relevant comparator on appearances before future Quadrennial Commissions.

68. The Drouin Commission quite appropriately rejected the notion, put forward by the Government, that when considering the DM-3 comparator, regard should be had only to the midpoint of the base salary range of DM-3s, without regard to at-risk awards.[34] The Commission chose to consider the average of actual at-risk awards as a percentage of the maximum awards available for DM-3s, an approach that is sound and that reflects the fact that the variable pay component of the remuneration of DM-3s was regarded by the Strong Committee as an integral part of the total compensation for DM-3s.[35] The Association and Council submit that this Commission should adopt this same approach.

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34 *Drouin Report* (2000) at 25-26.

35 *Ibid.*

69. The Government has provided information to the judiciary concerning the base salary range and at-risk pay for DM-3s from April 1, 1999 to present. The judiciary was also provided with information concerning the percentage of at-risk awards made to DM-3s during the same period. This information is included in Appendix A to these submissions, with an analysis of the remuneration of DM-3s in recent years and a comparison of the remuneration of DM-3s with the salaries of puisne judges during the period 1993 to present.

70. The Association and Council seek a judicial salary for puisne judges as of April 1, 2004 in an amount equal to the *current* remuneration of deputy ministers at the DM-3 level even though it can be expected that DM-3s will enjoy a further salary increase as of April 1, 2004.

4. Annual increments

71. The Drouin Commission recommended, and the Government accepted in its response to the *Drouin Report*, that judicial salaries be subject to annual increments over and above statutory indexing.[36] The Association and Council urge this Commission to make a similar recommendation so as to minimize the adjustments to be made to judicial salaries every four years. The Association and Council will make submissions as to the amount of these annual increments at the oral hearing.

5. Salary differentials with justices of the Supreme Court of Canada, Chief Justices and Associate Chief Justices

72. For many years the differential between the salaries of puisne judges and those of Chief Justices and Associate Chief Justices of the federally appointed judiciary has been relatively constant. The Drouin Commission saw no reason to alter this differential and it is submitted by the Association and Council that it ought to remain unchanged. The same submission is made in respect of the salary differential between superior court judges and puisne judges of the Supreme Court of Canada.

73. The Association and Council take no position on the question of whether the Commission should recommend a salary differential between appellate and trial court judges.

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36 *Ibid.* at 49.

6. Recommendations sought

74. The Association and Council urge this Commission to make the following recommendations:

> **That effective April 1, 2004, the salary of puisne judges be set at an amount equal to the midpoint of the current total remuneration (*i.e.* the midpoint of the base salary plus average at-risk award) of deputy ministers at the DM-3 level, inclusive of statutory indexing effective that date; and that said salary be increased, in addition to the statutory indexing, by annual increments as of April 1 of each of 2005, 2006 and 2007, in an amount to be fixed by the Commission.**
>
> **That the salaries of the justices of the Supreme Court of Canada, and of the Chief Justices and Associate Chief Justices, be increased effective April 1 of each of 2004, 2005, 2006 and 2007 by the same percentage as the salary of puisne judges, maintaining the same salary differentials as currently exist between their salaries and the salary of superior court judges.**

B. OTHER ITEMS

1. Incidental allowances

75. The level of incidental allowances should be adjusted to reflect the increased cost of the expenditures for which the judges are entitled to be reimbursed under subsection 27(1) of the *Judges Act*. The Association and Council submit that this Commission should recommend that incidental allowances be increased by $1,000 effective April 1, 2004, and that a further increase of $1,000 be effective April 1, 2006.

76. Subsection 27(1) of the *Judges Act* provides that federally appointed judges are entitled to be reimbursed up to $5,000 per annum "for reasonable incidental expenditures that the fit and proper execution of the office of judge may require". As explained in the *Drouin Report*, incidental allowances "cover such things as the cost of repair and replacement of court attire, the

purchase of law books and periodicals, memberships in legal and judicial organizations, the purchase of computers and other assorted expenses associated with the position".[37]

77. Before the Drouin Commission, the Association and Council requested an increase of incidental allowances on the ground that there had been no adjustment in these allowances for approximately ten years while the cost for the expenditures reimbursable therewith had increased significantly during that time period. The Drouin Commission agreed that an upward adjustment was warranted and recommended that incidental allowances be increased to $5,000 per annum effective April 1, 2000. This recommendation was accepted by the Government.

78. The Association and Council submit that a further increase is now necessary. Attached as Appendix "B" to these submissions is an updated version of a list of selected items of expenditures for legal publications, in electronic and print format, which had been submitted to the Drouin Commission. A comparison between the 1999 and the current versions of the list provides evidence of continuing cost increases.

79. With the advent of electronic research services, such as QuickLaw, WestLaw and eCarswell, judges can access a virtual legal library both at home or on the road while conducting circuits. In order to access these research services, judges need portable computers and appropriate software. Textbooks and other legal publications that are not readily available on the Internet are essential research tools for judges and can also be purchased in electronic format. It is noted in this connection that federal judges were recently invited to charge to their incidental allowances the monthly service fee for high-speed Internet, a service that used to be provided to the judges free of charge.

80. Based on recent information obtained from the Office of the Commissioner for Federal Judicial Affairs, 75% of federally appointed judges spent the whole amount of their incidental allowance in the fiscal year 2002-2003. Those who spent more were asked to borrow against their allowance for the following year.

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37 *Drouin Report* (2000) at 55.

81. If no adjustment is made at this time, the incidental allowances will remain unchanged until the time of implementation of the recommendations of the next Quadrennial Commission, approximately eight years after the 2000 adjustment. By then, judges would have lost pace with the increasing cost of items that they require to properly discharge their functions.

82. The Association and Council therefore urge this Commission to make the following recommendation:

> **That the allowance for incidental expenditures provided in s. 27(1) of the *Judges Act* be increased by $1,000 effective April 1, 2004, and by a further amount of $1,000 effective April 1, 2006.**

2. Removal allowances

(i) Relocation expenses

83. Many judges are required to move from their place of residence upon judicial appointment, or to transfer during tenure to assume judicial duties in another area. The *Judges Act (Removal Allowance) Order* (the "***Removal Allowance Order***")[38] offers assistance to judges having to incur relocation expenses in such circumstances, including by providing limited reimbursement in the event of a loss on the sale of the judge's principal residence.

84. The *Removal Allowance Order* provides a six-month period for the judge to sell his or her house. The *Order* also contemplates, in specified circumstances, that the six-month period be extended by "an additional period" which, in practice, is usually of one year.

85. The judges seek amendments to the *Order* which will permit that more than one extension be granted, if warranted.

86. Cases have arisen, usually involving judges having to relocate from a rural area, where the real estate market was such that a judge was unable to obtain a reasonable offer for his or her residence within the period allowed. In one instance, a judge lost the benefit of the *Order* by reason of the expiry of the extended period.

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38 C.R.C., c. 984. A copy of the *Removal Allowance Order* is included in Appendix "C".

87. This problem, which admittedly seldom arises, can be alleviated simply by permitting more than a single additional period of extension to the six-month period contemplated by the *Removal Allowance Order*. This would give the Commissioner for Federal Judicial Affairs the flexibility needed to deal with circumstances that are beyond the control of the judge.

88. The Association and Council therefore urge this Commission to make the following recommendation:

> **That subsections 3(2), 3.1(5) and 3.2(9) of the *Judges Act (Removal Allowance) Order* be amended by the addition of the words "or periods" after the word "period" in each of those subsections.**

(ii) Paragraphs 40(1)(c) and (e) of the *Judges Act*

89. The Association and Council ask that this Commission recommend that the *Judges Act* be amended to permit reimbursement of relocation expenses incurred prior to but in anticipation of retirement or resignation from office.

90. Paragraphs 40(1)(c) and (e) of the *Judges Act* provide for the payment of a removal allowance to certain judges in specified circumstances. Under these paragraphs, as presently worded, a removal allowance is payable to certain judges who, within two years after retiring or resigning from office, move to an area outside the area where they were statutorily required to reside.

91. These provisions can operate in a manner that is impractical. The following example, not an actual case, will serve to illustrate the problem sought to be resolved. Justice Jones was appointed to the Federal Court at age 50 on June 30, 1989. At the time she was living in Toronto. She moved to Ottawa and bought a house to comply with the residency requirement of the *Federal Court Act.*

92. Now aged 65, Justice Jones is entitled to full retirement on June 30, 2004. However, she would be willing to postpone retirement for two years, to June 30, 2006, in order to assist the Federal Court with its heavy workload. In anticipation of her retirement and relocation in Toronto, Justice Jones would like to sell her house in Ottawa now and buy a house in Toronto. She would rent an apartment in Ottawa until June 30, 2006 in order to comply with the statutory

residency requirement. Because the expenses relating to the sale of her house and move to Toronto would be incurred before her actual retirement date, Justice Jones could not seek reimbursement of these expenses under paragraph 40(1)(e), even if they were submitted after her actual retirement.

93. This problem can be addressed by adding the following subsection 40(1.3) to the *Judges Act*:

> Notwithstanding paragraphs 40(1)(c) and (e), claims under said paragraphs for expenses made in anticipation of a relocation but prior to retirement or resignation from office shall be reimbursable by a removal allowance within two years from the date of the judge's retirement or resignation from office.

This amendment would assist judges who wish to plan in advance of the actual date of their retirement. It entails no extra cost to the Government as the removal allowance would be payable if the sale of the house coincided with the retirement.

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

> **That the *Judges Act* be amended by the addition of subsection 40(1.3), in the following terms:**
>
> > **Notwithstanding paragraphs 40(1)(c) and (e), claims under said paragraphs for expenses made in anticipation of a relocation but prior to retirement or resignation from office shall be reimbursable by a removal allowance within two years from the date of the judge's retirement or resignation from office.**

(iii) Relocation costs program for partners of judges of the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada

95. The Association and Council ask that this Commission recommend the adoption and implementation of a relocation costs program, up to an accountable maximum of $5,000, for the partners of judges who are appointed to the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada. This program would cover such services as French/English language training; employment search; employment assistance; interview travel; preparation of curriculum vitae; and photocopy and transmittal costs for transcripts of

academic records. It is the understanding of the judiciary that programs of this sort are now in place for the RCMP, and others within the federal public service.

96. Appointment to one of the courts mentioned frequently entails a relocation of the judge so as to satisfy a statutory residence requirement. This normally implies the relocation of partners and families. Such relocation can be particularly disruptive to partners who have careers outside the home.

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

> **That a relocation costs program be adopted for the partners of judges appointed to the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada, up to an accountable maximum of $5,000.**

3. Resident Labrador judge's allowance

98. The Association and Council submit that an allowance in the amount of the northern allowance paid to federally appointed judges serving in Yukon, the Northwest Territories and Nunavut under s. 27(2) of the *Judges Act* should be paid to the resident judge in Goose Bay/Happy Valley, Labrador, to compensate for the additional cost of living in that remote community.

99. Goose Bay/Happy Valley is among the communities considered an isolated community under the Isolated Posts Directive of the Treasury Board of Canada, a copy of which is enclosed in Appendix "D" to these submissions. Federal public servants working in these isolated communities are entitled to additional compensation to offset abnormal cost differentials between isolated and non-isolated locations. A list of prices of staple consumer products illustrating the high cost of living in Labrador is also enclosed in Appendix "D" to these submissions.

100. The Association and Council urge this Commission make the following recommendation:

> **That the *Judges Act* be amended to provide for the payment of a yearly allowance to the resident Labrador judge in an amount of $12,000 per annum.**

4. Representational allowance for regional senior judges in Ontario

101. The Association and Council ask this Commission to recommend that Regional Senior Judges in Ontario be entitled to be paid a representational allowance of $5,000 per annum, to reimburse expenses actually incurred by them in the discharge of their extra-judicial obligations and responsibilities.

102. At present, the following judges receive a representational allowance: Chief Justices, puisne judges of the Supreme Court of Canada, the Chief Justice of the Court of Appeal of Yukon, the Chief Justice of the Court of Appeal of the Northwest Territories, the Chief Justice of the Court of Appeal of Nunavut, the senior judge of the Supreme Court of Yukon, the senior judge of the Supreme Court of the Northwest Territories and the senior judge of the Nunavut Court of Justice.[39] The Courtois Commission explained in the following terms the rationale for this allowance:

> As titular head of a court, or as symbolic head of the judiciary at the federal or provincial level, a chief justice or chief judge is invited or expected to attend state and other official and semi-official functions both within and outside the court's jurisdiction, and may be requested or expected to host certain functions, particularly those involving visiting judicial dignitaries from other countries.
>
> [...]
>
> The representational allowance therefore serves to reimburse a judge for expenses actually incurred by him or her for travelling, hospitality and related amounts in connection with the extra-judicial obligations and responsibilities that devolve upon the judge by virtue of the office.[40]

103. There are eight regional senior judges on the Superior Court of Justice in Ontario. These judges are the statutory delegates of the Chief Justice of that court pursuant to the Ontario *Courts of Justice Act* to carry out the duties of the Chief Justice in their respective regions. Many of the regional senior judges have as many, or more, judges under their administrative supervision and direction than Chief Justices in most provinces. Similar to Chief Justices and Associate Chief

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39 *Judges Act*, s. 27(6).

40 *Courtois Report* (1990) at 16-17.

Justices, they are required to host visiting judicial and legal delegations and to attend many Bar and judicial meetings and functions.

104. At present, regional senior judges must either personally absorb the expenses associated with these activities and functions or claim them against their incidental allowances.

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

> **That regional senior judges in Ontario be added to the judges entitled to a representational allowance under subsection 27(6) of the *Judges Act*, and that this representational allowance be in the amount of $5,000 per annum.**

5. Retirement age for judges of the Supreme Court of Canada

106. The Association and Council submit that judges of the Supreme Court of Canada should be entitled to retire after ten years of service on the Court.

107. Under the *Judges Act*,[41] judges of the Supreme Court of Canada with ten years of service on the Court may retire upon attaining the age of 65. Justices of the Supreme Court of Canada may not elect supernumerary status or early retirement even though they may have served many years on another court before being elevated to the Supreme Court of Canada. In view of the increasing burden on the judges of Canada's highest court, the Association and Council submit that justices of that Court should be entitled to retire after ten years of service on the Court, irrespective of age.

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

> **That s. 42(1)(e) of the *Judges Act* be amended to permit a judge of the Supreme Court of Canada to retire after ten years of service on that Court.**

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41 s. 42(1)(e).

V. COSTS

109. The Drouin Commission was of the opinion that irrespective of whether there exists in law an obligation on the Government to provide funding for the participation of the judiciary in the Commission's inquiry, some reimbursement of the judiciary's representational costs was both desirable and necessary to ensure the efficacy of the Commission's proceedings.[42]

110. The Drouin Commission noted that its proceedings had been materially improved by the active participation by both the judiciary and Government.[43] It added that it was highly desirable that members of the judiciary participate fully in the Commission process.[44]

111. After careful consideration of the issue, the Commission recommended that the Government pay 80% of the total representational costs of the judiciary incurred in connection with their participation in the judicial compensation process, such payment not to exceed an aggregate amount of $230,000.[45]

112. In its response to the *Drouin Report*, the Government did not accept this recommendation. Instead, the Government announced that it would propose an amendment to the *Judges Act* providing that 50% of judicial representational costs be paid to the judiciary on a solicitor/client basis, subject to taxation in the Federal Court, and that until the *Judges Act* is amended accordingly, this formula would apply to the costs incurred before the Drouin Commission, as well as future commissions.

113. Little can usefully be added to the Drouin Commission's full consideration of the issue of the funding of judicial representational costs before Quadrennial Commissions. The judiciary remains firmly of the view that the Government, the representational costs of which are paid from public funds, should be responsible for not less than 80% of all reasonable representational

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42 *Drouin Report* (2000) at 103.

43 *Ibid.* at 104.

44 *Ibid.* at 105.

45 *Ibid.* at 111.

costs incurred by the Association in connection with its participation in the Quadrennial Commission process, a constitutionally mandated process provided for in the *Judges Act*.

114. The Association and Council urge the Commission to recommend:

That the Government pay 80% of the total representational costs of the Association incurred in connection with its participation in the process of this Commission's inquiry.

VI. SUMMARY OF RECOMMENDATIONS SOUGHT

115. The Association and Council urge the Commission to recommend:

1. That effective April 1, 2004, the salary of puisne judges be set at an amount equal to the midpoint of the current total remuneration (*i.e.* the midpoint of the base salary plus average at-risk award) of deputy ministers at the DM-3 level, inclusive of statutory indexing effective that date; and that said salary be increased, in addition to the statutory indexing, by annual increments as of April 1 of each of 2005, 2006 and 2007 in an amount to be fixed by the Commission.

2. That the salaries of the justices of the Supreme Court of Canada, and of the Chief Justices and Associate Chief Justices, be increased effective April 1 of each of 2004, 2005, 2006 and 2007 by the same percentage as the salary of puisne judges, maintaining the same salary differentials as currently exist between their salaries and the salary of superior court judges.

3. That the allowance for incidental expenditures provided in s. 27(1) of the *Judges Act* be increased by $1,000 effective April 1, 2004, and by a further amount of $1,000 effective April 1, 2006.

4. That subsections 3(2), 3.1(5) and 3.2(9) of the *Judges Act (Removal Allowance) Order* be amended by the addition of the words "or periods" after the word "period" in each of those subsections.

5. That the *Judges Act* be amended by the addition of subsection 40(1.3), in the following terms:

> Notwithstanding paragraphs 40(1)(c) and (e), claims under said paragraphs for expenses made in anticipation of a relocation but prior to retirement or resignation from office shall be reimbursable by a removal allowance within two years from the date of the judge's retirement or resignation from office.

6. That a relocation costs program be adopted for the partners of judges appointed to the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada, up to an accountable maximum of $5,000.

7. That the *Judges Act* be amended to provide for the payment of a yearly allowance to the resident Labrador judge in an amount of $12,000 per annum.

8. That regional senior judges in Ontario be added to the judges entitled to a representational allowance under subsection 27(6) of the *Judges Act*, and that this representational allowance be in the amount of $5,000 per annum.

9. That s. 42(1)(e) of the *Judges Act* be amended to permit a judge of the Supreme Court of Canada to retire after ten years of service on that Court.

10. That the Government pay 80% of the total representational costs of the Association incurred in connection with its participation in the process of this Commission's inquiry.

The whole respectfully submitted.

Montréal, December 15, 2003.

Ogilvy Renault

L. Yves Fortier, C.C., Q.C.
Pierre Bienvenu
Ogilvy Renault, S.E.N.C.
1981 McGill College Avenue
Suite 1100
Montréal, Quebec H3A 3C1