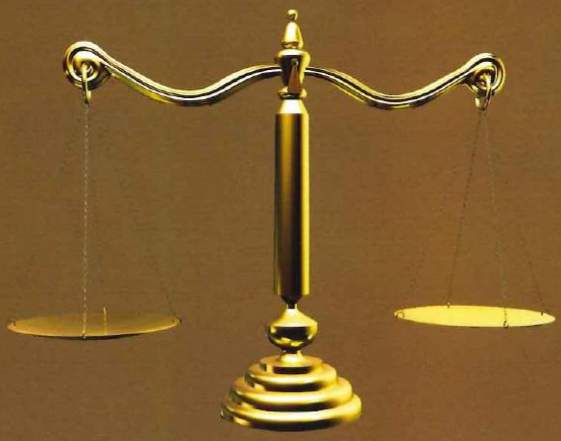
Judicial Compensation
and Benefits Commission

REPORT AND RECOMMENDATIONS

SUBMITTED TO
the Minister of Justice of Canada

May 15, 2012



Judicial Compensation and Benefits Commission

Commission d'examen de la rémunération des juges

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Brian M. Levitt

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May 15, 2012

The Honourable Robert Douglas Nicholson
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, Ontario
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Dear Minister:

Pursuant to Subsection 26(2) of the *Judges Act,* I am pleased to submit the report of the fourth Judicial Compensation and Benefits Commission.

Yours truly,

Brian M. Levitt
Chair

Encl.

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CHAPTER 1 - INTRODUCTION

1. The appointment of the fourth Quadrennial Judicial Compensation and Benefits Commission (the "Commission") was announced by the Honourable Rob Nicholson, P.C., Q.C., M.P. in December 2011.[1] The members are: Chair, Brian M. Levitt, and Commissioners Paul M. Tellier, P.C., C.C., Q.C., and Mark L. Siegel. The Commission is established under the *Judges Act*[2] to inquire into the adequacy of salaries and benefits payable to federally appointed judges. Its term spans a four-year period ending August 31, 2015 (the "Quadrennial Period").

2. The Commission is charged by the *Judges Act* to prepare a report for submission to the Minister of Justice within nine months from the commencement of its inquiry.[3] This is the Commission's report.

Background and Context

3. The *Constitution Act, 1867* provides the Parliament of Canada with the authority to set compensation for the judiciary. Section 100 states that:

> 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.[4]

Section 101 provides the Government with the authority to create the Supreme Court of Canada, Federal Court, and Tax Court of Canada, and to fix the remuneration of the judges of these courts.

4. Prior to the current Quadrennial Commission process, the *Judges Act* provided for the establishment of Triennial Commissions to make recommendations to Parliament regarding judicial compensation. Over time, the judiciary lost

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[1] A copy of the Department of Justice's News Release as well as the resumés of the Chair and Commissioners can be found at Appendix A.
[2] *Judges Act*, RSC, 1985 c J-1 ("*Judges Act*").
[3] *Ibid* at s 26(2).
[4] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 100, reprinted in RSC 1958, App II, No 5.

confidence in the Triennial Commission process due to the failure of successive governments to act on the recommendations of the Triennial Commissions. The report of the first Quadrennial Commission (the "Drouin Report") provides an overview of this history.[5]

5. In 1998 the *Judges Act* was amended[6] to establish the Quadrennial Judicial Compensation and Benefits Commission process following the Supreme Court of Canada's decision in *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island* ("PEI Reference Case").[7]

6. The constitutional guarantee of judicial independence is a cornerstone of the integrity of the Canadian judicial system. The three elements of judicial independence enunciated by the Supreme Court of Canada in the PEI Reference Case are security of tenure, administrative independence, and financial security.[8]

7. Chief Justice Lamer, speaking for the Court, held that in order to preserve judicial independence, an independent, effective and objective commission should be interposed

> between the judiciary and the other branches of government. The constitutional function of this body [would be] to depoliticize the process of determining changes or freezes to judicial remuneration.[9]

The Supreme Court of Canada went on to set forth the legal and constitutional requirements for a process to deal with the compensation of the judiciary without compromising its independence. This framework was summarized by the Drouin Commission as follows:

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[5] Report of the Judicial Compensation and Benefits Commission, submitted to the Minister of Justice of Canada, May 31, 2000 at 1 ("Drouin Report").
[6] Bill C-37, *An Act to Amend the Judges Act and Make Consequential Changes to Other Acts*, 1st Sess, 36th Parl, 1998 (assented to 18 November 1998).
[7] *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 *("PEI Reference Case*").
[8] *Ibid* at para 115.
[9] *Ibid* at para 166.

> 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 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.[10]

Mandate and Analytical Approach

8. The *Judges Act* establishes the Commission and mandates it to "inquire into the adequacy of the salaries and other amounts payable under [the] Act and into the adequacy of judges' benefits generally."[11]

9. In conducting its inquiry, the Commission must 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;

[10] Drouin Report, *supra* note 5 at 5.
[11] *Judges Act*, *supra* note 2 s 26(1).

> (*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.[12]

10. The Commission has carefully considered the evidence placed before it, and arrived at its recommendations by reference to the above-noted criteria.

11. The submissions of the parties are replete with calculations expressing results in precise terms. While the Commission does not quarrel with the mathematics, in the valuation of the judicial annuity and the analysis of comparative data on public and private sector compensation, the results of the analysis are extremely sensitive to the assumptions used. While these calculations aided the Commission in making its recommendations, the judgments underlying the recommendations were arrived at bearing this sensitivity in mind.

12. In arriving at its recommendations, the Commission built on the record of its predecessors as authorized so to do by the Supreme Court of Canada in *Bodner v Alberta* ("*Bodner*")[13]*.* The Commission will have more to say about process issues in Chapter 5. A chronology of Commission activities appears in Appendix B.

13. With the exception of Recommendation 1, this report, unlike the reports of previous Commissions, makes recommendations only where the Commission concluded that a change to the current judicial remuneration arrangements is necessary to maintain the adequacy of judicial compensation and benefits in terms of the applicable statutory criteria.

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[12] *Ibid* at s 26(1.1).

[13] *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 Quebec (Attorney General); Minc v Quebec (Attorney General),* 2005 SCC 44, [2005] 2 SCR *286* ("*Bodner*").

14. The Commission wishes to thank all those who made written and oral submissions. Their involvement in bringing important issues and viewpoints to the attention of the Commission aided its deliberations and reinforced the importance of this process. A list of those persons and groups who made submissions to the Commission is found at Appendix C. The Commission wishes to thank the Canadian Bar Association (the “CBA”) and the Barreau du Québec (the “Barreau”) for their thoughtful and informative submissions regarding procedural issues and the importance of the Commission process.

15. The Commission also wishes to thank those who so efficiently supported its work. Mme. Suzanne Labbé, our very able Executive Director, handled all administrative arrangements and provided valuable research and editorial input. Ms. Lacey Miller assisted with the writing and editing of this report. M. André Sauvé provided invaluable professional advice in relation to the Commission’s consideration of the judicial annuity and its public and private sector counterparts. Finally, the Commission had the good fortune to have the advice of Professor Martin Friedland with respect to judicial independence and the process issues discussed in Chapter 5.

CHAPTER 2 - JUDICIAL SALARIES

16. The remuneration of judges is set in a very particular context. Although their salaries are set by the federal Government, judges cannot negotiate their remuneration, and they are precluded from seeking alternative employment or business opportunities outside of their judicial duties.[14]

17. As the Drouin Report stated, bonuses or other forms of merit pay cannot be used as they are in other public service contexts when fashioning a compensation scheme for the judiciary. Moreover, the judicial annuity is a unique retirement scheme tailored to the judicial career path.[15]

Positions of the Government and Association and Council

18. As of April 1, 2011, judicial salaries were as follows:[16]

Supreme Court of Canada

Chief Justice	$361,300
Puisne Justices	$334,500

Federal, Tax, Appeal, Superior, Supreme and Queen's Bench Courts

Chief Justice or Senior Judge	$308,200
Puisne Judges	$281,100

Pursuant to s. 25(2) of the *Judges Act*, these salaries are adjusted upwards annually by either the percentage change in the industrial aggregate index ("IAI"), determined by Canada's Chief Actuary (the "IAI Adjustment")[17], or seven percent,

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[14] *Judges Act*, *supra* note 2 at s 55.
[15] Drouin Report, *supra* note 5 at 18.
[16] Office of the Commissioner for Federal Judicial Affairs, *Remuneration*, online: http://www.fja.gc.ca/appointments-nominations/considerations-eng.html#Remuneration.
[17] *Judges Act*, *supra* note 2 at s 25(2).

whichever is lower. In addition to this base salary, certain judges are entitled to receive allowances.

19. The Government proposed that judicial salaries be maintained at their current level. It also proposed that the IAI Adjustment be limited to an annual 1.5% increase for the Quadrennial Period.[18] Given that the 2012 IAI Adjustment was to take effect on April 1, 2012 and was estimated in the Government submission to exceed 1.5%, the Government in effect proposed that whatever that excess turned out to be should be clawed back over the balance of the Quadrennial Period, so as to limit the cumulative impact of the IAI Adjustment to a net increase of 6.1% over the Quadrennial Period.[19]

20. The Canadian Superior Courts Judges Association and the Canadian Judicial Council (the ”Association and Council”) proposed that this Commission endorse and adopt, prospectively commencing in the first year of the Quadrennial Period, all of the recommendations made by the Block Commission in its report (the “Block Report”).[20] With respect to salary, the Block Commission recommended that, in addition to statutory indexation increases, as of April 1, 2008, judicial salaries should be increased by 1.7%, and that for each of 2009, 2010 and 2011, a 2% increase should be implemented.[21] Translated into figures presently applicable, the Association and Council recommended an increase of 4.9% inclusive of statutory indexation as of April 1, 2012.[22]

21. Salary is one element of judicial compensation. The other major component is the judicial annuity. These two elements are common to all judges and constitute the bulk of total compensation for the judiciary. The Commission took the view that it is the total compensation of judges which is to be measured against the criteria set out in section 26(1.1) of the *Judges Act*. The Commission

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[18] Submission of the Government of Canada, December 23, 2011, at para 8 (“Government Submission**”)**.
[19] *Ibid* at footnote 10.
[20] Submission of the Association and Council, December 20, 2011, at para 3 (“A&C Submission”). See also Report of the Judicial Compensation and Benefits Commission, submitted to the Minister of Justice of Canada, May 30, 2008 (“Block Report”).
[21] Block Report, *ibid* at para 120. See also A&C Submission, *ibid* at para 83.
[22] A&C Submission, *supra* note 20 at para 169.

focussed first on these elements separately, and then on the aggregate, in arriving at its recommendations with respect to salary.

Comparators

22. Like all of its predecessors, the Commission selected appropriate public and private sector comparator groups as a basis for its analysis.

(a) Public Sector Comparator Group

23. In seeking out relevant comparators, the Commission took notice of the work of previous Commissions as well as the submissions of the Government and the Association and Council.

24. The Government submitted that, if the Commission felt the need to have a public sector comparator group, it should not be the highly-ranked deputy minister ("DM-3") group but rather all persons paid from the public purse or, if that submission was not accepted, all deputy ministers.[23]

25. The Government also took the position that, because variable compensation is not a tool which can be used in a judicial compensation scheme, when comparing the compensation of judges and public servants the Commission should ignore the variable portion of senior public service compensation.[24] In other words, the Government took the position that it would be appropriate to compare the salary of a judge with the salary of a deputy minister and yet ignore the substantial performance and merit pay opportunity afforded to deputy ministers as part of their total cash compensation. The Commission found this position to be inconsistent with the approach adopted by past Commissions, with customary compensation practice, and with common sense.

26. The Government also made submissions that focussed on job content – a form of task analysis. This type of analysis may be of some use in pay equity or other similar contexts but it was of no assistance to the Commission in arriving at a

[23] Government Submission, *supra* note 18 at paras 127, 110-121.
[24] *Ibid* at paras 122-129.

view as to "what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges"[25] -- words first penned by the Courtois Triennial Commission, which have been cited with approval by all preceding Quadrennial Commissions. The Commission took the view that the Government's analysis failed to give sufficient weight to the constitutional status and role of the judiciary and also the importance of its appearance and image to the effective performance of that role. The Commission found this submission to be a semantic exercise completely detached from workplace reality and, accordingly, of no relevance to the Commission's enquiry.

27. Like its predecessors, the Commission determined that the scope of the chosen public sector comparator group is a matter of judgment to be made by reference to the objective of the Commission's enquiry as first framed by the Courtois Commission. While the Commission recognizes that the choice of the DM-3 group may not be regarded as ideal due to its small sample size and other comparability issues such as tenure in position,[26] this Commission, like the Drouin and Block Commissions, focussed on the purpose of the analysis as articulated above and concluded that the seniority of the group and the functions its members discharge make it the best choice as a public sector comparator group for the judiciary. This choice has the additional advantage of eliminating outliers both above and below the DM-3 category.

28. Like the Block Commission, this Commission focussed its analysis on the midpoint of the DM-3 salary range, rather than the average. This choice provides a benchmark which provides comparability over time because the midpoint is:

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[25] Report and Recommendations of the 1989 Commission on Judges' Salaries and Benefits, chaired by E. Jacques Courtois, Q.C., March 5, 1990 at 10, cited with approval in the Block Report, *supra* note 20 at para 103.

[26] There are currently only 13 DM-3 positions. Regarding tenure of position, DM-3s hold office at the pleasure of the Governor-in-Council, whereas judges hold office on good behaviour. Often, the tenure of DM-3s is significantly shorter than that of judges. See Government Submission, *supra* note 18 at para 114.

> 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 high performers or low performers in a year could significantly affect the average performance pay.[27]

29. All previous Commissions have factored variable compensation into the public sector comparative analysis, notwithstanding substantially the same arguments as were made by the Government to this Commission on this point.[28] As noted above, the Commission has concluded that all compensation elements of comparator groups need to be considered. Accordingly, the quantum of bonus or other forms of variable pay must be factored into the analysis -- albeit by translating it into the judicial context through the use of judgment. This Commission has arrived at the same conclusion in this regard as did the Block Commission and for the same reasons. Accordingly, in its public sector comparative analysis, the Commission has determined that half of the performance pay opportunity is the appropriate inclusion for comparator purposes, because it is an objective reference point and reflects a static measure, remaining unvaried over time. Such a characterization could not be made if the Commission was to use the average performance pay of DM-3s in its comparison.[29]

30. The Government took exception to the Commission's position with respect to recommendation 14 of the Block Commission as applied to the selection of the public sector comparator group. Recommendation 14 stated that

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[27] Block Report, *supra* note 21 at para 106.
[28] See Drouin Report, *supra* note 5 at 26–27; Block Report, *supra* note 20 at para 108; Report of the second Quadrennial Commission, submitted to the Minister of Justice of Canada, May 21, 2004 ("McLennan Report") at 27.
[29] Block Report, *supra* note 20 at para 111.

> [w]here 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.[30]

While the Commission reached its conclusion based on its own work, it also concluded that the Government's position in this regard is counterproductive to the attainment of one of the objectives for judicial compensation mandated by the *Judges Act*, namely the attraction of outstanding candidates to the judiciary. The more certainty about the conditions of employment that can be provided to a candidate contemplating a mid-life career change to the judiciary, the lower will be the barriers to attracting the most successful candidates. By introducing an unnecessary degree of uncertainty about future remuneration, the Government's position that the comparator group is to be re-litigated anew every four years sacrifices efficacy on the altar of process.

31. It is the Commission's position that, while the appropriate public sector comparator group is a proper subject for submissions to a Quadrennial Commission, the onus of establishing the need for change lies with the party seeking it. The Commission believes that this approach strikes an appropriate balance between certainty, on the one hand, and flexibility to respond to changing circumstances, on the other. In this instance, the Government has failed to discharge that onus in regards to its argument that the DM-3 comparator be displaced by a broader comparator group, or no comparator at all.

32. Using the Commission's selected public sector comparator group, the Association and Council pointed out that there is currently a gap of $22,149, or 7.3%, between the salary of a *puisne* judge and the DM-3 comparator.[31] The information provided to the Commission by the Government did not allow for a similar comparison.

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[30] *Ibid* at para 201.
[31] See Table 3 in A&C Submission, *supra* note 20 at para 134.

33. The pension arrangements for deputy ministers are structured very differently from the judicial annuity. The evidence before the Commission established that the tenure and career path of deputy ministers and judges are quite different. The average age of judges upon appointment to the bench is 52 years, while the average age of deputy ministers generally is 53.9.[32] The median tenure of DM-3s and those ranked higher was 4.4 years, with the maximum tenure topping out at less than 12 years. In contrast, of the judges who retired between the years 2000 and 2011, the median tenure was 21.6 years, with a maximum of nearly 38 years.[33] In addition, under the public service pension arrangements, deputy ministers accrue credited service for years prior to their appointment to the comparator group and, in some cases, can accrue more than one year's credited service per year of employment.

34. The Commission's expert advised that the differences in tenure and career path between judges and deputy ministers make it difficult to undertake a comparative evaluation of their respective pension arrangements which would be useful to the Commission's deliberations. He also advised that the retirement benefits provided by their respective pension arrangements are likely to be substantial and adequate in their respective circumstances. Accordingly, in assessing total compensation for the purposes of comparison with the public sector comparator group, the Commission determined that the total cash compensation[34] should be considered an appropriate proxy for total compensation. As a result, the Commission's deliberations proceeded on the basis that the total compensation of a *puisne* judge is 7.3% below the total compensation of the selected public sector comparator.

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[32] Data provided by the Privy Council Office as of October 21, 2011, as cited in Government Submission, *supra* note 18 at para 111.
[33] Judicial Personnel System database of the Office of the Commissioner for Federal Judicial Affairs ("FJA") as of April 13, 2011, as cited in the Government Submission, *supra* note 18 at para 115.
[34] As mid-point salary plus one half of maximum performance pay.

(b) Private Practitioner Comparator

35. While the parties agreed that the remuneration of private sector lawyers is a relevant consideration for the Commission, they differed considerably as to the appropriate parameters for the analysis of the Canada Revenue Agency ("CRA") data available for private sector lawyers.

36. The Association and Council suggested that the appropriate parameters include: the 75th percentile income of self-employed lawyers aged 44 to 56, with an annual net professional income of at least $60,000.[35] Using these factors, the data yields, for 2010, an average income of $395,274 for private sector lawyers in Canada as a whole, and $468,261 if the analysis is confined to the top ten Canadian Metropolitan Areas ("CMA").[36]

37. Further, the Association and Council submitted that the growth rate of cash compensation for judges has in recent years lagged behind the rate at which incomes of private practitioners have grown.

38. The Government suggested that the appropriate CRA sample is that of the 65th percentile of all lawyers in Canada[37], although it presented data based on the 75th percentile. The Government's position was that the 65th percentile is the appropriate standard for "exceptional individuals" while the 75th percentile is the appropriate standard for "truly exceptional individuals".[38] No evidence was presented to the Commission indicating on what basis such a distinction might be made or that it is practical to do so.

39. The Government disputed the use of the $60,000 exclusion with respect to the CRA data. The parameters used by the Government in its analysis include the 75th percentile income of lawyers of all ages and all levels of income.[39] Based on these parameters, the data provided by the Government yields, for 2010, an

[35] A&C Submission, *supra* note 20 at para 150.
[36] See Table 4 in A&C Submission, *ibid* at para 152.
[37] Government Submission, *supra* note 18 at para 68.
[38] *Ibid* at para 66.
[39] They did not exclude those with incomes below $60,000 per annum from the data, as was done by the Association and Council.

average income of $278,526 for private sector lawyers. The Government did not provide information pertaining to the average income for private sector lawyers within the top ten CMAs.[40]

40. The Government presented evidence to the effect that, on average, the incomes of lawyers in private practice decline as they progress through their fifties.[41] The Government also noted that there is no evidence of difficulty in attracting qualified candidates from the private sector, given that

> [t]he percentage of judges appointed from the private sector in 2007-11 was 71%, which is consistent with past appointment data (73% from January 1, 1997 to March 21, 2007).[42]

In this regard, the Government took the position that a backlog of qualified candidates is evidence that its salary proposal meets the adequacy test to be applied by the Commission in relation to the attraction of candidates to the judiciary,[43] this being one of the four statutory criteria which the Commission is mandated to address.

41. The valuations of the judicial annuity, using accepted actuarial and accounting assumptions and methodology presented by the parties' experts, indicated values of 24%, by one reckoning, and 27%, by the other, of the judicial salary. The Commission's expert pointed out that these calculations are extremely sensitive to the interest-rate assumptions used and that, when a rate more reflective of current market expectations for interest rates is used, the same calculations would yield a percentage of the judicial salary which is substantially higher, well into the 40%-50% range. In the Commission's view, this is relevant to the impact of judicial compensation on the attraction of qualified candidates to the judiciary because efficacy in this regard is to be assessed by reference to

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[40] Government Submission, *supra* note 18 at paras 92, 97.
[41] *Ibid* at para 89.
[42] Data provided from the Commission for Federal Judicial Affairs, as cited in the Government Submission, *supra* note 18 at para 94.
[43] *Ibid* at paras 97, 100.

the perception of the typical candidate, not that of an actuary or accountant.[44] Moreover, the fact that the judicial annuity is a federal government obligation fully protected from inflation and based on a final earnings calculation makes it qualitatively more attractive to a private sector lawyer (particularly one who is self-employed) than the actuarially estimated value suggests.

42. In addition to the qualitative attractions of the bench -- namely, public service, freedom from the necessity to generate business, security of tenure, interesting work, and collegial colleagues -- the superiority of the judicial annuity to the capital accumulation alternatives available to private sector lawyers to provide retirement income must be taken into consideration in order to arrive at a comparison of judicial and private sector lawyer total compensation which is useful to the Commission's deliberations.

43. When the salary of a *puisne* judge is added to the amount that the Commission's expert determined a private practitioner would have to save annually in order to accumulate a sum sufficient to match the judicial annuity,[45] the total is in the same range as the income of a 52-year-old private practitioner, determined on the basis of the Association and Council's suggested approach to the CRA data for the ten largest CMAs. Obviously, if the same calculation is performed on the basis of the Government's approach to the CRA data, the sum would exceed the private practitioner's income benchmark. The age of 52 was selected by the Commission as the basis for this comparison because 52 is the average age at which judges were appointed between 1997 and 2011. While the comparison would be more favourable for older appointees, and less favourable for younger appointees, these variations do not affect the Commission's conclusions when the qualitative differences between the judicial annuity and the private savings alternative are taken into account.

[44] Information based upon research contained in letter from the Commission's expert, André Sauvé, dated February 14, 2012.
[45] Information based on research contained in letter from André Sauvé dated February 23,2012.

Purpose of the IAI Adjustment

44. The IAI Adjustment scheme was first added to the *Judges Act* in 1981. The debates that took place in both the House of Commons and Senate indicated that the IAI Adjustment was intended to deal with the constant salary confrontation between the judiciary and the government.[46] The Drouin Commission characterised the legislative purpose as being "...[i]n part to offset the prohibition on negotiation, and the politicization that would otherwise result with respect to judicial compensation."[47]

45. On its second reading in the House of Commons, The Right Honourable Jean Chrétien, then the Minister of Justice, stated that the measures in the *Judges Act* regarding the IAI Adjustment make "provision for future remuneration which should avoid further difficulties flowing from the dependence of judges on salary adjustments by statute."[48] Once the Bill reached the Senate, the Hon. Royce Frith stated that the adjustment mechanism was a very important element in the administration of judicial affairs, "the concept of which is intended to enhance the independence of the judiciary by removing judicial compensation from the give-and-take of the political process."[49]

46. The Government submissions characterized the IAI Adjustment as inflation protection without making any mention of its legislative history. In light of this history, the Drouin Commission made it clear that the IAI "is intended to, and in many years does, encompass more than changes in the cost of living as reflected in the consumer price index".[50] In the Commission's view the legislative history indicates that the IAI Adjustment was intended to be a key element in the architecture of the legislative scheme for fixing judicial remuneration without compromising the independence of the judiciary and, as such, should not lightly be tampered with.

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[46] Friedland, Martin. *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995) at 57 ("Friedland").
[47] Drouin Report, *supra* note 5 at 16.
[48] House of Commons Debates (December 1, 1980) at 5206 as cited in Friedland, *supra* note 46 at 58.
[49] Senate Debates (March 11, 1981) at 1993 as cited in Friedland, *ibid* at 58.
[50] Drouin Report, *supra* note 5 at footnote 7.

Review Concerning Salary for *Puisne* Judges

47. The foregoing analysis of the principal elements of judicial compensation and benefits and those of appropriate public and private sector comparators leads the Commission to the conclusion that the *puisne* judge's salary and benefits place his or her total compensation

    a) at least on a par with the total compensation of the private sector comparator group advocated for by the Association and Council, and well above the total compensation of the private sector comparator group advocated for by the Government; and

    b) somewhat behind the total compensation of the appropriate public sector comparator group.

48. In arriving at its judgment about the weight to be accorded to a discrepancy between judges` salaries and the total cash compensation of the public sector comparator group when formulating its recommendation as to *puisne* judges` salaries, the Drouin Commission cited with approval a submission made by the Government to the 1993 Triennial Commission to the effect that judicial salaries should be dealt with on the basis "that there should be a rough equivalence to the DM-3 midpoint".[51] The Drouin Commission also observed that the salaries of judges "should not be permitted to lag materially behind the remuneration available to senior individuals within the Government"[52], and that "[t]his concept of rough equivalence expressly recognizes that while the DM-3s and judges do not perform the same work, there is a basis for approximate remuneration parity"[53] The McLennan Commission found no basis in the *Judges Act* for employing the concept of rough equivalence with a comparator group.[54] The Block Commission framed its recommendation as to salary in terms of a "rough

[51] Drouin Report, *supra* note 5 at 28 and footnote 22.
[52] *Ibid* at 32.
[53] *Ibid* at 29
[54] McLennan Report, *supra* note 28 at 49

equivalent".[55] After considering the evidence in light of its mandate, the Commission agrees with the conclusion of the Drouin and Block Commissions that the "rough equivalence" standard is a useful tool in arriving at a judgment as to the adequacy of judicial remuneration, because this concept reflects the judgmental (rather than mathematical) and multi-faceted nature of the enquiry.

49. The Commission considered whether the 7.3% gap between the selected public sector comparator group's total compensation and that of the judges identified in the evidence is sufficiently large that the two cannot be regarded as "roughly equivalent", and results in the judges' total compensation "lagging materially behind" that of the selected public sector comparator group. In this connection, the Commission also considered the Government's position that the IAI Adjustment should be capped for the Quadrennial Period.

50. The Commission noted that the evidence before the Drouin and Block Commissions established gaps of respectively 4.8%[56] and 8.9%,[57] while the McLennan Commission did not articulate a corresponding figure. The Commission also noted that the Block Commission recommendations would have reduced the gap to 4.5% and also that the effect of the IAI Adjustment alone over the last Quadrennial Period has been to narrow the gap to 7.3%.

51. The Commission did not accept the Government's submission that the IAI Adjustment should be altered for the Quadrennial Period in light of:

    a) the legislative history of the IAI Adjustment, which clearly indicates that it was intended to be a key element of the architecture of the process for determining judicial remuneration without affecting judicial independence and, as such, not to be lightly tampered with; and

[55] Block Report, *supra* note 20 at para 118.
[56] Drouin Report, *supra* note 5 at 29-30.
[57] Block Report, *supra* note 20 at para 119.

b) the marginal incremental cost to the public purse of maintaining the IAI Adjustment as opposed to capping it at 1.5%, based on figures supplied by the Government.

52. While in the Commission's view the 7.3% gap tests the limits of rough equivalence, the Commission concluded that, provided that the IAI adjustment is maintained in its current form for the Quadrennial Period, the salary of *puisne* trial court judges does not require adjustment in order to maintain the adequacy of judicial compensation and benefits in light of the statutory criteria, for the reasons set out below.

Section 26(1.1) Analysis

53. The following represents the Commission's consideration of the s. 26(1.1) criteria viewed in light of the evidence before it.

(a) Prevailing economic conditions; cost of living; overall financial position of the federal government

54. The evidence before the Commission established that there is currently economic uncertainty both within Canada and worldwide, and that the Government is facing spending constraints as it unwinds the fiscal stimulus measures taken during the recession.[58] Data provided by the Government indicated that, following the release of the Block Report, both Canadian and world economies deteriorated rapidly.[59] It further indicated that, although the Canadian economy has since rebounded, progress has been slow. Specifically, it noted that Canada's gross domestic product is projected to grow only very modestly over the next year. Additionally, the Government has frozen the operating budgets of departments at their 2010-2011 levels for an additional two years.[60]

[58] Government Submission, *supra* note 18 at paras 41-44. See also A&C Submission, *supra* note 20 at para 90.
[59] Government Submission, *supra* note 18 at paras 30, 39.
[60] *Ibid* at paras 43-44.

55. In its submissions, the Association and Council acknowledged the post-Block Report global economic downturn.[61] Further, it admitted that in 2011 the global economy once again slowed, financial market volatility was on the rise and the Bank of Canada reduced its short-term growth outlook for Canada.[62] The Association and Council noted, however, that Canada has a strong fiscal position, both in its maintenance of low debt levels and in its projection of a balanced budget by 2016.[63] Further, Canada's longer-term economic outlook paints a more positive picture.[64]

56. The Commission understands the importance of being fiscally responsible, especially in these times of economic restraint. The Commission's analysis has been guided by the above information, as well as the words of the Supreme Court of Canada:

> [n]othing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times.[65]

57. The Commission took note of the uncertain economic outlook and the Government's budgetary constraints. The Commission also noted that judicial compensation and benefits constitute a relatively small outlay in the context of total federal government expenditures, being less than $452 million in the 2010-2011 fiscal year, constituting less than 0.17% of federal expenditures or 1.4% of the federal deficit for that year, and that the IAI Adjustment is but a tiny fraction of even that relatively small sum. The Commission further noted the importance of the constitutional role of the judiciary, of public perception of its quality and independence, and of the legislative history of the IAI Adjustment. Bearing in mind all of the foregoing, the Commission concluded that the Government had not made out the case for modification of the IAI Adjustment for the Quadrennial

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[61] A&C Submission, *supra* note 20 at para 86.
[62] *Ibid* at para 90.
[63] *Ibid* at para 96.
[64] Reply Submission of the Association and Council, January 30, 2012 at para 4 ("A&C Reply Submission").
[65] *PEI Reference Case*, *supra* note 7 at para 196.

Period based on the evidence presented with respect to the prevailing economic conditions and the overall financial position of the federal government.[66]

(b) The role of financial security in maintaining judicial independence

58. Both parties noted the important correlation between financial security and judicial independence; however, neither submitted that the current level of compensation puts the objective of judicial independence in jeopardy.[67] Given that the Commission is recommending the maintenance of the current judicial salary and of the IAI Adjustment, the Commission believes that its recommendation meets this objective.

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

59. Canada has an outstanding judiciary. The Government's submissions, the evidence of the Commission's expert with respect to the value of the judicial annuity, and the non-monetary distinctions between the judiciary and private practice all led the Commission to conclude that its recommendations will not result in a level of judicial compensation which deters outstanding candidates from seeking judicial appointment.

(d) Other Objective Criteria

60. The Commission has declined to accept the Government's submission that respect for the judiciary and belief in its independence will be undermined if, as the Government submits, over the Quadrennial Period the IAI Adjustment marginally exceeds increases in the salary package afforded to the appropriate comparator group of persons paid from the public purse (which increases are not now known or knowable).[68] Even accepting at face value the Government's forecast of future IAI Adjustments and public service salary-scale progression, the narrowing of the gap between the *puisne* judge's total compensation and

[66] Figures provided by the Government at the Commission's request by letter from its counsel dated March 27, 2012.
[67] Government Submission, *supra* note 18 at paras 49-53. See also A&C Submission, *supra* note 20 at paras 98-102.
[68] Transcript, Vol 1 at 121-122. Also at Government Submission, *supra* note 18 at paras 46-47.

that of the selected public sector comparator group over the Quadrennial Period would be modest.

61. More importantly, the Government's proposal, by its own admission, was expected to result in a reduction in individual judicial salaries in real terms.[69] The Commission believes that the prevailing economic conditions in Canada and the current financial position of the Government are not such as to justify amendment of the *Judges Act* to save a relatively inconsequential amount of public funds. The Commission believes that if the Government were to take this step in the current circumstances, there is a real risk that it would be perceived as a negative statement by the Government on the performance or value of the judiciary. This could have long-lasting detrimental effects not only on the attraction of the best candidates but also on the morale of the current judiciary, and its performance could suffer as a result. The Commission is not saying that the case for a reduction of judicial compensation in real terms can never be made out, but rather that the Government has not done so in the course of this process.

Recommendation 1

The Commission recommends that:

Effective April 1, 2012, the salary of federally appointed *puisne* judges sitting in all Canadian trial courts should be set, inclusive of statutory indexation, at $288,100.[70]

The statutory indexation pursuant to s. 25 of the *Judges Act* should be applied to the judicial salaries for each subsequent year of the Quadrennial Period.

[69] Government Submission, *supra* note 18 at footnote 10.
[70] As confirmed by the Office of the Commissioner for Federal Judicial Affairs, based on the IAI Adjustment of 2.5%.

Salary Differentials between Trial and Appellate Judges

62. Submissions have been made to all Quadrennial Commissions regarding the institution of a salary differential between the *puisne* judges of the trial and appellate courts.

63. Both the Drouin and McLennan Commissions commented favourably on submissions in favour of such a salary differential. The Drouin Commission declined to act on the basis that the matter required further review and evaluation, which it offered to undertake.[71] While the McLennan Commission declined to act on the submissions because it considered that such a recommendation was beyond its jurisdiction, it went on to state that, if the Commission had determined that it was empowered to do so, it would be "entirely probable" that it would favour such a differential.[72] The Block Commission recommended that such a differential be instituted based on a detailed history of the evolution of the court system in Canada which focussed on the evolution of the appellate courts and their distinct function.[73]

64. Appellate judges must not only state the law, they must also correct legal errors made in courts of first instance. Moreover, appellate decisions have a greater sense of finality than those of trial decisions. These decisions can be overturned only by the Supreme Court of Canada, a court which in recent years has heard fewer than 100 cases annually.[74] Furthermore, appellate court decisions are consistently applied by lower courts and are considered to be more persuasive jurisprudence than trial court judgments.

65. The Commission has concluded that the time has come to deal with the question of salary differentials for appellate court judges. Accordingly, the Commission determined to recommend a 3% salary differential for *puisne*

[71] Drouin Report, *supra* note 5 at 52.
[72] McLennan Report, *supra* note 28 at 55.
[73] Block Report, *supra* note 20 at paras 138-145.
[74] Supreme Court of Canada, summary of statistics 2001 to 2011, Online: http:scc-csc.gc.ca/stat/pdf/doc-eng.pdf. It should be noted that for that period, an average of 15 of the cases the Supreme Court of Canada heard were "as of right", meaning that the total number of cases the Court chooses to hear is, effectively, even smaller than indicated.

judges of the appellate courts (and the maintenance of the differential between those judges and the Chief and Associate Chief Justices of those courts) in light of:[75]

a) the fact that no recommendation is being made for a salary increase for the judiciary as a whole notwithstanding the fact that, while roughly equivalent, the total compensation of *puisne* judges is below that of the selected public sector comparator group;

b) the importance which a majority of Provincial appellate court judges have attached to this issue and the consistent, neutral position of the Association and Council in this regard throughout the Quadrennial processes;

c) the relatively small amount of money involved, based on figures supplied by the Government;[76] and

d) the Government's admission that, while economic uncertainty remains, the outlook has improved significantly from the situation which the Government faced at the time of its response to the Block Report.[77]

66. The Block Commission recommended that the salary differential between the judges of the Supreme Court of Canada and the balance of the federal judiciary be preserved by maintaining the differential then in place and fixing the salaries of the Supreme Court of Canada judges by reference to the newly increased salaries of the *puisne* judges of the other appellate courts. The Commission has not made such a recommendation because it could not see in the proceedings of the Block Commission or the submissions made to this Commission a record on the basis of which it could do so. The Commission would be pleased to

[75] Block Report, *supra* note 20 at paras 146–171.
[76] A salary differential of 3% for the current number of appellate judges as applied to the 2010-2011 salaries of trial court judges would have an aggregate cost of $1.2 million as compared to a total cost of judicial compensation and benefits for the same period of $452 million.
[77] Reply of the Government of Canada, January 30, 2012 at para 16 ("Government Reply").

further consider this matter if a reference is made by the Government pursuant to the *Judges Act* during our mandate.

67. The Commission considered, but did not agree with, the reservations as to jurisdiction which troubled the McLennan Commission. In the Commission's view, the differential recommended goes to the question of the adequacy of judicial remuneration because the recommended differential reflects a judgement made by the Commission as to a difference in the impact on the administration of justice of the work of the appellate court judges as compared to that of the work of judges of the trial courts. The Commission noted that neither the Drouin nor the Block Commissions were concerned about jurisdiction in regard to this issue.

68. Concerning the Commission's use of the Block Report with respect to salary differentials, the Government stated that "[t]his Commission must make its recommendations on an objective basis. The mere fact that a prior commission recommended a salary differential is insufficient."[78] The Commission has carefully considered all submissions made before it and reviewed a summary of the Block Commission transcript. In oral argument, counsel for the Government agreed that such a review would satisfy the Government's procedural concern.

Recommendation 2

The Commission recommends that:

> ***Puisne* judges sitting on provincial and federal appellate courts should be given a salary differential of 3% above *puisne* judges sitting on provincial and federal trial courts.**
>
> **Effective April 1, 2012, their salaries should be set, inclusive of statutory indexation, at $296,700.**

[78] *Ibid* at para 48.

Recommendation 3

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 and the chief justices and associate chief justices of the trial and appellate courts;

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 appellate courts should be established in relation to the salary of the *puisne* judges appointed to the appellate courts;

The salary differentials 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 trial courts; and

Effective April 1, 2012, the salaries should be set, inclusive of statutory indexation, at the following levels:

<u>Supreme Court of Canada</u>

Chief Justice of Canada $370,300
Justices $342,800

<u>Federal Court of Appeal and Provincial Courts of Appeal</u>

Chief Justices $325,300
Associate Chief Justices $325,300

<u>Federal Court, Tax Court and Trial Courts</u>

Chief Justices $315,900
Associate Chief Justices $315,900

CHAPTER 3 – JUDICIAL ANNUITY

Annuity for Senior Judges of the Territorial Courts

69. The Block Commission recommended that the *Judges Act* be amended in order for senior judges of the territorial courts to receive the same treatment with respect to their retirement annuities as chief justices of trial and appellate courts.[79]

70. In the past, territorial legislation failed to provide for supernumerary status; however, this status has now been recognized by applicable legislation and, as such, there are no bars to amending sections 43(1) and 43(2) of the *Judges Act* in order to confer the benefits currently provided only to chief justices and associate chief justices upon senior judges of the territorial courts.

71. Additionally, the *Judges Act* should be amended so that the retirement annuity of a former senior judge, who elected to continue serving as a *puisne* judge, is calculated based on the salary he or she received as a senior judge.

72. Like the Block Commission, the Commission believes that the adequacy of judicial remuneration requires similar treatment for similarly placed judges on the various courts. The only possible objection to making changes to give effect to this principle with respect to the territorial court judges would be based on the Government`s financial position. In view of the *de minimus* sums involved, the Commission concluded that the equitable considerations outweigh that objection. The Commission therefore makes the following recommendations relating to judicial annuities.

Recommendation 4

The Commission recommends that:

> **The *Judges Act* should 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 chief justices of both trial and appellate courts who elect supernumerary status.**

[79] Block Report, *supra* note 20 at para 180.

Recommendation 5

The Commission recommends that:

> **The *Judges Act* should be amended so that the retirement annuity of a senior judge of a territorial court who ceases to perform the duties of a senior judge and performs only the duties of a *puisne* judge, receiving the salary of a *puisne* judge, be granted a retiremen annuity based on the salary of a senior judge.**

Annuity for Trial Judges Who Previously Served on Courts of Appeal

73. The *Judges Act* provides that chief justices who elect to resume the duties of a *puisne* judge are subject to the removal of the salary differential afforded to chief justices and associate chief justices, but that their annuities continue to be calculated based on their salary as a chief justice or associate chief justice.[80]

74. The institution of a salary differential for appellate court judges in accordance with Recommendation 2 would mean that the same issue with respect to the basis for the judicial annuity would arise if an appellate court *puisne* judge accepted appointment to a trial court, thereby foregoing the appellate court salary differential. To support flexibility in the management of judicial resources in the courts and for the same reasons cited in support of Recommendations 4 and 5, the Commission has concluded that the *Judges Act* should be amended to provide that, in these circumstances, the judicial annuity should be based on the appellate court salary.

Recommendation 6

The Commission recommends that:

> **The *Judges Act* should be amended so that a *puisne* judge of an appellate court who accepts an appointment to a trial court, receiving the salary of a trial court judge, be granted a retirement annuity based on the salary of his or her former position as an appellate court judge.**

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[80] *Judges Act*, *supra* note 2 at s 43(2).

Submission of the Hon. Roger G. Conant, Q.C.

75. The Honourable Roger G. Conant, Q.C., filed a written submission dated January 16, 2012 and appeared before the Commission accompanied by able counsel at the public hearing in Montréal on February 27, 2012. Justice Conant requested that the Commission make a recommendation to the Government to repeal section 44(4) of the *Judges Act*, which provides that:

> [n]o annuity shall be granted under this section to the survivor of a judge if the survivor became the spouse or began to cohabit with the judge in a conjugal relationship after the judge ceased to hold office.[81]

76. Justice Conant`s position was that section 44(4) contravenes his rights under the *Canadian Charter of Rights and Freedoms* in that, after his death, there would be no survivor annuity paid to his spouse, with whom he began a relationship after his retirement from the judiciary. He argued that his contributions, totalling 6% of his salary during 19 years, were made with the anticipation that his spouse would receive a survivor annuity and that such contributions would be lost to him if no survivor annuity is paid.[82]

77. Justice Conant submitted that it would be unfair for him to be required to elect to receive a reduced annuity in exchange for a survivor annuity in these circumstances, as contemplated by the *Judges Act*. His position was that he had already contributed to the judicial annuity plan and his contributions should be returned to him if they are not used to provide his spouse with a survivor annuity.[83]

78. There is no basis for Justice Conant's argument that his annuity contributions created an expectation that a survivor annuity will be paid in circumstances other than those contemplated by the *Judges Act*. There are a variety of possible outcomes. Some judges will not be survived by an eligible survivor either because their spouse predeceased them or because they never had a

[81] *Ibid* at s 44(4).
[82] Submissions of Roger G. Conant, Q.C., January 16, 2012, at 3 ("Conant Submission").
[83] *Ibid* at 3.

spouse. In these cases, section 51(3) of the *Judges Act* provides for payment of a death benefit equal to the amount by which his or her contributions, together with interest thereon, exceed annuity payments made to or in respect of the judge. This section also provides judges with the assurance that they will always receive benefits at least equal to the value of their contributions, together with interest thereon. Accordingly, a judge cannot lose any of his or her contributions even if no survivor annuity is paid.

79. Subject to the regulations, section 44.2 of the *Judges Act* provides retired judges with spouses who do not qualify as eligible survivors with the option to obtain a survivor annuity for their spouse in exchange for a reduction in their judicial annuity on an actuarially equivalent basis. In theory, this means that the survivor pension is entirely paid for by the retired judge, at no cost to the Government. In practice, however, the Commission's expert advised that the value of the survivor pension to the judge's survivor is probably underestimated by actuarial calculations as it amounts to life insurance coverage granted to an older individual with no proof of insurability. The only safeguard is that the election of a survivor annuity under section 44.2 is not effective if the retired judge should die less than one year after making the election.

80. In coming to its decision, the Commission noted that a restriction similar to section 44(4) of the *Judges Act* applies to public sector employees under the *Public Service Superannuation Act*.[84] Also, the Commission understands that few, if any, private sector pension plans provide a survivor pension if the survivor became the spouse of the plan member after his or her retirement.

81. Finally, in terms of the statutory criteria which guide the Commission`s enquiry, the Commission concluded that it could not recommend the repeal of section 44(4) because to do so could have a significant impact on Government costs, for example should a retired judge marry a much younger spouse**.**

[84] *Public Service Superannuation Act*, RSC, 1985, c P-36 at s 26.

CHAPTER 4 – ALLOWANCES

Representational Allowances

82. Although the Block Report recommended that the representational allowances given to judges be increased,[85] this subject received only passing mention in the written and oral submissions of the parties.

83. The Commission decided not to recommend any change in these allowances. The Commission concluded in light of the evidence with regard to prevailing economic conditions in Canada and the tenor of the Government`s approach to deficit reduction that an increase in these allowances at this time was not essential to maintain the adequacy of judicial compensation and benefits in terms of the applicable statutory criteria.

84. The weighing of equity and cost which led the Commission to make Recommendations 4 and 5 also led the Commission to conclude that the adequacy of judicial remuneration requires that the senior family law judge in Ontario be paid the same representational allowance as other regional senior judges in the province.

Recommendation 7

The Commission recommends that:

> **All regional senior judges in Ontario, including the senior family law judge, should be paid the same representational allowance.**

[85] See Recommendation 9 in Block Report, *supra* note 20 at para 190.

CHAPTER 5 - PROCESS ISSUES

85. Aside from judicial remuneration, the proceedings of the Commission touched on matters of principle relating to the governance of the Commission process. The Commission believes that these procedural issues go to the very heart of the effectiveness of the mechanisms contemplated by the Supreme Court of Canada in its judgments relating to the establishment of judicial compensation and the maintenance of judicial independence. In order for the Quadrennial Commission process to achieve its stated objective, the process must not only be independent, objective and effective, but it must also be seen as such by the stakeholders, which in this case include the judiciary, the Government and the general public.

86. All processes must evolve in order to develop, improve and continue to meet their objectives in a changing environment. The Quadrennial Commission process is no different. The governance mechanism for such evolution is not specified in legislation. The question is: how should the process evolve?

87. At the public hearings, the Government spoke to the question of the Commission's jurisdiction to address procedural issues. The Government took the position, in effect, that the Commission's mandate is limited to a black-letter reading of section 26 of the *Judges Act* and, accordingly, that any matter falling outside such a reading should be regarded as being beyond the jurisdiction of the Commission.[86]

88. This position is at variance with the conclusion of all prior Commissions and with the view of this Commission.[87] Each Quadrennial Commission has an important role to play in overseeing the evolution of the Quadrennial Commission process and, in so doing, actively safeguarding the constitutional requirements. This imperative was aptly explained in the Block Report as follows:

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[86] Transcript, Vol 1 at 108 - 110.

[87] See Drouin Report, *supra* note 5 at 115-116. See also McLennan Report, *supra* note 28 at 89-93. See also Block Report, *supra* note 20 at paras 32-34.

> The parties [to the Commission process] 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 a guardian of the Quadrennial Commission process and actively safeguard these Constitutional requirements.[88]

89. While the Government stated in its submission that it agreed with the Association and Council on the undesirability of litigation relating to Commission reports and Government responses thereto,[89] the Government limited its submissions on process governance only to what the Commission could not do, rather than making detailed and constructive suggestions as to what it could do.[90]

90. In contrast to the Government's position, the Association and Council stated that it was of utmost importance that the Commission address process issues.[91]

91. The importance of the Commission, as well as its process, was eloquently stated by the Barreau as follows:

> [T]he Judicial Compensation and Benefits Commission is not a mere advisory committee, but rather a constitutional body. Its recommendations are of public importance and therefore cannot be set aside by the government without compelling reasons.[92] [Translation]

92. It was evident to the Commission, both from the submissions of the Association and Council and from the reaction of the judges across Canada who attended the public hearings, that there is a growing concern that the Commission process is losing credibility with a key stakeholder group, namely the judiciary, and, accordingly, that the Quadrennial process is in grave danger of ending up where

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[88] Block Report, *supra* note 20 at para 37.
[89] Post-Hearing Submission of the Government, March 5, 2012 at 3 ("Government Post-Hearing Submission").
[90] *Ibid*.
[91] A&C Submission, *supra* note 20 at para 79.
[92] Transcript, Vol 2 at 237.

the Triennial process did. The Association and Council asked that the Commission:

> [a]ccept the judiciary's urging to issue a recommendation reiterating the importance of strict adherence by all parties to the Commission process in order to preserve confidence and maintain the effectiveness of this constitutional process.[93]

93. This Commission agrees that all parties should adhere to the Commission process "in order to preserve confidence and maintain the effectiveness of the constitutional process."[94]

94. Section 26(7) of the *Judges Act* clearly states that a government response to the Commission's report is required within six months after receiving the report.[95] The Government took the position that "the timing and substance of the Government's 2009 response is not a subject of this inquiry…[the Commission's] mandate is prospective."[96]

95. The Association and Council, however, invited the Commission to comment on the fact that the Government did not respond within the required time to the reports of the last two Quadrennial Commissions.[97]

96. The Commission has decided not to do so because, in this case, it felt it would be more constructive to focus on the future than the past. In doing so, the Commission does not accede to the Government's position that the Commission would have exceeded its mandate if it had chosen to look at past conduct. The Commission should add, however, that it felt that the Association and Council's position on the timing of the response was more extreme than warranted. But the Commission, rather than discounting their position for this reason, interpreted its intensity as a proxy for the judiciary's general and growing dissatisfaction with the Quadrennial Commission process.

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[93] A&C Reply Submission, *supra* note 64 at para 91.
[94] *Ibid*.
[95] *Judges Act*, *supra* note 2 at s 26(7).
[96] Letter of the Government of Canada, December 13, 2011 at 2.
[97] A&C Reply Submission, *supra* note 64 at para 88.

Adequacy of the Government's Response

97. Satisfaction has two components – expectations and performance. In the course of its process, the Commission came to believe that better definition of the performance required from the Government in response to a Commission report would contribute to more focussed expectations on the part of the judiciary as to the basis on which they should evaluate the success of the process. The Commission was so concerned with this issue that it sought the views of the parties through a request for supplemental submissions in this regard. Specifically, the Commission requested that the parties describe what "success" of the Commission process would look like to them.[98]

98. The Government's submission defined success only by reference to "the perspective of a reasonable, informed member of the public",[99] a test used by the courts to determine whether a judge is biased, and adopted by the Supreme Court of Canada in the *PEI Reference Case* to determine whether a court has judicial independence within the meaning of section 11(d) of the *Canadian Charter of Rights and Freedoms*. While valid for the cited purpose, the test as so narrowly formulated is in the Commission's view of correspondingly limited use in assessing the constitutional adequacy of a Government response -- and, accordingly, the success of this process -- because it ignores the perspective of a key stakeholder, namely a reasonable, informed member of the judiciary.

99. The Commission does not believe that the constitutional objectives of this process can be met if the Government does not feel a need to be concerned that a reasonable, informed judge be satisfied that throughout the process the Government participated in good faith and in a respectful and non-adversarial manner that reflects the public interest nature of the proceedings. The judiciary constitutes a stakeholder in this process with a weighty interest. This process can be successful only if both the Government and the judiciary, acting reasonably, believe it is effective. Additionally, in omitting any focus on the judiciary, the

[98] Transcript, Vol 1 at 45-46. Transcript, Vol 2, at 242, 244.
[99] Government Post-Hearing Submission, *supra* note 89 at 2.

Government's submission betrays what the Commission believes is at the root of the judiciary's growing dissatisfaction with the process.

Recommendation 8

The Commission recommends that:

In formulating its response to this Report, the Government give weight to the importance of the perspective of reasonable, informed members of both the public and the judiciary.

Bodner: Effectiveness of the Commission Process

100. To highlight how a Government should constitutionally respond to a Commission report, the Commission sets out here some quotes from *Bodner*, the most recent Supreme Court of Canada decision on point. The Court's unanimous 2005 decision provides guidance to the Government on how it should approach its task. The Supreme Court's 1997 *PEI Reference* Case was meant to depoliticize the process. It did not do so. Provincial court judges in a number of provinces challenged the provincial governments' responses to provincial commission reports. Instead of reducing the friction present between judges and governments, the Court in *Bodner* stated that:

> the result has been to exacerbate it. Direct negotiations no longer take place but have been replaced by litigation...[T]he principles of the compensation commission process elaborated in the [PEI] *Reference* must be clarified.[100]

101. The Court in *Bodner* further noted that "the commission's work must have a 'meaningful effect' on the process of determining judicial remuneration."

> "Meaningful effect" does not mean binding effect. A commission's report is consultative...[T]he government retains the power to depart from the commission's recommendations as long as it justifies its decision with rational reason. These rational reasons

[100] *Bodner*, *supra* note 13 at para 12.

> must be included in the government's response to the commission's recommendations.[101]

102. The *PEI Reference Case* set forth a two-stage process for determining the rationality of a government's response: "(1) Has the government articulated a legitimate reason for departing from the commission's recommendations?" and "(2) Do the government's reasons rely upon a reasonable factual foundation?"[102] The *Bodner* court added a third stage:

> Viewed globally, has the commission process been respected and have the purposes of the commission – preserving judicial independence and depoliticizing the setting of judicial remuneration – been achieved?[103]

103. The Government cannot simply dismiss the Commission's recommendations. The Court in *Bodner* mandated that the Commission's recommendations be given weight, specifically stating that the Commission's recommendations must

> be considered by the judiciary and the government. The government's response must be complete, must respond to the recommendations themselves and must not simply reiterate earlier submissions that were made to and substantively addressed by the commission. The emphasis at this stage is on what the commission has recommended.[104]

104. The Court went on to state that the Government must deal with the issues before it in good faith. It must provide a legitimate response tailored to the Commission's recommendations, which is what the law, fair dealing and respect for the process require.

105. The Government, if it chooses to depart from the recommendations, must give legitimate reasons for departing therefrom. The Court noted:

> Bald expressions of rejection or disapproval are inadequate. Instead, the reasons must show that the commission's recommendations have been taken into account and must be based on facts and sound reasoning. They must state in what respect and to what extent they depart from the recommendations, articulating the grounds for rejection or variation. *The*

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[101] *Ibid* at paras 20-21.
[102] *PEI Reference Case, supra* note 7 at para 183.
[103] *Bodner, supra* note 13 at para 31.
[104] *Ibid* at para 23.

> *reasons should reveal a consideration of the judicial office and an intention to deal with it appropriately*...[A] mere assertion that judges' current salaries are "adequate", would be insufficient. [Emphasis Added].[105]

106. The Commission assumes that the Government will approach the recommendations in this Report in the spirit set forth by the Supreme Court of Canada in *Bodner*. The Commission expects that the Government's response, as stated above, will "reveal a consideration of the judicial office and an intention to deal with it appropriately."[106] If failure to do so were to lead to a court challenge, even though the judicial review would be a "deferential review which acknowledges both the government's unique position and accumulated expertise and its constitutional responsibility for management of [the government's] financial affairs,"[107] the fact that the parties once again felt the need to resort to litigation would mean that the Quadrennial process had failed. The stakes in such litigation would be very high. In the words of the Supreme Court of Canada: "If, in the end, the reviewing court concludes that the response does not meet the standard, a violation of the principles of judicial independence will have been made out."[108]

Recommendation 9

The Commission recommends that:

> **The Government give careful consideration to the third stage for assessing the rationality of a government response introduced by the Supreme Court of Canada's decision in *Bodner*: "Viewed globally, has the commission process been respected and have the purposes of the commission – preserving judicial independence and depoliticizing the setting of judicial remuneration – been achieved?"**

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[105] *Ibid* at paras 25 and 39.
[106] *Ibid* at para 97.
[107] *Ibid* at para 30.
[108] *Ibid* at para 40. Note also para 44 which states that "the appropriate remedy will generally be to return the matter to the government for reconsideration" or, if problems can be traced to the commission, then to return to the commission. This paragraph will tend to discourage litigation by the judiciary.

Recommendations of Prior Commissions

107. One procedural issue that the Commission dealt with is the ability of a Quadrennial Commission to rely on a recommendation of a prior Commission.

108. At the public hearings, in response to a question from the Commission, the Government took the position that this Commission could not adopt as its own the recommendation made by a prior Commission simply by relying on a reading of the report of that Commission. The Government took the position that proceeding in this manner would not meet the procedural requirement for objectivity because the Commission would not have been privy to the evidence adduced, and arguments made, before the prior Commission.[109]

109. In the view of the Commission, the Government's position is at variance with the Supreme Court of Canada's pronouncement set forth in *Bodner***,** in which the Court stated:

> The reports of previous commissions and their outcomes form part of the background and context that a new compensation commission should consider. A new commission may very well decide that, in the circumstances, its predecessors conducted a thorough review of judicial compensation and that, in the absence of demonstrated change, only minor adjustments are necessary.[110]

110. In response to a request from the Commission for clarification, the Government took the position that the Commission could meet the objectivity standard by reviewing summaries of the hearing transcripts of prior Commissions in lieu of reading the actual transcripts.[111] Out of an abundance of caution, the commissioners followed the suggested legalistic approach and reviewed a summary of the hearing transcripts of the Block Commission. This added cost to the Commission proceedings but no value.

111. This Commission believes that, in arriving at its recommendations, it is entitled to take into account recommendations made by a previous commission, in the

[109] Transcript Vol 1 at 188 -92
[110] *Bodner*, *supra* note 13 at para 15.
[111] Transcript, Vol 1 at 192.

absence of a demonstrated change, where consensus has emerged around a particular issue during a previous commission inquiry.

Recommendation 10

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 should be taken into account by the Commission, and reflected in the submissions of the parties.

Adversarial Nature of the Proceedings

112. The Commission now turns to a troubling aspect of the present process – its adversarial nature.

113. The process appears to have developed in a way which encourages the parties to take extreme positions which in some cases lack credibility, leaving the Commission to guess at the real intent of the party. Some would say that this is simply the adversarial process. But there is a crucial difference between the Commission process and a regular court case. Most litigation – civil and criminal – is settled by the parties with the assistance of their counsel. But this does not take place in the Commission process because no negotiation is permitted between the Government and the judiciary.

114. Chief Justice Lamer stated in the *PEI Reference Case* that "under no circumstances is it permissible for the judiciary – not only collectively through representative organizations, but also as individuals – to engage in negotiations over remuneration with the executive or representatives of the legislature. Any such negotiations would be fundamentally at odds with judicial independence".[112] The *Bodner* court refers, with apparent approval, to

[112] *PEI Reference Case*, *supra* note *7* at para 134.

the *PEI Reference Case*, and states that "[n]o negotiations are permitted between the judiciary and the government."[113]

115. There are other major differences from ordinary litigation which tend to exacerbate the litigious nature of the proceedings. Commissioners normally do not have expertise in issues of judicial independence and may or may not be experienced in the process of fixing compensation, so the parties involved in the process are tempted to bombard the Commissioners with statistics and arguments in an attempt to win them over. Further, there is usually no accumulated knowledge transferred from Commission to Commission. Each Triennial and Quadrennial Commission has had a new chair. Each Commission starts almost from scratch. While the Commission is provided with an adequate operating budget, the operation of Government procurement rules in the context of the compressed time-frame within which the Commission operates presents a real obstacle to the Commission's access to expert assistance, with the result that it must deal with some of the submissions of the parties largely at face value. There is no awarding of costs at the end of the proceedings, which in civil cases can act to moderate the behaviour of litigants. Additionally, the public purse pays the entirety of the Government`s costs and two-thirds of the costs of the representatives of the judiciary.[114] Generally, successful parties in civil cases receive only party and party costs, which account for substantially less than their financial investment in the litigation.

116. This Commission cannot solve the foregoing problems regarding its process. It did not ask the parties to address this issue. It can, however, recommend that the issue be discussed by the Government and by the judiciary well in advance of the next Quadrennial Commission process. The *PEI Reference Case* did not prohibit such discussions. Indeed, it contemplated that such

[113] *Bodner*, *supra* note 13 at para 8.
[114] *Judges Act*, *supra* note 2 at s 26.3.

discussions might take place when commissions across the country were being introduced. Chief Justice Lamer stated:

> I do not wish to dictate the exact shape and powers of the independent commission here. These questions of detailed institutional design are better left to the executive and the legislature, although it would be helpful if they consulted the provincial judiciary prior to creating these bodies.[115]

117. An examination of the issues could include looking at the process for setting judicial salaries in other common-law jurisdictions. In the United Kingdom, for example, there has been since 1971 a permanent commission, which periodically makes recommendations on judicial salaries and other top salaries of persons paid from public funds.[116]

118. Such an examination should also review techniques for lessening the adversarial nature of the Commission process, such as prehearing discussions, joint submissions, greater use of Commission-appointed experts, and less use of oral proceedings.[117]

Recommendation 11

The Commission recommends that:

The Government and the judiciary examine methods whereby the Commission process can be made less adversarial and more effective.

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[115] *PEI Reference Case*, *supra* note 7 at para 167.

[116] See Report No. 77 of the United Kingdom Review Body on Senior Salaries, 2011. Chapter 4 of Report No. 77 deals with the judiciary.

[117] Sterling, Lori and Hanley, Sean, "The Case for Dialogue in the Judicial Remuneration Process" in Adam Dodek and Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2011).

CHAPTER 6 - CONCLUSION

119. The members of the Commission have applied themselves diligently to a task which they consider an honour to have been asked to undertake. Our recommendations represent our considered and unanimous view of what best serves the public interest with respect to judicial compensation and benefits for the Quadrennial Period in the context of the statutory criteria which frame the Commission's mandate under the *Judges Act*.

120. The Government provided extensive evidence with regard to general economic conditions and the tenor of its overall approach to deficit reduction, and urged the Commission to bear in mind when formulating its recommendations the Supreme Court`s concern for the reputation of the judiciary, should a perception arise that judges are not shouldering their share of the burden in difficult economic times. In formulating its recommendations, the Commission gave weight to these submissions, recommending only those changes which the Commission concluded are essential to maintain the adequacy of judicial compensation and benefits in terms of the applicable statutory criteria. The Commission urges the Government to formulate its response to the Commission`s report by considering the Commission`s recommendations as a whole, bearing in mind the submissions made by the Association and Council which were not accepted by the Commission.

121. In closing, the Commission wishes to reiterate its concern for the current health and future of the Quadrennial process. The Commission believes that a robust and timely response by the Government to this Report is essential to maintain the confidence of the judiciary in the process. The Commission also believes that a joint "lessons learned" exercise based on the four Commission processes which have taken place over the past twelve years would be both timely and legal. The Commission hopes and expects that such an exercise would result in both the Government and the judiciary "recommitting" to the

Quadrennial process, and believes it likely that the exercise would result in a more efficient process and a greater satisfaction of all stakeholders with the outcome of future Quadrennial Commission processes.

Brian M. Levitt
Chair

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

Mark L. Siegel
Commissioner

CHAPTER 7 – LIST OF RECOMMENDATIONS

Recommendation 1

The Commission recommends that:

Effective April 1, 2012, the salary of federally appointed *puisne* judges sitting in all Canadian trial courts should be set, inclusive of statutory indexation, at $288,100.

The statutory indexation pursuant to s. 25 of the *Judges Act* should be applied to the judicial salaries for each subsequent year of the Quadrennial Period.

Recommendation 2

The Commission recommends that:

***Puisne* judges sitting on provincial and federal appellate courts should be given a salary differential of 3% above *puisne* judges sitting on provincial and federal trial courts.**

Effective April 1, 2012, their salaries should be set, inclusive of statutory indexation, at $296,700.

Recommendation 3

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 and appellate courts;

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 appellate courts should be established in relation to the salary of the *puisne* judges appointed to the appellate courts;

The salary differentials 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 trial courts; and

Effective April 1, 2012, the salaries should be set, inclusive of statutory indexation, at the following levels:

Supreme Court of Canada

Chief Justice of Canada $370,300
Justices $342,800

Federal Court of Appeal and Provincial Courts of Appeal

Chief Justices $325,300
Associate Chief Justices $325,300

Federal Court, Tax Court and Trial Courts

Chief Justices $315,900
Associate Chief Justices $315,900

Recommendation 4

The Commission recommends that:

The *Judges Act* should 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 chief justices of both trial and appellate courts who elect supernumerary status.

Recommendation 5

The Commission recommends that:

The *Judges Act* should be amended so that the retirement annuity of a senior judge of a territorial court who ceases to perform the duties of a senior judge and performs only the duties of a *puisne* judge, receiving the salary of a *puisne* judge, be granted a retirement annuity based on the salary of a senior judge.

Recommendation 6

The Commission recommends that:

> **The *Judges Act* should be amended so that a *puisne* judge of an appellate court who accepts an appointment to a trial court, receiving the salary of a trial court judge, be granted a retirement annuity based on the salary of his or her former position as an appellate court judge.**

Recommendation 7

The Commission recommends that:

> **All regional senior judges in Ontario, including the senior family law judge, should be paid the same representational allowance.**

Recommendation 8

The Commission recommends that:

> **In formulating its response to this Report, the Government give weight to the importance of the perspective of reasonable, informed members of both the public and the judiciary.**

Recommendation 9

The Commission recommends that:

> **The Government give careful consideration to the third stage for assessing the rationality of a government response introduced by the Supreme Court's decision in *Bodner*: "Viewed globally, has the commission process been respected and have the purposes of the commission – preserving judicial independence and depoliticizing the setting of judicial remuneration – been achieved?"**

Recommendation 10

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 should be taken into account by the Commission, and reflected in the submissions of the parties.**[118]

Recommendation 11

The Commission recommends that:

> **The Government and the judiciary examine methods whereby the Commission process can be made less adversarial and more effective.**

[118] This is Recommendation 14 of the Block Report.

Appendix A

Department of Justice

News Release

JUDICIAL COMPENSATION AND BENEFITS COMMISSION APPOINTMENTS

OTTAWA, December 2, 2011 – The Honourable Rob Nicholson, P.C., Q.C., M.P. for Niagara Falls, Minister of Justice and Attorney General of Canada, today announced the appointments of Paul M. Tellier, P.C., C.C., Q.C., Mark L. Siegel and Brian M. Levitt to the Judicial Compensation and Benefits Commission. These appointments are effective until August 31, 2015.

Paul M. Tellier, P.C., C.C., Q.C., of Montréal, is re-appointed a member as recommended by the judiciary. Mr. Tellier obtained a BA and an LLL from the University of Ottawa; he also graduated with a BLitt from the University of Oxford, England. Mr. Tellier was admitted to the Quebec Bar in 1963.

Mr. Tellier was President, CEO and Director of Bombardier Inc. in 2003-2004, and prior to that he served as President, CEO and Director of the Canadian National Railway Company (CN), from 1992 to 2002. Mr. Tellier served as the Clerk of the Privy Council and Secretary to the Cabinet of the Government of Canada from 1985 to 1992. He also served as Deputy Minister of Indian Affairs and Northern Development in 1979 and as Deputy Minister of Energy, Mines and Resources in 1982.

Mark L. Siegel, of Ottawa, is appointed a member as recommended by the Minister of Justice and Attorney General of Canada.

Mr. Siegel obtained his LLB from Osgoode Hall Law School in 1978 and was admitted to the Bar in 1980.

Mr. Siegel is a partner in Gowlings' Ottawa office, practising in all areas of taxation and wealth management, and has extensive involvement with community foundations and charitable organizations. Prior to his career at Gowlings, Mr. Siegel spent the first two years of his practice focusing on individual tax planning. He then joined the Rulings Division of Revenue Canada where he gained extensive experience in the areas of personal taxation, scientific research taxation and tax issues relating to leasing, financing and charities.

…/2

Brian M. Levitt, of Westmount, is appointed Chair as nominated by the other two members of the Judicial Compensation and Benefits Commission.

Mr. Levitt obtained a BASc in 1969 and an LLB in 1973, both from the University of Toronto. He was admitted to the Ontario Bar in 1975 and the Quebec Bar in 2001.
Mr. Levitt serves as corporate counsel at Osler, Hoskin & Harcourt LLP. He first joined Osler in 1976. In 1991, he became President, and subsequently CEO, of Imasco Limited, a Canadian consumer products and services company. Imasco was sold in 2000 and he returned to Osler in 2001. Mr. Levitt is currently the Chair of the Board of Directors of the Toronto-Dominion Bank. He is also a director of Domtar Corporation.

The Judicial Compensation and Benefits Commission is established under the *Judges Act* to inquire at least every four years into the adequacy of the salaries and benefits of the federally appointed judiciary. The Commission consists of three members: one is nominated by the judiciary and another by the federal Minister of Justice, and these two then nominate a Chairperson.

Additional information on the Judicial Compensation and Benefits Commission can be found at http://www.quadcom.gc.ca/.

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Ref.:

Julie Di Mambro
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Office of the Minister of Justice
613-992-4621

Media Relations
Department of Justice
613-957-4207

(Version française disponible)
Internet: www.canada.justice.gc.ca

Brian Levitt, LL.B, B.A.Sc.

Brian Levitt is Counsel to the firm Osler, Hoskin & Harcourt LLP. He is recognized as one of the leading corporate governance and M & A advisors in Canada. Mr. Levitt first joined Osler's Toronto office in 1976 and became a partner in 1979.

In 1991 Mr. Levitt became President and, subsequently, CEO of Imasco Limited, a Canadian consumer products and services company, which traded on the Toronto Stock Exchange and was, at the time, one of the larger public companies in Canada measured by market capitalization. Imasco was sold in 2000 and Mr. Levitt returned to Osler in 2001.

Mr. Levitt is Chairman of the board of directors of the Toronto-Dominion Bank. He is also currently a director of Domtar Corporation. He served as Board Chair of Domtar until its merger with the white paper business of Weyerhauser in 2007. He has served as a director of various substantial public companies over the past 20 years.

Mr. Levitt is very active in public life and community organizations. He currently serves as Chair of the Board of Trustees of the Montreal Museum of Fine Arts and Vice-Chair of the board of the C.D. Howe Institute. In 2007, he was appointed to the five-person Competition Policy Review Panel created by the Government of Canada to review key elements of Canada's competition and foreign direct investment policies.

He is a graduate of the University of Toronto and was admitted to the Ontario Bar in 1975 and the Québec Bar in 2001.

Mark L. Siegel

Mark Siegel is a partner in the Ottawa office of Gowlings Lafleur Henderson LLP, practicing in all areas of taxation and wealth management, and has extensive involvement with community foundations and charitable organizations, in terms of their organization, registering with CRA and ongoing operations. Mr. Siegel is also experienced in the area of foreign corporate tax planning.

Prior to joining Gowlings, he spent the first two years of his practice focusing on individual tax planning. He then joined the Rulings Division of Revenue Canada where he gained extensive experience in the areas of personal taxation, scientific research taxation and tax issues relating to leasing, financing and charities.

Following that, Mr. Siegel practiced in the Appeals Branch of Revenue Canada where he developed considerable experience in determining whether files should proceed to trial.

He is a graduate of the Osgoode Hall Law School and was admitted to the Ontario Bar in 1980.

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

Paul Tellier is a Director of the following companies: Rio Tinto plc and Rio Tinto Ltd.; GM Canada; McCain Foods Ltd; Chairman, Global Container Terminals Inc. (GCT); and Trustee, International Accounting Standards Foundation, London, United Kingdom.

Mr. Tellier is also Strategic Advisor to Société Générale, a global bank headquartered in France. He is co-Chair of the Prime Minister's Advisory Committee on the Public Service, and was a member of the Independent Advisory Panel on Canada's Future Role in Afghanistan.

Mr. Tellier was President and Chief Executive Officer and a Director of Bombardier Inc. in 2003 and 2004. Prior to this he 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. He has 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, and was admitted to the Québec Bar in 1963.

Appendix **B**

Commission's Process Chronology

On December 2, 2011 the Department of Justice issued a news release setting out the Commission appointments.

The Commission published a notice and posted it on the Commission website, www.quadcom.gc.ca, on December 7, 2011, inviting interested parties "[w]ishing to comment on matters within the Commission's mandate (judicial salaries, allowances, annuities, perquisites, etc.) to submit their written submissions to the Commission by January 16, 2012."[119]

In the same notice, requests to appear at the public hearings were sought from those who provided written submissions. By January 30, 2012, all requests by those seeking to be present at the public hearings had been made. Public hearings were held on February 20, 2012, in Ottawa, Ontario, and on February 27, 2012, in Montréal, Québec.

Contact information was readily available on the Commission's website to those who wished to communicate with the Commission. Communications from the Commission, and written submissions and responses to the Commission, were published on the website.

On December 8, 2011, the Commission issued a notice setting forth its views on certain of the recommendations contained in the Block Report.[120] It also sought submissions with respect to its process in relation to the timeliness and substance of the Government's response to the Block Report.

Both the Government and the Association and Council made submissions to the Commission regarding the issues raised by the notice. We have addressed these procedural issues in this report.

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[119] Found at http://www.quadcom.gc.ca/

[120] Report of the Judicial Compensation and Benefits Commission, submitted to the Minister of Justice of Canada, May 30, 2008 [Block Report].

Appendix C

List of Submissions, Letters and Replies received by the Commission[121]

1. Submission from the Government of Canada represented by the Department of Justice of Canada

2. Government response to the Commission's request for additional information

3. Joint submission from the Canadian Superior Courts Judges Association and the Canadian Judicial Council

4. Joint book of documents from the Government of Canada and the Canadian Superior Courts Judges Association and the Canadian Judicial Council

5. Submission from the Canadian Bar Association

6. Submission from le Barreau du Québec

7. Letter from the Honourable Roger G. Conant

8. Letter from Mr. Robert Michon

9. Letter from Ms. Connie Brauer and Mr. Victor Harris

10. Reply submission from the Government of Canada

11. Joint Reply Submission from the Canadian Superior Courts Judges Association and the Canadian Judicial Council

12. Letters from Mr. André Sauvé, Compensation Expert, concerning the valuation of judicial annuity and lawyers retirement income comparable

13. Response letter from Mr. B. FitzGerald to Mr. Sauvé's letters

14. Letter from the Privy Council Office, concerning the DM-3 Comparator

15. Letter from McDowall Associates in reply to Annex A of the Government of Canada Submission

[121] See http://www.quadcom.gc.ca/

Appendix D

Public Hearings - List of Participants

February 20, 2012

Representing the Judicial Compensation and Benefits Commission

- Brian M. Levitt
  Chair of the Commission

- Mark L. Siegel
  Commissioner

- Paul M. Tellier
  Commissioner

- Suzanne Labbé
  Executive Director

Representing the Government of Canada

- Cathy Beagan Flood
  Counsel
  Blake, Cassels & Graydon LLP

- Judith Bellis
  General Counsel
  Judicial Affairs, Courts and Tribunal Policy
  Justice Canada
  Observer

- Druscilla F. Flemming
  Deputy Director,
  Compensation Policy and Operations
  Senior Personnel, Privy Council Office
  Observer

- Patrick Xavier
  Counsel
  Judicial Affairs, Courts and Tribunal Policy
  Justice Canada
  Observer

Public Hearings - List of Participants

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

- Pierre Bienvenu
  Counsel
  Norton Rose Canada, LLP

- Azim Hussain, Partner
  Counsel
  Norton Rose Canada

- Me L. Yves Fortier
  Counsel
  Norton Rose Canada

- Jamie Macdonald
  Associate Lawyer
  Norton Rose Canada
  Observer

- The Hon. Madam Justice Mary T. Moreau
  President, Canadian Superior Courts Judges Association
  Observer

- The Hon. Mr. Justice James Adams
  Vice-President, Canadian Superior Courts Judges Association
  Observer

- The Hon. Mr. Justice Ted C. Zarzeczny
  Chair, Compensation Committee, Canadian Superior Courts Judges Association
  Observer

- The Hon. Mr. Justice T. Mark McEwan
  Vice-Chair, Compensation Committee, Canadian Superior Courts Judges Association
  Observer

- The Hon. Madam Justice Lynne Leitch
  Past President, Canadian Superior Courts Judges Association
  Observer

- The Hon. Chief Justice Warren Winkler
  Chair, Judicial Salaries and Benefits Commission
  Canadian Judicial Council
  Observer

Public Hearings - List of Participants

Representing the Canadian Bar Association

- Trinda Ernst
  President
  Canadian Bar Association

- Judy Hunter
  Counsel
  Canadian Bar Association

- Peter Browne
  Chair of the Canadian Bar Association's Judicial Compensation and Benefits Commission

Representing the Public (via conference call)

- Ms. Connie Brauer

- Mr. Victor Harris

Public Hearings - List of Participants

February 27, 2012

Representing the Judicial Compensation and Benefits Commission

- Brian M. Levitt
  Chair of the Commission

- Mark L. Siegel
  Commissioner

- Paul M. Tellier
  Commissioner

- Suzanne Labbé
  Executive Director

Representing the Government of Canada

- Cathy Beagan Flood
  Counsel
  Blake, Cassels & Graydon LLP

- Judith Bellis
  General Counsel
  Judicial Affairs, Courts and Tribunal Policy
  Justice Canada
  Observer

- Druscilla F. Flemming
  Deputy Director,
  Compensation Policy and Operations
  Senior Personnel, Privy Council Office
  Observer

- Patrick Xavier
  Counsel
  Judicial Affairs, Courts and Tribunal Policy
  Justice Canada
  Observer

Public Hearings - List of Participants

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

- Pierre Bienvenu
  Counsel
  Norton Rose, LLP

- Azim Hussain, Partner
  Counsel
  Norton Rose Canada

- The Honourable Madam Justice Mary T. Moreau
  President, Canadian Superior Courts Judges Association
  Observer

- The Hon. James Adams
  Vice-President, Canadian Superior Courts Judges Association
  Observer

- The Hon. Mr. Justice Ted C. Zarzeczny
  Chair, Compensation Committee, Canadian Superior Courts Judges Association
  Observer

- The Hon. Mr. Justice T. Mark McEwan
  Vice-Chair, Compensation Committee, Canadian Superior Courts Judges Association
  Observer

- The Hon. Mr. Justice Denis Jacques
  Treasurer, Canadian Superior Courts Judges Association
  Observer

Public Hearings - List of Participants

Representing the Barreau du Québec

- Louis Masson
  Bâtonnier du Québec

- Nicolas Plourde
  Vice président

- Marc Sauvé
  Directeur du Service de recherche et législation

Representing the Public

- David Morin
  Counsel

- The Hon. Roger G. Conant