POST-HEARING SUBMISSION

of the

CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

to the

JUDICIAL COMPENSATION AND BENEFITS COMMISSION

March 5, 2012

Pierre Bienvenu, Ad. E.
Azim Hussain
Norton Rose Canada LLP

TABLE OF CONTENTS

INTRODUCTION

1. The Commission has invited the principal parties to address the following question:

> What should be done to avoid that the Quadrennial Commission process suffer the same fate as the Triennial Commission and, in particular, how ought the Government be responding to the recommendations of this Commission in order to maintain confidence in the process?[1]

2. The question formulated by the Commission appropriately reflects the fact that the failure of the Triennial Commission process was not a failure of the Triennial Commission, but rather of the Government which, upon receipt of its reports, failed to respond to them or implement their recommendations.

I. DISCUSSION

A. The reason why the Triennial Commission process failed

3. The Triennial Commission process failed because, in the words of the Drouin Commission, "[d]espite extensive inquiries and research" by the five Triennial Commissions, "many of their recommendations on judicial salaries and benefits, between 1987 and 1993, generally were unimplemented or ignored."[2]

4. Under the statutory framework that created the Triennial Commission, the Minister of Justice was required to lay the Commission's report before Parliament no later than the 10th sitting day of Parliament after receiving it, but there was no requirement that the Minister actually respond to the report, let alone within a specific time. In the absence of any such statutory requirement, the Government largely failed to respond adequately to any of the Triennial Commission reports.

---

[1] Transcript, 20 February 2012, at pages 44-46, 49-50, 110-111.

[2] Drouin Report (2000) at 2.

5. This failure was first commented upon in 1988 by the Guthrie Commission, following the Government's delay in responding to the recommendations of the first Triennial Commission, the 1983 Lang Commission:

> Delays in implementing or substantial disregard of the recommendations of a Triennial Commission threatens the integrity of the review process and materially reduces its effectiveness. Regrettable delays in coming to decisions concerning the reports of the Dorfman and de Grandpré Committees and the Lang Commission should be avoided in the future.[3]

6. Every successive Triennial Commission commented on this failure on the part of the Government to meaningfully engage in the Triennial Commission process.

7. The Courtois Commission stated that the Government's failure to deal with the recommendations of the previous Triennial Commissions "renders meaningless this independent review process and effectively thwarts the evident intention of Parliament,"[4] while the Crawford Commission stated that "[t]he respect shown for the concept of judicial independence in the design of the Triennial Commission process has been tainted by the business-as-usual attitude of successive Governments once the Commission reports have been presented to Ministers of Justice and tabled in Parliament."[5]

8. The last Triennial Commission, the Scott Commission, noted that "[s]uccessive Commissions have stressed the process is flawed by reason of the failure of governments to act with reasonable dispatch to introduce and enact legislation in response to the recommendations of Triennial Commissions."[6] In the view of the Scott Commission, the government's failure to meaningfully respond to the Triennial Commission process had effectively politicized the setting of judicial compensation:

---

[3] Guthrie Report (1988) at 6..

[4] Courtois Report (1990) at 6.

[5] Crawford Report (1993) at 7.

[6] Scott Report (1996) at 5.

> An unanticipated and unintended result of the establishment of the present Triennial process has been the insulation of Ministers from the otherwise pressing requirements of the Constitution with respect to salaries and benefits. Upon delivery of successive reports, political debate in Committee has followed with governments behaving as though, "having caused the Report to be laid before Parliament," they were thereby absolved from their constitutional responsibilities. […] In spite of thorough recommendations by successive Commissions, Parliament has failed, in a proactive sense, to fix judicial salaries and benefits for many years.[7]

9. Chief Justice Lamer was equally blunt in an address to the Council of the Canadian Bar Association in 1994. Speaking of the Triennial Commission process, he said, "It looks good on paper, but it has one problem: it just does not work. Why? Because the Executive and Parliament have never given it a fair chance."[8]

10. In the aftermath of the failure of the Triennial Commission process, a new constitutional and statutory framework was created, and it is under this framework that the success or failure of the current Quadrennial Commission process will be judged.

B. The essential components of the existing constitutional process for the determination of judicial compensation

11. In the 1997 *Reference Re Provincial Court Judges* ("*PEI Reference*"),[9] the Supreme Court of Canada articulated a new constitutional framework for the setting by government of judicial compensation. While the case concerned provincial judges, and the federal Triennial Commission process was not before the Court, the Court was fully cognizant of its shortcomings.

12. Chief Justice Lamer, writing for the majority, found that the Constitution requires the existence of an "independent, effective and objective" commission that is interposed

---

[7] Scott Report (1996) at 7-8.

[8] The Right Honourable Chief Justice Lamer, "Remarks by the Rt. Honourable Antonio Lamer, P.C. , Chief Justice of Canada, to the Council of the Canadian Bar Association Annual Meeting" (20 August 1994) at 10 [unpublished], JBD at Tab 67. This is the address to which Mr. Bienvenu referred in oral argument in response to a question from Mr. Levitt, transcript at pages 46-47.

[9] [1997] 3 S.C.R. 3.

between the judiciary and the other branches of the State. The Court identified the following requirements of a constitutional commission process:

- the commission must meet promptly and regularly (the Court suggested intervals of between three to five years), and hold fair and objective hearings;[10]
- the commission may address all relevant issues;[11]
- the commission must provide a report that justifies and explains its recommendations;[12]
- the government must not set judicial compensation without first providing a response to the commission's report;[13]
- the government's response:
    - must be timely and actually respond to the commission's recommendations rather than simply reiterate the government's submissions to the commission;[14]
    - must be based on a reasonable factual foundation and sound reasoning;[15]
    - must give legitimate reasons for departing from or varying the commission's recommendations;[16]

---

[10] *PEI Reference*, *ibid.* at paras 173-174.

[11] *Ibid.* at para 174.

[12] *Ibid.* at paras 173-175.

[13] *Ibid.* at para 179.

[14] *Ibid.* at para 179.

[15] *Ibid.* at para 183.

[16] *Ibid.* at paras 180, 183.

- the government's response is subject to judicial review on the standard of simple rationality.[17]

13. In response to the constitutional imperatives enunciated by the Court in the *PEI Reference*, Parliament amended the *Judges Act* in 1998 to establish the current Quadrennial Commission process. In contrast to the statutory framework that created the Triennial Commission process, the Minister of Justice was now required under s. 26(7) of the *Judges Act* to respond to any Commission report within six months of receiving it.

14. In 2005, the Supreme Court of Canada was invited to elaborate on the standard of review applicable to a government's response refusing to implement the recommendation of a compensation commission. In *Bodner v. Alberta,*[18] the Court set out a three-part test for a reviewing court when considering the constitutionality of a government's response to a commission's recommendation:

1) Has the government articulated a legitimate reason for departing from the commission's recommendation?

2) Do the government's reasons rely upon a reasonable factual foundation?

3) 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?

C. Avoiding the fate of the Triennial Commission process: how ought the Government respond to the recommendations of the Commission in order to maintain confidence in the process?

15. The Triennial Commission process failed not because of the Triennial Commission but because of the Government's non-implementation of its recommendations. The current tension within the Quadrennial Commission process results not from the Quadrennial

---

[17] *Ibid.* at para 183.

[18] [2005] 2 S.C.R. 286.

Commission, but from the Government's responses refusing to implement the Commission's recommendations, and the Government's approach to the process at other steps of the process. Thus, in order to address the Commission's question, the scope of the analysis must be enlarged to include process issues.

1. The participants' duties and obligations

16. The principal parties and the Commission have obligations and duties at each step of the process. The principal steps include the following:

i) Start of the Commission

(i) It should start on time

(ii) In order to be able to do so, its members must be appointed no later than September 1

ii) Positions taken before the Commission

(i) There must be continuity with, and respect for, the work of past Commissions

(ii) There cannot be re-litigation of settled issues (*e.g.* appropriate comparators, calculation of their compensation for comparison purposes) unless there are significant factual changes

(iii) There should be no re-litigation of past recommendations and responses, though they form the background of the Commission's work

iii) Report of the Commission

(i) Every newly appointed Commission should not start anew, in effect re-inventing the wheel

(ii) The Commission's approach should be informed by the Commission's jurisprudence (*i.e.* the principles, practices, and determinations of past Commissions)

(iii) The Commission's report should develop recommendations within the framework of the Commission's jurisprudence

(iv) The Commission must continue to see it as its duty to consider expressions of concern about issues of process and, where appropriate, to offer guidance in this respect, including in the form of recommendations

(v) The Commission should consider each party's positions in light of its past position, including, in the case of the Government, its past responses

(vi) The Commission should exercise independent judgment.[19]

2. Tackling the Commission's question

17. The standard set out by the Supreme Court in *Bodner* applies when a government's refusal to implement a commission's recommendation is challenged in court. While the *Bodner* test will ultimately determine the validity of a government's response, the essence of the question posed by the Commission is how the Government should respond to the Commission's report so as to *avoid* litigation and strengthen the legitimacy of the Quadrennial Commission process. We address the essence of this question by discussing specific examples of past Government conduct in terms that, it is hoped, are sufficiently "specific" and "granular" to be of assistance to the Commission.

a) *Example of a Government response implementing a recommendation*

18. The response to the Drouin Commission and the First Response to the McLennan Commission are examples of appropriate, rational responses. They were issued within the

[19] For example, before the McLennan Commission, both parties proposed the continuation of annual increments in addition to IAI adjustments in order to allow for the gradual implementation of any proposed salary increase. The Commission declined to recommend this. (The Government conveniently accepted this while rejecting the Commission's salary recommendation that was designed to compensate for the lack of annual increments).

statutory time-period and, in substance, were consistent with the long-accepted principle developed during the Triennial Commission phase: seeking to achieve rough equivalence with the compensation of DM-3s. If the First Response to the McLennan Commission had been implemented, rough equivalence would have been achieved and subsequent Commissions, including the present Commission, would only have had to make minor adjustments.

19. The Government said in its response to the salary recommendation of the Drouin Commission:

> While the Commission recommends a higher salary increase (11.2%) than the Government had proposed in its written submission (5.7%), the recommended increase is significantly less than that sought by the judiciary (26.3%). From this perspective, the recommended increases are within the range of what would be considered reasonable, given the difficulties inherent in assessing the adequacy of judicial salaries.[20]

20. The Government said the following with respect the McLennan Commission salary recommendation in the First Response to the McLennan Commission's report:

> In arriving at its salary recommendation, the Commission engaged in a careful balancing of all the factors listed in s. 26(1.1), including the prevailing economic conditions in Canada, the role of financial security in ensuring judicial independence, and the need to continue to attract outstanding candidates to the judiciary. […] The Government is prepared to accept the Commission's salary recommendations for several reasons. […][21]

21. Both responses appropriately reflect the manner in which the commission process effectively constrains the discretion of government in fixing judicial salaries.

---

[20] Response to the Drouin Commission (13 December 2000).

[21] First Response to the McLennan Commission (30 November 2004).

b) *Example of a response refusing to implement a recommendation for reasons that appeared rational and legitimate: the Rule of 80 and the election of supernumerary status (Drouin Commission)*

22. Recommendation 8 of the Drouin Commission reads as follows:

> Effective as of April 1, 2000, judges have the right to elect supernumerary status for a period not exceeding 10 years upon attaining eligibility for a full pension.

23. As part of its response to the Drouin Commission's report, the Government indicated that it could not accept this recommendation because a variation in the number of supernumerary judges might have cost implications for the provinces and territories given their constitutional responsibility for the administration of justice. An increase in supernumerary positions might entail additional costs related to facilities and support services. Accordingly, the Government stated in its response that it needed to engage in consultations with the provinces and territories before accepting the recommendation. The Government also pointed to an upcoming Supreme Court of Canada judgment relating to supernumerary judges as a further reason not to accept the recommendation immediately since the judgment would provide guidance regarding the status of supernumerary judges.

24. Such a response, in and of itself, is rational and supported by reasons that are legitimate.

25. In the event, the Government took until August 2003 to complete its consultations and inform the judiciary that it was prepared to accept Recommendation 8. Even if one were to consider that this delay was not inordinate, the delay in the subsequent implementation of the recommendation most certainly was. When the Government notified the judiciary in August 2003 that it was prepared to accept Recommendation 8, it took the position that the recommendation would be implemented at the same time as the recommendations of

the next Quadrennial Commission.[22] This approach resulted in Recommendation 8 only being implemented in December 2006, six years after it was made.

c) *Examples of conduct that raises problems similar to those that ultimately resulted in the failure of the Triennial Commission process*

26. The above example shows what a rational and legitimate response would look like absent subsequent unconscionable delays in the implementation of recommendations accepted by the Government. Below are examples of conduct, including Government responses, that fall short of that standard.

i) Second Response to the McLennan Report

27. The Government's Second Response to the McLennan Report is a deplorable example of conduct which, unless it is denounced and never again engaged in, will assuredly lead this process to the same fate as the Triennial Commission process. The reasons for this prediction are fully set out in the Block Report (at paras 39 to 45) and the judiciary's Submission of December 2011 (at paras 42 to 53).

28. It is not for this Commission to opine as to whether the Second Response, had it been contested, would have met the *Bodner* test. However, it is within the remit of this Commission to observe that, when the Second Response is considered in light of subsequent events, including the failure of the Government to respond to the Block Report within the statutory time-period, its refusal to implement the Block Commission's recommendations, and its approach before this Commission, there is good reason for the Commission to be concerned about the fate of the Quadrennial Commission process, and to seek guidance from the parties as to how the integrity of the process can be preserved, and its credibility enhanced.

---

[22] As set out in the letter of the Government (19 August 2003).

ii) The Government's conduct since the Second Response

29. As indicated above, the Minister did not respond to the Block Report within the time-period set out in s. 26(7) of the *Judges Act*. The Minister's untimely response did not take issue with the substance of any of the Block Commission's recommendations, but declined to implement them because of the financial crisis and the uncertainty resulting from its recent onset.[23]

30. The Government's reliance on prevailing economic conditions had the effect of trumping the whole process. The judiciary noted the statement in the Response that if the economic situation improves, such circumstance could be taken into account by the Commission, and in the press release issued by the Association on the same day, it was noted that "the applicable constitutional principles will require that the Quadrennial Commission's recommendations be reconsidered once the economic situation is under control."

31. Before the present Commission, rather than follow up on the Minister's statement in the Response to the Block Report acknowledging the need for reconsideration of the Block Report before, or at the latest, within the next Commission cycle, the Government:

- has sought to re-litigate settled issues, in breach of the principle of continuity and Recommendation 14;
- has invited the Commission once again to defer consideration of an appropriate judicial salary level on account of economic conditions that are not the same as those in 2009;
- has proposed to attack the protection of the value of judicial salaries derived from IAI annual adjustments;
- has taken the formalistic, impractical, and disrespectful position that this Commission may not endorse and urge the prompt implementation of the Block Commission's recommendations unless certain formal conditions are met.

32. For its part, the judiciary has accepted the findings of the Block Commission that declined to adopt positions put forward by the Association and Council (*e.g.* the recommendation sought for the payment of interest on retroactive salary adjustments, and the contention that, for comparison purposes, the appropriate DM-3 compensation level should be the total average compensation of DM-3s rather than the midpoint of their salary range plus half eligible at-risk).

33. The judiciary cannot be the only party that accepts to adapt its positions based on the findings and overall jurisprudence of past Commissions. The Government must do the same to ensure the effectiveness of the Commission process.

34. The same holds true as regards the Government's response to the Commission's report. In no circumstance should the Minister's response be seen as an opportunity for the Government to re-assert the positions it has advanced before the Commission, still less to assert that the Commission was "in error" because it happened not to have agreed with the Government's position.

II. CONCLUSION

35. Neither party should measure success by assessing the extent to which the Commission has accepted its positions, assuming they do not seek to re-litigate settled issues.

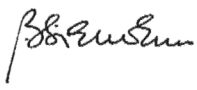
36. While the judiciary acknowledges that there may be reasons why, or circumstances when, the Government may not be in a position fully to implement all of the recommendations of the Commission (an example being Recommendation 8 of the Drouin Commission), the Government must accept that the Commission process, which is a constitutional process that forms an integral part of the Government's obligation to fix salaries, allowances and pensions under s. 100 of the *Constitution Act, 1867*, does indeed limit the Government's "discretion" and constrain its action when the time comes for the Minister to respond to the Commission's report.

---

[23] Response of the Government (11 February 2009).

The whole respectfully submitted
on behalf of the Canadian Superior Courts Judges Association
and the Canadian Judicial Council.

Montréal, March 5, 2012



_____

Pierre Bienvenu, Ad. E.
Azim Hussain
Norton Rose Canada LLP
1 Place Ville Marie
Suite 2500
Montréal, Québec H3B 1R1