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Book of Documents to accompany Response by CMACC (Original Response filed May 7, 2021)

Dated: May 13, 2021

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5. The salaries of Federal Court prothonotaries be increased, retroactive to April 1, 2016, to 80% of Federal Court judges' salaries, or $251,300.

6. The Government of Canada and the Chief Justice of the Federal Court of Canada should consider the possibility of allowing prothonotaries to elect supernumerary status under the *Judges Act* or of creating a senior prothonotary program for those eligible for retirement.

7. Prothonotaries should receive a non-taxable allowance of $3,000 annually, retroactive to April 1, 2016, to be used for the payment of expenses related to their duties.

8. Prothonotaries should be paid 95% of the reasonable full indemnity costs incurred before the Quadrennial Commission. Only if necessary should these costs be assessed under the *Federal Court Rules*. The Government should consider possible amendments to the *Judges Act* to permit these costs to be assessed in the Ontario Superior Court of Justice at Ottawa.

9. The *Judges Act* should be amended to provide that the retirement annuity of a chief justice or senior judge who has stepped down to a different court as a puisne judge be based on the salary of a chief justice and that the 2012 amendments to section 43(1) and section 43(2) be made retroactive to April 1, 2012.

10. The *Judges Act* should be amended to extend the entitlement to removal allowances as described in sections 40(1)(c) and (d) to a judge sitting in Labrador, effective April 1, 2016.

11. The necessary legislative amendments should be made to provide, effective April 1, 2016 the Chief Justice of the Court Martial Appeal Court of Canada compensation and allowances equal to those of other superior court chief justices, including an annuity based on the Chief Justice's salary in cases where the he or she has stepped down to a puisne judge position.

permanent, not *ad hoc* basis. Consequently, he seeks compensation and allowances equal to other chief justices of superior courts in Canada.[167]

186. Currently, the Chief Justice of the CMAC is paid as a Federal Court judge, with a representational allowance as prescribed under section 27 of the *Judges Act*. Chief Justice Bell is the only member of the Canadian Judicial Council and the only chief justice of a court governed by the Courts Administration Service Act who is remunerated at the rate of a *puisne* judge. Counsel for Chief Justice Bell submitted that his functions and responsibilities are equivalent to those of the other chief justices of superior courts in Canada.[168]

187. The Government agreed that the Chief Justice of the CMAC should receive the same annual salary as other superior court chief justices. Further, should the Chief Justice of the CMAC step down from that office, he or she should be entitled to an annuity, on retirement, based on the Chief Justice's salary.[169]

188. As with senior judges in the territories, we agree that the Chief Justice of the CMAC, who is similarly placed as the chief justices of other superior courts, should receive the same compensation and benefits as other chief justices.

RECOMMENDATION 11

The Commission recommends that:

> **The necessary legislative amendments should be made to provide, effective April 1, 2016 the Chief Justice of the Court Martial Appeal Court of Canada compensation and allowances equal to those of other superior court chief justices, including an annuity based on the Chief Justice's salary in cases where he or she has stepped down to a puisne judge position.**

[167] Submission of Chief Justice B Richard Bell at paras 2, 12.
[168] *Ibid* at paras 13-20.
[169] Government Reply Submission, *supra* note 27 at para 125.

has died in office, if the survivor or child lived with the judge at the time of death and moves within two years of the death.[164]

182. Due to Labrador's remoteness and the consequent challenges in recruiting superior candidates to sit there, Justice Stack argued that the removal allowances provided for in sections 40(1)(c)and (d) of the *Judges Act* should apply to relocations between Labrador and Newfoundland.[165]

183. The Government agreed that "an amendment be made to extend the entitlement to a removal allowance as described in s. 40(1)(c) and (d) to the judge sitting in Labrador".[166]

184. We agree that relocations between Labrador and Newfoundland are akin to relocations from a province to a territory and that the Labrador judge should be entitled to the removal allowance under sections 40(1)(c) and (d) of the *Judges Act*.

RECOMMENDATION 10

The Commission recommends that:

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COMPENSATION OF THE CHIEF JUSTICE OF THE COURT MARTIAL APPEAL COURT

185. Written submissions, dated February 24, 2016, were filed on behalf of the Honourable B. Richard Bell, Chief Justice of the Court Martial Appeal Court of Canada (CMAC). Chief Justice Bell was appointed a judge of the Federal Court, Court Martial Appeal Court of Canada, and Chief Justice of the CMAC on February 5, 2015. His functions on the CMAC are performed on a

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[164] *Supra* note 1.
[165] Stack Submission, *supra* note 164 at 1-2.
[166] Government Reply Submission, *supra* note 27 at para 124.

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[167] Submission of Chief Justice B Richard Bell at paras 2, 12.
[168] *Ibid* at paras 13-20.
[169] Government Reply Submission, *supra* note 27 at para 125.

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.

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?"

been earned, so long as the individual continues in employment. We believe that this is also a reasonable situation for the Judiciary.

Recommendation 6

> **The Commission recommends that, effective as of April 1, 2000, contributions toward a judicial annuity be reduced from 7% of salary to 1% of salary for the period during which a judge is entitled to receive a full annuity but continues to work in either a full-time or supernumerary capacity.**

4.7 Contributions to RRSPs

The Conference and Council requested the right to fully contribute to RRSPs after 15 years of service. There is no explicit link in the submission of the Conference and Council to the eligibility for retirement after 15 years and the cessation of contributions after 15 years, but there is a certain logic in linking the two proposals. Counsel for the Government pointed out that, for public service pensions, the RRSP limit is restored once contributions cease.[19]

The Commission sees no reason, either in policy or precedent, why contribution room to RRSPs should not be restored when judges cease making contributions to their annuity. We understand that this will not happen automatically, but will require amendment to Regulation 8309(2) of the *Income Tax Act.*

Recommendation 7

> **The Commission recommends that, effective as of April 1, 2000, the relevant regulations under the *Income Tax Act* be amended to afford judges the opportunity to contribute to RRSPs at the time they cease making contributions to the judicial annuity scheme, on the same basis as public servants are now allowed to do.**

[19] Transcript of the March 20, 2000 Public Hearing, at 15.

As of April 1 in each of 2001, 2002 and 2003, these salaries should be adjusted to maintain the same proportionate relationship with the salary of puisne judges established as of April 1, 2000.

(Section 2.6)

Recommendation 3

Incidental Allowances be adjusted to a level of $5,000 per year effective as of April 1, 2000.

(Section 3.1)

Recommendation 4

Northern Allowances be adjusted to a level of $12,000 per year effective as of April 1, 2000.

(Section 3.2)

Recommendation 5

Effective as of April 1, 2000, Representational Allowances be set as follows:

Chief Justice of Canada	$18,750
Chief Justices of the Federal Court of Canada and the Chief Justice of each province	$ 12,500
Supreme Court of Canada Puisne Judges, Trial Chief Justices, Other Designated Chief Justices and Senior Judges	$ 10,000

(Section 3.3)

Recommendation 6

Effective as of April 1, 2000, contributions toward a judicial annuity be reduced from 7% of salary to 1% of salary for the period during which a judge is entitled to receive a full annuity but continues to work in either a full-time or supernumerary capacity.

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cease making contributions to the judicial annuity scheme, on the same basis as public servants are now allowed to do.

(Section 4.7)

Recommendation 8

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.

(Section 4.8)

Recommendation 9

Effective as of April 1, 2000, to be eligible for early retirement with a pro-rated pension, a judge must serve at least 10 years and must be at least 55 years of age.

(Section 4.9)

Recommendation 10

Effective as of April 1, 2000, a pro-rated pension, available to any judge who has served at least 10 years and is at least 55 years of age, be calculated as 2/3 of salary in the year that early retirement is elected, multiplied by the number of years of service divided by the number of years which the electing judge would have been required to serve in order to earn a full annuity.

(Section 4.9)

Recommendation 11

Effective as of April 1, 2000, the pro-rated pension not be payable without actuarial reduction prior to the judge attaining age 60 and that the amount of the pension be indexed by the Consumer Price Index in each year that it is deferred.

(Section 4.9)

Recommendation 12

Should a judge who is eligible for early retirement wish to elect a pro-rated annuity that is payable immediately, the value of the annuity be reduced by 5% per year for every year that the annuity is paid in advance of age 60.

(Section 4.9)

retirement age of the judge is 74 based on the demographic assumptions of the last actuarial report and his or her current age (70) and service (20 years).

Finally, should a marital breakdown occur before the annuity is vested, that is before age 55 or the completion of 10 years of service, the former spouse would be allowed to exercise the lump-sum settlement option when the judge reaches age 55 and completes 10 years of service.

Recommendation 5:

The Commission recommends that the *Judges Act* be amended to provide for

- **the possibility of dividing, upon conjugal breakdown, the judicial annuity deemed to accrue during a relationship, up to a 50% limit;**
- **the judicial annuity to be deemed to accrue over the judge's entire period of judicial service, for the purpose of determining the portion of the judicial annuity that is subject to division upon conjugal breakdown;**
- **a lump sum settlement option, to ensure a clean break and the possibility of deferring such settlement until the date when the judge will have attained age 55 and completed 10 years of service, if applicable; and**
- **the demographic assumptions used for the most recent *Actuarial Report on the Pension Plan for the Federally Appointed Judges* to be used for purposes of determining the value of the judicial annuity and the expected retirement date of a judge in calculating the portion of the judicial annuity subject to division.**

The Commission also recommends that the government amend the *Judges Act* and the *Income Tax Act*, as necessary, to allow the transfer of a portion of the former spouses' lump-sum settlement to RRSPs, as if the judicial annuity were a registered pension plan, at least for the portion of the judicial annuity up to the defined benefit pension limits applicable to registered pension plans under the *Income Tax Act*.

3.4 Survivor Benefits for Single Judges

Madam Justice Alice Desjardins argued before us that "under the present state of affairs, married judges, those living as common-law couples and same-sex couples

LIST OF RECOMMENDATIONS

Recommendation 1:

The Commission recommends that the salary of puisne judges be established as follows. Effective April 1, 2004, $240,000, inclusive of statutory indexing on that date, and for the next three years: $ 240,000 plus cumulative statutory indexing effective April 1 of each of those years.

Recommendation 2:

The Commission recommends that the salaries of the justices of the Supreme Court of Canada and the chief justices and associate chief justices should be set as of April 1, 2004, and inclusive of statutory indexing, at the following levels:

Supreme Court of Canada:	
Chief Justice of Canada	$308,400
Justices	$285,600
Federal Court and Tax Court of Canada:	
Chief Justices	$263,000
Associate Chief Justices	$263,000
Appeal Courts, Superior and Supreme Courts and Courts of Queen's Bench:	
Chief Justices	$263,000
Associate Chief Justices	$263,000

Recommendation 3:

The Commission recommends that the senior northern judges receive equivalent compensation to that of a chief justice until such time as chief justices are appointed in those jurisdictions.

Recommendation 4:

The Commission does not recommend a salary differentiation between puisne judges who sit on courts of appeal and puisne judges who preside at trials.

Recommendation 5:

The Commission recommends that the *Judges Act* be amended to provide for

- the possibility of dividing, upon conjugal breakdown, the judicial annuity deemed to accrue during a relationship, up to a 50% limit;

- the judicial annuity to be deemed to accrue over the judge's entire period of judicial service, for the purpose of determining the portion of the judicial annuity that is subject to division upon conjugal breakdown;

- a lump sum settlement option, to ensure a clean break and the possibility of deferring such settlement until the date when the judge will have attained age 55 and completed 10 years of service, if applicable; and

- the demographic assumptions used for the most recent *Actuarial Report on the Pension Plan for the Federally Appointed Judges* to be used for purposes of determining the value of the judicial annuity and the expected retirement date of a judge in calculating the portion of the judicial annuity subject to division.

The Commission also recommends that the government amend the *Judges Act* and the *Income Tax Act*, as necessary, to allow the transfer of a portion of the former spouses' lump-sum settlements to RRSPs as if the judicial annuity were a registered pension plan, at least for the portion of the judicial annuity up to the defined benefit pension limits applicable to registered pension plans under the *Income Tax Act*.

Recommendation 6:

The Commission recommends that there be no change in the provision for survivor benefits for single judges until the matter is addressed by the government in the wider federal context.

Recommendation 7:

The Commission declines to recommend any change to the judicial annuities payable to the judges who retired during the 1992–97 time period.

Recommendation 8:

The Commission recommends that the Incidental Allowance of $5,000 per annum for each judge remain unchanged.

Recommendation 9:

The Commission recommends that effective April 1, 2004, s. 27(6) of the *Judges Act* be amended such that regional senior judges in Ontario be added to the judges entitled to a representational allowance under that section, and that the representational allowance for such regional senior judges be set, in s. 27(7), at an accountable maximum yearly amount of $5,000.

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

Evolution of the Structure of Superior Courts

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

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

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

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

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

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

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

Ex officio Membership and the Nature of Judicial Appointments

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

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[127] Presentation of Justice Campbell, Transcript of the March 13, 2008 Quadrennial Commission Public Hearing at 316.
[128] See *e.g.*, Alberta's *Court of Appeal Act*, R.S.A. 2000, c.C-30, ss.3(3).
[129] See *e.g.*, Saskatchewan's *Court of Appeal Act*, S.S. 2000, Chapter C-42.1, ss. 5(1).

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

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

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

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

Evaluating the Request under Section 26

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

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

Institutions versus Individuals

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

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

The Exercise of Appellate Functions by Trial Courts and Judges

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

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

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

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

Practical Considerations

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

Ad hoc participation by trial judges on courts of appeal

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

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

Recommendation 5

The Commission recommends that:

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

Recommendation 6

The Commission recommends that:

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

Annuity for Trial Judges who Previously Served on Courts of Appeal

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

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

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

Recommendation 7

The Commission recommends that:

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

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

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

Supreme Court of Canada

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

Federal Court of Appeal and Courts of Appeal

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

Federal Court, Tax Court and Trial Courts

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

Recommendation 5

The Commission recommends that:

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

Recommendation 6

The Commission recommends that:

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

Recommendation 7

The Commission recommends that:

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

Recommendation 8

The Commission recommends that:

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

Recommendation 9

The Commission recommends that:

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

Recommendation 10

The Commission recommends that:

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

Recommendation 11

The Commission recommends that:

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

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

Recommendation 7

The Commission recommends that:

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

Recommendation 7

The Commission recommends that:

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

Recommendation 8

The Commission recommends that:

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

Recommendation 9

The Commission recommends that:

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

Recommendation 10

The Commission recommends that:

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

Recommendation 11

The Commission recommends that:

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

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).

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?"**