JUDICIAL COMPENSATION AND BENEFITS COMMISSION

SUBMISSION

of the

CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

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OVERVIEW

1. Judicial independence is a fundamental principle of our democracy and legal tradition.

2. Judicial independence and judicial compensation are inextricably linked. As the Supreme Court of Canada confirmed, financial security, both in its individual and institutional dimensions, is, with security of tenure and administrative independence, one of the three core characteristics of judicial independence.

3. The Constitution of Canada requires the existence of a body that is interposed between the judiciary and the other branches of the state, whose constitutional function is to depoliticize the process of determining changes in judicial compensation. For Canada's 1,138 federally-appointed judges, and for the five Federal Court prothonotaries who were recently added to this process, the Judicial Compensation and Benefits Commission (the "**Commission**") is that body.

4. This submission to the Commission is made on behalf of the Canadian Superior Courts Judges Association (the "**Association**") and the Canadian Judicial Council (the "**Council**"). After addressing issues relating to the Commission process itself – a process of which the Commission is the guardian – the Association and the Council demonstrate in this submission the reasons why this Commission should recommend staged, annual increases to judicial salaries in order to bridge part of the gap that exists between the judicial salary of puisne judges and the key comparator for the establishment of judicial salaries, namely the remuneration of DM-3s, those senior public servants whose skills, experience and levels of responsibilities most closely parallel those of the judiciary.

5. Consistent with Recommendation 11 of the Levitt Commission, the Association and the Council are embarking upon the Commission's current inquiry determined to promote, and to contribute in establishing, a collaborative, non-adversarial relationship with the Government in relation to the Commission process.

I. INTRODUCTION

6. The submission of the Association and the Council is organized as follows. In the first section of this submission, the respective objects of the Association and the Council are described, notably in connection with the process for the determination of judicial compensation and benefits. In the Background section, which is complemented by an Appendix, a brief history of the Commission is recounted. The following section, entitled "The Commission's Mandate", is self-explanatory. In the Issues section, the Association and the Council address both process and substantive issues.

II. THE ASSOCIATION AND COUNCIL

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

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

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

   (iii) taking such actions and making such representations as may be appropriate in order to assure that the salaries and other benefits guaranteed by s. 100 of the *Constitution Act, 1867*,[1] and provided by the *Judges Act*[2] are maintained at levels and in a manner which is fair and reasonable and which reflect the importance of a competent and dedicated judiciary;

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

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

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

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1 Reproduced in the Joint Book of Documents ("**JBD**") prepared with the Government.

2 *Judges Act*, R.S.C. 1985, c. J-1, as amended [JBD at tab 24].

8. As of February 1, 2016, 92% of Canada's approximately 1,138 federally appointed judges are members of the Association.

9. In furtherance of the Association's objects that relate to judicial salaries and other benefits, a Compensation Committee was established to study and make recommendations to the Association's Executive Committee and Board of Directors in respect of issues regarding judicial compensation.

10. The Council was established by Parliament in 1971. It consists of the Chief Justice of Canada and the Chief Justices and Associate Chief Justices of the provincial and territorial superior courts, the Federal Court of Appeal, the Federal Court, the Tax Court of Canada and the Court Martial Appeal Court of Canada.

11. The objects of the Council are to promote and improve efficiency, uniformity and quality of judicial service in superior courts.[3] As part of its mandate, the Council has established a Judicial Salaries and Benefits Committee.

12. The Council and the Association have made joint submissions, written and oral, to each of the five Triennial Commissions (1982-1996) and to the four Quadrennial Judicial Compensation and Benefits Commissions (the "**Drouin Commission**", the "**McLennan Commission**", the "**Block Commission**", and the "**Levitt Commission**"). The Drouin Commission issued its report (the "**Drouin Report**") on May 31, 2000. The McLennan Commission issued its report (the "**McLennan Report**") on May 31, 2004. The Block Commission issued its report (the "**Block Report**") on May 30, 2008. The Levitt Commission issued its report (the "**Levitt Report**") on May 15, 2012.

13. The Association and the Council have worked closely together in preparing this submission on behalf of federally appointed judges. The recommendations sought from this Commission by the federal judiciary have been approved by the Association and the Council.

[3] The objects of the Council are set out in s. 60 of the *Judges Act* [JBD at tab 24].

III. BACKGROUND

A. Judicial Independence and Judicial Compensation

14. Judicial independence is a fundamental principle of our democracy and legal tradition. This principle, whose historical origins can be traced back to the *Act of Settlement, 1701*,[4] is incorporated in the Constitution of Canada through the preamble and the judicature sections of the *Constitution Act, 1867* and s. 11(d) of the *Canadian Charter of Rights and Freedoms*.[5]

15. Judicial independence and judicial compensation are inextricably bound to each other. In *Valente v. The Queen*,[6] *Reference Re Provincial Court Judges*[7] ("***PEI Reference***"), and more recently in *Bodner v. Alberta*[8] ("***Bodner***"), the Supreme Court of Canada confirmed that financial security, both in its individual and institutional dimensions, is, with security of tenure and administrative independence, one of the three core characteristics of judicial independence.[9]

16. It is important to keep in mind that financial security through adequate judicial compensation ultimately benefits the public, as emphasized by Chief Justice Lamer in the *PEI Reference*:

> I want to make it very clear that the guarantee of a minimum salary is not meant for the benefit of the judiciary. Rather, financial security is a means to the end of judicial independence, and is therefore for the benefit of the public.[10]

17. Under s. 100 of the *Constitution Act, 1867*, the Parliament of Canada has the duty to fix the compensation of federally appointed judges. Section 100 provides as follows:

> The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the

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[4] *Act of Settlement, 1701*, (U.K.), 12-13. Will. III, c. 2.

[5] For ease of reference, these provisions of the Constitution of Canada are reproduced in the JBD at tabs 22 and 23.

[6] *Valente v. The Queen*, [1985] 2 S.C.R. 673 [Book of Exhibits and Documents of the Association and the Council ("**BED**") at tab 1].

[7] *Reference Re Provincial Court Judges*, [1997] 3 S.C.R. 3 [JBD at tab 25].

[8] *Bodner v. Alberta*, [2005] 2 S.C.R. 286 [JBD at tab 26].

[9] *Valente*, *supra* at para. 40 [BED at tab 1]; *PEI Reference*, *supra* at paras. 115-122 [JBD at tab 25]; *Bodner*, *ibid.* at paras. 7-8 [JBD at tab 26].

[10] *PEI Reference*, *supra* at para. 193 [JBD at tab 25].

> Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

18. The Triennial Commission chaired by David W. Scott, Q.C. (the "**Scott Commission**") observed in its 1996 report that judges are in a unique position in that their remuneration is the subject of an obligation imposed on Parliament by the Constitution. The Scott Commission explained the value of this responsibility:

> Western democracies rooted in English constitutional tradition have been at pains to ensure that judicial independence, which ensures accountability on the part of the executive branch of Government, is uncontaminated by uncertainty (and thus preoccupation) on the part of the judges with their economic security. Under our Constitution the obligation is upon Parliament to "fix and provide" the salaries and benefits of judges. It is implicit in this constitutional imperative that the process be undertaken in an environment in which judicial independence is enhanced and the consequences of dependency eliminated.[11]

19. The process for determining judicial compensation, which is now provided in the *Judges Act*, has changed over time. The Association and Council have prepared for the Commission's information a summary of the history of this process in Appendix A.

B. The establishment of the current Commission

20. Under s. 26 of the *Judges Act*, as amended, this Commission was required to commence its inquiry on October 1, 2015. This was not possible, however, as the Orders in Council appointing the Chair and Members of this Commission were not issued until December 15, 2015.

21. The reasons for the delay in the commencement of this Commission's inquiry are discussed in the section of this submission devoted to process issues.

IV. THE COMMISSION'S MANDATE

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

> Commission
>
> 26(1) The Judicial Compensation and Benefits Commission is hereby established to inquire into the adequacy of the salaries and other

[11] Scott Report (1996) at 6 [BED at tab 28].

amounts payable under this Act and into the adequacy of judges' benefits generally.

Factors to be considered

(1.1) In conducting its inquiry, the Commission shall consider

(a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;

(b) the role of financial security of the judiciary in ensuring judicial independence;

(c) the need to attract outstanding candidates to the judiciary; and

(d) any other objective criteria that the Commission considers relevant.

23. The *Judges Act* does not equate "adequacy" of judicial salaries and benefits with the minimum necessary to guarantee the financial security of judges. Rather, the Commission must inquire into the adequacy of salaries and benefits with the dual purpose of ensuring public confidence in the independence of the judiciary and attracting outstanding candidates to the Bench.

24. In 2000, the Drouin Commission said the following about the relationship between judicial compensation and the role of the judiciary in modern Canadian society:

> In response to the *Charter of Rights and Freedoms* (the "*Charter*"), and the growing complexity of our social and economic relationships, the Judiciary is playing an increasingly public role in key decisions that affect us all. Moreover, the characteristics of the Judiciary have changed and continue to shift: judges are being appointed at a younger age, and more females are being appointed to the Bench. The caseload of judges has grown, as more cases move to the higher courts for determination. Many of these cases are high profile and controversial. They capture the public interest and become the focus of media attention. Judicial decisions often generate considerable political debate. The reality of these trends must be recognized when considering the salary and benefits that are adequate to secure judicial independence and attract outstanding candidates to the Bench.[12]

25. This remains true today. Some seven years after the Drouin Commission, the Chief Justice of Canada highlighted some of the serious challenges facing the judiciary and

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[12] Drouin Report (2000) at 10 [JBD at tab 28].

the justice system, including the increasing number of unrepresented litigants, the problem of long trials both in civil and criminal litigation, and the challenge presented by intractable, endemic social problems such as drug addiction and mental illness. The Chief Justice observed:

> […] Nothing is more important than justice and the just society. It is essential to flourishing of men, women and children and to maintaining social stability and security. You need only open your newspaper to the international section to read about countries where the rule of law does not prevail, where the justice system is failing or non-existent.
>
> In this country, we realize that without justice, we have no rights, no peace, no prosperity. We realize that, once lost, justice is difficult to reinstate. We in Canada are the inheritors of a good justice system, one that is the envy of the world. Let us face our challenges squarely and thus ensure that our justice system remains strong and effective.[13]

V. ISSUES

26. The Association and the Council set out below the issues that they submit for this Commission's consideration. The recommendations sought by the judiciary are provided at the end of the relevant discussion.

A. Process Issues

1. Introduction

27. Nearly all Triennial and Quadrennial Commissions made observations and suggestions relating to the process before the Commission. Some Commissions even made specific recommendations relating to process.

28. Nevertheless, before the Block Commission, the Government raised the question of the appropriateness of the Commission addressing process issues:

> 33. The Government has suggested that process concerns should be addressed by one of two means: direct discussions between the judiciary and Government or, in certain instances, review by the courts. In our view, the former is inadvisable; the latter is an option that must be carefully weighed.
>
> […]

[13] Chief Justice McLachlin, *The Challenges We Face*, Remarks presented to the Empire Club of Canada, Toronto, Ontario, March 8, 2007 [BED at tab 23].

> 37. The parties nevertheless require access to a forum where concerns related to process can legitimately be raised. It is our view that Quadrennial Commissions, by virtue of their independence and objectivity, are well-placed to serve as that forum and to offer constructive comments on process issues as they arise. While the structure and mandate of the Commission are outlined in statute, any question of process that affects the independence, objectivity or effectiveness of the Commission is properly within its mandate. <u>It is entirely appropriate and arguably imperative that the Commission serve as guardian of the Quadrennial Commission process and actively safeguard these Constitutional requirements</u>.[14] [emphasis added]

29. The Government reiterated its position on process issues before the Levitt Commission, going as far as to question the Commission's "jurisdiction" to address process issues, but the submission was rejected:

> 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.
>
> 88. This position is at variance with the conclusion of all prior Commissions and with the view of this Commission. 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. […][15]

30. The Levitt Commission was very concerned about the fate of the Quadrennial Commission process, stating that it was "in grave danger of ending up where the Triennial process did."[16] By this, the Levitt Commission meant to refer to a process that had lost credibility and had been shown to be ineffective in achieving the goal of preserving judicial independence through a non-politicized compensation commission process. The Levitt Commission therefore made a number of process recommendations, including to address what it described as the "troubling" adversarial nature of the Commission process:[17]

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14 Block Report (2008) at paras. 33 and 37 [JBD at tab 30].

15 Levitt Report (2012) at paras. 87-88 (citations omitted) [JBD at tab 31].

16 Levitt Report (2012) at paras. 92-93 [JBD at tab 31].

17 Levitt Report (2012) at para. 112 [JBD at tab 31].

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 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?

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.

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.

31. In its Response to the Levitt Report, the Government agreed to work with the judiciary to improve the Commission process. The Government also stated that "a less adversarial and more efficient process can be achieved by seeking and building upon genuine consensus, and the Government agrees with the Commission that the parties should explore additional methods for doing so".[18]

32. The Government indicated in its Response to the Levitt Report that it would propose amendments to the *Judges Act* to reduce the time for the Government's response from six months to four months, and to establish an express obligation to introduce implementing legislation in a timely manner. These amendments were adopted in 2012, and the judiciary considers that they have, indeed, contributed to improving the Quadrennial Commission process.

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[18] Response of the Government of Canada to the Report of the 2011 Judicial Compensation and Benefits Commission, May 15, 2012 [BED at tab 10].

33. With respect to Recommendation 10, and its equivalent in the Block Report, Recommendation 14 – both of which plainly call upon the parties to respect and build upon the findings of previous Commissions on recurrent issues – the Government took the position, in its response to the Levitt Report, that there is "only a 'consensus' on an issue if all parties before the Commission have agreed on that issue."

2. Follow-up on the Levitt Commission's process recommendations

34. On December 23, 2015, at the preliminary conference call with this Commission, the parties were asked to describe in their respective submissions the follow-up that has been given to the Levitt Commission's process recommendations, namely Recommendations 8 to 11.

35. The Association and the Council appreciate that the Commission would want to be informed of the parties' follow-up to the Levitt Commission's process recommendations, and respond to the Commission's request in this section. However, in order to preserve the parties' future ability to address process issues with candour in discussions *inter partes*, the judiciary limits itself to describing in broad terms the subject-matter of the discussions, without giving details of the content of these discussions or disclosing the relevant correspondence.

36. On January 24, 2014, representatives from the Association met with the federal Deputy Minister of Justice to discuss ways in which the judiciary and the Government could work together to improve the Commission process, consistent with the Levitt Commission's Recommendation 11.

37. In these discussions with the Government, the Association took the position that a major source of tension between the parties, contributing to the adversarial nature of the Commission process, was the Government's persistent attempts to re-litigate recurrent issues in regard to which a consensus had emerged from past Commission inquiries. The Association accordingly suggested that in order to respond to Recommendation 11 – and consistent with Recommendation 10 – the parties should attempt to identify these areas of consensus. The Government agreed to undertake this exercise.

38. In subsequent correspondence, the Association set out four areas around which the judiciary believed that a consensus had emerged from past Commission inquiries. The Association reiterated its belief that adopting a consensus position on these issues in the

future would be responsive to the Levitt Commission's recommendation that the parties work together to make the process less adversarial and more effective.

39. The Government did not accept the judiciary's main proposed area of consensus. In its initial response, it did not directly address the other three proposed areas of consensus, nor did it propose any alternative area of consensus. Instead, the Government reiterated the position it had taken before the Levitt Commission that each Commission is statutorily and constitutionally required to make its own assessment of the evidence and submissions received during its inquiry.

40. The Association pressed the Government to respond to the other proposed areas of consensus set out in the Association's correspondence. In a subsequent letter, the Government rejected these proposed areas of consensus and again reiterated the view that it is not open for a Commission to follow a previous Commission's findings.

41. The idea that each Quadrennial Commission should build on the work of previous Commissions is so unassailable, rooted as it is in common sense, that it should no longer detain the parties or the Commission. As noted by the Levitt Commission, this approach is also consistent with the Supreme Court of Canada's decision in *Bodner*. In light of this precedent, and the observations of the Block and Levitt Commissions in this regard, the judiciary hopes that the Government will not seek to re-litigate before this Commission issues around which a consensus emerges from previous inquiries, such as the relevance of the DM-3 comparator, the filters to be applied to generate relevant data on self-employed lawyers' income, or indeed the legitimacy for either party to raise process issues before the Commission.

3. Issues in relation to the present Commission process

42. Two issues have arisen in the course of the constitution of the present Commission that require mention. The first relates to the impact of a fixed election date on the statutory deadlines provided in the *Judges Act*; the second, to the required qualifications of the parties' nominees to serve on the Commission. A third issue, broader in scope, concerns the need for prior consultation with the judiciary prior to making amendments to the provisions of the *Judges Act* relating to the Commission process.

a) The need to respect statutory deadlines

43. Under the *Judges Act*, this Commission was required to begin its inquiry on October 1, 2015. Yet, the Orders-in-Council appointing the members of the Commission were only issued on December 15, 2015.

44. As reflected in the exchange of correspondence filed with this submission as **Exhibit A**, a difference has arisen between the parties on the impact of a forthcoming election on the Commission process, including on the need for the Government to proceed with the appointment of the members of the Commission in time for the inquiry to begin on the date mandated by the statute. Given the current confluence between the statutory start date of the Commission set out in the *Judges Act* and the fixed-date election period in the *Canada Elections Act*, this problem is likely to arise again in October 2019. It therefore seems relevant to invite consideration of the issue by this Commission.

45. As set out in their correspondence on the subject, the Association and the Council's position is that even if the statutory start of the Quadrennial Commission's inquiry occurs in the run-up to, or during an election period, the Government is required to comply with the *Judges Act* and move to constitute the Commission in time for the Commission to begin its inquiry on October 1.

b) Independence and impartiality of nominees

46. In June 2015, the Government advised the Association and the Council that its nomination to the Commission was a retired Deputy Minister of Justice. The Association and the Council's understanding is that this Deputy Minister had been directly involved as part of the Government's representation before the Levitt Commission, in addition to having participated, on behalf of the Government, in discussions with the judiciary concerning possible reforms to the Commission process between April 2010 and November 2012.

47. The Association and the Council respect the Government's right under the *Judges Act* to select its nominee to the Commission, a right that the judiciary also enjoys under the *Judges Act*. However, the right to select a nominee is necessarily constrained by basic principles. The Association and the Council are firmly of the view that these basic principles preclude the parties from nominating any person who has represented a party or acted as counsel for a party in relation to the current or previous Commissions.

48. The Association and the Council communicated this view to the Government and invited reconsideration of its nomination and the selection of another nominee. While the Government reasserted the view that its initial nomination was appropriate, the Government's nominee himself decided to withdraw his name.

49. The Association and the Council are not seeking any recommendation from the Commission on this question. However, the judiciary considers it essential that the position it adopted as to the requirements of independence and impartiality on the part of Commission members be made public, so as to inform future nominations. Accordingly, the Association and the Council file as **Exhibit B** to this submission their exchange of correspondence with the Government on this very important question.

c) The need for consultation with the judiciary prior to introducing amendments to the *Judges Act* relating to the Commission process

50. In the February 27, 2014 Government's Response to the Report of the Special Advisor on Federal Court Prothonotaries' Compensation, the Government indicated that in the future, this Commission would inquire into the adequacy of the compensation of Federal Court prothonotaries. The Government's Response did not provide any particulars as to what this would entail.[19]

51. On May 23, 2014, the Association wrote to the Minister of Justice to express its concern about the Government's proposal.[20] The Association asked for particulars in order to assess whether the constitutionality of the Quadrennial Commission process was engaged, and requested that the Government actively consult with the judiciary before any amendments were made to the *Judges Act* to implement this proposal.

52. On October 23, 2014, the Government introduced amendments to the *Judges Act* (and a minor related amendment to the *Federal Courts Act*) that proposed to include prothonotaries in the Commission process; this was done as part of the Government's omnibus budget bill, Bill C-43. The Government did not give any notice to the

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[19] Government's Response to the Report of the Special Advisor on Federal Court Prothonotaries' Compensation, February 27, 2014 [JBD at tab 33(a)].

[20] Letter from Justice Jacques to Minister MacKay, May 23, 2014, **Exhibit C**.

Association or the Council of the proposed amendments, either before or after it tabled the amendments. Bill C-43 received Royal Assent on December 16, 2014.[21]

53. Considering the constitutional status of judges appointed under s. 96 or s. 101 of the *Constitution Act, 1867* and the fact that the Commission process is responsive to the Government's obligations under s. 100 of the *Constitution Act, 1867*, the Association and the Council take issue with the Government's unilateral alteration of that process. Moreover, it is regrettable that the Government denied itself the opportunity to hear the judiciary's constructive suggestions and to work with the Association to find an appropriate way to attain the efficiency objective it was pursuing.

54. At a practical level, the inclusion of the prothonotaries in the Commission process introduces unnecessary procedural complications into the process. As counsel for the prothonotaries has noted in his submission in support of the prothonotaries' funding request,[22] the Government elected to include the prothonotaries in the Quadrennial Commission process and they "are now required to participate in a process that is significantly more complex and elaborate than the previous processes".

55. The Commission is a constitutional body, not a mere statutory advisory committee. Although the Government has the responsibility to legislate the Commission into existence, and has done so through the *Judges Act*, any unilateral steps by the Government to alter the Commission engages the constitutional legitimacy of the process. That being so, the judiciary considers it not only appropriate, but also in keeping with the Levitt Commission's recommendation that the "Government and the judiciary examine methods whereby the Commission process can be made less adversarial and more effective",[23] that no changes be made to the provisions of the *Judges Act* relating to the Commission process without prior consultation with the judiciary.

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[21] The full exchange of correspondence between the Association and the Government concerning the implementation of the Government's proposal is filed herewith as **Exhibit C**.

[22] Letter from Paliare Roland addressed to the Commission, dated January 19, 2016 at 2 [BED at tab 10].

[23] Levitt Report (2012) at para. 118 [JBD at tab 31].

d) Concluding remarks on process issues

56. Having canvassed the foregoing process issues, the Association and the Council are embarking upon the Commission's current inquiry determined to promote, and to contribute in establishing, a collaborative, non-adversarial relationship with the Government in relation to the Commission process, consistent with Recommendation 11 of the Levitt Commission.

B. Substantive Issues

57. The Association and the Council raise the issue of judicial salaries among the substantive issues to be addressed by the Commission.

1. Judicial salaries

58. The Association and the Council ask that the Commission recommend phased increases to the salary of puisne judges in order to start bridging the persistent gap that exists between the judicial salary and the remuneration of DM-3s, the most senior level of deputy ministers within the federal Government.[24] The data relating to the private practice comparator also indicate that these increases are necessary to continue to attract to the Bench outstanding candidates from private practice.

a) The *Judges Act* criteria

59. In inquiring about the adequacy of judicial salaries, the Commission must consider a number of criteria set out in s. 26(1.1)(a) to (d) of the *Judges Act*. Each of those criteria is addressed below.

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

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

[24] The DM-4 level is actually the highest. However, following the creation of the DM-4 level, the judiciary agreed for the time being not to consider DM-4s the relevant comparator since the number of people at that level has remained low and, as noted by the Block Commission, it continues to appear to be reserved for positions of particularly large scope.

61. The judiciary is cognizant of this statutory criterion and has shown itself sensitive, in the past, to the Government's ability to implement the Commission's salary recommendations. This is exemplified by the Association's reaction to the Government's response to the Block Report.

62. On February 11, 2009, the Government invoked the economic crisis that began in late 2008 (many months after the issuance of the Block Report) in order to refuse to implement, at that time, the increases to the judicial salary that had been recommended by the Block Commission. On that same day, the Association issued a press release stating that the federally appointed judiciary recognized that the Canadian economy was facing unprecedented challenges that called for various temporary measures, although it emphasized that the applicable constitutional principles would require that the Block Commission's recommendations be reconsidered once the economic situation improved.

63. Fortunately, this Commission is not faced with the kind of economic crisis that struck the global economy in late 2008. Nor is this Commission faced, as the Levitt Commission was, with an environment that included the *Expenditure Restraint Act*, which, even though it did not apply to judges, nevertheless limited the salary increases in the federal public sector until the 2010-2011 fiscal year.[25]

64. As part of the preparations for this Commission, the Department of Finance provided a letter to the Department of Justice dated February 24, 2016 setting out the Government's most recent assessment of the state of the Canadian economy and the Government's current and future financial position.[26] The Department of Finance provided the following assessments:

- "Private-sector economists now expect Canadian real GDP growth to slow to 1.4% in 2016 before picking up to 2.2% in 2017. The economists expect real GDP growth to average 1.9% per year over the 2016 to 2020 period."

- The Consumer Price Index is projected to increase by 1.1% in 2015, and 1.6% in 2016", and 2% in each of 2017, 2018, and 2019.

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25 *Expenditure Restraint Act*, SC 2009, c. 2, s 16.
26 Letter from Assistant Deputy Minister Nick Leswick to Anne Turley, February 24, 2016 [JBD at tab 9].

- The Government reported a budgetary surplus of $1.9 billion for the 2014-2015 fiscal year, and is expected to go into a deficit position in the 2015-2016 fiscal year. The federal debt stood at $612.3 billion as of March 31, 2015, or 31% of GDP.

65. The prospect that the Government will run a deficit in the 2015-2016 fiscal year is not perceived, in and of itself, as the sign of a troubled economy. As the Globe and Mail pointed out in a recent editorial, Canada's "debt-to-GDP ratio, at just over 30%, is far below our G7 peers, and a galaxy removed from any sort of danger zone. And thanks to borrowing costs lower than the rate of inflation, the cost of running a deficit has never been lower."[27]

66. In a report released on February 12, 2016, Douglas Porter, the Chief Economist of BMO Capital Markets, concluded that the Government's proposal for "a moderate dose of stimulus is an entirely appropriate response to current economic realities". Mr. Porter further noted that a moderate fiscal boost would leave Canada's debt-to-GDP ratio relatively unchanged and would not impact Canada's credit rating.[28]

67. More to the point, the federal Government's decision to move into a deficit position results from the Government's intention to spend more to promote economic growth as part of its fiscal stimulus plan.

68. On February 12, 2016, the Minister of Finance met with leading private sector economists as part of pre-budget consultations. The Department of Finance provided the following summary of the Minister's meeting with private sector economists, including an update on the Government's position since the November 2015 economic update:

- "Though recent global economic developments are more negative than expected in last November's *Update of Economic and Fiscal Projections*, the economists noted that Canada's underlying economic and fiscal fundamentals remain sound."

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[27] "Yes, Ottawa should run a bigger deficit (but first read the fine print)" Globe and Mail, February 19, 2016 [BED at tab 17].

[28] Douglas Porter and Robert Kavcic, "CanadAAA?", BMO Capital Markets, February 12, 2016 [BED at tab 15].

- "On January 1st, the Government cut taxes for an estimated 9 million Canadians through its middle class tax cut. This is a first step in a plan to grow the economy by strengthening the middle class, making historic investments in infrastructure and enhancing child benefits for low- and middle-income Canadians."

- "The Government is committed to investing in the economy and creating conditions for long-term economic growth."[29]

69. On February 22, 2016, the Minister of Finance commented during a "town hall" in Ottawa that deficits will be higher than expected for 2016-17 and 2017-18.[30] Nevertheless, the Minister remained optimistic and spoke of the Government's plan to "grow the economy".

70. It should also be noted that a long-term outlook by the Policy and Economic Analysis Program (PEAP) of the University of Toronto's Rotman School of Management forecasts the following positive trends:[31]

- "the recent drop in the Canadian dollar should translate into stronger net trade over the coming quarters";

- "More of the growth in the Canadian economy in the medium term than in past projections will come from net trade";

- "We anticipate that in the medium term and beyond, on a national accounts basis, the aggregate government sector budget will be roughly balanced";

- "Over the longer term, we see our forecast of the national accounts balances as roughly consistent with balanced public accounts budgets."

71. In sum, Canada has a fiscal position with low debt levels and sound underlying economic and fiscal fundamentals, and the Government is planning to introduce fiscal stimulus to promote economic growth. It follows that the economic conditions criterion set out in s. 26(1.1)(a) does not present an obstacle to this Commission recommending

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[29] Department of Finance, Minister Morneau Meets With Private Sector Economists, February 12, 2016, http://www.fin.gc.ca/n16/16-022-eng.asp [BED at tab 16].

[30] Susana Mas, "Deficit has soared ahead of March 22 budget, Bill Morneau says", February 22, 2016, www.cbc.ca/news/politics/morneau-fiscal-update-deficit-budget-1.3458207 [BED at tab 18].

[31] Policy and Economic Analysis Program, Rotman School of Management, *Long Term Outlook for the Canadian Economy,* February 2016 at I (Summary) [BED at tab 14].

an increase in judicial salaries that is otherwise justified, applying the comparators developed to assist in the determination of judicial salaries.

ii) The role of financial security in ensuring judicial independence

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

> We strongly affirm the importance of an independent judiciary, and we recognize the role that financial security plays as a fundamental component of independence as set out in the second enumerated factor under subsection 26(1.1).[32]

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

> What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be <u>depoliticized</u>. [...]
>
> […]
>
> The depoliticized relationships I have been describing create difficult problems when it comes to judicial remuneration. On the one hand, remuneration from the public purse is an inherently political concern, in the sense that it implicates general public policy. [...]
>
> On the other hand, the fact remains that judges, although they must ultimately be paid from public monies, are not civil servants. Civil servants are part of the executive; judges, by definition, are independent of the executive. The three core characteristics of judicial independence – security of tenure, financial security, and administrative independence – are a reflection of that fundamental distinction, because they provide a range of protections to members of the judiciary to which civil servants are not constitutionally entitled.[33]

74. The role and responsibilities of judges are *sui generis*, as the Government acknowledged in its submissions to the Drouin Commission.[34] Indeed, judges occupy a

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[32] Drouin Report (2000) at 8 [JBD at tab 28]

[33] *PEI Reference Case*, *supra* at paras. 140 and 142-143 (emphasis in original) [JBD at tab 25].

[34] As cited in the Drouin Report (2000) at 13 [JBD at tab 28].

unique position in our society and that uniqueness in all of its manifestations must be taken into account by the Commission. Those manifestations include the following :

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

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

(iii) Judges are prohibited by the *Judges Act*[35]- with good reason - from engaging in any other occupation or business beyond their judicial duties. It follows that judges cannot supplement their income by embarking upon other endeavours.

(iv) Judges must divest themselves of any commercial endeavour that may involve litigious rights. This is a significant sacrifice that other members of society are not called upon to make.

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

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

75. In light of the constitutional role of the judiciary as an independent branch of government and the framework applicable to the fixing of judicial compensation, it would be wrong in principle to consider the expenditure on judicial salaries as being simply one of many competing priorities on the public purse, as the Government attempted to cast the issue before the Block Commission.

76. The Block Commission rejected such a characterization and expressed its agreement with the submission made on behalf of the Canadian Bar Association to the effect that

[35] *Judges Act*, s. 57(1) [JBD at tab 24]

judicial independence is not a mere government priority, competing with other government priorities, but rather a constitutional imperative. Were the Commission to consider judicial salaries on the same footing with other government priorities, it would be placed in a highly politicized process. As the Block Commission concluded:

> 57. We agree with the views expressed by the Canadian Bar Association. The Government's contention that the Commission must consider the economic and social priorities of the Government's mandate in recommending judicial compensation would add a constitutionally questionable political dimension to the inquiry, one that would not be acceptable to the Supreme Court, which has warned that commissions must make their recommendations on the basis of "objective criteria, not political expediencies". […]
>
> 58. With regard to the Government's contention that any increases in judicial compensation must be reasonable and justifiable in light of the expenditure priority that the Government has accorded to attracting and retaining professionals of similarly high qualities and capacity within the federal public sector, we find no such requirement in the statutory criteria that the Commission must consider. In fact, were the Commission required to justify compensation increases in this way, it would make the Commission accountable to the Government and allow the Government to set the standard against which increases must be measured. This would be an infringement on the Commission's independence. Since the maintenance of the financial security of the judiciary requires that judicial salaries be modified only following recourse to an independent commission, any measure that would have the effect of threatening or diminishing the Commission's independence would conflict with this constitutional requirement.[36]

iii) The need to attract outstanding candidates to the judiciary

77. It is axiomatic that there is a correlation between the ability to attract talented individuals and adequate compensation. The Block Commission recognized this when it stated:

> It is not sufficient to establish judicial compensation only in consideration of what remuneration would be acceptable to many in the legal profession. It is also necessary to take into account the level of remuneration required to ensure that the most senior members of the Bar will not be deterred from seeking a judicial appointment. To do otherwise would be a disservice to Canadians who expect nothing less than excellence from our judicial system – excellence which must continue to be reflected in the calibre of judicial appointments made to our courts.[37]

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[36] Block Report (2012) at paras. 57-58 [JBD at tab 30].

[37] Block Report (2012) at para. 76 [JBD at tab 30]

78. The connection between talent and adequate compensation was the impetus for the Government's decision to strike the first Advisory Committee on Senior Level Retention and Compensation, which reported in 1998 (the "**Strong Committee**"). The Strong Committee had this to say about the correlation between compensation and the calibre of candidates:

> In our view, compensation policy should be designed to attract and retain the appropriate calibre of employees to achieve an organization's objectives. Such compensation policy needs to be internally equitable, to be responsive to the economic and social environment, and to encourage and reward outstanding performance. Salary is usually the major driver of such policy. Salary depends upon responsibility, individual performance and comparability with relevant markets. Typically, standard practices and techniques are used to evaluate each of these objectively and transparently.[38]

79. While adequate compensation is required to attract outstanding candidates to the Bench, there are particularities in the setting of judicial compensation that the Commission must take into account. In the words of the McLennan Commission:

> The considerations that go into the setting of judicial compensation and benefits are unique, in that so much of the usual process of determining compensation does not apply. Judges cannot speak out and bargain in the usual way. Compensation incentives usual in the private sector, such as bonuses, profit sharing, stock options, at-risk pay, recruitment and performance bonuses, together with the prospect of promotion, do not apply in the judicial context, although many of these financial incentives are increasingly common in the public sector.[39]

80. The need to attract outstanding candidates to the Bench, coupled with the fact that appointees predominantly come from private practice, explain the importance of self-employed lawyers' income as a comparator in the determination of judicial salaries. The McLennan Commission made the point succinctly when it said that "it is in the public interest that senior members of the Bar should be attracted to the bench, and senior members of the Bar are, as a general rule, among the highest earners in private practice."[40]

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38 Advisory Committee on Senior Level Retention and Compensation, *First Report: January 1998* at 7 [BED at tab 12].

39 McLennan Report (2004) at 5 [JBD at tab 29].

40 McLennan Report (2004) at 32 [JBD at tab 29].

iv) Other objective criteria

81. Among the "other objective criteria" that past Commissions have considered in their determination of judicial salaries is the evolution of the role and responsibilities of Canadian judges in the past 25 years. The following observations of the Drouin Commission are still apposite today:

> There are increasing, and ever-shifting, demands placed upon the Judiciary. As a result of the introduction of the *Charter*, the growth in litigation in Canada, the complexity of the matters which actually proceed before the courts, and intensified public scrutiny of judicial decisions, the process and requirements of "judging" have become more onerous at both the trial and appellate levels.[41]

82. Judicial decisions at all levels are becoming increasingly complex and continue to be the focus of attention by the media and the public. Judges are repeatedly called upon to adjudicate on sensitive and contentious matters of a socio-political nature, a trend that has been accentuated by the continued willingness of Parliament and the provincial legislatures to leave many controversial issues for determination by the courts. Vivid illustrations of this phenomenon can be found in the role played by courts in respect of the many difficult social and political issues confronting Canadian society today, such as physician-assisted death.

83. Globalization and technological innovations have also contributed to a greater complexity and volume of legal issues confronted by the judiciary, from e-discovery to multi-jurisdictional class actions to criminal trials involving complex evidence of encrypted communications between accused persons.

b) The comparators

84. In considering the adequacy of judicial salaries in light of the statutory criteria cited above, past Commissions – both Triennial and Quadrennial – have traditionally relied on two principal comparators: (a) the remuneration of DM-3s, and (b) the incomes of senior lawyers in the private practice of law in Canada.

85. While there has been some variation in the treatment of these comparators from Commission to Commission, a clear consensus has emerged to the effect that these are the two key comparators.

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[41] Drouin Report (2000) at 17 [JBD at tab 28].

i) Remuneration of the most senior deputy ministers

86. The use of the remuneration of the most senior deputy ministers, the so-called DM-3 comparator, predates the Triennial and Quadrennial Commissions. In 1975, Parliament amended the *Judges Act* to make the salary level of puisne judges roughly equivalent with the midpoint salary of the most senior level of deputy ministers.

87. The first Triennial Commission, the Lang Commission, noted in its 1983 report that "the historic relationship between the salaries of superior court judges and deputy ministers was restored in 1975".[42] The Lang Commission went on to find that this relationship had deteriorated since the amendments because judicial salaries had failed to keep up with the salaries of senior deputy ministers. In order to restore the "historic relationship", the Lang Commission recommended that judicial salaries be set by starting with the 1975 level and adjusting for inflation, an exercise that became known as the "1975 equivalency".

88. The Guthrie Commission in 1987 and the Courtois Commission in 1990 both applied the "1975 equivalency" when recommending increases to judicial salaries. Apart from recognizing that the application of the "1975 equivalency" restored the "historic relationship" between the salaries of senior deputy ministers and the judiciary, both commissions noted that the salaries of senior deputy ministers provided the best comparator for assessing the adequacy of compensation for puisne judges.

> Guthrie Commission:
>
> As a result of 1975 amendments to the Judges Act, the salary level of superior court puisne judges was made roughly equivalent to the mid-point of the salary range of the most senior level (DM3) of federal deputy minister. This was not intended to suggest equivalence of factors to be considered in the salary determination process, for no other group shares with the judiciary the necessities of maintaining independence and of attracting recruits from among the best qualified individuals in a generally well-paid profession. In 1975, judicial salary equivalence to senior deputy ministers was generally regarded, however, as satisfying all of the criteria to be considered in determining judicial salaries. At that salary level, a sufficient degree of financial security was assured and there were few financial impediments to recruiting well-qualified lawyers for appointment to the bench.[43]

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[42] Lang Report (1983) at 5 [BED at tab 24].

[43] Guthrie Report (1987) at 8 [BED at tab 25].

Courtois Commission:

> The reasons given by the Lang and Guthrie Commissions for recommending 1975 equivalence are still very much applicable, and we fully subscribe to them. Both previous Triennial Commissions relied in part on the fact that the salary level being recommended for superior court judges would restore the historical relationship of rough equivalence between the salaries of judges and those of senior deputy ministers in the federal Public Service. The salary level established by the 1975 amendments to the Judges Act did not result in a new, historically high, salary level for judges, but simply allowed for inflation that had occurred in the years prior to 1975. The fairness of that level has not been disputed. We note that 1975 equivalence would bring judges to within 2% of the mid-point of the salaries of the most senior level (DM-3) of federal deputy ministers. The DM-3 mid-point, we believe, reflects what the market place expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges. [our emphasis][44]

89. The Government advocated a move away from the "1975 equivalency" and the adoption of the current DM-3 comparator in its submissions before the next Triennial Commission, the Crawford Commission. The Government's submissions supporting the continued use of the DM-3 comparator were as follows:

> 1975 was a long time ago, and much has changed in the meantime, not the least of which has been our economy. There seems to be little point in trying to tie judicial salaries to some arbitrary level set so long ago and in very different circumstances. Therefore, the government thinks it would be better to do away with both the concept and the terminology of 1975 equivalence, and instead deal with judicial salary levels on the basis that there should be a rough equivalence to the DM-3 midpoint.[45]

90. The Crawford Commission in its 1993 report accepted the Government's submission that the "1975 equivalency" was no longer a particularly helpful benchmark as a determinant of judges' salaries. Instead, the Crawford Commission preferred to refer directly to a rough equivalence with the midpoint of the salary range of the most senior level of federal public servant, the DM-3. The Crawford Commission repeated the finding from the Courtois Report that "the DM-3 range and mid-point reflect what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges."[46]

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[44] Courtois Report (1990) at 10 [BED at tab 26].

[45] Government's submission to the Crawford Commission, cited in the Drouin Report (2000) at 28 [JBD at tab 28].

[46] Crawford Report (1993) at 11 [BED at tab 27].

91. The first Quadrennial Commission, the Drouin Commission, endorsed the principle of a relationship between judicial salaries and the remuneration of DM-3s in its 2000 report, although it did not believe that any one comparator should be determinative:

> [W]e have concluded that the important aspect of the DM 3 comparator, for the purposes of our inquiry, is the maintenance of a relationship between judges' salaries and the remuneration of those senior federal public servants whose skills, experience and levels of responsibilities most closely parallel those of the Judiciary.[47]

92. The McLennan Commission in 2004 considered the salaries of DM-3s, although it noted that it believed that it was important "to look at a broader range of the most senior public servants whose qualities, character and abilities might be said to be similar to those of judges."[48]

93. The Block Commission for its part rejected the Government's submission that it should consider a much wider public-sector comparator than DM-3s.[49] Instead, the Block Commission was definitive about the need to maintain rough equivalence between the compensation of DM-3s and that of puisne judges, and it went as far as to issue a formal recommendation that the Commission and parties should consider the issue of DM-3 comparison to be settled. Reproduced below are two key passages of the Block Report dealing with the DM-3 comparator:

> 103. The DM-3 level, as can be seen, has been a comparator for nearly every previous commission, and we believe, like the Courtois Commission, that this "reflects what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges".
>
> […]
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> 201. Where consensus has emerged around a particular issue during a previous Commission inquiry, such as the relevance of the DM-3 as a comparator, "in the absence of demonstrated change", we suggest that such a consensus be recognized by subsequent Commissions and

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47 Drouin Report (2000) at 31 [JBD at tab 28].

48 McLennan Report (2004) at 30 [JBD at tab 29].

49 With respect to the newly created DM-4 level, which included only two individuals, the Block Commission (and the judiciary) saw no justification to use it as a comparator, seeing that it "appears to be reserved for exceptional circumstances and positions of particularly large scope", Block Report (2012) at para. 105 [JBD at tab 30].

> arguably reflected in the approach taken to the question in the submissions of the parties.[50]

94. Most recently, the Levitt Commission, in 2012, similarly rejected the Government's submission that it should consider a much wider public-sector comparator than DM-3s, and instead confirmed the appropriateness of using the DM-3 comparator:

> 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 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.[51]

95. While the Triennial and Quadrennial Commissions have for the most part endorsed the DM-3 comparator as an accurate reflection of "what the marketplace expects to pay individuals of outstanding character and ability", there has been an evolution over the years as to what figure should be used as the DM-3 comparator.

96. As set out above, the initial Triennial Commissions used the midpoint of the 1975 salary range, adjusted for inflation, as the DM-3 comparator. The Crawford Commission adopted the Government's proposal to abandon the "1975 equivalency" and instead used the midpoint of the salary range as the DM-3 comparator. The Drouin Commission, as well as every Commission thereafter, updated the DM-3 comparator by adding the at-risk pay to the salary component, in recognition of the fact that at-risk pay is an integral part of the total compensation of DM-3s. The Block Commission – as well as the Levitt Commission – set the DM-3 comparator as the midpoint of the salary range plus half of eligible at-risk pay (the "**Block Comparator**").

97. The midpoint is the half-way point of a theoretical range, not the average or median figure of the actual salary paid. It appears that the midpoint, at its origin in 1975, was used as a proxy for the average, since in that era the Government did not publicly

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50 Block Report (2012) at paras. 103 and 201 [JBD at tab 30].

51 Levitt Report (2012) at para. 27 [JBD at, tab 31].

disclose the average compensation of DM-3s. Averages being now available, those figures would better reflect the actual remuneration paid to DM-3s, on average. The Association and the Council therefore submitted before the Block Commission that the relevant figure for the DM-3 comparator should be the total average compensation of DM-3s – that is, the average base salary plus average at-risk pay.

98. The Block Commission agreed that "[a]verage salary and performance pay may be used to demonstrate that judges' salaries do retain a relationship to actual compensation of DM-3s". Nonetheless, the Block Commission declined to adopt the total average compensation at that time because it believed that, due to the small number of DM-3s, any figure based on an average would fluctuate too much from year to year to assist the Commission in establishing any long-term comparison between the compensation of DM-3s and judges:

> 106. We also used the mid-point of the DM-3 salary range because it is an objective, consistent measure of year over year changes in DM-3 compensation policy. Average salary and performance pay may be used to demonstrate that judges' salaries do retain a relationship to actual compensation of DM-3s. However, average salary and performance pay are not particularly helpful in establishing trends in the relativity of judges' salaries to the cash compensation of DM-3s. They do not provide a consistent reflection of year over year changes in compensation. The DM-3 population is very small, varying between eight and ten people over the past few years, and average salaries and performance pay fluctuate from year to year. A person who has been promoted recently has a lower salary than one who has been in a position for many years. Turnover could cause significant changes in the averages over time. Similarly, a few very high performers or low performers in a year could significantly affect the average performance pay.[52]

99. The Association and the Council did not ask the Levitt Commission to use the total average compensation as the DM-3 comparator, their position in principle being that the Levitt Commission should recommend the prospective implementation of all of the Block Commission salary recommendations. However, the judiciary noted that "there is a significant disparity between the midpoint and actual average figures over the years",[53] adding the following proviso:

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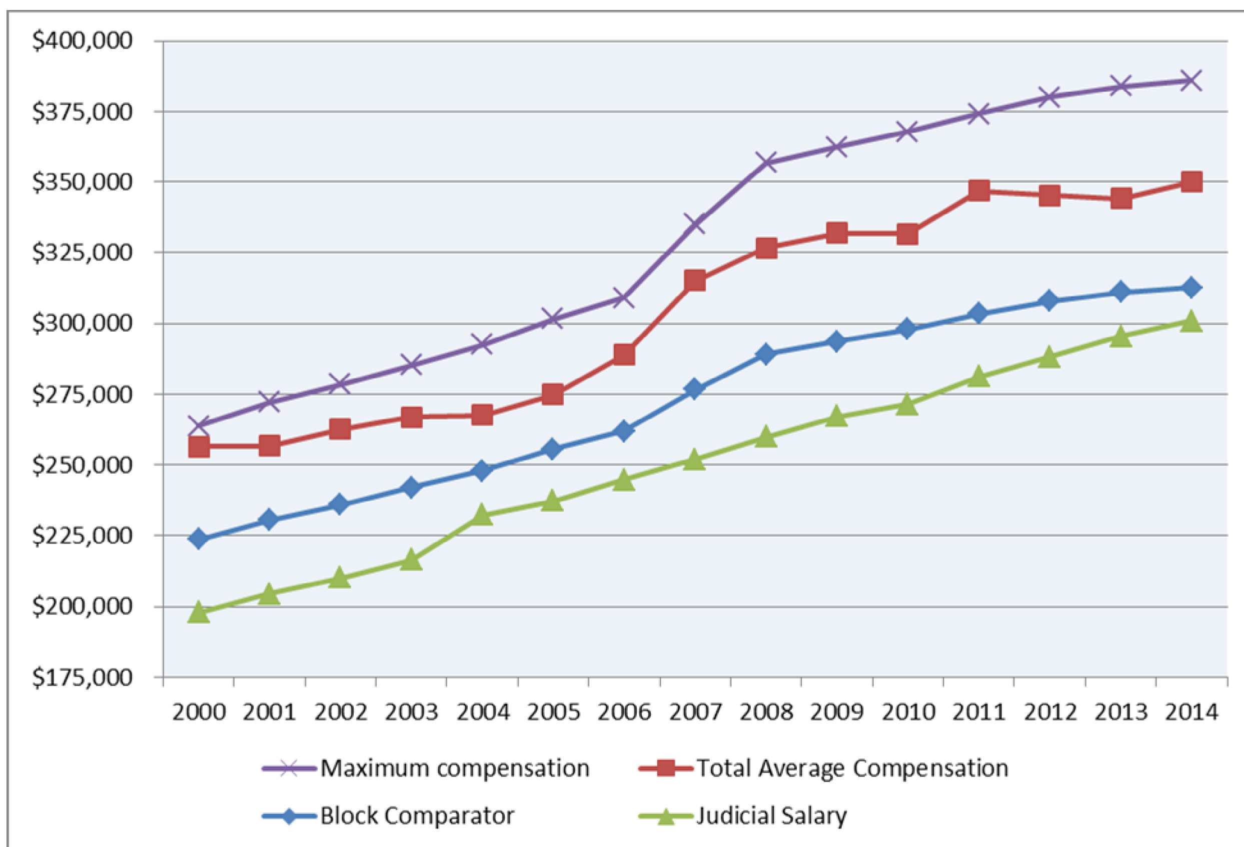
[52] Block Commission (2008) at para. 106 [JBD at tab 30].

[53] Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated December 20, 2011 at para. 117 [BED at tab 7].

> If DM-3 compensation continues to be at the upper end of the salary range and eligible at-risk percentage, future Quadrennial Commissions will likely decide to revisit the Block Commission's use of the midpoint figure rather than the average.[54]

100. As can be seen in the following graph, the disparity between the Block Comparator and the actual average figures has persisted through the past two quadrennial cycles. It is also apparent from this graph that the total average compensation of DM-3s remains consistently at the upper end of the maximum compensation available to DM-3s (maximum salary range plus maximum at-risk pay):

Figure 1
Comparison of DM-3 Maximum Compensation, Total Average Compensation, Block Comparator and Judicial Salary, 2000-2014



101. The third observation to be made from the above graph is that the Block Commission's concern about the reliability of total average compensation as a long-term reference has

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54 *Ibid* at footnote 90.

not been borne out. There have not been any significant yearly variations in the total average compensation. Instead, the total average compensation has followed the general trend line of the Block Comparator, albeit at a consistently higher rate.

102. As can be seen in the table below, since the year 2000 the Block Comparator has been 7% to 12.8% lower than the total average compensation on a yearly basis, with an average yearly difference of 10.3%:

Table 1
Comparison of Block Comparator and Total Average Compensation, 2000-2014

Date	Block Comparator	Total Average Compensation	Difference between Block Comparator and Total Average Compensation	
			Percentage	$
April 1, 2000	$223,630	$256,574	-12.8%	-$32,944
April 1, 2001	$230,615	$256,842	-10.2%	-$26,227
April 1, 2002	$236,060	$262,610	-10.1%	-$26,550
April 1, 2003	$242,000	$267,051	-9.4%	-$25,051
April 1, 2004	$248,050	$267,670	-7.3%	-$19,620
April 1, 2005	$255,585	$274,844	-7.0%	-$19,259
April 1, 2006	$261,965	$288,848	-9.3%	-$26,883
April 1, 2007	$276,632	$315,233	-12.2%	-$38,601
April 1, 2008	$289,095	$326,580	-11.5%	-$37,485
April 1, 2009	$293,522	$331,866	-11.6%	-$38,344
April 1, 2010	$297,949	$331,557	-10.1%	-$33,608
April 1, 2011	$303,250	$346,866	-12.6%	-$43,617
April 1, 2012	$307,910	$345,269	-10.8%	-$37,360
April 1, 2013	$311,055	$343,993	-9.6%	-$32,938
April 1, 2014	$312,628	$349,890	-10.6%	-$37,262

103. In respect of every year except two over the past 15 years, the Block Comparator produces a figure that is at least roughly 10% below the actual compensation, on average, of the individuals in the DM-3 category. It is therefore apparent that the total average compensation provides a more accurate reflection of the actual compensation of DM-3s than the Block Comparator. What the Commission can learn from the Block

Comparator is the midpoint of the range of compensation the Government is prepared to pay any one individual in the DM-3 category. By contrast, the total average compensation tells the Commission what the Government is actually paying individuals in the DM-3 category, an amount which, year after year, is significantly higher than the midpoint.

104. The table below shows that since the year 2000, the judicial salary of puisne judges has been 13.2% to 22.8% lower than the total average compensation on a yearly basis, with an average yearly difference of 17.7%:

Table 2
Comparison of Judicial Salary and Total Average DM-3 Compensation, 2000-2014

Date	Judicial Salary	Total Average DM-3 Compensation	Difference between Judicial Salary and Total Average Compensation	
			Percentage	$
April 1, 2000	$198,000	$256,574	-22.8%	-$58,574
April 1, 2001	$204,600	$256,842	-20.3%	-$52,242
April 1, 2002	$210,200	$262,610	-20.0%	-$52,410
April 1, 2003	$216,600	$267,051	-18.9%	-$50,451
April 1, 2004	$232,300	$267,670	-13.2%	-$35,370
April 1, 2005	$237,400	$274,844	-13.6%	-$37,444
April 1, 2006	$244,700	$288,848	-15.3%	-$44,148
April 1, 2007	$252,000	$315,233	-20.1%	-$63,233
April 1, 2008	$260,000	$326,580	-20.4%	-$66,580
April 1, 2009	$267,200	$331,866	-19.5%	-$64,666
April 1, 2010	$271,400	$331,557	-18.1%	-$60,157
April 1, 2011	$281,100	$346,866	-19.0%	-$65,766
April 1, 2012	$288,100	$345,269	-16.6%	-$57,169
April 1, 2013	$295,500	$343,993	-14.1%	-$48,493
April 1, 2014	$300,800	$349,890	-14.0%	-$49,090

105. Based on a review of the data that the judiciary has now gathered over the past two quadrennial cycles, it seems clear that when assessing the adequacy of judicial salaries,

this Commission should look to the total average compensation of DM-3s for a reflection of "what the marketplace expects to pay individuals of outstanding character and ability".

106. As of April 1, 2015:

(i) the salary of a puisne judge is $308,600;

(ii) the Block Comparator is $314,259; and

(iii) while the total average DM-3 compensation for 2015-2016 is not yet available, since the Government has not yet allocated at-risk pay, it is known that the total average DM-3 compensation for the previous year, namely 2014-2015, was $349,890.

Thus, the total average DM-3 compensation is already significantly above both the salary of puisne judges and the Block Comparator. This gap will only increase to the end of the current quadrennial cycle in 2019 if the status quo is maintained.

107. The table below shows:

(i) the projected salaries for puisne judges from 2016 to 2019, indexed according to the Industrial Aggregated Index ("**IAI**") projections provided by the Office of the Chief Actuary;[55] and

(ii) the projected total average compensation for DM-3s from 2015 to 2019, applying an annual increase of 1.9%, based on the average annual growth of the average salary DM-3s without at-risk pay from 2000 to 2014.[56]

[Table appears on next page]

55 The Office of the Chief Actuary has forecasted IAI as follows: 2016, 1.8%; 2017, 2.2%; 2018, 2.4%; 2019, 2.6%, Letter from L. Frappier, Office of the Chief Actuary, Office of the Superintendent of Financial Institutions, dated February 25, 2016 [JBD at tab 7].

56 The rate of increase is calculated from the 2000-2001 fiscal year because that was the year that the Government fully implemented the Strong Committee's recommended increases to at-risk pay for DM-3s.

Table 3
Comparison of Judicial Salary and Total Average Compensation
2015-2019 (Projected)

Date	Judicial Salary	Total Average Compensation	Difference between Judicial Salary and Total Average Compensation	
			Percentage	$
April 1, 2015	$308,600	$356,538	-13.4%	-$47,938
April 1, 2016	$314,100	$363,312	-13.5%	-$49,212
April 1, 2017	$321,000	$370,215	-13.3%	-$49,215
April 1, 2018	$328,700	$377,249	-12.9%	-$48,549
April 1, 2019	$337,200	$384,417	-12.3%	-$47,217

108. As set out above, as of 2019:

- the projected salary for puisne judges will be $337,200; and
- the projected total average compensation for DM-3s will be $384,417.

This means that the status quo would leave judicial salaries at the end of the current quadrennial cycle, in 2019, at $47,217, or 12.3%, less than the total average compensation of DM-3s.

109. The Association and the Council submit that the statutory criteria require an increase of the judicial salary to bridge the very significant gap that exists between the judicial salary and the DM-3 comparator, consisting of the remuneration of those senior public servants whose skills, experience and levels of responsibilities most closely parallel those of the judiciary.

110. The Association and the Council are conscious of the fact that the gap is significant and cannot be filled instantly. The judiciary therefore invites the Commission to recommend that at least half of the $47,217 gap, that is, an amount of approximately $23,600, be gradually reduced over the next four years.

111. In order to reduce this gap, the salary of puisne judges should be increased by 2% as of April 1, 2016, 2% as of April 1, 2017, 1.5% as of April 1, 2018 and 1.5% as of April 1, 2019, all exclusive of statutory indexing based on the IAI. As can be seen in the following table, this would increase judicial salaries in 2019 by $23,700 more than what

they would be with IAI adjustments alone. This would leave judicial salaries at $23,517, or 6.1%, less than the projected total average compensation of DM-3s by the end of the current quadrennial cycle.

Table 4
Comparison of Judicial Salary with proposed increases and Total Average Compensation, 2015-2019 (Projected)

Date	Judicial Salary	Total Average Compensation	Difference between Judicial Salary and Total Average Compensation	
			Percentage	$
April 1, 2015	$308,600	$356,538	-13.4%	-$47,938
April 1, 2016	$320,300	$363,312	-11.8%	-$43,012
April 1, 2017	$333,700	$370,215	-9.9%	-$36,515
April 1, 2018	$346,700	$377,249	-8.1%	-$30,549
April 1, 2019	$360,900	$384,417	-6.1%	-$23,517

112. The above projections assume that the statutory indexation based on IAI as provided for in s. 25 of the *Judges Act* will remain unchanged through the present quadrennial cycle. The IAI adjustment in the *Judges Act* is, along with the judicial annuity, one of the cornerstones of judicial financial security and an integral part of the “social contract”[57] that the Government and lawyers appointed to the Bench have entered into. In view of the constant risk of the politicization of the setting of judicial compensation, IAI adjustments have long been recognized as an essential tool to preserve judicial independence through financial security for the judiciary.

113. Before the Levitt Commission, the Government submitted that the annual IAI adjustments should be capped at 1.5% (a percentage below the expected IAI figures for that quadrennial cycle). The Levitt Commission rejected the Government’s submission as inconsistent with the history and purpose of the IAI adjustment:

> 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

[57] This is the expression used in the Scott Report (1996) at 14 to describe the expectations arising from the salary indexation provided by the *Judges Act* [BED at tab 28].

> the cost of living as reflected in the consumer price index". 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.[58]

114. Despite the Levitt Commission's urging that the IAI adjustment "should not lightly be tampered with", the Government has now advised that it intends to ask the Commission to recommend that the statutory indexation in the *Judges Act* be changed from IAI to the Consumer Price Index ("**CPI**"). The Association and the Council are surprised by this position and will submit that changing the statutory indexation in the *Judges Act* to the CPI would be inconsistent with the history and purpose of the IAI adjustment. The Association and the Council reserve their right to respond to any such proposal in their Reply Submission.

ii) Self-employed lawyers' income

115. The incomes of self-employed private practitioners have been considered by nearly all judicial compensation commissions as an important comparator in the setting of adequate judicial salaries. This comparator has particular relevance in view of the third criterion provided in s. 26(1.1) of the *Judges Act*, namely, "the need to attract outstanding candidates to the judiciary", since lawyers in private practice have long been the primary source of candidates to the Bench.[59]

116. As in the past, the Canada Revenue Agency ("**CRA**") was mandated by the Government and the judiciary to assemble a database consisting of the 2010 to 2014 tax returns of individuals identified by CRA as self-employed lawyers. This database was then used to generate statistics based on specific parameters.

117. The table below shows the relevant data for the 44-56 age group (52 remains the average age of appointment[60]), at the 75th percentile, with a low-income exclusion of

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58 Levitt Report (2012) at para. 46 (citation omitted) [JBD at tab 31].

59 Between 2011 and 2015, 36% of the 226 judicial appointees were from the public sector, which includes government, academia, legal aid clinics, in-house counsel for corporations or other organizations and provincial courts, based on data compiled from information provided by the Commissioner for Federal Judicial Affairs to the principal parties for 2007 to 2011, and 2011 to 2015 [JBD at tab 5].

60 Based on data found in the Appointees Age at Date of Appointment – April 1, 2011 to March 30, 2015 [JBD at tab 5(a)].

$60,000, for Canada as a whole and the top 10 CMAs, where the majority of judges reside. The table compares this data with the salary of puisne judges:

Table 5
Comparison of salary of puisne judges with net professional income of self-employed lawyers at 75th percentile
(Net professional income ≥ $60,000, Age group – 44-56)
Canada and top ten CMAs, 2010 to 2014

	75th Percentile Income		Salary of Puisne Judges		
				% Difference from	
Year	Canada	Top ten CMAs	$	Canada	Top ten CMAs
2010	$372,005	$471,330	$271,400	-27.0%	-42.4%
2011	$361,610	$450,845	$281,100	-22.3%	-37.7%
2012	$365,305	$457,880	$288,100	-21.1%	-37.1%
2013	$364,340	$437,055	$295,500	-18.9%	-32.4%
2014	$373,290	$454,915	$300,800	-19.4%	-33.9%

118. The parameters set out in this table, namely 44-56 age band, 75th percentile, low-income exclusion, top 10 CMAs, have all been endorsed by previous Commissions.[61]

119. The rationale behind the low-income exclusion is that lawyers in private practice who earn below a certain threshold are not suitable candidates for the judiciary since that low income reflects a lack of success or time commitment that is incommensurate with the demands of a judicial appointment.[62]

120. While the amount of $60,000 has been the traditional low-income cut-off since 2000, it appears that after fifteen years, an adjustment for inflation is now required. The Association and the Council are advised that it would be appropriate that this figure be adjusted to $80,000, to account for inflation since the year 2000, the year in the data when the level of $60,000 was first applied.

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[61] Drouin Report (2000) at 38-40 [JBD, tab 28]; McLennan Report (2004) at 40 [JBD, tab 29]; Levitt Report (2012) at para. 43 [JBD at tab 31].

[62] See *e.g.* Annex B to the Reply Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council before the Levitt Commission entitled “Report of Robert Levasseur and Larry Moate” dated January 27, 2012 at 3: “[…] as the exclusion selection criteria implies, lawyers who are not really committed to their profession or are not successful should not be candidates to join the judiciary” [BED at tab 9].

121. When the low-income exclusion figure is adjusted to account for inflation, the data is the following:

Table 6
Comparison of salary of puisne judges with net professional income of self-employed lawyers at 75th percentile
(Net professional income ≥ $80,000, Age group – 44-56)
Canada and top ten CMAs, 2010 to 2014

Year	75th Percentile Income		Salary of Puisne Judges		
			$	% Difference from	
	Canada	Top ten CMAs		Canada	Top ten CMAs
2010	$402,330	$501,590	$271,400	-32.5%	-45.9%
2011	$396,065	$484,310	$281,100	-29.0%	-42.0%
2012	$395,690	$491,575	$288,100	-27.2%	-41.4%
2013	$392,230	$465,230	$295,500	-24.7%	-36.5%
2014	$405,585	$482,380	$300,800	-25.8%	-37.6%

122. As can be seen from the above tables, there is a considerable discrepancy between the judicial salary and the income of self-employed lawyers. Moreover, it must be borne in mind that the income of many self-employed lawyers is greater than what is captured in the CRA data given the prevalence of income-splitting vehicles such as family trusts, and the use of professional corporations by high-income earners to defer income for distribution in the future, neither of which are reflected in the CRA data.

123. Even when the judicial salary is grossed up by a percentage representing the value of the judicial annuity, as was done by the Levitt Commission,[63] there remains a gap between the resulting grossed up amount of judicial salary and the income of self-employed lawyers, particularly in the top ten CMAs, as shown in the table below.

[Table appears on next page]

[63] Levitt Report (2012) at paras. 41-43 [JBD at tab 31]. The Commission's expert, Mr. Sauvé, arrived at the value of 24.7%, as explained in his letter of February 14, 2012.

Table 7
Comparison of salary plus annuity of puisne judges with net professional income of self-employed lawyers at 75th percentile (Net professional income ≥ $80,000, Age group – 44-56) Canada and top ten CMAs, 2010 to 2014

Year	75th Percentile Income		Salary of Puisne Judges		
			$ Includes Annuity valuation of 24.7%	% Difference from	
	Canada	Top ten CMAs		Canada	Top ten CMAs
2010	$402,330	$501,590	$338,436	-15.9%	-32.5%
2011	$396,065	$484,310	$350,532	-11.5%	-27.6%
2012	$395,690	$491,575	$359,261	-9.2%	-26.9%
2013	$392,230	$465,230	$368,489	-6.1%	-20.8%
2014	$405,585	$482,380	$375,098	-7.5%	-22.2%

c) Conclusion

124. Except for statutory indexing, there has been no increase to the salary of puisne judges since April 1, 2004. As the Association and the Council observed in their Reply Submission to the Levitt Commission dated January 27, 2012,[64] the Government's refusal to implement the salary recommendation of the McLennan Commission resulted in a loss of $31,900 per judge in the 2004-2007 period, while the refusal to implement the recommendation of the Block Commission represented a loss of $51,100 per judge in the 2008-2011 period.

125. The Association and the Council submit that the criteria under s. 26(1.1) of the *Judges Act*, and the data relevant to the two key comparators for the establishment of the judicial salary for puisne judges, justify that this Commission make the following salary recommendation:

Recommendation: That the salary of puisne judges be increased by 2% as of April 1, 2016, by 2% as of April 1, 2017, by 1.5% as of April 1, 2018, and by 1.5% as of April 1, 2019, all exclusive of statutory indexing based on the IAI.

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[64] Reply Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated January 30, 2012 at 9-10 [BED at tab 8].

2. Salary differentials between chief justices and associate chief justices, puisne judges of the Supreme Court of Canada and the Chief Justice of Canada

126. For many years, there have been relatively constant salary differentials between puisne judges, chief justices and associate chief justices, puisne judges of the Supreme Court of Canada, and the Chief Justice of Canada. It is submitted by the Association and the Council that these differentials ought to remain unchanged.

Recommendation: That the salary differentials between puisne judges, chief justices and associate chief justices, puisne judges of the Supreme Court of Canada and the Chief Justice of Canada be maintained in the same proportion as currently exists.

VI. COSTS

127. Under s. 26.3(2) of the *Judges Act*, the judiciary is entitled to reimbursement of two-thirds of the costs arising from its participation in the Commission's inquiry. The Block Commission recommended that this remain unchanged while the Levitt Commission did not make any recommendation concerning costs.

128. The Association and the Council do not at this stage seek to change this provision. However, the Association and the Council reserve the right to seek a larger portion of their representational costs in the event that the Government's unilateral addition of Federal Court prothonotaries in the Commission process, or other factors, result in an increase in the judiciary's overall representational costs.

VII. SUMMARY OF RECOMMENDATIONS SOUGHT

129. The following is a summary of the recommendations sought by the judiciary:

Recommendation: That the salary of puisne judges be increased by 2% as of April 1, 2016, by 2% as of April 1, 2017, by 1.5% as of April 1, 2018, and by 1.5% as of April 1, 2019, all exclusive of statutory indexing based on the IAI.

Recommendation: That the salary differentials between puisne judges, chief justices and associate chief justices, puisne judges of the Supreme Court of Canada and the Chief Justice of Canada be maintained in the same proportion as currently exists.

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

Montréal, February 29, 2016

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APPENDIX A:
Summary of the history of
the Triennial and Quadrennial Commission processes

1. Prior to 1981, advisory committees reviewed judges' compensation and made recommendations to the Government.[65] As noted by the Drouin Commission, this process was unsatisfactory because the advisory committee recommendations "generally were unimplemented or ignored", and "the process merely amounted to petitioning the government to fulfill its constitutional obligations."[66]

2. In 1982, the Triennial Commission process was established. Under s. 19.3 of the *Judges Act* as it read at the time, the Triennial Commission was required to inquire into the adequacy of judicial compensation and to make recommendations to the Minister of Justice. The objective of the Triennial Commission process was to depoliticize the determination of judicial salaries and benefits in order to preserve judicial independence.

3. There was no obligation on the part of the Government under the Tribunal Commission process to respond or act upon the recommendations made by Triennial Commissions.

4. This proved to be a fundamental shortcoming, and no one disputes that the Triennial Commission process was a failure. The salary recommendations of the five Triennial Commissions were generally ignored, left unimplemented and often became the subject of a politicized debate.[67]

5. It is relevant to cite what the Scott Commission said, in 1996, in the twilight of the Triennial Commission process:

> The purpose of the Commission was to ensure that, through the creation of a body which would be independent both of the judiciary and Government, Parliament would be presented with an objective and fair set of recommendations dictated by the public interest, having the effect of maintaining the independence of the judiciary while at the same time attracting those pre-eminently suited for judicial office. The theory was that, by way of such recommendations, emanating from regularly

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[65] Two advisory committees were chaired by Irwin Dorfman, Q.C. (report issued on November 22, 1978) and Jean de Grandpré (report issued on December 21, 1981) respectively.

[66] Drouin Report (2000) at 2 [JBD at tab 28].

[67] The reports of the Triennial Commissions were as follows: Lang Report (1983), Guthrie Report (1987), Courtois Report (1990), Crawford Report (1993), and Scott Report (1996) [BED at tabs 24-28].

> convened independent commissions, the process would be de-politicized and judicial independence would be thus maintained.
>
> While the idea was sound, the underlying assumptions appear to have been naïve. The result has been a failure in practice to meet the desired objectives. Since the first Triennial, there have been four Commissions (Lang (1983), Guthrie (1986), Courtois (1989) and Crawford (1992)). In spite of extensive inquiries and exhaustive research in each case, recommendations as to the establishment of judicial salaries and other benefits have fallen almost totally upon deaf ears. The reasons for this state of affairs have been largely political.[68]

6. Previously, the Crawford Commission in 1993 had lamented Government delays in acting upon recommendations made by the Commission:

> The 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. This failure to act with reasonable promptness cannot but lead to the entire review process losing credibility. This Commission notes, for example, that the legislation (Bill C-50) comprising the Government's response to the 1989 Commission on Judges' Salaries and Benefits (the Courtois Commission), was not introduced in Parliament until December 1991, and that by the end of the mandate of the current Commission, this relatively uncomplicated legislation had not yet been enacted.[69]

7. The regrettable state of affairs of this important process was commented upon by former Chief Justice Lamer in 1994, in an address to the Council of the Canadian Bar Association, when he said that the Triennial Commission "looks good on paper, but it has one problem. It doesn't work. Why? Because the Executive and Parliament have never given it a fair chance."[70]

A. The *PEI Reference*

8. In 1997, the Supreme Court of Canada in the *PEI Reference* explained that the Constitution requires the existence of a body such as a commission that is interposed between the judiciary and the other branches of the state. The constitutional function of

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[68] Scott Report (1996) at 7 [BED at tab 28].

[69] Crawford Report (1993) at 7 [BED at tab 27].

[70] The 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 9 [unpublished] [BED at tab 22].

this body is to depoliticize the process of determining changes to or freezes in judicial compensation.

9. This objective is achieved by entrusting that body with the specific task, at regular intervals, of issuing a report on the salaries and benefits of judges to the executive and the legislature. The Court said that the body must be independent, objective, and effective in order to be constitutional.[71] Any changes to judicial salaries without prior recourse to this body would be unconstitutional.[72]

10. The existence of this body also ensures that the judiciary does not find itself in a position of having to negotiate its salary directly with the government, something that is fundamentally at odds with judicial independence.[73]

11. A necessary component of the effectiveness of this body is the timely implementation of its recommendations, or a prompt response from the government in question providing legitimate reasons for a refusal to implement.[74]

B. The Quadrennial Commission Process and the First Quadrennial Commission

12. Acting upon the constitutional imperative enunciated by the Supreme Court of Canada in the *PEI Reference*, Parliament amended the *Judges Act* in 1998 and established the Quadrennial Commission. A key aspect of these amendments was the requirement that the Minister of Justice respond to the recommendations of the Quadrennial Commission within six (6) months of receiving them. Since the mandate of the Commission began on September 1, and since it was required to issue its report within nine (9) months from the start of its mandate, the deadline for the issuance of the Minister's response was the end of November of the subsequent year.[75]

13. The first Quadrennial Commission was chaired by Mr. Richard Drouin, QC, in 1999. The other members were Ms. Eleanore Cronk (now of the Ontario Court of Appeal) and Mr. Fred Gorbet. The Drouin Report was issued on May 31, 2000. It was an impressive,

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71 *PEI Reference*, *supra* at paras. 169-175 [JBD at tab 25]; see also *Bodner*, *supra* at para. 16 [JBD at tab 28].

72 *PEI Reference*, *supra* at para. 147 [JBD at tab 25].

73 *PEI Reference*, *supra* at para. 186 [JBD at tab 25].

74 *PEI Reference*, *supra* at paras. 179-180 [JBD at tab 25].

75 As discussed below, Parliament amended the *Judges Act* in 2012 following the Levitt Report to change the start of the Commission's mandate to October 1, and to reduce the time in which the Minister of Justice must respond to the recommendations of the Quadrennial Commission to within four (4) months.

well-reasoned report by any standard. The Drouin Commission took note that the Triennial Commissions had failed despite the goal of depoliticizing the process.[76]

14. The Government's response to the Drouin Report marked an improvement as compared to previous Government responses to Triennial Commission reports. On December 13, 2000, the Government responded to the Drouin Report pursuant to s. 26(7) of the *Judges Act*. The Government accepted all but two of the Drouin Commission's recommendations,[77] and amendments to the *Judges Act* implementing the Government's Response were adopted expeditiously, in June 2001.

C. The McLennan Commission

15. The second Quadrennial Commission, the McLennan Commission, was established in September 2003. It was chaired by Roderick McLennan, Q.C., and its two members were Gretta Chambers, C.C. and Earl Cherniak, Q.C. As required by the *Judges Act*, the Commission issued its report on May 31, 2004.

16. The principal issue of contention between the judiciary and the Government before the McLennan Commission was the determination of the amount of judicial salary. When the McLennan Commission began its inquiry, the salary of a puisne judge was $216,600.

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76 Drouin Report (2000) at 2 [JBD at tab 28].

77 The two exceptions were eligibility for supernumerary status and reimbursement of costs of the judiciary before the Quadrennial Commission. Supernumerary judges are judges who are eligible to retire but choose instead to continue sitting. Their workload is determined in consultation with their respective chief justices. Sometimes the workload is full-time, and often is nearly so. In no event is it less than 50% of a full-time workload. The Drouin Commission had recommended that, effective April 1, 2000, judges have the right to elect supernumerary status for a period not exceeding ten years upon attaining eligibility for a full pension (Recommendation 8). In her response to the Drouin Report, the Minister indicated that the Government was not prepared to accept Recommendation 8 at that time. The reasons given included the need to consult the provinces and territories, the fact that the Supreme Court of Canada would soon consider, in *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405, important constitutional issues relating to the status of supernumerary judges, and, more generally, the need for better information concerning the contribution of supernumerary judges. The judgment of the Supreme Court of Canada in *Mackin* was released on February 14, 2002. As for the intended consultations with the provincial and territorial governments, it was expected that they would be carried out in a timely fashion. In the event, it was only on August 19, 2003, that the judiciary was advised that the Government had decided to accept Recommendation 8. Moreover, the Government took the position that the necessary amendments to the *Judges Act* would only be made as part of the overall package of amendments that would follow the Government's response to the report of the subsequent commission, the McLennan Commission. Those amendments were only made in December 2006, six and a half (6½) years after the Drouin Commission's recommendation. In the meantime, judges who were eligible for this recommendation were deprived of its benefit. It is worth noting that, unlike a delay in the implementation of a salary recommendation, the delay in implementing Recommendation 8 could not be, and was not, remedied retroactively.

17. The Association and the Council submitted to the Commission, based on the level of remuneration of traditional comparators, as applied in the Drouin Report, that the salary of a puisne judge should be increased to $253,880 as of April 1, 2004, plus annual salary increments of $3,000 in 2005, 2006 and 2007, in addition to indexation according to the Industrial Aggregate Index ("**IAI**") provided in the *Judges Act*. For its part, the Government proposed an increase to $226,300 as of April 1, 2004, inclusive of IAI for 2004, plus annual salary increments of $2,000 in 2005, 2006 and 2007, in addition to IAI for 2005, 2006 and 2007. As the McLennan Commission observed, when the $2,000 annual salary increments contemplated by the Government are taken into account, the Government's proposal represented an increase of 7.25% over those years, in addition to IAI in 2005, 2006 and 2007.[78]

18. The McLennan Commission recommended an increase for the salary of puisne judges to $240,000 as of April 1, 2004, inclusive of IAI in that year, plus IAI effective April 1 in each of the next three years, as already provided for in the *Judges Act*. The Commission did not recommend annual salary increments, as proposed by the Government and supported by the Association and the Council, in addition to IAI.

19. The Commission's recommendation represented a one-time 10.8% increase for the four-year period commencing April 1, 2004, in addition to IAI in the years 2005, 2006 and 2007, as compared to the 7.25% increase proposed by the Government.

1. The Government's response to the McLennan Report

20. The Government's response to, and delayed partial implementation of, the McLennan Report was a source of grave concern for the judiciary. As elaborated below, the Association and the Council observed that politicization was creeping into the process yet again, and was undermining the nascent and still fragile Quadrennial Commission process, much as the Triennial Commission process was undermined and ultimately came to fail.

[78] McLennan Report (2004) at 23 [JBD at tab 29].

21. On November 20, 2004, the Minister of Justice issued the Government's response (the "**First Response**") to the McLennan Report, as required by s. 26(7) of the *Judges Act*.[79] The First Response accepted all but one[80] of the recommendations of the McLennan Commission.

22. With respect to judicial salary, the Minister stated in the First Response that the McLennan Commission had "engaged in a careful balancing of all the [statutory] factors"[81] and provided "thorough and thoughtful"[82] explanations for its conclusions. The Minister noted that the salary increase recommended by the McLennan Commission "appears reasonable".[83]

23. On May 20, 2005, the Government introduced Bill C-51 to implement its acceptance of the McLennan Commission's recommendations, notably its salary recommendation. The Bill passed first reading and was supposed to be referred to committee after second reading. However, the Bill died on the order paper when Parliament was dissolved on November 29, 2005.

2. The newly elected Government's second response to the McLennan Report

24. A new Government was elected on January 23, 2006. Shortly after the new Government came to power, the then Minister of Justice purported to issue a second response to the McLennan Report on May 29, 2006 (the "**Second Response**").[84] On May 31, 2006, the Government tabled Bill C-17 in the House of Commons, which would implement the recommendations of the McLennan Report only to the extent that they were accepted in the Second Response.

25. The Second Response contradicted the First Response. The Government no longer accepted the salary recommendation set out in the McLennan Report. In its Second Response, the Government proposed an increase to judicial salaries of 7.25% as of

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79 Response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission (November 20, 2004) [BED at tab 2].

80 The Government refused to accept the McLennan Commission's recommendation that the judiciary be reimbursed for 100% of its disbursements and 66% of its legal fees. Instead, the Government's First Response proposed that the reimbursement be a total of 66% for all costs.

81 First Response at 3 [BED at tab 2].

82 First Response at 2 [BED at tab 2].

83 First Response at 4 [BED at tab 2].

84 Response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission (May 29, 2006) [BED at tab 3].

April 1, 2004.[85] There was no mention of the fact that this increase was the exact percentage increase that the Government had proposed in its submission to the McLennan Commission in 2003-2004. In effect, the Government's Second Response unilaterally imposed what the Government had proposed in the first place, as if the Commission process had been of no consequence.

26. The Second Response stated that the McLennan Commission's recommendations must be analyzed in light of the mandate and priorities upon which the Government had recently been elected.[86] A summary list of the new Government's budget priorities and measures of "fiscal responsibility" was given in the Second Response.[87] It further stated that Canadians expect that expenditures from the public purse should be reasonable and generally proportional to these economic pressures and priorities, and that the McLennan Commission's salary recommendation did not pay heed to this reality.[88]

27. Significantly, the Government did not attempt to argue that the economic conditions in Canada were not as strong as when the First Response had been made. In fact, the Second Response was delivered at a time when economic conditions in Canada were very strong, with a real economic growth of 2.8% for 2006[89] and the Government having a budgetary surplus of $4.7 billion[90] in the first quarter of 2006 and of $13.2 billion for the fiscal year 2005-2006.[91]

28. On June 2, 2006, counsel for the Association wrote to the Minister of Justice to protest the issuance of the Second Response and to invite the Government to reconsider the position adopted in the Second Response. The Association also expressed the hope that Bill C-17 would be amended in the committee stage.

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85 Second Response at 2 [BED at tab 3].

86 Second Response at 4, 6 [BED at tab 3].

87 Second Response at 6 [BED at tab 3].

88 Second Response at 7 [BED at tab 3].

89 Statistics Canada, Catalogue #13-016-X, Economic accounts key indicators, Canada, at 22. The indicator is the real gross domestic product (GDP) [BED at tab 19].

90 Department of Finance Canada, "The Fiscal Monitor", January to March 2006. The budgetary surplus was $1.7 billion in January 2006 and $4.1 billion in February 2006. In March 2006, there was a budgetary deficit of $1.1 billion [BED at tab 20].

91 Department of Finance Canada, "Fiscal Reference Tables", October 2011 [BED at tab 21].

29. The Association's letter also made the point that the so-called reasons put forward in the Second Response were not "legitimate reasons" for departing from the Commission's salary recommendation, as required by the relevant constitutional jurisprudence.[92]

30. On July 31, 2006, the Minister of Justice responded by simply stating that the Government had regard for the principles set out in the *PEI Reference* and *Bodner* in developing its Second Response.[93] The Minister omitted to respond to the Association's point that the Second Response was statutorily and constitutionally invalid as a question of process, and constitutionally invalid as a question of substance.

31. The Second Response was implemented through Bill C-17,[94] which received Royal Assent on December 14, 2006.[95] Puisne judges' salary was fixed retroactively at $232,300 as of April 1, 2004, rather than at $240,000 had the McLennan Commission's recommendation and the First Response been implemented. At the beginning of the following Quadrennial Commission cycle, the salary for puisne judges, statutorily adjusted by the IAI, was $252,000 as of April 1, 2007, rather than $262,240 had the McLennan Commission's recommendation and the First Response been implemented.

3. The inconsistency of the Second Response with applicable constitutional principles

32. The *Judges Act* does not contemplate multiple government responses. The Association and the Council are firmly of the view that multiple responses undermine the cardinal constitutional requirement of effectiveness and are inconsistent with the Supreme

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92 The Supreme Court in the *PEI Reference*, *supra* at para. 183 spoke of the need for the government to provide a "legitimate reason" for refusing to accept commission recommendations [JBD at tab 25]. The Supreme Court had occasion to elaborate on that requirement in *Bodner*, *supra* at paras. 23-27 [JBD at tab 28].

93 The statement in *Bodner, supra* that the process appears to be working satisfactorily at the federal level (para. 12), requires context. *Bodner* addressed the nascent commissions in four provinces, set up in response to the *PEI Reference*, *supra*. It was decided at a point in time (July 2005) after the Government's First Response to the McLennan Report had been given, and before the Second Response (May 2006). Accordingly, it was possible at that time for the Supreme Court to point to the Quadrennial Commission process for federally appointed judges as appearing to be working satisfactorily. Subsequent events proved otherwise.

94 *An Act to amend the Judges Act and certain other Acts in relation to courts*, S.C. 2006, c. 11.

95 The fact that the majority opposition parties did not amend Bill C-17 cannot be taken as Parliamentary acceptance of the way in which the Government conducted itself. Opposing Bill C-17 or proposing to amend it with the risk of defeating it carried with it the probability of the proverbial Pyrrhic victory: the Bill would have been defeated, thereby communicating Parliament's displeasure with the conduct of the Government, but the judiciary would be left with the status quo, which was even less than what the newly elected Government was prepared to accept in its Second Response. This would have been particularly unfair to judges eligible to elect supernumerary status pursuant to a recommendation from the Drouin Report in 2000 that had yet to be implemented. The dilemma was set out in Senator Jaffer's speeches in the Senate on December 6 and December 13, 2006 [BED tab tab 5].

Court's rationale for requiring of government that it formally respond, with diligence, to a Commission report. While the First Response was issued under, in accordance with, and within the time-limit set out in the *Judges Act*, the Second Response has no status whatsoever under the *Judges Act*[96] or the constitutional process expounded in the *PEI Reference*.

33. The Second Response, by a newly elected government, also served to politicize the Quadrennial Commission process since such a response was sought to be justified on the basis of the new Government's priorities. The Association and the Council submit that the Second Response was, in essence, the expression of a newly elected Government's disagreement, for political reasons, with a previous government's formal response to the McLennan Report.[97]

34. The Association and the Council further submit that the inordinate delay of 2½ years between the issuance of the McLennan Report and the implementation of the flawed Second Response undermined the effectiveness of the process, in addition to depriving members of the judiciary of the time value of the salary increase that the Government finally accepted and the actual time lost for those judges who would have been able to elect supernumerary status earlier had the Government implemented that recommendation more promptly.

35. The Association and the Council submitted these concerns to the Block Commission, which agreed that they were well-placed. The Block Report stated in this regard:

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

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[96] Section 26(7) of the *Judges Act* provides: "The Minister of Justice shall respond to a report of the Commission within six months after receiving it." The statute makes no allowance for a further report. The Block Commission expressed serious concern about the issuance of more than one response, see Block Report (2008) at paras. 42-45 [JBD at tab 30].

[97] The Block Commission correctly observed that judicial independence cannot be seen as just another government priority, and that there was no statutory justification for increases in judicial compensation to be measured against the "expenditure priority that the Government has accorded to attracting and retaining professionals of similarly high qualities and capacity within the federal public sector", Block Report (2008) at para. 58 [JBD at tab 30].

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

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

45. While the Commission's effectiveness is most important in the context of the preservation of judicial independence, on a related note, the perceived effectiveness of the Commission is likely to influence the ability of the parties to convince nominees to accept appointment to future Commissions. Advisory committees, Triennial Commissions and Quadrennial Commissions have been populated by individuals who considered it an honour to serve the public interest in this capacity; the current Commission is no exception. However, continuing to attract suitable members for future Commissions will depend to a large extent on the ability to assure them that they will be participating in a process that is independent, objective and effective.[98]

D. The Block Commission

36. The third Quadrennial Commission, the Block Commission, was established in October 2007. It was chaired by Sheila Block, and its two members were Paul Tellier, C.C., Q.C. and Wayne McCutcheon. The Commission issued its report on May 30, 2008.

[98] Block Report (2008) at paras. 42-45 [JBD at tab 30]. See also the evidence of Mr. E. Cherniak, QC to the House of Commons Standing Committee on Justice and Human Rights (Meeting No. 24, October 24, 2006), 39th Parliament, 1st Session [BED at tab 4].

37. Apart from process issues related to the serious concerns expressed by the judiciary with the Government's lack of solicitude for the Quadrennial Commission process, as exemplified by its tabling of the Second Response, the principal issue before the Block Commission was the determination of the judicial salary for the puisne judges. The Commission also made a number of other substantive recommendations.

1. Salary and other substantive recommendations

38. When the Block Commission began its inquiry, the salary of a puisne judge was $252,000. The Association and the Council proposed a salary increase of 3.5% as of April 1, 2008, and 2% for 2009, 2010, and 2011, in addition to IAI. Under this proposal, the salary of puisne judges at the end of the Block Commission's mandate, *i.e.* as of April 1, 2011, would have been $302,800. The actual salary of puisne judges as at April 1, 2011, was $281,100.

39. The Government proposed a salary increase of 4.9% as of April 1, 2008, inclusive of IAI, which was 3.2% on that date, for a proposed net increase of 1.7%. For the subsequent years, it proposed nothing except to leave IAI in place. IAI was 2.8% on April 1, 2009, 1.6% on April 1, 2010, and 3.6% on April 1, 2011. Under the Government's proposal, the salary of puisne judges would thus have been $286,000 as of April 1, 2011.

40. The Government's proposed increase as of April 1, 2008, of 4.9% inclusive of IAI, necessarily meant that the Government was of the view that, as of April 1, 2008, some kind of increase was indeed appropriate, even though it was not of the same order of magnitude as that proposed by the Association and the Council.

41. The Block Commission reviewed the various comparators proposed by the parties, ultimately deciding that DM-3s and lawyers in private practice were the appropriate comparator groups to arrive at recommendations on judicial salaries. The Block Commission rejected the Government's position that the most relevant comparator group was all of the strata among the most senior federal public servants, namely EX 1-5, DM 1-4, and Senior LA (lawyer cadre).

42. The Block Commission also rejected as unhelpful the Government's attempt to use the pre-appointment income data of judges as support for the argument that current judicial salaries are not a disincentive to attracting significant numbers of judges who enjoyed high pre-appointment incomes. The judiciary had objected to the collection and use of

this data because of concerns for individual privacy, the unreliability of the data and its lack of relevance.

43. The Block Commission came to the conclusion that the appropriate comparator among senior deputy ministers, namely DM-3s and DM-4s, was the midpoint of the DM-3 salary range plus one-half of the maximum performance pay[99] for which DM-3s are eligible. As for lawyers in private practice, the Block Commission noted that there was no certainty that the Government would continue to be successful in attracting outstanding judicial candidates from the senior Bar in Canada if the income spread between lawyers in private practice and judges were to increase markedly.

44. Using the comparator of the midpoint of the DM-3 salary range[100] plus one-half of eligible performance pay, the Block Commission noted that the resulting figure for DM-3s was $276,632 for the 2007-2008 fiscal year. The salary of puisne judges was $252,000 in that year, or 91% of the DM-3 comparator.[101]

45. To achieve "rough equivalence" with the DM-3 salary range midpoint plus one-half eligible performance pay, the Block Commission recommended an increase of 4.9%, inclusive of IAI, for a salary of $264,300 effective April 1, 2008, and an increase of 2% for each of 2009, 2010, and 2011, in addition to IAI.

46. If the Block Commission's recommendation had been implemented, the salary for puisne judges in the 2011-2012 fiscal year would have been $302,800, a figure roughly equivalent to the figure of $303,249.50, which was the midpoint of the DM-3 salary range plus one-half of eligible performance pay for 2011-2012. The actual salary of puisne judges for 2011-2012 was $281,100. For comparison purposes, the overall *average* DM-3 compensation for the 2010-2011 fiscal year was $331,557.

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99 In the July 2011 report of the Advisory Committee on Senior Level Retention and Compensation, the Committee used the expression "performance pay" as a synonym for at-risk pay, although the Government continues to refer to the variable part of the compensation paid to DMs, including bonuses, as "at-risk pay" [BED at tab 13].

100 "Midpoint" should not be confused with median. The midpoint figure is simply the halfway point of the theoretical salary range, whereas the median figure would be the actual salary of the person falling in the middle of the range of persons arranged from lowest to highest. The average salary is a different concept from both the midpoint and the median in that it reflects the relative weight of the range of salaries given that it takes into account the combination of the salary figures and the number of people earning them.

101 Block Report (2008) at para. 119 [JBD at tab 30].

47. In addition to its salary recommendation, the Block Commission made recommendations regarding the retirement annuity of senior judges of the territorial courts, representational allowances, and an appellate differential.

2. Observations and recommendations as to process

48. The Block Commission made a number of important observations relating to process, an overriding one being that Quadrennial Commissions should serve as the guardian of the Quadrennial Commission process. The Block Commission expressed the view that process-related issues should be the subject neither of direct discussions between the Government and the judiciary, which are inadvisable, nor of litigation before the courts, if at all possible, the latter being an option that must be "carefully weighed".[102] The Block Commission added:

> 37. The parties nevertheless require access to a forum where concerns related to process can legitimately be raised. It is our view that Quadrennial Commissions, by virtue of their independence and objectivity, are well-placed to serve as that forum and to offer constructive comments on process issues as they arise. While the structure and mandate of the Commission are outlined in statute, any question of process that affects the independence, objectivity or effectiveness of the Commission is properly within its mandate. It is entirely appropriate and arguably imperative that the Commission serve as guardian of the Quadrennial Commission process and actively safeguard these Constitutional requirements.

49. In addition to its concerns with the issuance of the Second Response, another important observation contained in the Block Report relates to the need to respect, and reflect in the future submissions of the parties, the consensus that has emerged around particular issues during a previous Commission inquiry.[103] The Block Commission gave as an example of such an issue the relevance of DM-3 as a comparator.

3. The Government's response to the Block Report

50. Under the *Judges Act*, the Minister of Justice was required to respond to the Block Report by November 30, 2008, six months after receiving it. This statutory deadline came and went without a response being made by the Minister, as required by the Act.[104]

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[102] Block Report (2008) at paras. 33ff [JBD at tab 30].
[103] Block Report (2008) at paras. 21 and 201 [JBD at tab 30]
[104] *Judges Act*, s. 26(7) [JBD at tab 24].

51. On February 11, 2009, well beyond the strict statutory deadline, the Minister of Justice issued a response declining to implement, at that time, any of the recommendations made by the Block Commission. Importantly, the Minister's response did not reject any of the Commission's recommendations. Rather, the Minister invoked the economic crisis that began in late 2008 as the reason for the Government's decision.

52. The Association issued a press release on February 11, 2009, stating that federally appointed judges recognized that the Canadian economy was facing unprecedented challenges calling for various temporary measures. However, it emphasized that the applicable constitutional principles would require that the Block Commission's recommendations be reconsidered once the economic situation improved. The Association also expressed its deep concern about the Minister of Justice's failure to respect the statutory deadline for issuing his response to the Block Report.

E. The Levitt Commission

53. The fourth Quadrennial Commission, the Levitt Commission, was established in December 2011. It was chaired by Brian Levitt, and its two members were Paul Tellier, C.C., Q.C., and Mark Siegel. The Commission issued its report on May 15, 2011.

54. As with the Block Commission, the principal issue before the Levitt Commission was the determination of the judicial salary for puisne judges. Integral to the Commission's consideration of this issue, however, was the Government's unexpected request that the Commission recommend that the annual adjustments to judicial salaries based on the IAI be capped at 1.5%. The Levitt Commission also articulated a number of concerns with the future of the Commission process itself.

1. Salary and other substantive recommendations

55. The salary of a puisne judge was $281,100 when the Levitt Commission began its inquiry. The Association and the Council proposed that the Levitt Commission adopt, prospectively commencing in the first year of the quadrennial period, the Block Commission's recommendations. This would have resulted in a 4.9% increase as of April 1, 2012 inclusive of IAI, and increases of 2% for each of 2013, 2014 and 2015, in addition to IAI.

56. The Government proposed that judicial salaries be maintained at their current level, and that salary adjustments based on the IAI be limited to an annual increase of 1.5% for the quadrennial period. The Government admitted that it expected that this proposal would result in a reduction in individual judicial salaries in real terms.[105]

57. The Levitt Commission rejected the Government's proposed cap on IAI. The Levitt Commission found that the legislative history of IAI "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."[106] The Levitt Commission further found that the cost of retaining the existing statutory indexation as opposed to imposing a 1.5% cap would have only a marginal incremental cost to the public purse.

58. The Levitt Commission then considered the parties' arguments on the appropriate comparator groups and concluded that a "rough equivalence" with the DM-3 salary range midpoint plus one-half eligible performance pay was 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."[107]

59. The Levitt Commission rejected the Government's argument that it should depart from the practices of previous Quadrennial Commissions and consider all persons paid from the public purse, or at least consider the average salary of deputy ministers without variable pay, if it felt the need to use a public sector comparator group. Aside from questioning the merits of the Government's argument, the Levitt Commission found that adopting a comparator group that was consistent with comparator groups used by previous Quadrennial Commissions furthered the goals of the *Judges Act*:

> 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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> > [w]here consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of

[105] Submission of the Government of Canada to the Levitt Commission, December 23, 2011, footnote 10 [BED at tab 6].

[106] Levitt Report (2012) at para. 51 [JBD at tab 31].

[107] Levitt Report (2012) at para. 48 [JBD at tab 31].

> demonstrated change, such consensus be taken into account by the Commission and reflected in the submissions of the parties.
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> 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.
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> 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.

60. Using the comparator of the midpoint of the DM-3 salary range plus one-half of eligible performance pay, the Levitt Commission noted that the resulting figure for DM-3s was $303,249.50 for the 2011-2012 fiscal year. The salary of puisne judges was $281,100 in that year, or 7.3% less than the DM-3 comparator.

61. The Levitt Commission noted that while the 7.3% gap between the DM-3 comparator and the salary of puisne judges "tests the limits of rough equivalence", the salary of puisne judges did not require any further adjustments as long as IAI was maintained in its current form for the quadrennial period.

62. In addition to its salary recommendation, the Levitt Commission recommended, as had the Block Commission, that puisne judges sitting on provincial and federal appellate courts receive a salary differential of 3% above puisne judges sitting on provincial and federal trial courts and made further recommendations concerning supernumerary status, representational allowances and annuities for certain categories of the judiciary.

2. Observations and recommendations as to process

63. Along with making recommendations on substantive matters, the Levitt Commission addressed a number of procedural issues that it believed "go to the very heart of the effectiveness of the mechanisms contemplated by the Supreme Court of Canada" in *Bodner* and the *PEI Reference*. [108]

64. The Levitt Commission rejected the Government's position that it did not have any jurisdiction to deal with process issues, finding that each Quadrennial Commission has an important role to play in overseeing the evolution of the process and "actively safeguarding the constitutional requirements."[109]

65. The Levitt Commission stated that it was evident there was "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 the Triennial process did."[110] The Levitt Commission was so concerned about the fate of the Quadrennial Commission process that it specifically asked the Government and the judiciary to file post-hearing submissions addressing the question "[w]hat should be done to avoid that the Quadrennial Commission process suffer the same fate as the Triennial Commission [...]?"

66. The Levitt Commission made four recommendations that it hoped would help strengthen the process. First, the Levitt Commission recommended that the Government, when drafting its response, take into account not just the perspective of reasonable, informed members of the public but the judiciary as well. The Levitt Commission was concerned that any response that ignored the judiciary's perspective would only further exacerbate the existing credibility issues:

> 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

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[108] Levitt Report (2012) at para. 85 [JBD at tab 31].
[109] Levitt Report (2012) at para. 88 [JBD at tab 31].
[110] Levitt Report (2012) at para. 92 [JBD at tab 31].

> Government and the judiciary, acting reasonably, believe it is effective. Additionally, in omitting any focus on the judiciary, the Government's submission betrays what the Commission believes is at the root of the judiciary's growing dissatisfaction with the process.[111]

67. Second, the Levitt Commission emphasized the importance of the Government's response complying with the Supreme Court of Canada's decision in *Bodner*, and warned that failure to do so could lead to litigation.

68. Third, the Levitt Commission recommended that when consensus has emerged around a particular issue during a previous Commission inquiry, that, in the absence of demonstrated change, the Commission should take this consensus into account and it should be reflected in the parties' submissions. The Levitt Commission found that this position was entirely consistent with the Supreme Court of Canada's decision in *Bodner*. The Levitt Commission rejected the Government's position that a Commission could only adopt a previous Commission's recommendations if it reviewed the transcript of evidence before that Commission.

69. Finally, the Levitt Commission commented on what it saw as the "troubling" adversarial nature of the Quadrennial Commission process. The Levitt Commission accordingly recommended that the Government and the judiciary examine methods whereby the Commission process can be made less adversarial and more effective.

70. The Levitt Commission concluded its report by reiterating its concern about the future of the Quadrennial process:

> 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.[112]

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[111] Levitt Report (2012) at para. 99 [JBD at tab 31].

[112] Levitt Report (2012) at para. 121 [JBD at tab 31].

3. The Government's response to the Levitt Report

71. On October 12, 2012, the Minister of Justice issued the Government's response to the Levitt Report.

72. The Government accepted the Levitt Commission's recommendations that judicial salaries should continue to be automatically indexed every April 1 based on IAI, that all retirement benefits currently enjoyed by chief and associate chief justices should be extended to the three senior northern judges, and that the senior family law judge in Ontario should receive the same representational allowance as all Ontario senior regional judges.

73. The Government rejected the Commission's recommendation that judges of appellate courts receive a salary differential.

74. The Government did not respond in detail to the Levitt Commission's process recommendations. The Government reiterated its position that each Quadrennial Commission must consider the parties' arguments anew and not simply adopt the recommendations of previous Commissions. With respect to the recommendation calling for respect of the consensus around particular issues that may have emerged during a previous Commission inquiry, – which quite plainly meant to refer to a consensus arising out of the report(s) of previous Quadrennial Commission(s) –, the Government's response made the surprising observation that no consensus could arise on any issue unless the *main parties* were in agreement.

75. The Government's response stated that it would amend the *Judges Act* to improve the timeliness of the Commission process by reducing the time for the Government's response from six months to four months and establishing an express obligation on the Government to introduce implementing legislation in a timely manner. Finally, the Government stated that it was "open to exploring with the judiciary approaches that would make the process less adversarial and thereby improve its overall effectiveness."

4. Amendments to the *Judges Act*

76. The Government made the above-mentioned amendments to the *Judges Act* through the omnibus *Jobs and Growth Act, 2012*. The amendments to the *Judges Act* changed the Quadrennial Commission's start date from September 1 to October 1, reduced the

Minister of Justice's time to respond to the Quadrennial Commission's report from six (6) months to four (4) months, and specified that the Minister had to introduce a bill to implement the response "within a reasonable period."

77. In 2014, through the *Economic Action Plan 2014 Act, No. 2*, the Government amended the *Judges Act* and the *Federal Courts Act* to include Federal Court prothonotaries within the scope of the Quadrennial Commission's statutory mandate.