# SUBMISSION

**of the**

# CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

**and the**

# CANADIAN JUDICIAL COUNCIL

**to the**

# JUDICIAL COMPENSATION AND BENEFITS COMMISSION

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## I. INTRODUCTION

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

2. The Association is 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 section 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.

3. As of December 1, 2007, 974 (or 93%) of Canada's approximately 1050 federally appointed judges are members of the Association.

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[1] Reproduced in the judiciary's Book of Cited Documents.

[2] R.S. 1985, c. J-1, as amended

4. 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.

5. 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.

6. The objects of the Council are to promote and improve efficiency, uniformity and quality of judicial service in superior courts.[3]

7. As part of its mandate to improve the quality of judicial service, the Council has established a Judicial Salaries and Benefits Committee. The Council, aided by that Committee, and the Association have made joint submissions, written and oral, to each of the five Triennial Commissions and to the first and second Quadrennial Judicial Compensation and Benefits Commissions (the "**Drouin Commission**" and the "**McLennan Commission**", respectively[4]).

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

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[3] The objects of the Council are set out in section 60 of the *Judges Act.*

[4] 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.

## II. BACKGROUND

### A. Judicial Independence and Judicial Compensation

9. 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*,[5] is incorporated in the Constitution of Canada through the preamble and the judicature sections of the *Constitution Act, 1867* and section 11(d) of the *Canadian Charter of Rights and Freedoms*. For ease of reference, these provisions of the Constitution of Canada are reproduced in the judiciary's Book of Cited Documents.

10. Judicial independence and judicial compensation are intimately connected. In *Reference Re Provincial Court Judges*[6] ("***PEI Reference***"), and more recently in *Bodner v. Alberta*[7] ("***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.[8]

11. 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.[9]

12. 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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5 (U.K.), 12-13. Will. III, c. 2.

6 [1997] 3 S.C.R. 3.

7 [2005] 2 S.C.R. 286.

8 *PEI Reference*, *supra* at paras. 115-122; *Bodner* at paras. 7-8.

9 *PEI Reference*, *supra* at para. 193.

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

13. The process for determining judicial compensation, which is now provided in the *Judges Act*, has evolved over time.

14. Prior to 1981, advisory committees reviewed judges' compensation and made recommendations to the Government.[10] As noted by the Drouin Commission, this process was unsatisfactory to the judiciary because the advisory committee recommendations were often ignored and judges felt that the process was tantamount to petitioning the Government to fulfill its constitutional obligations.[11]

15. 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. However, there was no obligation on the part of the Government under that process to respond or act upon the recommendations made by Triennial Commissions.

16. It is widely acknowledged 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.[12]

17. In the twilight of the Triennial Commission process, the Scott Commission said in 1996:

> 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

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10 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, reproduced in the judiciary's Book of Cited Documents.

11 Drouin Report (2000) at 2.

12 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), reproduced in the judiciary's Book of Cited Documents.

> attracting those pre-eminently suited for judicial office. The theory was that, by way of such recommendations, emanating from regularly 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.[13]

18. Similarly, the Crawford Commission in 1993 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.[14]

19. 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."[15]

20. 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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13 Scott Report (1996) at 7.

14 Crawford Report (1993) at 7.

15 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], reproduced in the judiciary's Book of Cited Documents.

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

21. This objective is achieved by entrusting that body with the specific task 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.[16] Any changes to judicial salaries without prior recourse to this body would be unconstitutional.[17]

22. 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.[18]

23. 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.[19]

**B. The Quadrennial Commission Process**

24. 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 begins on September 1, and since it must issue its report within nine (9) months from the start of its mandate, the deadline for the issuance of the Minister's response is the end of November of the subsequent year.

25. The first Quadrennial Commission was chaired by Mr. Richard Drouin, QC, in 1999. The other commissioners were Ms. Eleanore Cronk (now of the Ontario Court of Appeal)

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16 *PEI Reference*, *supra* at para. 169-175; see also *Bodner*, *supra* at para. 16.

17 *PEI Reference*, *supra* at para. 147.

18 *PEI Reference*, *supra* at para. 186.

19 *PEI Reference*, *supra* at para. 179-180.

and Mr. Fred Gorbet. The Drouin Report was issued on May 31, 2000. It was an impressive, well-reasoned report by any standard. The Drouin Commission took note that the Triennial Commission had failed despite the goal of depoliticizing the process.[20]

26. 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,[21] and amendments to the *Judges Act* implementing the Government's Response were adopted expeditiously, in June 2001.

27. In one respect—the delayed implementation of the recommendation relating to the right to elect supernumerary status[22]—the Government's response to the Drouin Commission was a source of disappointment and concern for the Association and Council. 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*,[23] important constitutional issues relating to the status of supernumerary judges, and, more generally, the need for better information concerning the contribution of supernumerary judges.

28. 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

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20 Drouin Report (2000) at 2.

21 The two exceptions were eligibility for supernumerary status and reimbursement of costs of the judiciary before the Quadrennial Commission.

22 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.

23 [2002] 1 S.C.R. 405.

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 to take advantage of 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.

## C. The McLennan Commission

29. The second Quandrennial 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.

30. 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.

31. The Association and 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 for cost of living. For its part, the Government proposed an increase to $226,300 as of April 1, 2004, inclusive of indexation for cost of living for 2004, plus annual salary increments of $2,000 in 2005, 2006 and 2007, in addition to statutory indexation for cost of living 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 indexation for cost of living in 2005, 2006 and 2007. [24]

32. The McLennan Commission recommended an increase of judicial salary for puisne judges to $240,000 as of April 1, 2004, inclusive of indexation for cost of living in that year, plus the cost-of-living indexing effective April 1 in each of the next three years, as already provided for in the *Judges Act*. The Commission did not accept to recommend annual salary increments, as proposed by the Government and supported by the Association and Council, in addition to the annual cost-of-living indexation already provided for in the *Judges Act*. The Commission's recommendation represented a one-time 10.8% increase for the four-year period commencing April 1, 2004, in addition to cost-of-living indexation in the years 2005, 2006 and 2007, as compared to the 7.25% increase proposed by the Government.

## D. The Government's Response to the McLennan Report

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

34. 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*.[25] The Response accepted all but one[26] of the recommendations of the McLennan Commission.

35. 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]

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[24] McLennan Report (2004) at 23.

[25] The full text of the First Response is reproduced in the judiciary's Book of Cited Documents.

[26] 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.

factors"[27] and provided "thorough and thoughtful"[28] explanations for its conclusions. The Minister noted that the salary increase recommended by the McLennan Commission "appears reasonable".[29]

36. 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.

37. 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**").[30] 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.

38. 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 of judicial salary of 7.25% as of April 1, 2004.[31] 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 sought to impose the increase that it had proposed in the first place, as if the Commission process was of no consequence.

39. 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

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27 First Response at 3.

28 First Response at 2.

29 First Response at 4.

30 The full text of the *Response of the Government of Canada to the Report of the 2003 Judicial compensation and Benefits Commission* (May 29, 2006) is reproduced in the judiciary's Book of Cited Documents.

31 Second Response at 2.

been elected.[32] A summary list of the new Government's budget priorities and measures of "fiscal responsibility" was given in the Second Response.[33] 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.[34] 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.

40. 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.[35] The Association also expressed the hope that Bill C-17 would be amended in the committee stage.

41. 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.[36]

42. 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.[37] 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 content.

43. 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

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32 Second Response at 4, 6.

33 Second Response at 6.

34 Second Response at 7.

35 The Association's letter of June 2, 2006 is reproduced in the judiciary's Book of Cited Documents.

36 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. The Supreme Court had occasion to elaborate on that requirement in *Bodner*, *supra* at paras.23-27.

37 The Minister's letter of July 31, 2006 is reproduced in the judiciary's Book of Cited Documents.

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.

44. The Second Response was implemented through Bill C-17,[38] which received Royal Assent on December 14, 2006. Puisne judges' salary was fixed retroactively at $232,300 as of April 1, 2004, rather than at $240,000 had the Commission's recommendation and the First Response been implemented. The current salary for puisne judges, statutorily indexed for cost-of-living adjustments, is $252,000, rather than $262,240 had the Commission's recommendation and the First Response been implemented.

45. The *Judges Act* does not contemplate multiple government responses. The Association and Council are firmly of the view that multiple responses undermine the cardinal constitutional requirement of effectiveness and are inconsistent with the Supreme Court's rationale for requiring of government that it formally respond, with diligence, to a commission report.

46. The Association and 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. While the original 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* or the constitutional process expounded in the *PEI Reference*.

47. The Association and 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

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

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.

48. On March 12, 2007, the Association and Council through their counsel wrote to the Minister of Justice to reiterate the contents of the Association's letter of June 2, 2006, namely that the Second Response was constitutionally and statutorily invalid, and therefore that the prescribed process had not been respected.[39] The letter also indicated that the judiciary intended to make representations to the next Commission in order to record the judiciary's objection to, and serious concern with, the manner in which the Government has dealt with its constitutional obligations in respect of judicial independence.

49. On March 20, 2007, the Minister of Justice responded through his counsel to the judiciary's letter of March 12, 2007.[40] The Minister failed to take any substantive position on the judiciary's assertion that the Second Response was invalid. Rather, the Minister simply responded that the Commission has no jurisdiction to consider legal or constitutional concerns about the Government's conduct in relation to the process, and that the judiciary should seek judicial review of the Government's conduct if it is a source of concern to the judiciary. The letter also took the position that the pace at which a bill moves through Parliament is a question of Parliamentary process and procedure, a sovereign domain immune from judicial review.

## E. Restoring Confidence in the Process

50. It should be a priority for this Commission to ensure that the process over which it is presiding is preserved and respected. Any action that results in a loss of confidence in the process by either one of the principal parties should be of concern to the Commission.

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[39] See letter of March 12, 2007, reproduced in the judiciary's Book of Cited Documents.

[40] See letter of March 20, 2007, reproduced in the judiciary's Book of Cited Documents.

51. The Association and Council reject the notion that litigation is the only way by which the Government can be told that its conduct risks undermining this important and fragile constitutional process.[41] Indeed, the Supreme Court has recently commented that litigation surrounding judicial compensation casts a "dim light" on all involved.[42]

52. It cannot be doubted that the First Response was legally and constitutionally valid. It is equally clear in the face of the issuance of the Second Response, the nature of its contents, and the inordinate delay in implementing the McLennan Commission recommendations, that the determination of judicial remuneration following the last Quadrennial Commission was not depoliticized and, accordingly, that the Commission's process was not respected.

53. Compensation commissions have been described in the *PEI Reference* as an institutional sieve.[43] As such, the Commission acts as an intermediary between the judiciary and the Government in relation to judicial compensation, an alternative to direct contact between the two. As the Supreme Court said in the *PEI Reference*, the Commission "provides a forum in which members of the judiciary can raise concerns about the level of their remuneration that might have otherwise been advanced at the bargaining table."[44]

54. The Commission should not remain passive in the face of Government conduct that undermines its role and effectiveness, and it should not be content simply to make recommendations in response to submissions made to it. The Commission must take an active role in preserving the process, including by speaking to the parties in its report.

55. The Crawford Commission in 1993 expressed the view that commissioners "should be prepared to become advocates for their recommendations".[45] More recently, all members of the McLennan Commission appeared before Parliamentary committee in the Fall of

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41 The litigation leading up to the *Bodner* decision spawned by the refusal of four provincial governments to implement commission recommendations offers evidence of the need for commissions to be more proactive in their capacity as the neutralizing body between the judiciary and the government.

42 *Bodner*, *supra* at para. 12.

43 *PEI Reference, supra* at para. 189.

44 *PEI Reference*, *supra* at para. 189.

45 Crawford Report (1993) at 8.

2006 to explain their recommendations. It stands to reason that Commission members should also be advocates for the integrity and respect of the Commission process itself, as has already been done in the past. As set out above, successive Triennial Commissions have complained about the disregard and politicization of the process.

56. The Association and Council call upon the Commission to state in its report that the manner in which the McLennan Report has been dealt with is most unsatisfactory, and to express its concern that the constitutional process expounded in the *PEI Reference* is threatened by such Government conduct. The Commission should emphasize the importance of strict adherence to all aspects of the Commission process.

57. The Association and Council reject the Government's view that this Commission has no jurisdiction to comment on the Government's conduct. The Commission is the touchstone and guardian of the process to determine judicial compensation. This process is undermined if the Government rejects Commission recommendations for illegitimate reasons, or delays implementation of its response. If the process is undermined, the Commission ceases to be effective, one of the essential constitutional prerequisites set out by the Supreme Court of Canada.

## III. THE COMMISSION'S MANDATE

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

> Commission
>
> 26(1) The Judicial Compensation and Benefits Commission is hereby established to inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges' benefits generally.
>
> Factors to be considered
>
> (1.1) In conducting its inquiry, the Commission shall consider
>
> (a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
>
> (b) the role of financial security of the judiciary in ensuring judicial independence;

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

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

59. The *Judges Act* does not equate "adequacy" of judicial salaries and benefits with the minimum necessary to guarantee the financial security of judges. Compensation commissions are not to determine at what point financial security is undermined with a view to recommending a salary merely above that mark. 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.

60. 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.[46]

61. The McLennan Commission for its part observed that

> [t]he *sui generis* nature of the role and responsibilities of judges in Canada requires that they be provided with salary and benefits, before and after retirement, to ensure a reasonable standard of living, in order that they may function fearlessly and impartially in the advancement of the administration of justice and that they be independent of both government and all litigants appearing before them."[47]

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46 Drouin Report (2000) at 10.

47 McLennan Report (2004) at 3-4.

## IV. ISSUES

62. The Association and Council set out below the issues that they submit for this Quadrennial Commission's consideration. The recommendations sought by the judiciary are provided at the end of the discussion for each of those issues, and repeated *in seriatim* for convenience at the end of these submissions.

## A. JUDICIAL SALARIES

### 1. Overview

63. An increase in the salaries of federally appointed judges is necessary in order to bridge the gap that persists between judicial salaries and the compensation of the most senior deputy ministers within the Government of Canada. An increase is also warranted by current income levels of senior private practitioners in Canada.

64. The Association and Council are therefore seeking, over the mandate of this Commission, phased salary increases of 3.5% as of April 1, 2008 and 2% as of each of April 1, 2009, 2010, and 2011, the whole exclusive of statutory indexing.

65. The above phased increases will mitigate a further erosion of the important principle of maintaining a rough equivalence between the remuneration of the judiciary and the compensation paid to senior deputy ministers.

### 2. The *Judges Act* criteria

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

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

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

68. According to the Organization for Economic Cooperation and Development (OECD), when all levels of government are taken into account, Canada was the only G7 country to record a surplus in 2006.[48]

69. In the fiscal year ending on March 31, 2007, the federal Government recorded its tenth consecutive budget surplus. In the Economic Statement released on October 30, 2007, the federal Government announced that the surplus for the fiscal year ending on March 31, 2007 was $13.8 billion, which is significantly more than the $9.2 billion predicted in the March 2007 budget.[49] It is no wonder that the Government, in this same Economic Statement, referred to Canada's economic and fiscal fundamentals as "rock solid".[50]

70. Despite the recent downturn in the United States in the wake of the sub-prime mortgage crisis, the Canadian economy remains strong. The Canadian dollar in 2007 closed above parity for the first time since 1976, buoyed by the country's strong commodity exports, its current account surplus and repeated federal budget surpluses.[51] The Government projects that it will meet its target of a 25% debt-to-GDP ratio by 2012-2013,[52] one year ahead of the original target,[53] and down from a peak of nearly 70% in 1995-1996.[54]

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48 As cited in Government of Canada, *The Budget Plan 2007* at 310, reproduced in the judiciary's Book of Cited Documents.

49 Government of Canada, *Economic Statement* (2007) at 44, reproduced in the judiciary's Book of Cited Documents.

50 Government of Canada, *Economic Statement* (2007) at 7, reproduced in the judiciary's Book of Cited Documents.

51 "The Loonie Takes Wing" *The Economist* (27 September 2007), reproduced in the judiciary's Book of Cited Documents.

52 Government of Canada, *The Budget Plan 2007* at 152, reproduced in the judiciary's Book of Cited Documents.

53 Government of Canada, *The Economic and Fiscal Update* (2006) at 32, reproduced in the judiciary's Book of Cited Documents.

54 Government of Canada, *The Budget Plan 2007* at 307, reproduced in the judiciary's Book of Cited Documents.

71. Canada's employment performance is at its strongest in 30 years and consumer confidence remains high.[55] Between 2001 and 2005, the gross national income per capita in Canada increased by 17.5%.[56]

72. Robust economic growth and federal budget surpluses are expected to continue for the foreseeable future. In its Budget Plan of March 19, 2007, the Department of Finance, relying on a survey of private-sector forecasters, expected real GDP to increase by 2.3% in 2007 and 2.9% in 2008.[57] The outgoing governor of the Bank of Canada, Mr. David Dodge, has stated that he expects mineral and energy prices to remain strong for the foreseeable future, due to strong demand in emerging economies such as China. If this prediction holds true, *The Economist* predicted that Canada should successfully weather a recession in the United States, should one occur.[58]

73. Since 2006,[59] the Government has published on three occasions budget surplus projections for the period between 2006 and 2012. The projection of $4.2 billion for 2006-2007 was revised upward to $9.2 billion in the 2007 budget, and it was finally determined to be nearly $14 billion, as noted above. Furthermore, as of September 28, 2007, the Government was already operating at a $7.8 billion surplus,[60] meaning that its earlier projection of $3.5 billion for 2007-2008 was also too low. The revised projected underlying surplus as of October 30, 2007 is now $11.6 billion for 2007-08 and $4.4 billion for 2008-09.[61] It appears that the Government prefers to make very conservative projections, which are subsequently adjusted upwards in order to reflect the actual

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55 Government of Canada, *The Budget Plan 2007* at 10, reproduced in the judiciary's Book of Cited Documents.

56 Organization for Economic Cooperation and Development, *OECD Factbook 2007* at 29, reproduced in the judiciary's Book of Cited Documents.

57 Government of Canada, *The Budget Plan 2007* at 36, reproduced in the judiciary's Book of Cited Documents.

58 "The Loonie Takes Wing" *The Economist* (27 September 2007).

59 Government of Canada, *The Economic and Fiscal Update* (2006) at 30, reproduced in the judiciary's Book of Cited Documents.

60 "Government posts second large surplus in two days" *The Globe and Mail* (28 September 2007), reproduced in the judiciary's Book of Cited Documents.

61 Government of Canada, *Economic Statement* (2007) at 43, reproduced in the judiciary's Book of Cited Documents.

position. It can be concluded that the Government's financial position will continue to be exceptionally strong in the coming years.

74. A robust economy does not justify granting a windfall to the judiciary. The Association and Council therefore agree with the McLennan Commission when it concluded that healthy prevailing economic conditions in Canada can never serve as a licence for being "overly generous or spendthrift".[62] However, Parliament's intention is that the Commission should not view economic considerations as an impediment to an otherwise appropriate salary increase when the overall economic conditions are good and the current financial position of the Government is healthy.

**b) The role of financial security in ensuring judicial independence**

75. 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).[63]

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

> What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be depoliticized. [...]
>
> […]
>
> The depoliticized relationships I have been describing create difficult problems when it comes to judicial remuneration. On the one hand, remuneration from the public purse is an inherently political concern, in the sense that it implicates general public policy. [...]

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62 McLennan Report (2004) at 9.

63 Drouin Report (2000) at 8.

> 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.[64]

77. The role and responsibilities of judges are *sui generis*, as the Government acknowledged in its submissions to the Drouin Commission.[65] Indeed, judges occupy a 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 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* - 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.

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

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

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.

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

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

> [j]udicial salaries and benefits must be set at a level such that those most qualified for judicial office, those who can be characterized as outstanding candidates, will not be deterred from seeking judicial office.[66]

79. 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's mandate was the following:

> To provide independent advice and recommendations to the President of the Treasury Board concerning executives, deputy ministers and other Governor-in-Council appointees of the federal Public Service and public sector on:
>
> - developing a long-term strategy for the senior levels of the Public Service that will support the human resource management needs of the next decade,
> - compensation strategies and principles, and
> - overall management matters comprising among other things human resource policies and programmes, terms and conditions of employment, classification and compensation issues including rates of pay, rewards and recognition. [67]

80. The Strong Committee had this to say about the correlation between compensation and the calibre of candidates:

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66 McLennan Report (2004) at 15.

67 Advisory Committee on Senior Level Retention and Compensation, *First Report: January 1998* at 40, reproduced in the judiciary's Book of Cited Documents.

> 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.[68]

81. 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.[69]

82. The need to attract outstanding candidates to the Bench, coupled with the fact that the vast majority of appointees come from private practice, explain the importance of private sector income in the determination of judicial salaries. The Scott Commission considered the relationship between judicial salaries and private sector income to be very important. Indeed, the Scott Commission characterized the statutory indexing of judges' salary as

> a statutory mechanism for ensuring that there will be, to the extent possible, a constant relationship, in terms of degree, between judges' salaries and the incomes of those members of the Bar most suited in experience and ability for appointment to the Bench. The importance of the maintenance of this constant cannot be overstated. It represents, in effect, a social contract between the state and the judiciary. [70]

83. 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

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68 Advisory Committee on Senior Level Retention and Compensation, *First Report: January 1998* at 7, reproduced in the judiciary's Book of Cited Documents.

69 McLennan Report (2004) at 5.

70 Scott Report (1996) at 14.

members of the Bar are, as a general rule, among the highest earners in private practice."[71]

**d) Other objective criteria**

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

> There are increasing, and ever-shifting, demands placed upon the Judiciary. As a result of the introduction of the *Charter*, the growth in litigation in Canada, the complexity of the matters which actually proceed before the courts, and intensified public scrutiny of judicial decisions, the process and requirements of "judging" have become more onerous at both the trial and appellate levels.[72]

85. 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. A vivid illustration of this phenomenon can be found in the role played by Canadian courts in respect of the difficult issue of same-sex marriage.

86. The McLennan Commission echoed this point and explicitly supported the factors set out by the Drouin Commission, quoted above:

> If anything, those factors are even more relevant in 2004, given the involvement of the courts in such diverse and controversial matters as same-sex marriage, First Nation land claims and constitutional challenges to legislation. One vivid example serves to signify the issue – the child pornography decision in *R. v. Sharp*, where the trial judge was widely (but totally improperly) vilified in some quarters for concluding

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71 McLennan Report (2004) at 32.

72 Drouin Report (2000) at 17.

that the relevant sections of the *Criminal Code* violated the provisions of the *Canadian Charter of Rights and Freedoms*.[73]

## 3. The comparators

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

i) the remuneration of the most senior level of deputy ministers within the federal Government; and

ii) the incomes of senior lawyers in the private practice of law in Canada.

88. While judges, particularly senior judges, in other jurisdictions such as England, Australia, New Zealand and the United States of America have been mentioned in the reports of previous commissions, the task of comparing, on the one hand, the complete context of Canadian judicial responsibilities, salaries and benefits within the Canadian economy, with the complete context of foreign judicial responsibilities, salaries and benefits within their respective economies, on the other hand, presents far too many variables in terms of duties, jurisdictions, currency values and fluctuations, cost of living, tax regimes, etc. to be useful as a comparative exercise.

### a) The most senior deputy ministers

#### *i) DM-3s and DM-4s*

89. From at least the advent of the Triennial Commission process to the most recent Quadrennial Commission, judicial salaries have been compared with the remuneration of the most senior level of deputy ministers within the Government.[74]

90. With time, what started as a benchmark matured into the principle that there should be a rough equivalence between the salaries of federally appointed puisne judges and the

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73 McLennan Report (2004) at 5.

74 See Lang Report (1983) at 6.

midpoint of the remuneration of DM-3s, until recently the most senior level of deputy ministers within the federal Government.

91. Until the Crawford Commission reported on March 31, 1993, continual reference was made to the 1975 amendments to the *Judges Act* which had made the salary level of puisne judges roughly equivalent with the midpoint salary of the most senior level of deputy ministers. That rough equivalence was then adjusted regularly for inflation. Triennial Commissions prior to the Crawford Commission referred to that exercise as "1975 equivalency", and each of them successively recommended salary increases for judges as a function of the 1975 level, adjusted for inflation.

92. In its submission to the Crawford Commission, in 1993, the Government argued in support of direct equivalency with the highest deputy minister as opposed to the application of the "1975 equivalency", which entailed going back to the 1975 DM midpoint and adjusting for inflation in the years since that point.[75]

93. The Crawford Commission accepted that submission and found that the concept of "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.[76]

94. It is important to note that the midpoint is a midpoint of a salary range, not of the actual salary paid. Given that the upper and lower limits of the salary range for each of the DMs are theoretical limits rather than actual pay levels received, the Association and Council submit that it is more accurate to rely upon the average salary and/or compensation of senior deputy ministers, now that such averages are available, since those figures reflect actual remuneration paid on average.

95. Past commissions were of course fully appreciative of the fact that use of the DM-3 comparator for the purpose of setting judges' salaries does not amount to equating judges

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75 As cited in the Drouin Report (2000) at 28.

76 Crawford Report (1993) at 11.

to public servants.[77] As noted by the Crawford Commission, rough parity of this nature between judges and top level public servants finds support in the comparative salary figures from a number of other common law democracies.[78]

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

> While we agree that the DM-3 comparator should not be determinative of our recommendations concerning judicial salaries, in our view, it is an appropriate and useful comparator at this time. More particularly, we have concluded that the important aspect of the DM-3 comparator, for the purposes of our inquiry, is the maintenance of a relationship between judges' salaries and the remuneration of those senior federal public servants whose skills, experience and levels of responsibilities most closely parallel those of the Judiciary. We agree with the substance of the observation by both the Courtois and Scott Commissions (1990 and 1996) that the relationship between the remuneration of DM-3s and judges should be maintained, not as a precise measure of "value" but as a reflection of "what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges." [79]

97. In the time period between the report of the Drouin Commission in 2000 and the beginning of the mandate of the McLennan Commission in 2003, the Government created a category above the DM-3. The DM-4 category was created as a consequence of a recommendation of the Strong Committee in its third report, dated December 2000.[80] It is interesting to note that one of the factors behind the recommendation of the Strong Committee was the need to "[send] an important message in terms of the government's willingness to attract and retain qualified and experienced staff."[81]

98. At the time of the McLennan Commission, it was understood that there were only two DM-4s, the Clerk of the Privy Council and the Deputy Minister of Finance. The

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77 See *e.g.* Crawford Report (1993) at 11.

78 Crawford Report (1993) at 11.

79 Drouin Report (2000) at 30-31.

80 Advisory Committee on Senior Level Retention and Compensation, *Third Report: December 2000* at 41, reproduced in the judiciary's Book of Cited Documents.

81 *Ibid.*

Association and Council have recently been informed by the Government that while there are still only two incumbents in the DM-4 category, the identity of their respective departments is now confidential on the ground that it would identify the particular individuals. The Government has advised that, in general, DM classification is personal to the incumbent and based on merit, and that it is not linked to particular departments.

99. It was explicitly stated before the McLennan Commission that, while the Association and Council reserved the right to use DM-4 as a comparator before subsequent Commissions, the judiciary was willing at that point to forego comparison with the compensation of DM-4s since the category was new and still in a state of flux. There is at present no indication that the DM-4 category will be phased out, and there is no reason to ignore it in the comparison between judicial compensation and the compensation of the most senior deputy ministers.

100. The McLennan Commission expressed some concern about confining the comparison to the DM-3 category,[82] and it also considered information relating to other DM categories. It seemed also to have drawn comparisons with other Governor-in-Council appointees, known as GC and GCQ categories, noting that some of these positions are quasi-judicial in nature.[83]

101. The Association and Council submit that judicial salaries should continue to be compared with the remuneration of the most senior deputy ministers. This comparator has withstood the test of time, and it is one that the Government itself submitted before the Crawford Commission as a formal comparator that should be adopted.[84]

102. To expand the comparative exercise would create the risk of diluting the comparator to a point where there would be no underlying principled logic justifying the comparison. The comparison of judicial salaries with the compensation of the most senior deputy ministers is required on the principled basis that the judiciary is not subordinate to the

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82 McLennan Report (2004) at 28.

83 McLennan Report (2004) at 30.

84 The Government's submission on this point before the Crawford Commission is cited in the Drouin Report (2000) at 28.

executive. Members of the judiciary should earn at the same general level as the senior members of the executive since it would otherwise upset the political equilibrium between these two branches of the state.

103. Consideration of the DM-1 is an example of how the comparator risks being diluted if other Governor-in-Council appointees are considered. The Association and Council have been informed by the Government that the DM-1 is normally an Associate Deputy Minister reporting to a DM or to a Deputy Secretary to the Privy Council Office. DM-1s can therefore fairly be described as "DMs in training". It is submitted that any comparison between the judiciary and this category would be bereft of principle.

104. As stated above and by many successive compensation commissions, comparison between the remuneration of the most senior deputy ministers and that of judges should continue, not because it is a precise measure of "value", but as a reflection of what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by senior deputy ministers and judges. Just as the senior deputy ministers are outstanding professionals who must execute with excellence heavy responsibilities regarding the conduct of the affairs of the executive branch, judges are appointed because of their outstanding performance as lawyers and because they must impartially and independently adjudicate disputes that have significant ramifications in the public and private spheres.

***ii) At-risk pay***

105. In recent years, a variable component described as "at-risk pay" has become a significant component of the remuneration of DMs (and certain other Governor-in-Council appointees). That component arose out of the recommendations of the Strong Committee, which said the following about "at-risk" pay for deputy ministers:

> […]we are proposing a compensation system where the job rate, the fixed component of compensation that is paid for fully satisfactory performance, is adjusted at intervals using market comparisons of total compensation in appropriate comparator groups. The proposed compensation system would have no overtime payments or automatic annual increments. It would, however, include a considerable amount of pay "at risk"—a variable component of compensation that is tied to

> corporate and individual achievement against targets, but that is integral to the total package.[85] [emphasis added]

106. More recently, the 2007 Advisory Committee on Senior Level Retention and Compensation, chaired by Carol Stephenson (the "**Stephenson Committee**"), has used the expression "performance award" or "performance pay" to refer to the variable part of the compensation paid to DMs,[86] although the Government continues to refer to it as "at-risk pay".

107. The Association and Council took the position before both the Drouin Commission and the McLennan Commission that at-risk-pay, for the purpose of making comparison with judicial salaries, should be considered an integral part of the compensation of DMs.

108. The Drouin Commission quite appropriately rejected the notion, put forward by the Government, that when considering the DM-3 comparator regard should be had only to the midpoint of the base salary range of DM-3s, without regard to at-risk awards. The Drouin Commission chose to consider the average of actual at-risk awards, an approach that is sound and that reflects the fact that the variable pay component of the remuneration of DM-3s is in reality an integral part of the total compensation for DM-3s, and was regarded as such by the Advisory Committee on Senior Level Retention and Compensation.[87] The Association and Council submit that this Commission should adopt the same approach.

109. While the McLennan Commission acknowledged that judicial salaries cannot include an at-risk component,[88] it nonetheless concluded that this component "cannot be ignored" [89] and indeed took it into account in its analysis.[90]

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85 Advisory Committee on Senior Level Retention and Compensation, *First Report: January 1998* at 20, reproduced in the judiciary's Book of Cited Documents.

86 The Stephenson Committee issued its report in the form of a letter addressed to the Honourable Vic Toews dated March 28, 2007, reproduced in the judiciary's Book of Cited Documents.

87 Drouin Report (2000) at 25-26.

88 See McLennan Report (2004) at 27-28.

89 McLennan Report (2004) at 27.

90 McLennan Report (2004) at 28-31.

110. Regrettably, the Government appears to want to continue to re-litigate this issue. In its Second Response, the Government attempted to impugn the McLennan Report because of the latter's consideration of at-risk pay in the analysis of DMs' compensation.[91]

111. It will be important for this Commission emphatically to reiterate that there is no credibility to a comparison of remuneration if one category is amputated of a significant component that forms an integral part of the recipient's total remuneration package.[92]

### *iii) Current compensation levels of DM-3s and DM-4s*

112. The Stephenson Committee issued its Spring report on March 28, 2007.[93] It recommended, for implementation as of April 1, 2007, a 3.9% blended average increase in total compensation for DMs, apportioned as a 2.1% increase in base salaries and the balance apportioned differentially based on level. For DM-3s, the Committee recommended a 2.1% increase in base salaries and a maximum performance award of 27.4% up from 21.1%. For DM-4s, the recommendation was a 2.1% increase and a maximum performance award of 32.4% up from 26.1%.

113. On June 28, 2007, the Government accepted all of the recommendations of the Stephenson Committee and stated that they will be implemented immediately.[94]

114. The chart below provides compensation information for the DM-3s from 2003 to 2007. The actual at-risk component of the compensation of DM-3s for the year 2007-2008 will only be determined in the Summer of 2008. However, if an average is taken of the

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91 Second Response at 7.

92 We note that in the most recent report of the Advisory Committee on Senior Level Retention and Compensation, the Stephenson Committee, a recommendation was made to increase further the amount of at-risk compensation available. This is discussed below.

93 The Stephenson Committee issued its report in the form of a letter addressed to the Honourable Vic Toews dated March 28, 2007, reproduced in the judiciary's Book of Cited Documents.

94 "President of the Treasury Board welcomes recommendations of the Advisory Committee on Senior Level Retention and Compensation" (June 28, 2007), online: http://www.psagency-agencefpgc.ca/media/2007/20070628_e.asp, reproduced in the judiciary's Book of Cited Documents.

previous three years since April 1, 2004,[95] the average at-risk pay as a proportion of average salary would be 11.7%, and the at-risk pay would be $30,505, for an estimated total average compensation of $291,235 for the year 2007-2008.

| DM-3 COMPENSATION INFORMATION | | | | | | |
|---|---|---|---|---|---|---|
| **Date** | **Salary Range** | **Mid-Point Salary** | **Average Salary** | **Average at Risk Pay** | **Average at Risk Pay as % of Average Salary** | **Total Average Compensation** |
| April 1, 2003 | $202,100 - $237,800 | $219,950 | $236,863 | $30,188 | 12.7% (max. 20%) | $267,051 |
| April 1, 2004 | $207,200 - $243,800 | $225,500 | $239,980 | $27,690 | 11.5% (max. 20%) | $267,670 |
| April 1, 2005 | $213,500 - $251,200 | $232,350 | $248,644 | $26,200 | 10.5% (max. 20%) | $274,844 |
| April 1, 2006 | $218,800 - $257,500 | $238,150 | $255,178 | $33,670 | 13.2% (max. 21.1%) | $288,848 |
| April 1, 2007 | $223,600 - $263,000 | $243,300 | $260,730 | (est. $30,505)* | (est. 11.7%)* (max. 27.4%) | (est. $291,235)* |

* Unavailable until Summer 2008

115. The chart below provides the available compensation information for DM-4s. The current midpoint of the base salary of a DM-4 is $272,400, while it was $266,750 between April 1, 2006 and March 31, 2007. This does not include the substantial at-risk component of the remuneration of DM-4s. The average base salary and the average at-risk pay awarded to DM-4s are not available due to confidentiality concerns. However, if it is assumed that the DM-4 incumbents receive in 2007-2008 an average salary that bears a relationship to the midpoint which parallels the relationship of the DM-3 average salary to the DM-3 midpoint in 2007-2008, it would mean that the DM-4 average salary is 7.2% more than the midpoint of $272,400, *i.e.* $291,915. Similarly, for the maximum DM-4 at-risk award of 32.4%, if it is assumed that DM-4s will receive for the 2007-2008 year an average at-risk pay in the same proportion as DM-3s are projected to receive (11.7% out of a maximum 27.4%), it would mean that the DM-4 average at-risk pay is 42.7% of

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95 The rationale for going back to April 1, 2004 as opposed to April 1, 2003 is that the former date facilitates a clearer comparison with judicial salaries since that date is the most recent watershed for judicial salary increases.

the maximum 32.4%, which is 13.8% of $291,915, resulting in $40,284 as average at-risk pay. Therefore, the estimated total average compensation of DM-4s for 2007-2008 would be $332,199 ($291,915 + $40,284). If this estimation methodology is applied to previous years for DM-4s, the calculation yields the figures found in the table below.

| DM-4 SALARY INFORMATION | | | | | | |
|---|---|---|---|---|---|---|
| **Date** | **Salary Range** | **Mid-Point Salary** | **Average Salary** | **Average at Risk Pay** | **Average at Risk Pay as % of Average Salary** | **Total Average Compensation** |
| April 1, 2003 | $226,400 - $266,400 | $246,400 | (est. $265,347) * | * | * | * |
| April 1, 2004 | $232,100 - $273,100 | $252,600 | (est. $268,820) * | (est. $38,710)* | (est. 14.4%)* | (est. $307,530)* |
| April 1, 2005 | $239,100 - $281,300 | $260,200 | (est. $278,447)* | (est. $36,477)* | (est. 13.1%)* | (est. $314,924)* |
| April 1, 2006 | $245,100 - $288,400 | $266,750 | (est. $285,823)* | (est. $46,589)* | (est. 16.3%)* (max. 26.1%) | (est. $332,412)* |
| April 1, 2007 | $250,300 - $294,500 | $272,400 | (est. $291,915)* | (est. $40,284)** | (est. 13.8%)** (max. 32.4%) | (est. $332,199)** |

* Unavailable due to confidentiality concerns

** Unavailable due to confidentiality concerns and unavailable until Summer 2008

### *iv) Compensation levels of other senior civil servants*

116. The same compensation information as that provided above for DM-3s and DM-4s is reproduced in Appendix A for DM-1s and DM-2s. There were three other categories of Governor-in-Council appointees considered by the McLennan Commission: GC, GCQ, and heads of Crown corporations. The composition of these categories can be found in Appendix B and their salary information can be found in Appendix C.

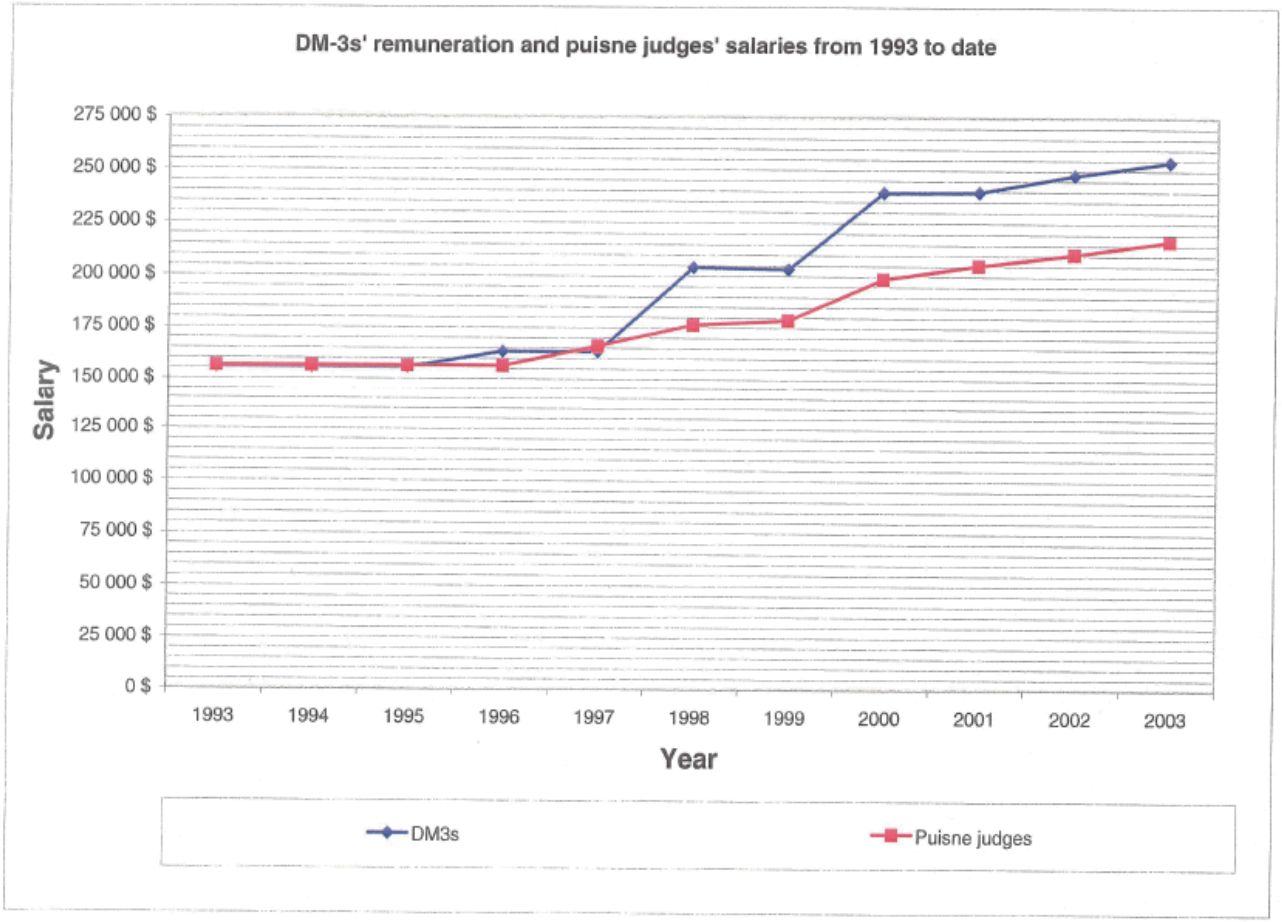
### *v) Comparison with judicial salaries*

117. It is important to note that the most recent available compensation information relates to the year April 1, 2007 - March 31, 2008. This Commission must make its recommendations in light of an effective date of April 1, 2008, by which time there will of course have been another increase in the compensation of DMs and the other above-mentioned Governor-in-Council appointees. Therefore, DM compensation as a

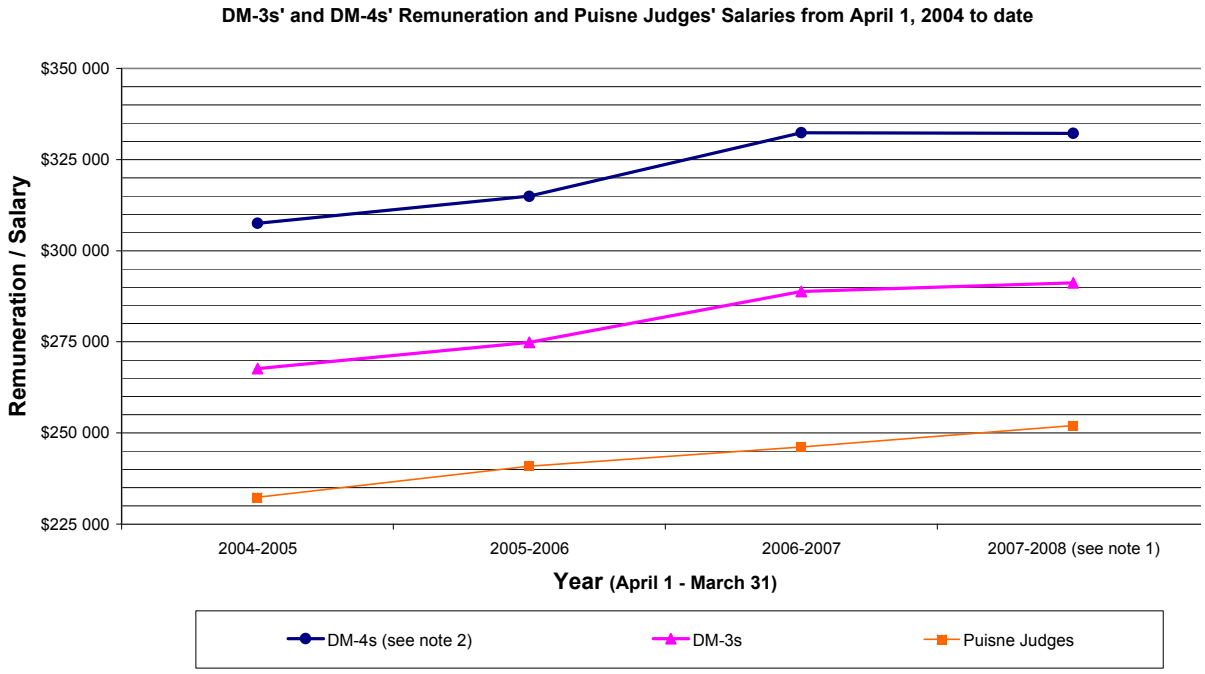
comparator for judicial salaries is necessarily a conservative comparator since judicial salaries will always be one year behind DM compensation, even if there is an attempt at maintaining rough equivalence.

118. The current salary of a puisne judge, in effect between April 1, 2007 and March 31, 2008, is $252,000. The total average compensation of a DM-3 *last* year (*i.e.* from April 1, 2006 to March 31, 2007) was $288,848. Once at-risk pay, as determined in the summer of 2008 for the current fiscal year, is added to the current average base salary of a DM-3 of $260,730, the total average compensation of DM-3s this year will undoubtedly increase, likely to more than $290,000.

119. Before the McLennan Commission, the Association and Council expressed concern that there was an increasing disparity between the salary of puisne judges and the midpoint of the DM-3 remuneration range, as illustrated by the graph below (and also in Appendix F).



120. Since April 1, 2004, the salary of puisne judges and the average compensation of DM-3s and DM-4s have evolved as set out in the graph below (and also in Appendix G).




**Note 1**
The "at risk" portion of the 2007-2008 DM-3 salary is currently unavailable and has been projected based on the immediately preceding 3-year average calculated as a percentage of average base salary, being 11.7%.

**Note 2**
The average salary and the "at risk" portion of the DM-4s' salaries are not made available due to confidentialityconcerns. Accordingly, the total average compensation of the DM-4s, including the "at risk" portion, has been estimated for each annual period based on the assumption that the DM-4 incumbents received average salaries and average "at risk" paythat bear the same relation to the DM-3s' average pay to mid-point salary and average "at risk" pay to maximum at risk pay, respectively.

121. As illustrated in Appendix G and above, the gap between judicial remuneration and that of the most senior deputy ministers is persisting. The longer this situation is allowed to persist, the more difficult it will be to narrow the gap. Yet, there is no comparator that embodies the democratic principle of equilibrium between the branches of the state the way this comparator does.

### b) Private-sector lawyers' income

#### *i) Introduction*

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

123. Lawyers in private practice have long been the primary source of candidates to the Bench. The Drouin Commission noted that in the years 1990 to 1999, 73% of those appointed to the Bench came from the private Bar, a proportion that increases to 82% if judges elevated from the provincial or territorial Bench are excluded from the calculation.[96] As the McLennan Commission reported in May 2004, based on information from the Judicial Appointments Secretariat, approximately 73% (268/368) of appointees during the period from January 1, 1997 to March 30, 2004 came from private practice.[97] For the period April 1, 2004 to March 31, 2007, a majority of 78% (110/141) continued to be appointed from the private sector. This proportion increases to 84% (110/131) if judges elevated from the provincial Bench and masters are excluded.[98] In short, it has been and will continue to be the case that the overwhelming majority of judges come from the private Bar.

124. Among the judges appointed between April 1, 2004 and March 31, 2007, 61.7% came from the ten largest urban centres.[99] In order to ensure that outstanding candidates from

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96 Drouin Report (2000) at 36-37.

97 See McLennan Report (2004) at 17, Table 2.

98 Information provided to Justice Canada and the Association by the Judicial Appointments Secretariat, Tables 7 and 8: "Appointees in Private Practice, Predominant Area of Practice, April 1, 2004 to March 31, 2007" and "Appointees Not in Private Practice, Predominant Area of Practice, April 1, 2004 to March 31, 2007", reproduced in the judiciary's Book of Cited Documents.

99 The following are the 10 largest Census Metropolitan Areas, according to the 2006 census: Toronto, Montreal, Vancouver, Ottawa-Gatineau, Calgary, Edmonton, Quebec City, Winnipeg, Hamilton, and London. See Table 4, "Place of Practice/Employment at Time of Appointment, City/Province/Territory, April 1, 2004 to March 31, 2007", provided by the Judicial Appointments Secretariat, and reproduced in the judiciary's Book of Cited Documents.

the private Bar will continue to seek judicial appointments, judicial salaries must be fixed taking into account the higher level of earnings that such practitioners enjoy as well as the higher cost of living that prevails in such centres.

125. The McLennan Commission found that the income of self-employed lawyers in the larger Canadian cities exceeded the current level of judicial compensation, even when the value of the judicial annuity is factored in.[100] Observing that many appointees come from higher-income brackets, the McLennan Commission expressed the view that it is important "to establish a salary level that does not discourage members of that group from considering judicial office."[101]

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

127. Income is of course not the only measure of the quality of candidates from the Bar. It is also clear that the judicial annuity is a substantial benefit to judges which is not enjoyed by private practitioners. In addition, as the Lang Commission noted some twenty-four years ago, there is real value to be placed upon the opportunity for public service which is offered to members of the judiciary.[102] Nevertheless, judicial compensation, including

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100 McLennan Report (2004) at 48. The McLennan Commission estimated, based on the advice of its experts, that the value of the government-paid portion of the judicial annuity could be set at 22.5% of salary (see McLennan Report (2004) at 58).

101 McLennan Report (2004) at 49.

102 See Lang Report (1983) at 2-3.

judicial annuities, remains a factor of significant importance in the need to attract outstanding candidates to the judiciary.

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

### *ii) The Navigant Study*

129. In view of the McLennan Commission's findings that the data provided by the Canada Revenue Agency ("**CRA**") for 2001 lawyers' income was generally unreliable, and its urging that some means be found to collect data on which future commissions could rely,[103] the Association commissioned Navigant Consulting, Inc. ("**Navigant**") to obtain data about private-sector lawyers' income in Canada. Navigant conducted a country-wide survey administered by way of e-mails sent to lawyers.

130. Navigant determined the level of income, both at the provincial level and across the country, at the 75th percentile. The McLennan Commission agreed with the application of the 75th percentile:

> The 75th percentile of income, calculated with an income exclusion [of $60,000], strikes a reasonable balance between the largest self-employed income earners and those in lower brackets, given the criteria that we must apply. To the extent that there is validity in the Government's submission that lawyers at the highest income levels do not apply for the bench, of which there is no evidence, the use of the 75th percentile level takes that into account.[104]

131. The low-income cut-off of $60,000 was applied by the McLennan Commission because it was of the view that it would be unlikely that lawyers from the pool of qualified candidates would have an income level lower than $60,000.[105] The Navigant survey similarly excluded part-time practitioners, respondents who were not lawyers, and

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103 McLennan Report (2004) at 91-92.

104 McLennan Report (2004) at 43.

105 *Ibid.*

respondents who have less than 10 years membership at the Bar,[106] all with a view to ensuring that only the pool of qualified candidates was being analyzed.

132. As set out in greater detail in its report (the "**Navigant Report**"), Navigant found that lawyers' income in the private sector at the 75th percentile for Canada as a whole in 2006 was $366,216.[107] In Ontario, the income at the 75th percentile was $437,500.[108] Only Saskatchewan had income at the 75th percentile which was less than $252,000, the current salary of puisne judges.[109]

***iii) The 2005 CRA data***

133. CRA was mandated by the Government to assemble a database consisting of the 2005 tax returns of self-employed individuals who identified themselves as lawyers on forms T2032, "Statement of Professional Activities", or T2124, "Statement of Business Activities".[110] This database was then used to generate tables based on certain parameters.

134. As discussed in the Navigant report, when CRA was asked to generate a table of net professional income of all self-employed lawyers in Canada for 2005, with low-income exclusion of $60,000, the income at the 75th percentile was $304,276. A similar table for the top ten Census Metropolitan Areas yielded income at the 75th percentile of $362,944. These 2005 incomes are substantially higher than the 2007 salary of $252,000 for puisne judges, higher even when taken together with the attributed value of the judges' annuity.[111]

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106 These exclusions seem to have had the same effect as the $60,000 exclusion since applying the $60,000 exclusion to the Navigant data did not change the resulting income level at the 75th percentile.

107 Navigant Report at 15.

108 *Ibid*.

109 The data for Yukon, Nunavut and the Northwest Territories was aggregated to protect confidentiality.

110 According to the methodology used by CRA, filers who incorrectly filed a business income tax return form instead of a professional form were re-assigned to a professional income return form.

111 The McLennan Commission estimated, based on the advice of its experts, that the value of the government-paid portion of the judicial annuity could be set at 22.5% of salary (see McLennan Report (2004) at 58).

135. There are two important caveats to note. First, the CRA data is 2005 incomes. Salary levels in the private sector have increased since then. There should therefore be an adjustment in line with increases in private-sector lawyers income, which in recent years have been significantly higher than inflation. Second, the CRA data does not necessarily show the full picture of the income-earning capacity of a lawyer and his/her family. Lawyers in private practice are in a position to structure their affairs to achieve a measure of income-splitting with other family members or family-owned entities such that a portion of the consolidated profit from a professional business often accrues to taxpayers other than the lawyer in question.

### 4. Salary increases sought by the judiciary

136. The Association and Council seek the following salary increases, phased over the mandate of this Commission: 3.5% as of April 1, 2008 and 2.0% as of each of April 1, 2009, 2010, and 2011, the whole exclusive of statutory indexing.

137. The current salary of puisne judges is $252,000 and, as of April 1, 2008, will be increased by statutory indexing of, as currently estimated, 2.4% to $258,048.[112] If the proposed 3.5% increase were awarded, total remuneration would be $266,868 as of April 1, 2008. With an annual 2% increase thereafter and estimated annual statutory indexations in subsequent years of 2.6%, 2.8%, and 3%, respectively, the salary of puisne judges at the end of this Commission's mandate would be $307,170.

138. Statutory indexing is excluded from the increases sought by the Association and Council because, while statutory indexing protects adequate compensation (within the meaning of s. 26(1) of the *Judges Act*) against inflation, it is not a means to determine adequate compensation.

139. The principal rationale for the proposed annual phased increases is that it reflects the reality that salary increases are meant to cover the four years of the mandate of the Commission. Both the Government and the judiciary invited the McLennan Commission

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[112] This figure is based on current IAI projections by the Office of the Superintendent of Financial Institutions, see Appendix D.

to adopt this approach, which the Drouin Commission had itself adopted by recommending increases in instalments over the course of its mandate.

### 5. Payment of interest on retroactive salary increases

140. Government implementation of Commission recommendations has often been delayed. Most recently, when the salary recommendation of the McLennan Commission was partially implemented, it was implemented woefully late.

141. The statute by which the Second Response was implemented was adopted on December 14, 2006, and the increased salary was paid in January 2007. The McLennan Commission issued its recommendations in May 2004. The Government therefore took 2½ years to implement an increase.

142. While the salary increase was made retroactive to April 1, 2004, and included cumulative statutory indexing for cost of living since April 1, 2004, members of the judiciary were deprived of the benefit of that increase between April 1, 2004 and December 14, 2006, the latter being the beginning of the period of the increased salary.

143. Interest is the only way to compensate for the benefit lost during the period of delayed implementation. A salary increase is not truly retroactive unless interest is applied to capture the benefit lost during the period of retroactivity.

144. Accordingly, the Association and Council urge the Commission to recommend that payment of a retroactive salary adjustment to federally appointed judges shall always include interest at the rate prescribed pursuant to the *Income Tax Act* from the day on which the adjustment is effective, such interest rate to be applied to the modified base amount if it is further adjusted for cost of living on April 1 in the intervening year or years, between the effective date of the retroactive adjustment and the date of implementation.

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

145. For many years, relatively constant salary differentials have existed between puisne judges, chief justices and associate chief justices, puisne judges of the Supreme Court of Canada, and the Chief Justice of Canada. Neither the Drouin Commission nor the McLennan Commission saw any reason to alter these differentials, and it is submitted by the Association and Council that they ought to remain unchanged.

### 7. Salary differential between appellate and trial court judges

146. The Association's membership includes trial as well as appellate judges. Therefore, the Association and Council have historically adopted a position of neutrality on the question of whether the Commission should recommend a salary differential between appellate and trial court judges.

147. While maintaining this traditional position of neutrality, the Association and Council submit that this Commission has the jurisdiction to consider the issue of a salary differential.

### 8. Salary recommendations sought by the judiciary

148. The Association and Council urge the Commission to make the following salary recommendations:

**That the salary of puisne judges be increased by 3.5% as of April 1, 2008 and by 2.0% as of each of April 1, 2009, 2010, and 2011, the whole exclusive of statutory indexing.**

**That payment of a retroactive salary adjustment to federally appointed judges shall always include interest at the rate prescribed pursuant to the *Income Tax Act* from the day on which the adjustment is effective, such interest rate to be applied to the modified base amount if it is further adjusted for cost of living on April 1 in the intervening year or years, between the effective date of the retroactive adjustment and the date of implementation.**

**That the salary differential 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.**

## B. OTHER ITEMS

### 1. Relocation upon retirement

149. Paragraphs 40(1)(c)-(f) of the *Judges Act* provide for the payment of a retirement removal allowance to judges of the Supreme Court, the Federal Courts, the Tax Court, and the territorial courts. This removal allowance is payable upon, or in anticipation of, the judge's retirement. It is also payable upon the judge's death, in which case payment is made to the survivor and children. The removal allowance covers the costs of moving to a place in Canada outside the area in which the judge was required to reside by the relevant statute.

150. The above provisions omit judges of the provincial superior courts and courts of appeal, even though those judges may also be required to relocate upon appointment or during their tenure, as acknowledged in paragraphs 40(a) and (b) of the *Judges Act* and as reflected in the various provincial statutes requiring judges to relocate so that they reside in the districts where they sit.

151. Before the McLennan Commission, Justice Wright in his own capacity had proposed an extension of the allowance provided for in s. 40(1)(c)-(f) to all provincial superior court and appellate judges. The McLennan Commission did not accept Justice Wright's submission and recommended that there be no change to the entitlement to the post-retirement removal allowance.[113]

152. It is submitted that it is anomalous for only a certain category of federally appointed judges needing to relocate by reason of their appointment to be reimbursed for their relocation expenses in relation to retirement. This asymmetry should be corrected. The McLennan Commission declined to accept Justice Wright's submission because it thought that there was no statutory requirement for superior court judges to reside in a specific area. In fact, statutes such as the *Court of Appeal Act* and *Court of Queen's Bench Act* in Alberta, the *Queen's Bench Act* in Saskatchewan, the *Court of Queen's*

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[113] McLennan Report (2004) at 84.

*Bench Act* in Manitoba, the *Courts of Justice Act* in Quebec, the *Judicature Act* in New Brunswick, and the *Judicature Act* in Nova Scotia all contain residency requirements for superior court judges in those jurisdictions.

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

**That, in light of the various provincial statutes imposing residency requirements, section 40 of the *Judges Act* be amended so that judges of the provincial superior courts and courts of appeal are treated similarly to the judges of the Supreme Court, the Federal Courts, the Tax Court, and the territorial courts as far as relocation upon retirement, or relocation of survivors and children upon death, is concerned.**

### 2. Northern judges' annuity

154. Subsections 43(1) and (2) of the *Judges Act* respectively provide that where a judge who previously held the office of chief justice or associate chief justice elects supernumerary status, or elects to cease performing the duties of that office and perform only the duties of a judge, his or her annuity shall be based on the salary annexed to the office of chief justice or associate chief justice, as the case may be.

155. The senior judges of the territorial courts are not included in s. 43(1) and (2) of the *Judges Act*. Yet, they are in every other respect the same as the chief justices or associate chief justices of the provincial superior courts. This inconsistency should be corrected.

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

**That the *Judges Act* be amended, where necessary, so as to ensure that "chief justice" includes senior judges of the territorial courts in respect of the matter of their annuities.**

### 3. Increase in representational allowance

157. A representational allowance for chief justices and associate chief justices, as well as for puisne judges of the Supreme Court of Canada, was introduced by an amendment to the

*Judges Act* effective April 1, 1979. The amounts of the allowance were doubled effective April 1, 1985 and were only subsequently increased effective April 1, 2000.[114]

158. The representational allowance is used to defray the costs arising from the supplementary obligations attached to the post of those who benefit from this allowance, namely chief justices and associate chief justices, senior judges and regional senior judges of certain courts, and puisne judges of the Supreme Court of Canada.

159. The current levels of the representational allowance are set out in s. 27(6) of the *Judges Act*. Most of those who benefit from this allowance are currently entitled to receive $10,000 as a representational allowance, except for the Chief Justice of Canada, who is entitled to $18,750, and the Chief Justice of the Federal Court of Appeal and the chief justices of each province, who are entitled to $12,500.

160. It will be eight years since these representational allowances were last adjusted. In light of the significant increase in the administrative tasks and representational functions of those who benefit from this allowance, the current levels are inadequate and no longer commensurate with the responsibilities attached to these offices.

161. Figures from the Office of the Commissioner of Federal Judicial Affairs indicate that around 50% of those who are entitled to the allowance draw on the full amount of the allowance, while the overall usage rate of this benefit is 88%. Anecdotal evidence indicates that those who draw on the full amount of the allowance actually need more than is currently available to adequately perform their representational functions.

162. The Association and Council submit that the base allowance of $10,000 should be increased to $12,000 and that the other representational allowances should be similarly increased by approximately 20% of their current levels, *i.e.* $22,550 for the Chief Justice of Canada and $15,000 for chief justices of the provinces and of the Federal Court of Appeal. This increase essentially reflects the cumulative IAI increases since 2000. Additionally, the Association and Council submit that the representational allowance for

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114 See Table attached as Appendix E.

Ontario regional senior judges, including the senior family law judge, should be increased to $5,600, which reflects the cumulative IAI increases since 2004.

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

**That s. 27(6) of the *Judges Act* be amended in order to increase the current levels of representational allowances to $5,600 for Ontario regional senior judges, including the senior family law judge, $12,000 for chief justices and associate chief justices, senior judges, and puisne judges of the Supreme Court of Canada, $15,000 for chief justices of the provinces and of the Federal Court of Appeal, and $22,550 for the Chief Justice of Canada.**

## C. PROMOTING PROMPT GOVERNMENT IMPLEMENTATION OF COMMISSION RECOMMENDATIONS

164. The judiciary's serious concern with the Government's conduct in relation to the McLennan Report, including the issuance of a Second Response and the delayed partial implementation of its recommendations, has already been expressed at the outset of these submissions. The judiciary has also expressed the need to restore confidence in the Commission process.

165. The Association and Council reiterate their call on this Commission to state in its report that the manner in which the McLennan Report has been dealt with is most unsatisfactory, and to express its concern that the constitutional process expounded in the *PEI Reference* is threatened by such Government conduct.

166. In this section, the judiciary urges the Commission to invite the Government to give consideration to amending the *Judges Act* so as to promote prompt Government implementation of Commission recommendations after the Minister of Justice has issued a response under s. 26(7) of the *Judges Act*.

167. As far back as the first Triennial Commission, the Lang Commission, there have been deliberations on effective means of implementing recommendations of compensation commissions. The Lang Report (1983) recommended that the Government develop a

formula for the fixing of salaries similar to that in effect in New South Wales, Australia.[115] In that jurisdiction, the recommendations of an independent Remuneration Tribunal become law after the passage of a fixed time if no specific objection is made to its recommendations by 50% of the legislature.

168. Such a formula is often referred to as a negative-resolution model. The Lang Commission considered the fact that s. 100 of the *Constitution Act, 1867* provides for Parliament to fix the salaries of superior court judges, but concluded that the provision was not a "final barrier" to the adoption of the negative-resolution formula.[116] The Lang Commission suggested as well that the possibility of a constitutional amendment be considered as part of the adoption of this formula.

169. The Guthrie Report (1987) also considered the "New South Wales formula".[117] It took note of the fact that both the Joint Committee on Judicial Benefits and the Canadian Bar Association made representations before the Commission to the effect that the Government should adopt the New South Wales formula. However, the Guthrie Commission declined to endorse the formula, concluding that it would not "be such an improvement on the present system as to justify a constitutional amendment."[118] Nonetheless, the Guthrie Commission did call on Parliament to be prompt in its implementation of, or expression of disagreement with, recommendations, lamenting the fact that there had been no action on the recommendations of the Lang Commission or the Dorfman and de Grandpré Committees before it.[119]

170. It should be noted that the "New South Wales formula" is no longer confined to that Australian state. In 1989, the Australian Parliament amended the *Remuneration Tribunal Act 1973* to provide for a negative-resolution procedure at the federal level as well.[120]

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115 Lang Report (1983) at 13 and 16.

116 Lang Report (1983) at 14.

117 Guthrie Report (1987) at 25.

118 *Ibid.*

119 Guthrie Report (1987) at 6.

120 *Remuneration Tribunal Act 1973* (Aus.), ss. 7(5)-7(8), reproduced in the judiciary's Book of Cited Documents.

Since 1989, the Remuneration Tribunal is required to "determine" the remuneration of Federal Court and territorial Supreme Court judges. It must give the Minister a copy of every determination it makes. The Minister must cause a copy of the determination to be laid before each House of Parliament within 15 sitting days of that House after the Minister receives the determination.

171. The legislation provides that the determination comes into effect on the latest of the date specified in the determination and the day after the 15th sitting day of the House of Representatives or the Senate after a copy of the determination is laid before the House or Senate. If either House of Parliament, within 15 sitting days of that House after a copy of the determination has been laid before it, passes a resolution disapproving of the determination, then the determination either does not come into operation or has no force or effect as of the date of the disapproval. As a practical matter, the Tribunal can set a date for coming into force that ensures that the disapproval deadline has expired before the determination comes into force.

172. Given that critics of a negative-resolution model for the federal level in Canada point to s. 100 of the *Constitution Act, 1867*, and the fact that it provides that judicial salaries shall be “fixed” by Parliament, it is noted that the Australian Constitution also requires that judicial remuneration be "fixed" by Parliament. Section 72(iii) of the *Commonwealth of Australia Constitution Act* states:

> 72. The Justices of the High Court and of the other courts created by the Parliament:
>
> [. . .]
>
> (iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office. [Emphasis added.]

173. The Courtois Report (1990) recommended that there be time limits within which the Government would have to respond to the Commission.[121] Following the Supreme Court

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[121] Courtois Report (1990) at 7.

decision in the *PEI Reference*,[122] such a time limit now exists in the *Judges Act* at s. 26(7).[123]

174. The Crawford Report (1993) recommended not only that the Government respond within a fixed period, but also that it introduce resultant legislation as soon as feasible and no later than 20 sitting days after the expiry of a nine-month period immediately following the submission of the Commission report to the Minister.[124] While the Crawford Commission declined to recommend that its recommendations be binding on the Government, stating that it would be neither desirable nor constitutional, it insisted on the need for the process to be effective and depoliticized.

175. The Scott Report (1996) had extensive passages on means to reform the process of Government treatment of Commission recommendations.[125] Two options were considered: the negative-resolution formula and a fixed time period for the tabling of a bill incorporating the desired changes to judicial remuneration.

176. The Scott Commission concluded that the negative-resolution formula "has much to recommend it", but that it was not likely to be taken seriously by the Government. The Scott Commission also saw a risk that future reports of the Commission might be discarded in their entirety by the Government as a way to pre-empt the effect of the negative-resolution formula.[126]

177. Accordingly, the Scott Commission confined itself to the more "modest" proposal of having a fixed time period for the tabling of a bill incorporating the desired changes to judicial remuneration. Its specific recommendation was formulated as follows:

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122 *PEI Reference* at para. 179.

123 However, it arguably falls short of what the Supreme Court said the Constitution required since the *Judges Act* only requires the Minister of Justice to respond, whereas the Supreme Court said that the body that is responsible for setting judicial salaries, in this case, Parliament, must respond (*PEI Reference* at para. 179).

124 Crawford Report (1993) at 7-8.

125 Scott Report (1996) at 6-12.

126 Scott Report (1996) at 11.

> It is therefore recommended that: section 26(3) of the *Judges Act* be amended to require that the Minister, after a fixed period of time (three months), shall cause the Report of the Triennial Commission to be tabled in the House of Commons, together with the Government's response to the Report and a Government Bill incorporating those matters requiring legislative change as part of the process of implementing the same; both the Response and the Bill to be filed within a fixed number of sitting days (30 days) after the expiry of the initial period noted above.[127]

178. The Scott Commission warned that if corrective measures were not introduced, "the statutory scheme will collapse of its own weight with the attendant damage to the institution of the judiciary which can be expected to occur."[128]

179. As already noted, following the *PEI Reference* the *Judges Act* was amended to reflect the constitutional requirement that the Government formally respond to the report of the Commission. In spite of these amendments, there remains a significant lacuna in the *Judges Act* in that there is an abrupt end to the Commission process once the Minister of Justice issues a response to the Commission's report under s. 26(7). The absence of any formal steps provided for by the statute after the response is given allows for inordinate delays after a response has been issued. This is contrary to the constitutional norm that requires diligence in dealing with the Commission's recommendations, a requirement which necessarily extends to implementing the Government's response.

180. Based on the options canvassed by past Commissions and the Supreme Court in the *PEI Reference*, the following three models are options to promote the prompt implementation of the Commission's recommendations:

i) Negative-resolution procedure, where Commission recommendations become effective unless the House of Commons or the Senate passes a resolution rejecting them within a specified period of time.

ii) Affirmative-resolution procedure, where Commission recommendations become effective only if the House of Commons and the Senate pass a resolution accepting them.

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127 Scott Report (1996) at 12.

128 *Ibid.*

iii) Statutory provisions requiring the Minister of Justice, within a set time period, to table a bill implementing the Commission's recommendations, to the extent that the executive branch has accepted them, and/or requiring Parliament to complete the legislative process in relation to an implementation bill within a specified time period.

181. The Association and Council do not espouse any particular option before the Commission. These options are simply presented in order to inform the recommendation sought by the judiciary for changes to the *Judges Act* providing for prompt implementation.

182. The Association and Council are aware that doubts have been raised in the past about the constitutional validity of some of these options. The Association and Council point out, however, that consideration of these options predates the *PEI Reference*, which has elevated the commission process to a constitutional status.

183. The Association and Council urge this Commission, in addition to stating in its report that the manner in which the McLennan Report has been dealt with is most unsatisfactory, and to express its concern that the constitutional process expounded in the *PEI Reference* is threatened by such Government conduct, to make the following recommendation:

**That consideration be given to amending the *Judges Act* in order to provide for steps towards prompt implementation of the Commission's recommendations after the Minister of Justice has issued a response, to the extent of that response.**

## D. COSTS

184. Under s. 26.3(2) of the *Judges Act*, the judiciary is entitled to a reimbursement of two-thirds of the costs arising from its participation in the Commission's inquiry. It is important to recount the genesis of this provision since the advent of the Quadrennial Commission process.

185. The Drouin Commission was of the opinion that some reimbursement of the judiciary's representational costs was both desirable and necessary to ensure the efficacy of the Commission's proceedings.[129]

186. The Drouin Commission noted that its proceedings had been materially improved by the active participation by both the judiciary and Government.[130] It added that it was highly desirable that members of the judiciary participate fully in the Commission process.[131]

187. After careful consideration of the issue, the Commission recommended that the Government pay 80% of the total representational costs of the Association incurred in connection with the judiciary's participation in commission process.[132]

188. In the Minister's response to the Drouin Report, the Government stated that it did not accept this recommendation. Instead, the Government announced that it would propose an amendment to the *Judges Act* providing that 50% of judicial representational costs be paid to the judiciary on a solicitor/client basis, subject to taxation in the Federal Court. The *Judges Act* was amended accordingly.

189. The judiciary urged the McLennan Commission to reiterate the Drouin Commission's recommendation in this respect, on the basis of the compelling reasoning set out in the Drouin Report. The McLennan Commission reasoned as follows:

> As pointed out by the Drouin Commission and equally today, in the case of the Government, all of its representational costs are covered by public funds. In addition, it had available to it, also at public expense, the services of a variety of experts, as required or considered desirable by it and paid for by the government. We do not believe that the participation of the judiciary should become a financial burden on individual judges.[133]

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129 Drouin Report (2000) at 103.

130 Drouin Report (2000) at 104.

131 Drouin Report (2000) at 105.

132 Drouin Report (2000) at 111.

133 McLennan Report (2004) at 88.

190. As a result, the McLennan Commission recommended that the Government pay 100% of the disbursements and two-thirds of the legal fees incurred by the judiciary.

191. Once again, the Government did not accept this recommendation. Rather, the Government responded by substituting the two-thirds reimbursement now provided for in the *Judges Act* for the formula recommended by the McLennan Commission.

192. The Association and Council deplore that, for the second time, a carefully considered and well-reasoned recommendation has been rejected by the Government and replaced by a variance thereof which is financially more burdensome to the judiciary. Accordingly, the Association and Council submit that the Commission should recommend that the Government ought to pay 100% of the disbursements and two-thirds of the legal fees incurred by the judiciary.

193. If the Commission were to decline to recommend a change to the formula set out in s. 26.3(2) of the *Judges Act*, the judiciary submits in the alternative that at least the costs arising from the survey conducted by Navigant should be reimbursed in their entirety since it was at the McLennan Commission's behest that the judiciary took it upon itself to retain Navigant, with a view to providing reliable private-sector data that would be useful to the Commission and all parties.

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

**That the Government should reimburse 100% of the disbursements and two-thirds of the legal fees of the judiciary.**

Alternatively,

**That, by way of exception to the formula set out in s. 26.3(2) of the *Judges Act,* the fees and expenses of Navigant Consulting, Inc. in connection with the survey of Canadian private-sector lawyers' income be reimbursed in full to the Association.**

## V. SUMMARY OF RECOMMENDATIONS SOUGHT

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

1. **That the salary of puisne judges be increased by 3.5% as of April 1, 2008 and by 2.0% as of each of April 1, 2009, 2010, and 2011, the whole exclusive of statutory indexing.**

2. **That payment of a retroactive salary adjustment to federally appointed judges shall always include interest at the rate prescribed pursuant to the *Income Tax Act* from the day on which the adjustment is effective, such interest rate to be applied to the modified base amount if it is further adjusted for cost of living on April 1 in the intervening year or years, between the effective date of the retroactive adjustment and the date of implementation.**

3. **That the salary differential 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.**

4. **That, in light of the various provincial statutes imposing residency requirements, section 40 of the *Judges Act* be amended so that judges of the provincial superior courts and courts of appeal are treated similarly to the judges of the Supreme Court, the Federal Courts, the Tax Court, and the territorial courts as far as relocation upon retirement, or relocation of survivors and children upon death, is concerned.**

5. **That the *Judges Act* be amended, where necessary, so as to ensure that "chief justice" includes senior judges of the territorial courts in respect of the matter of their annuities.**

6. **That s. 27(6) of the *Judges Act* be amended in order to increase the current levels of representational allowances to $5,600 for Ontario regional senior judges, including the senior family law judge, $12,000 for chief justices and associate chief justices, senior judges, and puisne judges of the Supreme Court of Canada, $15,000 for chief justices of the provinces and of the Federal Court of Appeal, and $22,550 for the Chief Justice of Canada.**

7. **That consideration be given to amending the *Judges Act* in order to provide for steps towards prompt implementation of the Commission's recommendations after the Minister of Justice has issued a response, to the extent of that response.**

**8. a) That the Government should reimburse 100% of the disbursements and two-thirds of the legal fees of the judiciary.**

Alternatively,

**b) That, by way of exception to the formula set out in s. 26.3(2) of the *Judges Act*, the fees and expenses of Navigant Consulting, Inc. in connection with the survey of Canadian private-sector lawyers' income be reimbursed in full to the Association.**

The whole respectfully submitted.

Montréal, December 14, 2007

Pierre Bienvenu
Azim Hussain
**Ogilvy Renault LLP**
1981 McGill College Avenue
Suite 1100
Montréal, Québec H3A 3C1

# APPENDIX A -

## Compensation information for DM-1s and DM-2s

| DM-1 COMPENSATION INFORMATION | | | | | | |
|---|---|---|---|---|---|---|
| **Date** | **Salary Range** | **Mid-Point Salary** | **Average Salary** | **Average at Risk Pay** | **Average at Risk Pay as % of Average Salary** | **Total Average Compensation** |
| April 1, 2003 | $157,000 - $184,700 | $170,850 | $178,667 | $13,338 | 7.5% (max: 15%) | $192,005 |
| April 1, 2004 | $160,900 - $189,400 | $175,150 | $182,485 | $11,631 | 6.4% (max. 15%) | $194,116 |
| April 1, 2005 | $165,800 - $195,100 | $180,450 | $191,587 | $13,970 | 7.3% (max. 15%) | $205,557 |
| April 1, 2006 | $170,000 - $200,000 | $185,000 | $198,804 | $16,431 | 8.3% (max. 16.1%) | $215,235 |
| April 1, 2007 | $173,600 - $204,200 | $188,900 | $200,816 | (est. $14,660)* | (est. 7.3%)* (max. 22.4%) | (est. $215,476)* |

* Unavailable until Summer 2008

| DM-2 COMPENSATION INFORMATION | | | | | | |
|---|---|---|---|---|---|---|
| **Date** | **Salary Range** | **Mid-Point Salary** | **Average Salary** | **Average at Risk Pay** | **Average at Risk Pay as % of Average Salary** | **Total Average Compensation** |
| April 1, 2003 | $180,500 - $212,300 | $196,400 | $208,548 | $18,996 | 9.1% (max. 20%) | $227,544 |
| April 1, 2004 | $185,000 - $217,700 | $201,350 | $213,465 | $19,494 | 9.1% (max. 20%) | $232,959 |
| April 1, 2005 | $190,600 - $224,300 | $207,450 | $217,552 | $19,588 | 9% (max. 20%) | $237,140 |
| April 1, 2006 | $195,500 - $230,000 | $212,750 | $225,912 | $25,339 | 11.2% (max. 21.1%) | $251,251 |
| April 1, 2007 | $199,700 - $234,900 | $217,300 | $230,498 | (est. $22,589)* | (est. 9.8 %)* (max 27.4%) | (est. $253,087)* |

* Unavailable until Summer 2008

## APPENDIX B -

## Description of GC, GCQ and heads of Crown corporations

| GC AND GCQ POSITIONS | |
|---|---|
| **Level** | **Name of Positions** |
| GC-9 | 1. President, Natural Sciences and Engineering Research Council<br>2. President, Social Sciences and Humanities Research Council |
| GC-10 | 1. President, Canadian Institutes of Health Research<br>2. President, National Research Council of Canada |
| GCQ-09 | 1. Chairperson and Member, Canadian Radio-television and Telecommunications Commission<br>2. Chairperson and Member, Canadian Transportation Agency<br>3. Chairman and Member, National Energy Board<br>4. Commissioner of Competition, Office of the Commissioner of Competition<br>5. Superintendent, Office of the Superintendent of Financial Institutions |
| GCQ-10 | No Positions |

| HEADS OF CROWN CORPORATIONS | |
|---|---|
| **Level** | **Name of Positions** |
| GRP07 | 1. President, Business Development Bank of Canada<br>2. Master of the Mint, Royal Canadian Mint<br>3. President and Chief Executive Officer, Via Rail Canada Inc.<br>4. President, Export Development Canada<br>5. President, Farm Credit Canada |
| GRP08 | 1. President, Canada Mortgage and Housing Corporation<br>2 President and Chief Executive Officer, Atomic Energy of Canada Limited |
| GRP09 | 1. President, Canadian Broadcasting Corporation |
| GRP10 | 1. President, Canada Post Corporation |

## APPENDIX C -

## Salary ranges and maximum performance awards for DMs and other Governor-in-Council appointees recommended by the Stephenson Committee and accepted by the Government

| Cash Compensation for the DM Group | | | | |
|---|---|---|---|---|
| Level | April 1, 2006 – March 31, 2007 | | Accepted for April 1, 2007 – March 31, 2008 | |
| | Salary Range Maximum $ | Maximum Performance Award | Salary Range Maximum $ | Maximum Performance Award |
| DM-1 | 200,000 | 16.1% | 204,200 | 22.4% |
| DM-2 | 230,000 | 21.1% | 234,900 | 27.4% |
| DM-3 | 257,500 | 21.1% | 263,000 | 27.4% |
| DM-4 | 288,400 | 26.1% | 294,500 | 32.4% |

| Cash Compensation for the GC Group | | | | |
|---|---|---|---|---|
| Level | April 1, 2006 – March 31, 2007 | | Accepted for April 1, 2007 – March 31, 2008 | |
| | Salary Range Maximum $ | Maximum Performance Award | Salary Range Maximum $ | Maximum Performance Award |
| Level GC-9 | 234,800 | 15% | 239,800 | 21.3% |
| Level GC-10 | 270,000 | 20% | 275,700 | 26.3% |

| Cash Compensation for the GCQ Group | | |
|---|---|---|
| Level | **April 1, 2006 – March 31, 2007** | **Accepted for April 1, 2007 – March 31, 2008** |
| Level GCQ-9 | 258,300 | 276,500 |
| Level GCQ-10 | 306,000 | 327,000 |

| Cash Compensation for CEOs of Crown corporations | | | | |
|---|---|---|---|---|
| **Level** | **April 1, 2006 – March 31, 2007** | | **Accepted for April 1, 2007 – March 31, 2008** | |
| | **Salary Range Maximum $** | **Maximum Performance Award** | **Salary Range Maximum $** | **Maximum Performance Award** |
| Group-7 | 269,000 | 15% | 274,700 | 15% |
| Group-8 | 309,400 | 15% | 315,900 | 15% |
| Group-9 | 371,300 | 20% | 379,100 | 20% |
| Group-10 | 445,600 | 25% | 455,000 | 25% |

## Compensation information for GCs, GCQs and CEOs (2003-2006)

| GC-09 Salary Information | | |
|---|---|---|
| **Date** | **Salary Range** | **Mid-Point Salary** |
| April 1, 2003 | $189,000 - $222,400 | $205,700 |
| April 1, 2004 | $192,900 - $226,900 | $209,900 |
| April 1, 2005 | $197,700 - $232,600 | $215,150 |
| April 1, 2006 | $199,700 - $234,800 | $217,250 |

| GC-10 Salary Information | | |
|---|---|---|
| **Date** | **Salary Range** | **Mid-Point Salary** |
| April 1, 2003 | $217,400 – $255,800 | $236,600 |
| April 1, 2004 | $221,800 - $260,900 | $241,350 |
| April 1, 2005 | $227,400 - $267,500 | $247,450 |
| April 1, 2006 | $229,500 - $270,000 | $249,750 |

| GCQ-09 Salary Information | | |
|---|---|---|
| **Date** | **Salary Range** | **Mid-Point Salary** |
| April 1, 2003 | $207,900 - $244,600 | $226,250 |
| April 1, 2004 | $212,200 - $249,600 | $230,900 |
| April 1, 2005 | $217,500 - $255,900 | $236,700 |
| April 1, 2006 | $219,600 - $258,300 | $238,950 |

| GCQ-10 Salary Information | | |
|---|---|---|
| **Date** | **Salary Range** | **Mid-Point Salary** |
| April 1, 2003 | $246,400 - $289,900 | $268,150 |
| April 1, 2004 | $251,300 - $295,700 | $273,500 |
| April 1, 2005 | $257,700 - $303,200 | $280,450 |
| April 1, 2006 | $260,100 - $306,000 | $283,050 |

| GRP07 Salary Information | | |
|---|---|---|
| **Date** | **Salary Range** | **Mid-Point Salary** |
| April 1, 2003 | $209,900 - $246,900 | $228,400 |
| April 1, 2004 | $215,200 - $253,200 | $234,200 |
| April 1, 2005 | $221,700 - $260,800 | $241,250 |
| April 1, 2006 | $228,700 - $269,000 | $248,850 |

| GRP08 Salary Information | | |
|---|---|---|
| **Date** | **Salary Range** | **Mid-Point Salary** |
| April 1, 2003 | $289,600 - $340,700 | $315,150 |
| April 1, 2004 | $297,000 - $349,400 | $323,200 |
| April 1, 2005 | $305,900 - $359,900 | $332,900 |
| April 1, 2006 | $315,600 - $371,300 | $343,450 |

| GRP09 Salary Information | | |
|---|---|---|
| **Date** | **Salary Range** | **Mid-Point Salary** |
| April 1, 2003 | $241,300 - $283,900 | $262,600 |
| April 1, 2004 | $247,500 - $291,200 | $269,350 |
| April 1, 2005 | $255,000 - $300,000 | $277,500 |
| April 1, 2006 | $263,000 - $309,400 | $286,200 |

| GRP10 Salary Information | | |
|---|---|---|
| **Date** | **Salary Range** | **Mid-Point Salary** |
| April 1, 2003 | $347,500 - $408,800 | $378,150 |
| April 1, 2004 | $356,400 - $419,300 | $387,850 |
| April 1, 2005 | $367,100 - $431,900 | $399,500 |
| April 1, 2006 | $378,800 - $445,600 | $412,200 |

**APPENDIX D -**

**IAI Projections by the Office of the Superintendent of Financial Institutions**

PROTECTED B

Our File: P6120-5

22 October 2007

Mr. David Murchie
Senior Policy Advisor
Judicial Affairs, Courts & Tribunal Policy
Public Law Sector East Memorial Building 5211
284 Wellington St.
Ottawa, ON
K1A 0H8

Dear David:

Subject: Industrial Aggregate

Further to your request, the following is our most recent assumption for the Industrial Aggregate Index (IAI) to which judges' salaries are indexed. We had provided an estimate of these numbers to you in March, but we have since revised our assumptions for the 31 March 2007 valuation report, which should be tabled soon.

| Year | IAI |
|---|---|
| 1 April 2008 | 2.4% |
| 1 April 2009 | 2.6% |
| 1 April 2010 | 2.8% |
| 1 April 2011 | 3.0% |

Should you have any question, do not hesitate to contact me.

Yours truly,

M. Mercier
Actuary
(613) 990-7861

## APPENDIX E -

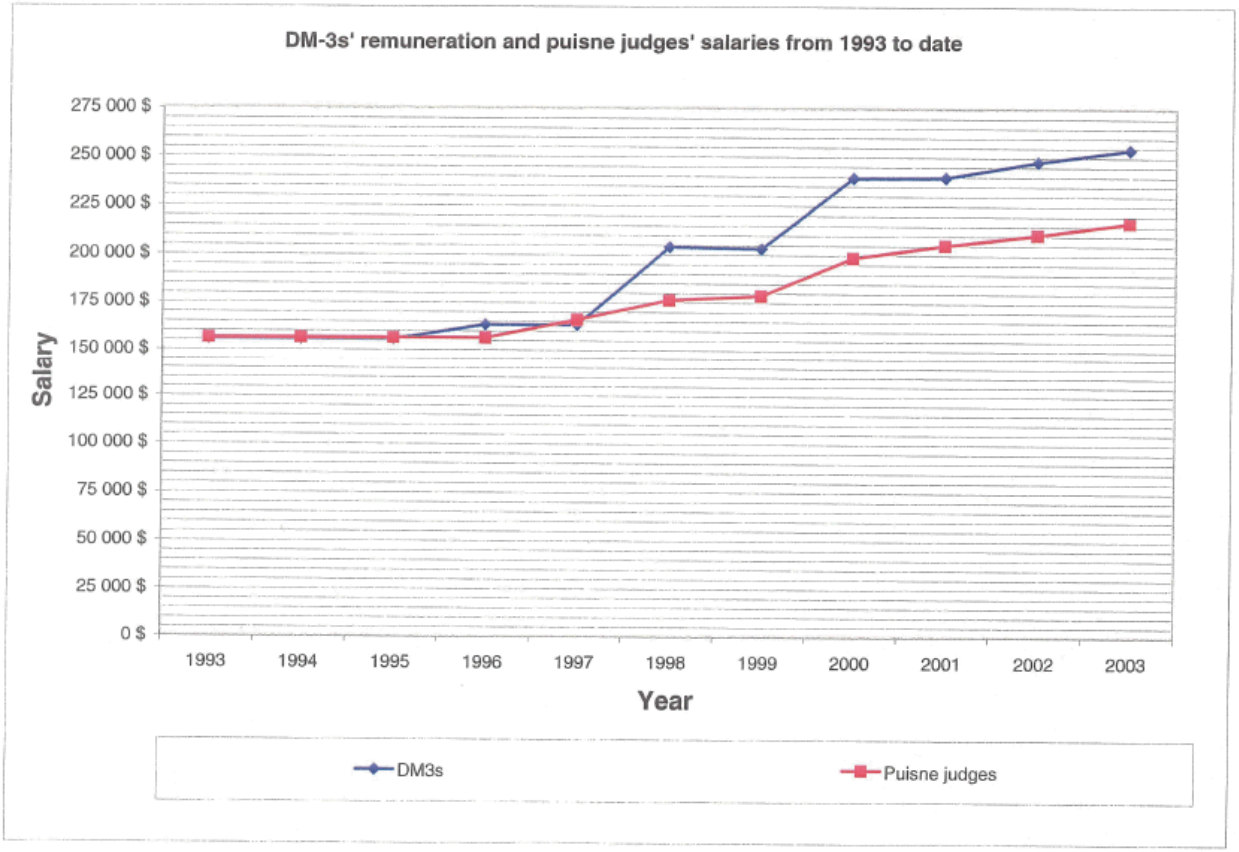
## Current representational allowances under s. 27(6) of the *Judges Act*

| | **April 1, 79** | **April 1, 85** | **April 1, 00** | **April 1, 04** |
|---|---|---|---|---|
| Chief Justice of Canada | $5,000 | $10,000 | $18,750 | $18,750 |
| Each puisne judge of the Supreme Court of Canada | $2,500 | $5,000 | $10,000 | $10,000 |
| Chief Justice of the Federal Court of Appeal and each chief justice described in ss. 12 to 21 of the *Judges Act* as the chief justice of a province | $3,500 | $7,000 | $12,500 | $12,500 |
| Each other chief justice referred to in ss. 10 to 21 of the *Judges Act* | $2,500 | $5,000 | $10,000 | $10,000 |
| Chief justices of the Court of Appeal of Yukon, the Court of Appeal of the Northwest Territories, and the Court of Appeal of Nunavut, and the senior judges of the Supreme Court of Yukon, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice | | | $10,000 | $10,000 |
| Chief Justice of the Court Martial Appeal Court of Canada. | | | $10,000 | $10,000 |
| Each regional senior judge of the Superior Court of Justice in and for the Province of Ontario | | | | $5,000 [(1)] |

[(1)] Giving effect to one of the recommendations of the last Quadrennial Commission, the Act was amended, effective April 1, 2004, to provide for representational allowances to the regional senior judges in Ontario.

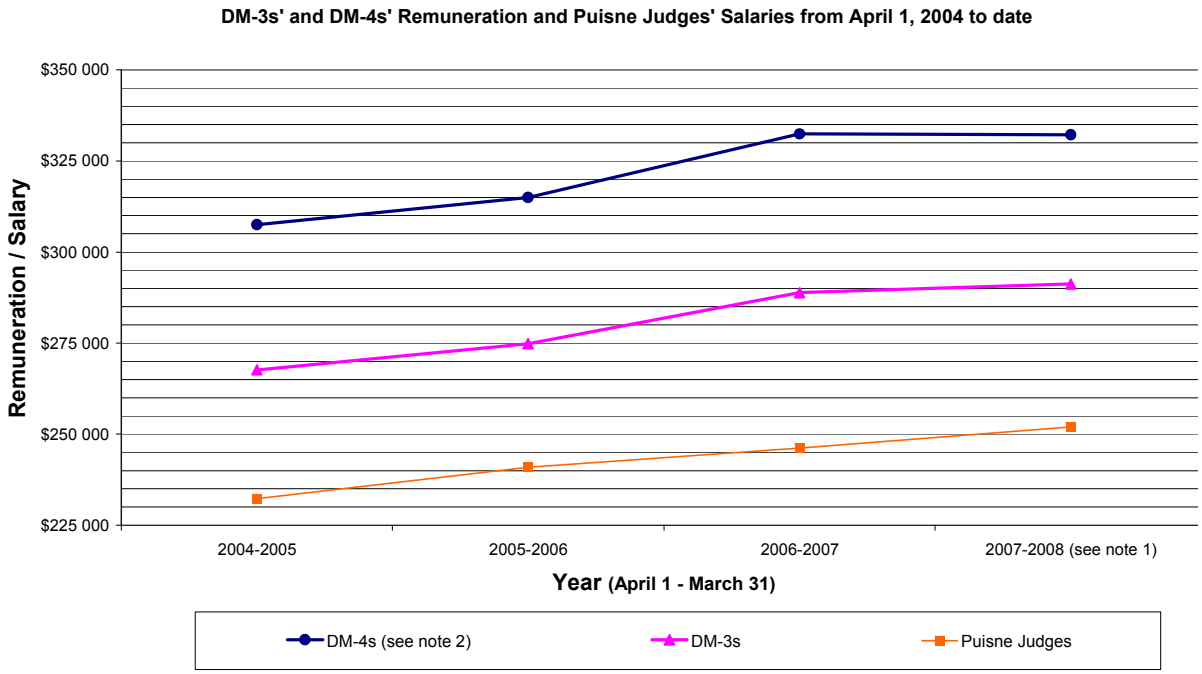
**APPENDIX F -**

**Comparative graph of DM-3s' compensation and puisne judges' salaries from 1993 to March 31, 2003**



# APPENDIX G -

## Comparative graph of DM-3s' and DM-4s' compensation and puisne judges' salaries from April 1, 2004 to date




**Note 1**

The "at risk" portion of the 2007-2008 DM-3 salary is currently unavailable and has been projected based on the immediately preceding 3-year average calculated as a percentage of average base salary, being 11.7%.

**Note 2**

The average salary and the "at risk" portion of the DM-4s' salaries are not made available due to confidentiality concerns. Accordingly, the total average compensation of the DM-4s, including the "at risk" portion, has been estimated for each annual period based on the assumption that the DM-4 incumbents received average salaries and average "at risk" pay that bear the same relation to the DM-3s' average pay to mid-point salary and average "at risk" pay to maximum at risk pay, respectively.