

IN THE MATTER OF A DISPUTE  
AND IN THE MATTER OF A RENEWAL AGREEMENT

BETWEEN

THE GOVERNMENT OF BRITISH COLUMBIA  
(BRITISH COLUMBIA PUBLIC SERVICE AGENCY)

("Government" or "Employer")

AND

THE BRITISH COLUMBIA CROWN  
COUNSEL ASSOCIATION

("Association" or "Crown Counsel")

REPORT AND RECOMMENDATIONS  
FOR SETTLEMENT OF THE PARTIES'  
RENEWAL AGREEMENT

DISPUTE RESOLUTION PANEL:

Colin Taylor, QC - Chair  
Paul Cavalluzzo  
Eric Harris, QC

DATE OF HEARINGS:

October 16, 17, 2003  
Vancouver, BC

## I

This is an unusual form of interest arbitration arising out of the failure of the parties to reach agreement on the terms and conditions for the renewal of their Agreement which expired on March 31, 2003.

The British Columbia Crown Counsel Association was incorporated as a Society in 1991 to represent Crown Counsel in British Columbia with respect to matters regarding the terms and conditions of their employment with the Government of British Columbia. The Association represents 400 Crown prosecutors in British Columbia who work in 40 separate offices around the province. The Association has signed agreements with Government in 1992, 1995, 1997 and 2001 (Agreement term 1998-2003). The last agreement expired on March 31, 2003.

For administrative purposes, the province is divided into 6 regions - 5 by geography and 1 by specialization of work. Region 1 is Vancouver Island. Region 2 is Vancouver including Richmond, Burnaby, North and West Vancouver, Squamish, Whistler and Sechelt. It also provides Crown Counsel for monthly court sittings in Bella Bella and Bella Coola. Region 3 is the Fraser Valley from Hope to New Westminster. Region 4 is the Interior comprising the Okanagan and the South East of the province. Region 5 is the

Northern half of the province with the major office located in Prince George. The 6th Region is called Criminal Appeals and Special Prosecutions (CASP). Based primarily in Vancouver, Crown Counsel in that unit does appeals, commercial crime prosecutions, organized crime prosecutions and other cases such as the Air India prosecution. Region 1 has 50 Crown Counsel, Region 2 - 150 Crown, Region 3 - 80 Crown, Region 4 - 40 Crown, Region 5 - 40 Crown, and CASP - 40 Crown.

The Crown Counsel Act, R.S.B.C. 1996 c.87, identifies certain positions that are excluded from the Association representation: Regional Crown Counsel, Deputy Regional Crown Counsel, Directors and the Assistant Deputy Attorney General.

The contract renewal process contained in Article 3 of the expired agreement ("the Agreement") is part of the result of the resolution of a lengthy dispute between the Association and the Government that extended from 1998 until 2000. The dispute was resolved in 2000 when the Association received statutory recognition as bargaining agent for Crown Counsel with the proclamation of section 4.1 of the Crown Counsel Act and by the parties agreeing to a process to settle the terms of the Agreement for Crown Counsel for the period April 1, 1998 to March 31, 2003. Donald Munroe, Q.C. was appointed to make recommendations for the resolution of the issues in dispute. Mr. Munroe published his recommendations on June 19, 2000 and the

Government announced its acceptance of them on July 14, 2000. A five-year Agreement, retroactive to April 1, 1998, between the Government and the Association was signed on January 5, 2001. The Association had agreed in the process to be bound - as it is bound in this process - by the recommendations.

The current Agreement expired on March 31, 2003. It contains a renewal process in Article 3 which the parties have followed.

Article 3(1) of the renewal process provides for the Attorney General to commission "independent, expert comparative studies of financial terms of employment, classification and workload for Crown Counsel." That report was completed in February 2003 by Mr. Charles Connaghan.

Article 3(2) provides for the parties to negotiate and make every reasonable effort to conclude a Renewal Agreement. That process failed whereupon this "Dispute Resolution Panel" was struck.

Article 3(4) sets out the mutual agreement of the parties with respect to the objective of the recommendations of this Panel:

*It is the intention of the parties that the recommendations made by the Panel will contribute to the orderly, constructive and expeditious settlement of terms and*

*conditions of employment. The parties believe that the process herein contained will promote the independent, impartial and professional exercise by Crown Counsel of their responsibilities under the Crown Counsel Act.*

The Agreement renewal process specifies that only the Attorney General can reject the report and recommendations of the Panel and, to do so, he must lay the report and recommendations of the panel before the Legislative Assembly, with his written reasoned response for rejecting the report and recommendations. The Association does not have a right of rejection.

Just as Article 3(4) of the renewal process provides that the process is designed to promote the independence of Crown Counsel in carrying out their duties, so too does the description of the role of Crown Counsel contained in the "Connaghan Report." He describes the role of Crown counsel in the following terms:

*In general the role of the Crown Counsel in the criminal process is that of an officer of justice engaged in the administration of justice. The duty of a Crown Counsel is not to seek a conviction in any case but to lay before the trier of fact in a criminal trial (Judge or Judge and jury) what is considered to be credible and relevant evidence of the alleged crime. Former Supreme Court of Canada jurist, the Honourable Peter Cory commented in a recent report on the role of Crown Counsel in the administration of Justice. The*

report is entitled "The Inquiry regarding Thomas Sophonow". He said:

"Crown counsel must be a symbol of fairness, prompt to make all reasonable disclosure. As well they must be scrupulous in the attention given to the welfare and safety of witnesses. They enjoy the respect of all the members of the judiciary. Much is expected of Crown Counsel by society, their community and by the judiciary. The community looks upon the Crown prosecutor as a symbol of fairness, of authority, and as a spokesman for the community."

The full quote from the Sophonow report (November 5, 2001), from which the above passage was extracted says:

The role of Crown Counsel is of great importance to the administration of justice and to the welfare of the community. The Crown prosecutor must proceed with the case against the accused fairly and courageously. Prosecutions must proceed even in the face of threats and attempts at intimidation. These insidious threats can on occasion extend to family members. Despite these threats and the danger in which the Crown and at times the family of the Crown are placed, charges must still be vigorously prosecuted. They must be brought to trial and prosecuted with diligence, dispatch and fairness. Crown Counsel are often overworked and paid less than their contemporaries who are in private practice. Nonetheless they must be industrious to ensure that all the arduous preparation required for each trial or appeal has been completed before the matter comes to court. Crown Counsel must be of absolute integrity and above all suspicion of favoritism or unfair compromise.

.....

*As a rule, Crown Counsel attain and maintain a very high level of professional excellence and fairness. They fulfill all of society's high expectations. It is truly a high office, honoured by the bench, the bar and the community. They should always have, not only the respect of the public, and the legal community, but the resources to handle their ever increasing caseloads and the financial compensation that their important office deserves.*

The position of the Association is that the jointly commissioned report of comparative salaries for Crown Counsel in Canada prepared by Mr. Connaghan proves that the salaries for Crown Counsel working for the Province of British Columbia are substantially behind those of the traditional comparators, and a market adjustment salary increase is required for the Crown Counsel covered by this Agreement. Otherwise, it is argued, British Columbia will not be paying salaries commensurate with the professional and independent standing of Crown Counsel, and it will lose its ability to retain and attract the best candidates for this important role.

The Government does not agree with the weight which the Association seeks to place upon the Connaghan Report. It points to the "protocol issues" agreed between the parties on January 29, 2003 which include the following:

*It was agreed that the factual basis for collective bargaining or an interest arbitration would be the facts referred to in the Chuck Connaghan Report, subject to any corrections that either party felt needed to be made to the facts that he finds. Both parties would be free to argue in an arbitration about the under pinnings of the Connaghan Report and to submit updates as well.*

The Government submits that the parties intended the Connaghan Report to be a source of information only and that it must not be taken as an agreement by the parties that certain comparators identified by the Report will predominate. The Government accepts the relevance of the Report but not the degree of relevance urged by the Association.

## II

It is generally accepted that interest arbitrators should attempt to replicate the result which would have occurred if the collective bargaining process had not been interrupted by arbitration.

This principle was expressed by the arbitration board in Re Board of School Trustees, School District No. 1 (Fernie) and Fernie District Teachers' Association (1982) 8 L.A.C. (3d) 157 (Dorsey) in which the board, at p.159, said:

*There seems to be a consensus in British Columbia that the task of an interest arbitrator is to simulate or attempt to replicate what might have been agreed to by the parties in a free collective bargaining environment where there may be the threat and resort to a work stoppage in an effort to attain demands. This consensus accepts that an arbitrator's notions of social justice or fairness are not to be substituted for market and economic realities.*

This approach was first articulated in Re Building Service Employees, Local 204, and Welland County General Hospital (1965) 16 L.A.C. 1 in which Professor Harry Arthurs asked whether the role of an interest arbitrator was to adjust or adjudicate the difference between the parties. He rejected the notion of "adjustment", which might be described as finding a result to which both parties would subscribe. The correct approach, said Professor Arthurs, was adjudication, a process he described as follows:

*Here, the board applies evidence to pre-determined and rational standards, as does a Court of law or a board of arbitration in a grievance dispute. The negotiating positions of the parties, and the acceptability of the award to them, is at best a marginal factor in the award. Rather, the board attempts to be "objective" in measuring the entitlement of the parties to wages and working conditions. (p.2)*

The board in Welland then went on to consider the proper yardstick for measuring proposed wage increases

and determined that interest arbitrators should alter only the procedure and not the end-product of collective bargaining. Thus, it is an exercise in discerning labour market realities and, considered in this light, interest arbitration is a substitute for free collective bargaining where there may be the threat and resort to a strike. This being so, the interest arbitrator must look to relevant wage comparisons and not apply some abstract notion of social justice or fairness. The market and economic realities are the governing factors.

The views of Professor Arthurs in Welland were generally adopted by Arbitrator P.C. Weiler in Re Building Service Employees, Local 204 and Peel Memorial Hospital (1969) 20 L.A.C. 31. He did sound a cautionary note about the danger of the system "feeding on itself" by which he meant that interest arbitrators might simply rely on other interest arbitration awards.

If interest arbitration is an adjudicative method of decision making as opposed to an adjustment method through mediation, then it requires appropriate objective criteria to guide its reasoning. Since it is intended as a procedural substitute for the resort to a work stoppage within a system of free collective bargaining, then arbitrators must try to simulate the results which the parties would have reached under the sanction of a work stoppage. The best evidence of such a standard is the pattern of settlements in other

comparable workplaces in the community, especially those reached in free collective bargaining.

It is not the function of an interest arbitrator to speculate as to how the issues would likely have played out in the dynamics of collective bargaining. Nor is it his or her function to fashion a settlement based on a reasonable compromise between the negotiating positions of the two parties. The interest arbitrator is required to "act adjudicatively" and base the final result on rational objective criteria: Re Beacon Hill Lodges of Canada and Hospital Employees Union (1985) 19 L.A.C. (3d) 288 (Hope) and Welland, *supra*.

The arbitral jurisprudence establishes that to achieve replication, the interest arbitrator must engage in an objective analysis of the terms and conditions of employment prevailing for similar work in the relevant labour market. In other words, what is the prevailing standard in relationships in which similar work is performed in similar working conditions: City of Whitehorse and International Association of Fire Fighters, Local 2217 (1993) unreported (Taylor).

Interest arbitrators have observed that the search for accurate and relevant data to determine the prevailing standard and tailoring an appropriate replicated settlement will inevitably be an

unscientific process. However, the arbitrator must ensure that, at the very least, an award is based upon a "rational matching of like circumstances": Fernie, *supra*.

If interest arbitration is to be viewed as a credible replacement for the result which likely would have occurred but for the interruption in collective bargaining, then it must not be based upon abstract notions of fairness or justice.

While the criteria has been formulated in many different ways, the primary objective criterion is the prevailing rates or standards for the particular jobs in issue. In applying the prevailing rate criterion, one must not overlook the necessity for collective agreements to be responsive to the individual needs and circumstances of the parties. For example, the wages and benefits provided by one employer may not be appropriate for another employer facing different economic circumstances. The prevailing rate criterion, while generally the most important factor in determining the terms and conditions of employment, may not take account of all of the differences between employers. Accordingly, as with all factors in this imprecise exercise, it should be applied with care and proper inquiry.

The primary importance of the prevailing rate criterion was observed in Re Halifax Regional

Municipality and Halifax Regional Professional  
Firefighters Association, I.A.F.F., Local 268 (1998) 71  
L.A.C. (4<sup>th</sup>) 129 (Kuttner):

*... pre-eminence of place has almost invariably been given, both by arbitrators and by legislators to the comparability factor. (p.143)*

The board, in that case, went on to say, at p.144:

*... other bargaining relationships become relevant if the empirical evidence supports the drawing of a particular comparison or relativity as between two groups of employees based upon objective criteria, including the nature of the work, skills, abilities and qualifications required and circumstances in which they are exercised.*

While the prevailing standard is arguably the most important consideration for the interest arbitrator, it is not to be applied without regard to the circumstances of the parties and the specific facts of each case; it is not to be applied as one would a mathematical formula. The prevailing standard must not be used to fashion a result if it is improbable that the same result would have been achieved through collective bargaining. Nor must the prevailing standard be applied without regard for the historical relationship between the parties. The prevailing standard is a critical factor but not an inflexible template.

### III

The outstanding issues are as follows:

1. Compensation.
2. Classification structure.
3. Term of Agreement.
4. Dues.
5. Agreement Renewal.
6. Indemnity.
7. Effect of reduction in the establishment of employees.
8. Secure Parking.
9. Vehicle Safety.
10. Benefits.
11. Professional Development Allowance.
12. Grievances/Association Participation.
13. Association Activities.
14. Preparation for Court.
15. Auxiliaries.
16. Disciplinary Action.

Following the close of submissions, the Panel was of the view that, with the exception of compensation and classification, many, if not all, of these issues should have been settled by the parties. We, therefore, asked the parties to resume negotiations. They did so

and subsequently advised that the parties had been unable to make any meaningful progress.

#### COMPENSATION AND CLASSIFICATION

These two issues are closely related and it is convenient to treat them together.

Two previous arbitrators have examined Crown Counsel compensation and classification structure. The first was Vincent Ready in 1992. His recommendations resulted in the formation of the classification levels which, for the most part, still exist today. They are:

- Level 1 (0 - 5 years of call)
- Level 2 (6 - 10 years of call)
- Levels 3A, 3B
- Level 4

In the 1992 award, Levels 3A, 3B and Level 4 had population controls of 20, 15 and 7 respectively. The Award was fully implemented by December 1, 1993 with a salary range of \$38,000 (Level 1) to \$98,000 (step 3 of Level 4).

The second examination of these matters is found in the Report and Recommendations of Donald Munroe, QC issued in June 2000. The award was fully implemented by April 1, 2001 with a salary range from an entry level of \$45,914 to a top Level 4 salary of \$114,240. Those

salary levels have changed by the addition of general salary increases given to most employees of the Government. Those increases were 2.5% - 2001; 2.5% - 2002 and a cost of living increase in 2003. The salary structure, effective March 30, 2003, is the following:

LEGAL COUNSEL SALARY SCHEDULE  
ANNUAL, BI-WEEKLY AND HOURLY RATES  
EFFECTIVE MARCH 30, 2003

BRITISH COLUMBIA  
PUBLIC SERVICE AGENCY

CLASS. CODE	CLASSIFICATION TITLE	YEAR OF CALL	ANNUAL	BIWEEKLY	HOURLY
044 1001	LEGAL COUNSEL LEVEL 1	1	49,782.30	1,908.15	27.2593
		2	53,456.45	2,048.98	29.2711
		3	57,130.87	2,189.82	31.2831
		4	60,805.81	2,330.68	33.2954
		5	64,480.75	2,471.54	35.3077
044 1002	LEGAL COUNSEL LEVEL 2	6	68,767.74	2,635.86	37.6551
		7	73,054.74	2,800.18	40.0026
		8	77,340.16	2,964.44	42.3491
		9	81,629.51	3,128.85	44.6979
		10	85,030.77	3,259.22	46.5603
		STEP	ANNUAL	BIWEEKLY	HOURLY
044 1103	LEGAL COUNSEL LEVEL 3A	1	91,834.34	3,520.00	50.2857
		2	94,102.02	3,606.92	51.5274
		3	96,368.40	3,693.79	52.7684
		4	98,635.29	3,780.68	54.0097
044 1203	LEGAL COUNSEL LEVEL 3B	1	98,636.34	3,780.72	54.0103
		2	101,147.43	3,876.97	55.3853
		3	103,657.75	3,973.19	56.7599
		4	106,168.32	4,069.42	58.1346
044 1004	LEGAL COUNSEL LEVEL 4	1	106,169.10	4,069.45	58.1350
		2	110,592.80	4,239.01	60.5573
		3	115,016.77	4,408.58	62.9797
		4	119,440.47	4,578.14	65.4020
		5	123,864.43	4,747.71	67.8244

It will be observed that the salary range as of March 30, 2003 is \$49,782 to \$123,864. Levels 1 and 2 set out automatic wage increases to the tenth year of call to the Bar. Level 1 covers years 1-5. Level 2 covers years 6-10 and is described in the Agreement as the "working level." Levels 3B and 4 are merit

categories. Entry into Levels 3A and 3B requires a minimum of eight years of call. Entry into Level 4 requires a minimum of ten years of call.

Level 3A is attained at year 12 unless the employer shows cause why the candidate does not meet the qualifications for entry.

Levels 3B and 4 still have population minimums which are now 50 and 12. There are presently about 200 Crown in Level 3A. The population figures for levels 3B and 4 have not been treated as maximums but rather as minimums. Presently, there are 13 Crown Counsel in Level 4 and 50 in Level 3B.

The two previous reports and recommendations resulted in a starting salary of approximately 39% - 40% of the top salary.

The Association proposes:

- a salary range of \$61,658 to \$153,830;
- presumptive eligibility for Level 3A in year 11 as opposed to the present year 12;
- making level 3B a reverse onus entry level for which Crown Counsel will be eligible, at the

latest, one year after entering the final level of 3A;

- adding a minimum of 27 new Crown Counsel to Level 4;
- adding a cost of living (COLA) clause with adjustments occurring on the first day of April in each year of the Agreement;
- market analysis annually.

The Government submits that "the nature of their role [Crown Counsel] must lose its influence as a basis for awarding compensation increases above those awarded to the rest of the public sector. Their role ought not to become a permanent basis for awarding compensation increases beyond those awarded to other public sector employees, many of whom exercise similarly independent discretionary judgement."

There is no evidence before us with respect to compensation in the general public service but we can take arbitral notice of the fact that recent announcements suggest that the 2003 settlement contained no general wage increase.

At p.17 of his Report and Recommendations, Mr. Munroe said this:

*In the absence of stipulated criteria, I have looked for guidance to what I consider to be the most appropriate comparables, and I have considered those comparables in terms of present-day practicability in British Columbia. In my view, comparisons are reasonably drawn between Crown Counsel in this jurisdiction, on the one hand, and Crown Counsel in Alberta, Ontario and the federal jurisdiction, on the other hand. As the Government rightly observes, caution must be exercised not to do comparisons simply on the basis of labels. Thus, a comparison between "level 4" Crown Counsel in different jurisdictions would depend for its legitimacy on the class specifications in each jurisdiction connoting essentially the same responsibilities and expectations at that level. But looking at the matter as objectively as possible, I conclude that the level 4 Crown Counsel in British Columbia (\$91,752 - \$100,464) are comparable-to-higher than the L.O. 4's in Alberta (\$85,440 - \$94,524); roughly comparable to the C.C. 4's in Ontario (\$95,932 - \$126,007); and fall somewhere between the Vancouver-based LA-3A's (\$86,975 - \$110,295) and LA-3B's (\$100,985 - \$123,205) in the federal jurisdiction. I should note the information provided to me by the Association that a salary arbitration for all Ontario government lawyers is scheduled to take place next month; that the Ontario Crown Attorneys' Association will be arguing in that proceeding that substantial salary increases are due the Crown Attorneys on the ground, among others, that compensation levels have not been raised since 1992. Of course, I have no way of knowing how that arbitration will turn out.*

*As I have indicated, I find the above comparables to be the most influential. However, as I have also indicated, I have had*

*to consider the practicability of the application of those comparables in British Columbia's existing economic and negotiating environment - most especially in the public sector. (pp.17-18)*

Mr. Munroe then went on to recommend salary ranges which, as of March 31, 2003, are \$49,782 to \$123,864.

It will be observed that Mr. Munroe referred to the anticipated salary arbitration for Ontario Crown Counsel which was issued soon afterwards. This contained a 30% salary increase but it appears as if there had been no increases for Crown Counsel in Ontario since 1991.

Mr. Munroe accepted Ontario, Alberta and the Vancouver-based Department of Justice as the "most appropriate comparables." Nevertheless, the Government submits that the Munroe award does not mean that any particular "relativities" are intended to be, or impliedly are, a basis for his decision and we should focus on wage increases granted to public service employees in British Columbia:

*... the focal point of this Panel's inquiry must be on the fact that this is an "employment relationship" and, in that regard, parallels the type of relationship which the Government enjoys with many thousands of others.*

That suggests that because Crown Counsel and other general public service employees have a common employer, they must be treated alike in matters of compensation. This proposition does not meet the principles of replication. Nor does it accord with historical reality and the Reports of Mr. Ready and Mr. Munroe which do not support the Government's view of replication.

We observe, as well, that the Government's position is contrary to the agreement reached with the Association. Under the heading "Agreement Renewal", the parties agreed in article 3(1) of their Agreement to commission an "independent, expert comparative stud[y] of financial terms of employment, classification and workload for Crown Counsel ...". The Government submits this is a source of information only and seeks to confine our inquiry to British Columbia, eschewing comparisons with other provinces "who do not share the role of being stewards of the economy of British Columbia."

The proper focus of the inquiry must be to discover the standard existing in like relationships with respect to similar work. To put it in the vernacular, "what is the going rate?" If the attempt is to replicate the result which would have occurred if the negotiation process had not been interrupted by arbitration, the evidence is clearly against the

proposition that the parties would have settled on the basis of the wage increases in the general public service. The historical data does not support that notion and it is not supported by Mr. Ready and Mr. Munroe.

Arbitrator Hope put it best at p.304 of Beacon Hill, *supra*:

*Arbitrators are expected to achieve replication through an analysis of objective data from which conclusions are drawn with respect to the terms and conditions of employment prevailing in the relevant labour market for work similar to the work in issue.*

Mr. Munroe determined that the most relevant comparators for the Crown Counsel were Ontario, Alberta and the Department of Justice (Vancouver). Moreover, these are the jurisdictions which the Government agreed were most comparable. At Appendix B of his Report, Mr. Connaghan said:

*While nine jurisdictions were contacted to provide salary and benefit information, the parties agreed to contact Alberta, Ontario and the Federal Justice Department to obtain specific salary information. The jurisdictions were asked to evaluate the job descriptions of the five BC Crown Counsel classification levels to determine the salary range they would allocate to each BC Level. (emphasis added)*

The comparators are not, and have not been since 1991, other public service employees in British Columbia. The Government submits that the work of the Crown Counsel "must lose its influence" in establishing compensation. Why? That proposition has no principled basis in replication theory or in historical terms. The fact is that Mr. Munroe, whose Report and Recommendations were accepted and implemented, did tie Crown Counsel compensation to their counterparts in Ontario, Alberta and the Department of Justice (Vancouver). Moreover, that is a correct application of the theory of replication.

The parties agreed before Mr. Munroe, that Ontario, Alberta and the Department of Justice were the most appropriate comparators and there is no evidence before us to suggest anything has changed to make them now inappropriate.

#### IV

We turn next to a discussion of the comparators.

The top Level 4 British Columbia salary at March 31, 2003 is \$123,864. The relevant comparators are the following:

Federal Department of Justice (Vancouver)

The maximum Department of Justice LA 3B salary figure for 2003 is \$140,500 compared to the 2000 figure of \$123,205. This ignores potential bonuses which can apply in the federal public service (as well as Ontario and Alberta) because they are performance-based arrangements which are discretionary. We observe that Mr. Munroe did not speak to bonuses. Whether he did not consider them or considered them to be irrelevant is unknown. In any event, there is no guarantee of bonus payments and they are based upon performance. As such, they ought not to be considered in our deliberations.

#### Ontario

Ontario's CC4 salary figure for 2003 is \$169,759 compared to the year 2000 salary of \$126,007.

#### Alberta

Mr. Munroe compared the top pay rates for the top level of Crown Counsel. There is a new, higher category in Alberta - LO 4B - the top salary for which in 2002-03 is \$119,988.

#### Starting Salaries

As of April 1, 2003, the starting salaries for counsel in Alberta are \$52,232; Ontario - \$65,850 and

in Vancouver - \$52,205 for counsel with the Federal Department of Justice.

The starting salary in British Columbia is \$49,782 as of March 31, 2003.

In British Columbia, the salary is based on year of call which means that salaries progress once a year. In Ontario, for CC1 (level 1 Crown), there is progression every 6 months. If a bonus is added, this can result in progress through level 1 quite quickly. A 5-year Crown is at \$74,400 in Alberta; \$92,388 in Ontario and \$72,235 for the Federal Government. A 5-year Crown in British Columbia is presently at \$64,480.

It is irrefutable, based upon the relevant market comparison data, that Crown Counsel in British Columbia have fallen behind crown counsel performing similar work under similar conditions in Ontario, Alberta and the Department of Justice (Vancouver). There is no case to be made that work performed by Crown Counsel here is any less onerous or that less is expected of them. Indeed, given the nature of the many high profile prosecutions in British Columbia, it might be that the opposite case could be made.

Our recommendation with respect to compensation must recognize the need for a market adjustment increase for salaries to Crown Counsel; the continuing relevance of the analysis done by Mr. Munroe and the

comparators which the parties then agreed upon and continued to agree upon by way of the Connaghan Report; the increases in the salaries of the comparators since 2000 and the need to maintain internal relativity.

As we said earlier, however, the replication theory is not the application of a mathematical formula or the simple substitution of one set of numbers for another. The prevailing standard is not to be applied without regard to the circumstances of the parties and the specific facts of each case. The prevailing standard must not be used to fashion a result if it is improbable that the same result would have been achieved through negotiation. Nor must the prevailing standard be applied without regard for the historical relationship between the parties. Or, as Mr. Munroe put it, "I have considered those comparables in terms of present-day practicability in British Columbia" (p.17), and at p.18, "I have had to consider the practicability of the application of those comparables in British Columbia's existing economic and negotiating environment - most especially in the public sector." Mr. Ready put it this way: "... any increase has to be cognizant of the present economic circumstances existing in Government."

#### Recommendation

Taking into account all of these considerations, we recommend a revised salary schedule "A" to the

Agreement which provides a salary range of \$56,000 - \$140,000, maintaining the same internal relativity as presently exists. In doing so, we observe that in its February 2003 budget, the Government announced that it would not give pay increases to public servants from 2003/04 to 2005/06 unless a justification could be made for the increase as a market adjustment. The Connaghan Report demonstrates the need for such an adjustment for Crown Counsel.

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The recommended market adjustment salary increase will still leave the Crown Counsel in British Columbia some distance behind their counterparts (especially Ontario) doing similar work in similar circumstances. There should, therefore, be some means for the Association not to fall even further behind during the life of the Renewal Agreement. We observe that Ontario has an automatic adjustment made each year for its salaries based on the Average Industrial Wage Aggregate Index.

The market adjustment we have recommended is at risk of erosion over the term of the Renewal Agreement and it should be protected by a COLA clause. However, we are cognizant of the economic realities faced by the Government and the prevailing views on wage increases as distinct from market adjustment increases. While there is an identifiably clear and irrefutable case to

be made for a market adjustment for Crown Counsel, there is not, in light of the "existing economic and negotiating environment - most especially in the public sector", the same case to be made for a COLA clause, notwithstanding the otherwise persuasive case for its inclusion. The Association's COLA proposal is rejected.

We do not accept the Association's submission with respect to an annual market analysis.

#### CLASSIFICATION STRUCTURE

In 1992, there were 20 Crown Counsel at Level 3A, 15 at Level 3B and 7 at Level 4. In 1995, those numbers changed to 38, 30 and 7. In practice, those numbers have been treated as minimums. The Munroe Award changed Level 3A to make all Crown reaching 12 years presumptively eligible. In addition, the number of 3B's were increased to a minimum of 50 and the number of 4's to a minimum of 12. There are about 200 Level 3A's.

The Association submits that the increased length and complexity of trials, combined with a high crime rate, has meant that serious prosecutions are being done by Crown at Level 3A and Level 3B because of a lack of positions for people to occupy in Levels 3B and 4. The Air India trial has two Level 4 Crown who have been fully occupied on that case since 1998. The

Association submits that with 119 separate murder prosecutions currently in progress, there is a shortage of Level 3B and Level 4 positions for Crown Counsel since the work that is normally reserved for those in Level 3B and Level 4 is being assigned and performed by those in lower levels.

The salary schedule provides for a salary lockstep for years 1-10 and for Crown to be reclassified to Level 3A at year 12 unless it can be shown that a person does not meet the criteria for Level 3A.

#### Recommendation

We recommend that Crown Counsel be presumptively eligible for entry into Level 3A at year 11, subject to the employer establishing that the candidate does not meet the criteria for reclassification.

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The Association submits that the qualifications should be changed to enable Crown to move to Step 2 of Level 3B upon completing one year at Step 4 of Level 3A unless the employer can demonstrate that the employee does not meet the criteria of Level 3B. It is argued that many serious prosecutions are being conducted by Crown who are in Level 3A. The difficulty with that argument is that it does not accord with the concept of merit being the basis for transition between Levels 3A and 3B. The criteria agreed by the parties to be met by

Level 3B counsel suggests that a transition to Level 3B based simply on years at the bar is not appropriate. It would, for example, involve the assumption that all of the persons elevated to Level 3B exhibit "leadership, unique knowledge or service to the organization." It is not surprising that serious prosecutions are being performed at the 3A level. That's where the work is. But there is a limit to the number of positions which the Government needs to have filled by persons demonstrating extraordinary ability. If the Association's submission were accepted, it could result in an increasing amount of working level work being performed by people who are overqualified for its performance. It must be kept in mind that Levels 3B and 4 are merit classifications. A reverse onus clause would not remove this difficulty. The reverse onus clause at Level 3A does not take into account any issue of whether the Government needs an ever increasing number of Crown Counsel to perform Level 3A work even though they may be otherwise meritorious. We do, however, accept that the population in Level 3B should be increased in order to reward performance. In October 2000 Level 3B had 56 persons. It now has 50.

#### Recommendation

We are persuaded that the population of Level 3A includes those who are qualified to enter Level 3B.

We recommend that Level 3B have a minimum of 90 Crown Counsel to be filled in accordance with the criteria identified in the Agreement within the first two years of the Renewal Agreement.

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There are presently 13 Level 4's in the entire Province. There are 119 murder prosecutions ongoing including the largest mass murder prosecution in Canadian history. The Crown Counsel in charge of that case is a 3B. Defense counsel have negotiated increased fees above Legal Aid rates because of the complexity of the case. That has occurred in other cases.

The Crown in charge of the organized crime prosecutions is a Level 3B.

Two Level 4 Crown are involved with the Air India trial and have been on the case for 6 years.

As cases become longer and more complex, there is a need for an increase in the number of senior classified Crown Counsel.

We are persuaded that many high-profile, serious prosecutions are conducted by Crown Counsel who are not classified at Level 4.

#### Recommendation

We recommend an increase to the minimum number of Level 4 positions to 25.

## V

We turn next to deal with the remaining issues which the parties were unable to resolve.

### TERM OF RENEWAL AGREEMENT

#### Recommendation

We recommend a three-year term from April 1, 2003 to March 31, 2006.

### DUES

The Association proposes mandatory deduction of dues for all Crown Counsel covered by the Agreement. Currently, dues are only deducted upon express authorization. The Association is the exclusive bargaining agent for all Crown Counsel and a mandatory dues deduction provision simply reflects that reality. There is no cost to the Government of a Rand formula provision.

The Government opposes the Association's proposal on the ground that s.21 of the Employment Standards Act prohibits the employer from making deductions from an employee's wages unless expressly authorized under s.22(1).

In our view, the Employment Standards Act has no application to Crown Counsel because of their exclusion under s.31 of the Regulation.

Section 4.1(2) of the Crown Counsel Act establishes the Association as the exclusive bargaining agent for all Crown Counsel and authorizes it to enter into agreements with the Government on their behalf. As the exclusive bargaining agent for all Crown Counsel (not just those who are members of the Association), the Association is statutorily authorized to bargain for the deduction and remittance of dues from all Crown Counsel.

All Crown Counsel benefit from the work of the Association and the agreements which it bargains and all Crown Counsel should support the Association and ensure its financial stability. There is no rational basis for denying a Rand formula dues provision and, in our view, no legal basis to deny it.

#### Recommendation

We recommend that Article 5 of the Agreement be deleted and replaced with the following:

Every Crown Counsel covered by this Agreement shall, as a condition of continuing employment, authorize deduction from her/his biweekly salary, dues and fees of the Association. The Employer agrees to deduct, on a bi-weekly basis from the compensation of each Crown Counsel, a sum equivalent to the dues of the Association, fixed in accordance with its constitution, and shall within one month forward to the Association the total amount of such dues or fees collected together with a list of those Crown Counsel for whom deductions were made and the amounts that were deducted.

The Employer will notify the Treasurer of the Association of the name and work location of all Crown Counsel appointed within thirty (30) days of their appointment.

#### AGREEMENT RENEWAL

The current situation is that the Association is bound to accept this Panel's recommendations and the Government may reject them if it complies with the procedures in Articles 3(12) and 3(14) of the Agreement. In that event, items upon which the parties agree will form the Renewal Agreement with an expiry of March 31, 2005. At that time, if the Government has rejected this Report and Recommendations, the

Association will have the right to terminate any process for agreement renewal and withdraw services.

The Association seeks a process that is binding upon both parties or a process of negotiation and arbitration that exists in Ontario. Alternatively, the Association seeks to end the deferred right to strike for a present right to withdraw services.

The current agreement has its roots in the Interim Mediator's Report dated October 31, 1999 issued by Stephen Owen, QC. With respect to agreement renewal, he said:

*10. Where impasse is reached in the negotiation of interest issues, there must be a fair and effective dispute resolution process available, especially given the likely high level of essential service exclusions. As a general rule, the Province rejects binding third party arbitration of interest issues. While there have been occasional exceptions in British Columbia, and while such a process is used for prosecutor interest dispute resolution in other jurisdictions, this is a valid public policy decision of the provincial government for which it is politically accountable.*

*11. As an alternative, a non-binding but mandatory arbitration process should be established to address impasse on interest issues, where a single arbitrator from a jointly approved list conducts a hearing and publishes a reasoned report of findings and recommendations. Where a recommendation is*

*not accepted by the Government, the Attorney General should be obliged to table a reasoned response in the legislature within a set period of time.*

That remains the Government's public policy view of delegating to third parties, in a binding form, decisions which affect the public interest. That is the public policy decision which underlies the agreement renewal process. To give effect to the Association's proposal would be to fundamentally alter the basis on which the Agreement was negotiated. As such, it is improbable that the Association would have achieved its proposal in bargaining.

#### Recommendation

We recommend no change to the agreement renewal provision.

#### INDEMNITY

#### Recommendation

We recommend no change to the indemnity letter attached to and forming part of the Agreement.

#### EFFECT OF REDUCTIONS IN THE ESTABLISHMENT

Recommendation

We do not agree with the Government's jurisdictional argument. It is correct to say that reductions in establishment of employees is not a matter which can be addressed in negotiations between the parties. That is not the issue. The issue is the effect of a decision by the Government to reduce the number of Crown positions. In our view, the effect of reductions is a matter for negotiation between the parties and therefore an issue for this Panel. There ought to be protection against layoff based upon seniority. We recommend a system in which junior members of a classification are laid off and bumping rights provided for senior employees to bump into junior classifications and perform the work at the rate of that classification. This is generally the scheme which is found in a seniority rated system.

SECURE PARKING

The Panel finds itself with insufficient information to properly deal with this issue. There is insufficient evidence with respect to the availability of parking spaces to give effect to the Association's proposal and we have no satisfactory evidence as to its cost. Would it involve the construction of "safe and secure parking facilities" or is it a matter of different distribution of currently available spaces?

The Association couches its proposal in terms of personal risk. Do others who are in daily contact with accused persons face a similar risk and are they provided free parking? The evidence does not indicate that this is a benefit in most other jurisdictions.

This issue raises more questions than answers.

Article 30 of the Agreement is titled "Parking." It provides for a committee to review the matter of employee safety and make recommendations. In our view, this step must be taken before it is put to a dispute resolution panel. In this respect, the Association says that the committee does not function. It is said that the committee has not met in the past two years and that the chair of the committee has failed to respond to the issue of parking and vehicle safety even though it was brought to the chair's attention.

All agreements are made against a background of understandings and expectations. This Agreement is no different. In negotiating Article 30, the parties understood and expected that the necessary efforts would be made to see that it was implemented in accordance with those reasonably held understandings and expectations. If the committee is not functioning as it should, there is a remedy.

#### Recommendation

We recommend that the issue of safe and secure parking be thoroughly examined by the Article 30 Committee. This presumes that the necessary steps will be taken to see that Article 30 functions as intended and in accordance with the expectations of the parties.

#### VEHICLE SAFETY

Crown Counsel are called upon, from time to time, to travel by road in order to conduct trials and other business. They wish to have the option of using their own vehicles for such travel at the applicable mileage rate. As it stands, the Government can require Crown to use a government vehicle or a rental vehicle and the Government may restrict reimbursement for mileage if Crown Counsel opt to use a personal vehicle for government business.

The concern of the Association is that its members are compelled to use unfamiliar and potentially unsuitable vehicles for hazardous driving. It is argued that government vehicles are of concern to Crown Counsel since their requests to repair windshields or to augment equipment to make them safer have not been met. If a Crown is uncomfortable or unfamiliar with the government vehicle, he or she can take their personal vehicle but may be disentitled to mileage payments which would otherwise apply.

The Association's proposal simply seeks the option to use a personal vehicle without being denied the mileage reimbursement.

Insurance is not an issue. All private vehicles used on the employer's business are required to carry certain coverage.

The Association's proposal is reasonable and is in the interests of safety, comfort and improved working conditions.

Recommendation

We recommend the Association's proposal which reads as follows:

*Where any Crown Counsel is required to travel by vehicle for government business, the Employer shall,*

- a) provide a suitable government vehicle,*
- b) provide a suitable rental vehicle, or*
- c) permit use of Crown Counsel's personal vehicle.*

*the choice of which will be left to the option of the Crown Counsel.*

*The Employer shall not restrict reimbursement for applicable mileage payments to Crown Counsel who opt to use a personal vehicle for government business.*

*The Employer shall ensure that emergency safety equipment is made available where rental or personal vehicles are used for government business.*

*All Crown Counsel covered by this agreement who use their private automobiles in the course of their duties shall ensure that their vehicles are sufficiently insured for third party liability coverage as required by the terms and conditions of employment for excluded employees.*

BENEFITS

The Association submits that all benefits applicable to Crown Counsel should be unaltered without consent of the Association and certain benefits should be specifically brought into the Agreement.

Article 2 of the Agreement reads as follows:

Article 2: Application

*This agreement applies to all Crown Counsel in British Columbia for whom the Association has been designated as the exclusive bargaining agent pursuant to the Crown Counsel Act.*

*Except as this agreement provides otherwise, the terms and conditions of employment and policies applicable to excluded management employees under the Public Service Act shall apply to Regular Crown Counsel.*

*Except as this agreement provides otherwise, the terms of service for Contract Crown Counsel shall be those contained in his or her agreement with the Attorney General to perform services as Crown Counsel, and those terms and conditions and policies provided to excluded management employees under the Public Service Act which are not inconsistent with his or her agreement, other than health and welfare benefits and pension, for which Contract Crown Counsel receive payment in lieu.*

*The Employer will not enter into, or continue, any employment or contractual relationship with Crown Counsel which conflicts with the terms of this agreement.*

The Association proposes an amendment to the language of the second paragraph to add a second sentence that reads:

*Any changes made during the term of this Agreement to any of the terms and conditions of employment for excluded employees are not applicable to Regular Crown Counsel without the consent of the Association.*

The Government says this proposal is an attempt by the Association to contract out of legislation which ought not to be countenanced by this Panel.

The Public Sector Employer's Amendment Act would limit severance and carry-over of leave banks for employees who are not included in a bargaining unit. There is a petition before the Court to determine whether Crown Counsel are covered by the legislation. The Government submits that if the Association is unsuccessful in that litigation, the provisions relating to excluded employees will apply to them. Therefore, it is argued, the Benefits language proposal is an attempt to contract out of legislation.

That, in our view, is not a correct characterization of the Association's proposal. The Association is the exclusive bargaining agent for all Crown Counsel and is authorized to enter into agreements with the Government which must include all

matters affecting working conditions save certain exceptions.

Since the Association is statutorily recognized as a bargaining agent, it seeks to prevent changes to working conditions without negotiation. That is what bargaining agents do. The Panel should consider the merits of the Association's proposal and leave the effect of the legislation on those proposals for the outcome of the litigation.

The Crown Counsel Act requires the parties to bargain collectively in good faith and make every reasonable effort to conclude agreements with respect to working conditions. These include vacations, time bank, severance and health benefits. Given its status as exclusive bargaining agent, the Association's position is that all changes to terms and conditions of employment must be approved by the Association. We agree. It may be that the outcome of the litigation will affect certain aspects of the Association's proposal. That will have to be determined in due course. We are considering the merits of the Association's proposal to have a say, as the exclusive bargaining agent for Crown Counsel, with respect to changes to their working conditions.

#### Recommendation

We recommend that Article 2 of the Agreement be amended, by adding to the second paragraph thereof, the following sentence:

Any changes made during the term of this Agreement to any of the terms and conditions of employment for excluded employees are not applicable to Regular Crown Counsel without the consent of the Association.

The Association has not made out a case for changes to family leave, corrective eye wear allowance and paramedical practitioners visits and those proposals are rejected.

#### PROFESSIONAL DEVELOPMENT ALLOWANCE

The allowance is currently \$500 per year. Given the cost of continuing legal education courses and books, this amount will not go far in enabling Crown Counsel to remain current in the law which is their duty and responsibility. One book and one CLE course will cost well over the \$500 allowance. The National Criminal Law conference, likely the most important and relevant conference for Crown Counsel, costs more than \$500 for registration alone.

#### Recommendation

We recommend that the Professional Development Allowance be increased by \$100 in each year of the renewal Agreement. This is a modest increase given the duty and responsibility of Crown Counsel to remain current in the law; the obvious benefit to the Government and the public of Crown Counsel continuing to be current in the law and the very high cost of law books and materials and of attending continuing legal education conferences.

#### ROBES AND DRYCLEANING COSTS

Robes and drycleaning costs are purely work related costs that are now borne by Crown Counsel to do their job. Robes serve no non-work related function. Crown Counsel cannot deduct such costs from their income for tax purposes and are left to pay these solely work-related costs themselves. The Employer covers the costs of robes and drycleaning for other government employees in the court system such as court clerks and judges.

Ontario Crown Counsel receive court attire and drycleaning costs. Manitoba provides court attire.

#### Recommendation

We recommend that the Government reimburse each Regular Crown Counsel for the cost of robes, vests, court shirts and tabs required for appearance before

superior courts. In addition, we recommend reimbursement for the drycleaning of those items once a year.

The Association's submission on internet cost is rejected.

#### GRIEVANCES/ASSOCIATION PARTICIPATION

The Association seeks a provision in the renewal Agreement which will provide for Crown Counsel who have initiated a grievance time off, with no loss of pay and no loss of time bank credits, to attend meetings with the Employer and arbitration hearings. The Association's proposal extends that to one Association representative.

The Ontario Crown Counsel have a similar provision.

There is no evidence that this has been a problem for the Association in the past. There were three grievances involving individuals that went to arbitration during the term of the last Agreement. The grievors were not docked pay. However, the Association says it was notified that with the expiry of the Agreement, that practice would change.

The Association asserts that the Government gets the benefit of its representatives doing their jobs at nights and weekends without overtime pay and docking

Association representatives pay for attending grievances and other representative meetings is unfair since the work assigned to the Crown will still get done.

In order for the Agreement to be administered in accordance with its underlying understandings and expectations, members of the Association must be able to use the grievance and arbitration procedure without fear of loss of salary. Crown Counsel should not be financially disadvantaged for pursuing grievances. After all, that is the manner in which the Agreement is enforced.

The difficulty with no loss of pay for the Association representative is that the Government would bear the cost of representational activities undertaken by the Association on behalf of its members. We understand this is not a benefit which has been extended to unionized employees or other management employees and it would be inconsistent with the manner in which Government treats all other employees who have exclusive bargaining agents.

#### Recommendation

We recommend that Crown Counsel who has initiated a grievance under Article 29 of the Agreement be given time off with no loss of pay and no loss of time banks to attend meetings with the Employer under this

Article. Where a Crown Counsel's grievance is referred to arbitration, he or she will be allowed leave without the loss of pay and without loss of time bank credits to attend the arbitration hearing.

#### ASSOCIATION ACTIVITIES

For the reasons set out above, the Association's proposed changes to Article 8 are rejected.

#### PREPARATION FOR COURT

The Association's proposal is a summary of a Practice Directive applicable to all Crown Counsel. The proposal would serve to incorporate the practice into the Agreement. There is no factual basis alleged for doing this. It would rigidify an existing policy when there is no identifiable reason for doing so. The Association's proposal is rejected.

#### AUXILIARIES

The Public Service Act governs procedures for the hiring of new Crown Counsel to existing, full-time positions. By definition, only in the event of temporary vacancies are employee to be hired on an auxiliary basis. The Association asserts that the Government has not followed the normal process for

filling FTE vacancies with respect to Crown Counsel and points to an arbitration award dated August 26, 2003 (Stan Lanyon QC) which indicates that the Government has hired 25% of the current complement of Crown Counsel through auxiliary positions, that is to say without Public Service Act competition.

The Association submits that all in-service Crown Counsel in the province should have a chance to compete for positions created in the province. There are, says the Association, Crown Counsel in northern regions, with spouses in southern regions, waiting for opportunities to compete for positions closer to their family. It is argued that the Association's proposal is in harmony with the principle of merit contained in the Public Service Act.

The Association's proposal would have the Government post a competition when an auxiliary is converted to a regular position. The Government opposes this because "the whole basis for conversion is that the position was, in reality, a regular Crown Counsel position and not an auxiliary position. The process of conversion is simply a recognition of that status."

That statement nicely identifies the problem which the Association's proposal seeks to remedy. That statement of the issue suggests that Crown Counsel are hired on an auxiliary basis where, in fact, the vacancy

is not temporary but rather a regular Crown Counsel position.

If there is a regular position vacant, there should be a proper competition and the provisions of Article 22 of the Agreement should be followed so that existing Crown Counsel can compete for positions that may be desirable in terms of location or the nature of the work.

The intent of the Public Service Act should be fostered by posting all positions that become recognized as "work of a continuous nature."

#### Recommendation

We recommend the following amendment to Article 20(d) of the Agreement:

- (d) *The Employer agrees to meet with representatives of the Association to review the circumstances of auxiliary Crown Counsel as specified below:*
  - (i) *The review date shall occur on the first of the month following the signing of this agreement.*
  - (ii) *Crown Counsel whose work is of a continuous nature at that time shall be converted to regular employee status.*
  - (iii) *Within 30 days of the conversion there shall be a posting for an*

*in-service competition for the Regular Crown Counsel position. The position shall be posted at a salary level equal to the year of call of the incumbent auxiliary Crown Counsel converted to regular Crown Counsel status, who shall also be eligible to compete for this position and any other Crown Counsel position vacancy resulting from this process. In the event no other applications are received within 30 days of the posting, the converted incumbent shall be offered the position.*

- (iv) There shall be a further review on each anniversary of the meeting referred to in (i) above.*

#### ARTICLE 6 DISCIPLINE

We recommend that the following language be added to Article 6 of the Agreement:

*(b) A copy of any disciplinary letter will be provided to the affected Crown Counsel and to the Association.*

*(c) Where a Crown Counsel is required to attend a meeting which the Employer believes may result in discipline, the Crown Counsel will be notified in writing in advance of the purpose of the meeting and may elect to have an Association representative from within the geographic location attend the meeting with him/her provided that the meeting will not be unduly delayed as a result.*

*(d) In this Agreement, disciplinary action means the imposition of one or more of the following:*

- (i) a written warning which is written on behalf of the Employer will form part of the employee's employment record*

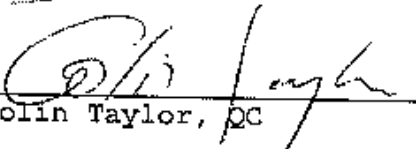
and which may be referred to justify increased discipline for subsequent infractions;

- (ii) a suspension without pay;
- (iii) dismissal for cause;
- (iv) demotion to a lesser position for cause.


The foregoing constitutes our report and recommendations, it being understood that neither party will find that all of the recommendations meet their expectations. It is, however, our considered judgement that the recommendations, as a package, are consistent with the established principles which should guide such disputes while having due regard for the real substance of the dispute and the practical realities which must be taken into account.

This report is signed by the Chair and Mr. Cavalluzzo. Mr. Harris dissents. His dissenting report is attached hereto.

All of which is respectfully submitted this 14th day of January, 2004.

  
Colin Taylor, QC

  
Paul Cavalluzzo

  
Eric Harris, QC

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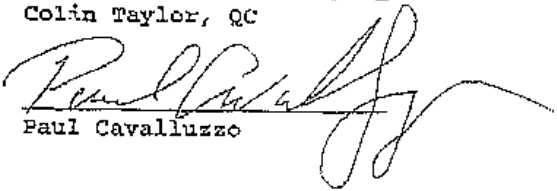
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The foregoing constitutes our report and recommendations, it being understood that neither party will find that all of the recommendations meet their expectations. It is, however, our considered judgement that the recommendations, as a package, are consistent with the established principles which should guide such disputes while having due regard for the real substance of the dispute and the practical realities which must be taken into account.

This report is signed by the Chair and Mr. Cavalluzzo. Mr. Harris dissents. His dissenting report is attached hereto.

All of which is respectfully submitted this 14th day of January, 2004.

Colin Taylor, QC

  
Paul Cavalluzzo

Eric Harris, QC

IN THE MATTER OF A DISPUTE  
AND IN THE MATTER OF A RENEWAL AGREEMENT

BETWEEN

THE GOVERNMENT OF BRITISH COLUMBIA  
(BRITISH COLUMBIA PUBLIC SERVICE AGENCY)

("Government" or "Employer")

AND

THE BRITISH COLUMBIA CROWN  
COUNSEL ASSOCIATION

("Association" or "Crown Counsel")

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DISSENT OF ERIC J. HARRIS, Q. C.

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January 14, 2004

I have read the Report and Recommendations of the majority of the Dispute Resolution Panel which was established under the Agreement between the parties. I have concluded that I must record my dissent from the recommendations of the majority.

This is a very unusual form of interest dispute process as it is intended to result in recommendations to the parties and to the Attorney General rather than in a final and binding award. The Attorney General is entitled to accept or reject the Report and Recommendations of the Panel. If the Attorney General decides to reject the Report and Recommendations of the Panel, he is required by the Agreement to do so on a reasoned basis by delivering a written rejection to the parties.

This important aspect of the process leads me to reach the conclusion that while the Employer, in good faith, was prepared to seek the advice of the Panel, the Employer was not prepared to surrender its ultimate ability to reject the Report and Recommendations of the Panel.

Interest Arbitrators generally accept, as does the majority of the Panel, that arbitrators in an interest dispute should attempt to replicate the agreement which the parties would have achieved if they had been able to reach agreement. In this dispute, I agree with the majority of the Panel that care must be taken to determine on an objective basis what the parties would likely have agreed to.

However, I consider the unique nature of this process is a very important factor to be taken into account in making recommendations to the parties. Indeed,

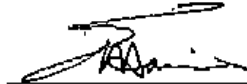
it is my view that this unusual agreement has the effect of modifying the application of the replication theory in the circumstances of this dispute. In other words, it is futile to seek to impose on the Attorney General a set of recommendations which he would likely consider are based on irrelevant criteria. In this case, the replication theory provides very thin cover for the Panel's analysis.

The Panel's analysis cannot take place in isolation. In my view, it can only be undertaken in the context of the broader public service and public sector of British Columbia. Every public sector employee can properly claim to perform a valuable public service which requires professionalism and dedication. To distinguish between Crown Counsel and other public servants, with the greatest of respect, does a disservice to other public servants who would not benefit from the special consideration received by Crown Counsel.

In these circumstances, I therefore cannot agree with the majority of the Panel who have decided that comparisons between Crown Counsel in British Columbia and Crown Counsel elsewhere in Canada are the primary basis for comparison. Instead, I consider that comparisons should be made to other public servants in British Columbia as well as to other Crown Counsel in Canada.

I am satisfied that, if such comparisons were made, the recommendations of the majority could not be sustained. I am also satisfied there is no evidence that recommendations based on such broader comparisons would in any way undermine the integrity or viability of the Crown Counsel service in British Columbia. I am satisfied there is no evidence that the Crown Counsel service in British Columbia has lost or would lose significant numbers of Crown Counsel if they were compensated on the basis I have described.

No useful purpose would be served by my description of the recommendations I would have made in this dispute, as it is only the majority report which will form the basis for consideration by the Attorney General. I therefore respectfully dissent from the recommendations made by the majority.



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Eric J. Harris, Q. C.

