

**IN THE MATTER OF THE JUDGES ACT, R.S.C. 1985, c. J-1, as amended.**

**2007 JUDICIAL COMPENSATION  
AND BENEFITS COMMISSION**

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**SUBMISSION OF THE GOVERNMENT OF CANADA**

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## PART I - INTRODUCTION AND OVERVIEW

1. The importance of an impartial and independent judiciary in securing the rule of law is universally recognized as essential to maintaining a free and democratic society. Canada enjoys an international reputation as having a judiciary whose quality and commitment is unparalleled, and whose independence is secured constitutionally and statutorily.
2. The Government of Canada recognizes the importance of ensuring an adequate level of compensation, not only to ensure the financial security of the superior court judiciary but, as importantly, to maintain its high level of excellence.
3. The Government of Canada is committed to the Judicial Compensation and Benefits Commission process (the “Quadrennial Commission” process), mandated by the Supreme Court of Canada and established under the *Judges Act*, the underlying purpose of which is to maintain the public confidence in the impartiality of the judiciary by ensuring that the courts are protected from perceived political interference through economic manipulation.
4. It is well understood by the Government and the judiciary that the Quadrennial Commission process is unique in that its fundamental purpose is to serve the public interest by upholding judicial independence. Both the Government and the judiciary (the “principal parties”) have recognized and accepted their shared responsibility to

ensure that the Commission is able to fulfill its mandate in the most effective manner.

This commitment is reflected in the collaborative manner in which preparations for this Commission have been undertaken by the principal parties.

5. The 1999 and 2003 Commissions and the principal parties have had to grapple with the inadequacies and inconsistencies in the evidence available. In particular, concern had been repeatedly expressed about the lack of a common reliable set of data in relation to the incomes of self-employed lawyers, who constitute an important source of appointments to the superior court Bench.
6. As discussed more fully below, in preparation for this Commission, the Government shared with the judiciary a wide range of information related to compensation of its most senior cadre. The principal parties agreed to work together to develop a common set of data generated by the Canada Revenue Agency (the "CRA") upon which to base their respective submissions. It is the parties' hope that the resulting data will help to avoid the controversy and considerable frustration experienced in earlier Commission processes.
7. The Government is confident that the constructive approach taken by the parties, particularly in the development of improved evidence, will assist the Commission in the fulfillment of its mandate.

8. However, as important as the efforts are to improve the quality and reliability of the evidence before it, and as previous Commissions have observed, the assessment of the adequacy of judicial compensation is not and cannot be a formulaic exercise of mathematical analysis. It is in the end an exercise of informed judgment in relation to all of the statutory criteria established by Parliament in subsection 26(1.1) of the *Judges Act*.

9. The Government's submission is premised on three main arguments. First, adequacy of judicial compensation must be considered in light of the range of demands on the public purse. Second, it should be roughly proportional to overall compensation trends required to attract and retain other professionals of the highest capacity and caliber who choose to work in the public sector and contribute to the public interest. Third, tangible remuneration, including salaries, annuity, and other benefits are not the sole, or indeed the predominant, reason why outstanding candidates seek judicial office. The intangible benefits of judicial office can be as important in the decision to go to the bench. These include the desire to make a contribution to public life, the challenge and inherent interest of the work, including the opportunity to directly influence the development of the law, not to mention the recognition, status and quality of life associated with service on the Bench. These considerations underpin the Government's key submission that judicial compensation and in particular salary trends should track those of the most senior cadres of federal public officials whose compensation is based on the same broad considerations.

## PART II - COMMISSION MANDATE

10. Section 26 of the *Judges Act*<sup>1</sup> establishes the “Quadrennial” Judicial Compensation and Benefits Commission. The Commission’s task is to inquire into the adequacy of judicial salaries and benefits for superior court judges and report its recommendations.
11. Superior court judges are those judges appointed and paid by the federal Government. They sit on the Supreme Court of Canada, Federal Court of Appeal, Federal Court, Tax Court of Canada, and the superior trial and appellate courts in every province/territory. There are approximately 1,047 superior court judges<sup>2</sup>, of whom 1,003 are *puisne* judges.<sup>3</sup>
12. The *Judges Act* provides statutory criteria to guide the Commission in making its inquiry. Subsection 26(1.1) directs the Commission to consider the following factors in its inquiry:
- (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;

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<sup>1</sup> R.S.C. 1985, c. J-1, as amended (<http://laws.justice.gc.ca/en/index.html?noCookie>). See Appendix 1.

<sup>2</sup> Number of judges on the Bench as of December 1, 2007, based on information provided by the Office of the Commissioner for Federal Judicial Affairs.

<sup>3</sup> A *puisne* judge is a judge not designated a Chief Justice, an Associate Chief Justice, or a judge of the Supreme Court of Canada.

- (c) the need to attract outstanding candidates to the judiciary; and
- (d) any other objective criteria that the Commission considers relevant.

13. These statutory criteria provide the analytical framework within which the adequacy of judicial salaries and benefits are to be assessed. The constitutional principles identified in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (“*P.E.I. Judges Reference*”)<sup>4</sup> inform the interpretation and application of the statutory criteria.

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<sup>4</sup> <http://scc.lexum.umontreal.ca/en/1997/1997rcs3-3/1997rcs3-3.html>

### PART III - CURRENT ENTITLEMENTS

14. As of April 1, 2007, *puisne* judges receive a salary \$252,000.<sup>5</sup> All judicial salaries are indexed automatically pursuant to section 25 of the *Judges Act*. Based on the Industrial Aggregate (IA), which is a measure of average weekly earnings (AWE), an indexation increase is applied on April 1 of each year.<sup>6</sup>
15. All judges are also entitled to a broad array of benefits including an incidental allowance, health and dental benefits, life insurance, and considerable retirement benefits and options.<sup>7</sup>

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<sup>5</sup> Chief Justices/Associate Chief Justices/Senior Judges, Supreme Court of Canada judges, and the Chief Justice of Canada receive salaries of \$276,200, \$299,800 and \$323,800, respectively (a proportionate increase at each level of 9.6%, 8.5%, and 8.0%, respectively).

<sup>6</sup> Judicial salaries are increased by the percentage change in the IA from one year to the next year. For example, the AWE reported for 2005 was \$725.41 and for 2006 was \$747.08. The percentage change between the two figures, 3.0%, is the IA. Applying this 3.0% on April 1, 2007 raised the salary of a *puisne* judge from \$244,700 to \$252,000.

<sup>7</sup> Under the *Judges Act*, superior court judges' benefits include:

- Incidental allowance of \$5000 per year (s. 27(1)) (Federal Court and Tax Court judges receive an additional \$2000 per year, s. 27(3));
- Insurance comparable to that available under the Public Service Management Insurance to executives, including life insurance, supplementary life insurance, post-retirement life insurance, dependants' insurance; and accidental death and dismemberment insurance (s. 41.2);
- Coverage under the Public Service Health Care Plan, the Public Service Dental Care Plan and after retirement coverage under Public Service Health Care Plan and the Pensioners' Dental Services Plan (s. 41.3);
- An annuity at two thirds salary (s. 42(1)):
  - after fifteen years in office when combined age and number of years in judicial office is not less than eighty
  - if afflicted with a permanent infirmity
  - at age of retirement after ten years in judicial office (pro-rated if less than 10 years)
- Early retirement option at fifty-five and 10 years in office (s. 43.1)
- Survivor's annuity equal to one-third of a judicial salary (s. 44) with option to elect for enhanced annuity (s. 44.01); dependent's annuity (s. 47); option to elect an optional survivor annuity (s. 44.2) if relationship commences after the judges' retirement.
- Option to elect supernumerary status (s. 28, s. 29)

16. The task for this Commission is to assess the adequacy of the judicial salary and benefits in light of the statutory criteria set out in subsection 26(1.1). The Government will address each criterion in turn.

**PART IV - ANALYSIS****(a) Prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government**

17. Canada's economic position as well as the Government's financial position are important contextual elements in the determination of the "adequacy" of judicial compensation. The Government accepts that the nature of the judicial office and function imposes unique considerations in terms of claims on public resources. However, the first criterion is premised on the recognition that judges are paid from the public purse which is subject to many competing and legitimate demands outlined below.
18. The 2003 Commission suggested that this criterion required it to ask "...whether the state of economic affairs in Canada would or should inhibit or restrain us from making the recommendations we would otherwise consider appropriate."<sup>8</sup> The Government does not agree with this approach. Rather, in the Government's view, the Commission must undertake its analysis in light of Canada's economic position and the overall state of the Government's finances and economic and social priorities of its mandate. Secondly, any increases in judicial compensation must be reasonable and justifiable in light of the expenditure priority that the Government has accorded to attracting and retaining professionals of similarly high, indeed outstanding, qualities and capacity within the federal public sector.

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<sup>8</sup> *Judicial Compensation and Benefits Commission Report (Report)*, May 31, 2004, p. 9. (<http://www.quadcom.gc.ca/rpt/report.20040531.html>). See Appendix 2.

19. On October 30, 2007 the Minister of Finance tabled the Government's Economic Statement<sup>9</sup> in the House of Commons setting out the Government of Canada's assessment of the current state of the Canadian economy and the current and future position of the Government of Canada, and includes economic forecasts based on the average of private sector forecasts surveyed by the Department of Finance in October 2007.
20. The Economic Statement demonstrates the continued robustness of the Canadian economy, but also notes that recent turbulence in global financial markets, stemming largely from developments in the U.S. housing sector and mortgage markets, and the rapid appreciation of the Canadian dollar have led to increased uncertainty regarding the near-term growth in Canada and abroad.
21. Reflecting these developments private sector forecasters expect real economic (GDP) growth to moderate from 2.8% in 2006 to 2.5 % in 2007 and 2.4% in 2008. In the longer-term growth is forecast at 2.7%, 2.9% and 3.1% for 2009 to 2012 respectively. Inflation (based on the Consumer Price Index) increased by 2.0 % in 2006 and is projected to increase by 2.3 % in 2007 and 2.2 % in 2008. However, the GST reduction effective January 1, 2008 is likely to result in a downward revision of this projection. Inflation for 2009 to 2012 is forecast at 2.0%.<sup>10</sup>

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<sup>9</sup> Economic Statement, tabled in the House of Commons by the Honourable Jim Flaherty, October 30, 2007 ([http://www.fin.gc.ca/budtoce/2007/ec07\\_e.html](http://www.fin.gc.ca/budtoce/2007/ec07_e.html)). See Appendix 3.

<sup>10</sup> Letter from Mr. Paul Rochon, Assistant Deputy Minister, Economic and Fiscal Policy Branch, Department of Finance, dated December 11, 2007. See Appendix 4.

22. To off-set the potential downside risks to the economy described in paragraph 20 above, the Government is taking measures which include improving Canada's business tax advantage to bolster confidence and encourage investment, and reducing personal taxes. The Government also remains committed to reducing the federal debt by \$10 billion in 2007-08, and \$3 billion in 2008-09 and each year thereafter. These tax and debt reductions illustrate the range of demands on the fiscal framework.
23. After taking into account the tax and debt reductions that the Government sees as strategically important to secure Canada's continuing prosperity, the Government's planning surplus is forecast at \$1.6 billion, \$1.4 billion, \$1.3 billion and \$4.5 billion for 2007-08 to 2010-11 respectively.<sup>11</sup> This is the amount available to fund any and all new government priorities and unexpected liabilities, based on current information. From the planning surplus, the Government must determine its priorities from among many competing demands, including increases to judicial compensation.
24. In addition to debt reduction the key priorities of the Government are outlined in the March 2007 Budget, and include: strengthening the federation by restoring the fiscal balance to permit provinces and territories to better provide services and infrastructure, providing tax relief for working families, preserving the environment, improving health care, supporting Canadian troops and supporting Canadian farmers. These priorities demonstrate the breadth of demands on the planning surplus.

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<sup>11</sup> Economic Statement, *supra*, at page 47.

25. In sum, while Canada's economic fundamentals are strong, there are potential downside risks to which the Government must remain attentive. To this end, the Government continues its unflinching commitment to overall fiscal responsibility in order to ensure our future economic health and prosperity. Within this context, the adequacy of the judicial salary must be analyzed.

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

26. In assessing the "adequacy" of the judicial compensation, it is necessary to consider if the compensation is adequate to secure the financial security of the judiciary.

27. The *P.E.I. Judges Reference* identifies three components of financial security:

- (1) the requirement of an independent, objective and effective commission;
- (2) the avoidance of negotiations between the judiciary and the executive; and,
- (3) the requirement that judicial salaries not fall below a minimum level.<sup>12</sup>

28. While the first two components of financial security relate to process, the third component of financial security is substantive. Judicial salaries must not fall below a minimum level in order to protect the judiciary from interference through economic manipulation. Public confidence in the administration of justice is preserved when judicial salaries are adequate, because the public remains confident that the judiciary

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<sup>12</sup> [1997] 3 S.C.R. 3 at paras. 131-135. See Appendix 5.