

This is the Response to the Report of the Judicial Compensation and Benefits Commission, dated May 31, 2004, by the Minister of Justice on behalf of the Government pursuant to s. 26(7) of the *Judges Act*.

## **1. Background: Supreme Court of Canada Independence Decision and a Revised Judicial Compensation and Benefits Process**

The current federal Judicial Compensation and Benefits Commission (the Commission) was established in 1998 to meet the constitutional requirements established in support of the principle of judicial independence in the *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*.<sup>1</sup> The purpose of this independent, objective and effective commission is to depoliticize the process of judicial remuneration, so that the “courts are both free and appear to be free from political interference through economic manipulation by the other branches of government”.<sup>2</sup>

The Commission is required to convene every four years, and to issue a report with recommendations within nine months of the commencement of its work. The statutory mandate of the Commission is to inquire into the adequacy of judicial compensation and benefits.<sup>3</sup> In doing so the Commission is directed by statute to consider:<sup>4</sup>

- a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and 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.

The Commission’s recommendations are not binding. However the Government is required to respond publicly to the Commission’s report. Where recommendations are not accepted, or where it is proposed that a recommendation should be modified, the government must provide a reasonable justification for its decision. The reasonableness of the government’s response is reviewable in a court of law and must meet the legal standard of “simple rationality”, measured by the reasons and the evidence offered in support by the government.

It should be noted that while the Minister of Justice is responding publicly today on behalf of the Government of Canada,<sup>5</sup> it will be for Parliament to consider and approve the Government’s proposed amendments to the *Judges Act*. Section 100 of the *Constitution Act, 1867* requires that the salaries and allowances of the federally appointed judiciary be established by Parliament. The Government will introduce a Bill for consideration by Parliament at the earliest reasonable opportunity.

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<sup>1</sup> [1998] 1 S.C.R. 3 (*P.E.I. Judges Reference*)

<sup>2</sup> *Ibid.* 88, para. 131.

<sup>3</sup> *Judges Act*, R.S. 1985, c. J-1, as amended (the “*Judges Act*”), s. 26 (1).

<sup>4</sup> *Ibid.*, s. 26(1.1).

<sup>5</sup> *Ibid.*, s. 26(7).

## **2. Report of the 2003 Quadrennial Judicial Compensation and Benefits Commission**

The current Commission was established on September 1, 2003. As required by the *Judges Act*, the judiciary and the Government each nominated one member of the Commission. Those two members nominated a third member to serve as Chair of the Commission. The three members, Chairman Roderick McLennan, Q.C., and Commissioners Gretta Chambers, C.C., O.Q., and Earl Cherniak, Q.C., were appointed by the Governor in Council to hold office for a term of four years on good behaviour.<sup>6</sup>

The Commission sought and received written submissions, supported by expert and other evidence, from a broad range of interested persons, including representatives of the judiciary and the Government. Two days of public hearings were held in February 2004. The Commission heard submissions from representatives of the Government, the Canadian Judicial Council and the Canadian Superior Court Judges Association, and all others who chose to make oral submissions. In addition to the expert evidence provided in the various submissions, the Commission retained its own consultants to assist its deliberations.

The Commission delivered its Report<sup>7</sup> to the Government on May 31, 2004. An excerpt from the Report setting out the text of the Commission's recommendations is attached as Annex A.

## **3. Response to the Report**

At the outset, the Government wishes to acknowledge and thank the Chair and the Commissioners for their comprehensive report on the full range of submissions received by the Commission. The Commission process was transparent and accessible, which contributed in an important way to public perception of the Commission's independence and objectivity in developing its recommendations. The thorough and thoughtful explanations provided in the Report reflect the seriousness with which the Commission approached its mandate and the care it took in its deliberations and recommendations.

As indicated throughout the Commission proceedings, the Government is fully committed to ensuring the effectiveness of the Judicial Compensation and Benefits Commission process in support of the principle of judicial independence. The Government regards this public Response to the Commission recommendations as a critical element in ensuring public confidence in the legitimacy of this constitutionally mandated process.

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<sup>6</sup> *Ibid.*, s. 26.1. The Commissioners' curriculum vitae can be found on the Commission website ([www.quadcom.gc.ca](http://www.quadcom.gc.ca))

<sup>7</sup> *Judicial Compensation and Benefits Commission Report*, May 31, 2004 ("*Report*"). The *Report*, written submissions and supporting materials can be found at [www.quadcom.gc.ca](http://www.quadcom.gc.ca).

Briefly, for reasons set out below, the Government is prepared to accept all of the recommendations of the 2003 Judicial Compensation and Benefits Commission, with one exception. As also explained below, the Government does not fully accept Recommendation 16 relating to judicial representational costs, but rather will propose a modified costs formula.<sup>8</sup> The Government will propose to Parliament that the necessary amendments to the *Judges Act* be implemented at the earliest reasonable opportunity.

### a) Recommendations 1-2: Salary Adjustments

The Commission recommended a 10.8% salary increase effective April 1, 2004, inclusive of statutory indexing<sup>9</sup>. The proposed salary of a puisne<sup>10</sup> judge would rise from \$216,600 to \$240,000 as of April 1, 2004. There would be equivalent increases for Chief Justices and judges of the Supreme Court of Canada.<sup>11</sup> Notably, the Commission declined to recommend a continuation of an additional annual salary component for the following three years, other than statutory indexing effective April 1 of each year.

In arriving at its salary recommendation, the Commission engaged in a careful balancing of all the factors listed in s. 26(1.1), including the prevailing economic conditions in Canada, the role of financial security in ensuring judicial independence, and the need to continue to attract outstanding candidates to the judiciary.

<sup>8</sup> The alternative formula is discussed *infra.*, Recommendation 16, Representational Costs.

<sup>9</sup> Recommendation 1: The Commission recommends that the salary of puisne judges be established as follows. Effective April 1, 2004, \$240,000, inclusive of statutory indexing on that date, and for the next three years: \$240,000 plus cumulative statutory indexing effective April 1 of each of those years. (“Statutory indexing”: under the *Judges Act*, judicial salaries are indexed to the Industrial Aggregate Wage.)

<sup>10</sup> “puisne” refers to a judge who does not hold the office of Chief Justice.

<sup>11</sup> Recommendation 2: The Commission recommends that the salaries of the justices of the Supreme Court of Canada and the chief justices and associate chief justices should be set as of April 1, 2004, and inclusive of statutory indexing, at the following levels:

#### Supreme Court of Canada:

Chief Justice of Canada	\$308,400
Justices	\$285,600

#### Federal Court and Tax Court of Canada:

Chief Justices	\$263,000
Associate Chief Justices	\$263,000

#### Appeal Courts, Superior and Supreme Courts and Courts of Queen’s Bench:

Chief Justices	\$263,000
Associate Chief Justices	\$263,000

As with past Commissions, this Commission grappled with the challenge of identifying appropriate salary comparators given the unique nature of the judicial role. In arriving at its salary recommendations, the Commission had regard to a wide range of information concerning remuneration in both the public and private sector provided by the Government, the judiciary, and its own compensation experts. In addition to examining the traditional comparator of the DM-3<sup>12</sup> salary mid-point, the Commission broadened its consideration to the compensation of other senior officials appointed by the federal Government, including all levels of deputy ministers and other Governor in Council appointees.

However, the Commission regarded private sector legal income as "...an important, and perhaps the most important, comparator..."<sup>13</sup>, because most appointees to the bench are drawn from senior lawyers from the Bar.<sup>14</sup> The specialized professional nature of the pool from which the judiciary is drawn is one aspect of its unique nature. Accordingly the Commission gave particular consideration and weight to available information about the incomes of lawyers in private practice.

The Government is prepared to accept the Commission's salary recommendations for several reasons.

The proposed increase appears reasonable when considered as an increase of approximately 2.7% per year, above annual indexing, over the relevant four-year period (April 1, 2004 to March 31, 2008) given that the Commission declined to recommend the continuation of the annual salary increment that was implemented following the Drouin Commission's recommendations<sup>15</sup> and that had been proposed by both the Government and judiciary.<sup>16</sup>

Such annual increases are within a reasonable range of general compensation trends for senior members of the federal public service.

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<sup>12</sup> Deputy Minister, Level 3

<sup>13</sup> p. 41, *Report*

<sup>14</sup> pp. 31-32, *Report*

<sup>15</sup> The 1999 Judicial Compensation and Benefits Commission was chaired by Richard Drouin, Q.C., and the other Commissioners were Eleanore Cronk and Fred Gorbet.

<sup>16</sup> The Government proposal was for a 4.48% increase in the first year, with a \$2,000 annual increment plus statutory indexing in the next three years. The judiciary's proposal was for a 17.2% first year increase, with a \$3,000 annual increment plus statutory indexing in the next three years.

While the Commission's recommended increase (10.8%) is greater than what the Government proposed (4.48%, plus an annual increment of \$2,000), it is nevertheless significantly less than the increase sought by the judiciary (17.2%, plus an annual increment of \$3,000).

In light of all these factors, the Government is of the view that the Commission's salary recommendations are reasonable and will propose their implementation to Parliament.

It is important to note however that the Government's acceptance of the Commission salary recommendations should not be taken as a complete acceptance of all of the assumptions made by the Commission with respect to the comparative analysis undertaken. The Commission itself identified the particular difficulty of assessing trends in the incomes of private practice lawyers. While significant efforts and progress had been made by both the Government and the judiciary in developing improved data and analysis, the Commission was left to do the best it could in light of the unsatisfactory nature of the information that is currently available in this area.

The Commission has in fact made a number of constructive suggestions to improve the process for future Commissions, particularly in relation to the development, under the auspices of the Commission itself, of more detailed and reliable comparative information in advance of the next Commission. As indicated, the Government is committed to ensuring that the Commission process is both objective and effective, and therefore welcomes these suggestions. The Government is fully prepared to participate in any discussions and joint efforts with the Commission and judiciary that would serve to improve the timeliness and reliability of information upon which the next Commission can rely.

### **b) Recommendation 3: Salaries for Senior Judges of the North**

The Government accepts the Commission recommendation that the Senior Judges of the Northern Territories receive the same salary as provincial superior court Chief Justices.<sup>17</sup> At the same time the Government is pleased to take this opportunity to announce that the Government will also propose that the necessary amendments be made to designate the northern Senior Judges as Chief Justices of their respective courts.

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<sup>17</sup> Recommendation 3: The Commission recommends that the senior northern judges receive equivalent compensation to that of a chief justice until such time as chief justices are appointed in those jurisdictions.

### **c) Recommendation 4: Salary Differential between Trial and Appellate Judges**

The Commission declined to recommend a salary differential between trial judges and court of appeal judges as had been proposed by some members of Court of Appeal.<sup>18</sup> The Government accepts and endorses the Commission's reasons in this regard.

### **d) Recommendation 5: Division of Annuity on Relationship Breakdown**

As proposed by the Government, and supported by the judiciary, the Commission recommended a mechanism to divide the judicial annuity in the event of a relationship breakdown.<sup>19</sup> The annuity scheme for the federally appointed judiciary is unique in failing to provide for such a mechanism.

The Commission's recommendation largely mirrors the Government's own proposal, but for one aspect, the deemed accrual period. Unlike most pension plans, the judicial annuity scheme does not provide for an annual accrual formula. In order to calculate the division of an annuity on relationship breakdown, a "notional" accrual period must be established. The Government had proposed that the deemed period of accrual would cease on the date the judge became entitled to a full annuity.

The Commission's recommendation would calculate the accrual period based on the expected period of judicial service. In the Commission's view, this formula would be fairer for both judges and spouses, as it can accommodate the annuity being shared with a spouse in the circumstances of a second conjugal breakdown. The Government is prepared to accept that the Commission's recommended approach represents a reasonable, cost-neutral mechanism for dividing the judicial annuity.

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<sup>18</sup> Recommendation 4: The Commission does not recommend a salary differentiation between puisne judges who sit on courts of appeal and puisne judges who preside at trials.

<sup>19</sup> Recommendation 5: The Commission recommends that the *Judges Act* be amended to provide for:

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

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

**e) Recommendation 6: Survivor Benefits for Single Judges**

The Commission declined to recommend a change in the provision of survivor benefits for single judges.<sup>20</sup> In doing so, the Commission accepted the Government's submission in this regard.

**f) Recommendation 7: Enhanced Annuity for Judges who Retired between 1992-1997**

The Commission also accepted the Government's position with respect to, and declined to recommend, proposed changes to annuities payable to judges who retired during the period of fiscal restraint between 1992 and 1997.<sup>21</sup>

**g) Recommendations 8-14: Allowances**

The Commission recommended that the Incidental Allowance<sup>22</sup> remain unchanged<sup>23</sup>. The Government accepts the reasons given by the Commission in this regard.

The Commission recommended that Regional Senior Judges<sup>24</sup> of Ontario receive a representational allowance<sup>25</sup> of \$5,000 per year<sup>26</sup>. In view of Ontario's size and the distribution of its population, Regional Senior Judges take on responsibilities in representing their courts within defined geographical areas of the province that are akin to the duties undertaken by Chief Justices and other senior judges. In light of all of the circumstances, the Government accepts this recommendation.

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<sup>20</sup> Recommendation 6: The Commission recommends that there be no change in the provision for survivor benefits for single judges until the matter is addressed by the government in the wider federal context.

<sup>21</sup> Recommendation 7: The Commission declines to recommend any change to the judicial annuities payable to the judges who retired during the 1992-97 time period.

<sup>22</sup> The incidental allowance of \$5,000 per year (s. 27(1), *Judges Act*) permits the judiciary to purchase items and equipment, such as robes, law books and computers, which assist in the execution of judicial functions.

<sup>23</sup> Recommendation 8: The Commission recommends that the Incidental Allowance of \$5,000 per annum for each judge remain unchanged.

<sup>24</sup> "...Ontario has divided the province into eight judicial regions, with a regional senior judge administering the judges in each of those regions." (p. 76, *Report*)

<sup>25</sup> A representational allowance (s. 27(6), s. 27(7), *Judges Act*) reimburses Chief Justices and other like senior judges for travel and other expenses actually incurred as they discharge their special extra-judicial obligations such as representing their courts at conferences and public events.

<sup>26</sup> Recommendation 9: The Commission recommends that effective April 1, 2004, s. 27(6) of the *Judges Act* be amended such that regional senior judges in Ontario be added to the judges entitled to a representational allowance under that section, and that the representational allowance for such regional senior judges be set, in s. 27(7), at an accountable maximum yearly amount of \$5,000.

The Government also accepts the Commission recommendation that a Northern Allowance<sup>27</sup> should be paid to the superior court judge resident in Labrador.<sup>28</sup> This allowance is merited given that the higher cost of living and isolation experienced in Labrador is similar to that experienced by judges currently entitled to the Northern Allowance.

The Commission made a number of recommendations concerning relocation expenses<sup>29</sup> for judges. Presently, the *Removal Allowance Order*<sup>30</sup> provides a six-month time period for a judge to sell his or her home. In specific circumstances, that six-month period may be extended for “an additional period” which can run up to a year.<sup>31</sup> The judiciary had requested that this period of time be extended. The Commission declined to make this recommendation, but did recommend that the Commissioner for Federal Judicial Affairs have the discretion to provide an additional period time in the case of “unusual” circumstances.<sup>32</sup> In the Government’s view, the current Removal Allowance Order guidelines provide sufficient discretion so that such an additional period may be granted where circumstances warrant.

The Government also accepts Recommendation 12,<sup>33</sup> that judges of the federally constituted courts and superior courts in the Northern territories be reimbursed for relocation expenses incurred within two years prior of the judge becoming eligible to retire. Judges of these courts are required to comply with statutory residency requirements when they accept their appointments, and many will incur relocation expenses upon their retirement as they return to the parts of Canada in which they resided prior to appointment. The recommendation is designed to be cost-neutral, and will

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<sup>27</sup> The Northern Allowance (s. 27(2), *Judges Act*) of \$12,000 is intended to contribute to the higher cost of living in the territories.

<sup>28</sup> Recommendation 10: The Commission recommends that the *Judges Act* be amended to provide for the payment of an isolated post allowance to the resident Labrador judge in the amount of \$12,000 per annum, in conformity with the isolation allowances provided to the judges of the Northern Territories.

<sup>29</sup> Pursuant to s. 40 of the *Judges Act*, certain judges are entitled to reimbursement of moving expenses in prescribed circumstances, such as upon appointment to a place other than where the judge resided at the date of appointment.

<sup>30</sup> The *Removal Allowance Order* is the regulation made under the *Judges Act* which guides the specific entitlements to reimbursement of moving expenses.

<sup>31</sup> p. 81, *Report*

<sup>32</sup> Recommendation 11: The Commission recommends that the requested extension not be granted and that the Office of the Commissioner of Federal Judicial Affairs be mandated to deal with any circumstances that in the Commissioner’s view can reasonably be deemed ‘unusual’.

<sup>33</sup> Recommendation 12: The Commission recommends that, notwithstanding paragraphs 40(1)(c) and (e), claims under these paragraphs for expenses made in anticipation of a relocation, but prior to retirement or resignation from office, shall be reimbursable by a removable allowance, provided that:

- (i) the anticipated expenses are incurred no earlier than two years prior to the judge becoming eligible to retire, and
- (ii) that all relocation expenses connected with that relocation be paid within the timeframes currently provided in the Removal Allowance Order and that no later expenses should be reimbursed.

provide flexibility to these judges to aid their retirement planning. The Government therefore accepts this proposal.

The Commission also recommended that the partners of judges of the federally constituted courts be reimbursed for expenses incurred in an obligatory relocation, up to an accountable \$5,000 limit<sup>34</sup>. The Government accepts this recommendation on the understanding that “partners” mean married spouses and common-law partners, and the expenses in question relate to expenses incurred as a result of a disruption in the partner’s employment.

The Government accepts Recommendation 14<sup>35</sup>, wherein the Commission declined to recommend that all superior court judges be entitled to relocation expenses to permit relocation to any part of Canada upon retirement.

#### **h) Recommendation 15: Supreme Court of Canada Retirement after Ten Years**

The Commission recommended that judges of the Supreme Court of Canada should be eligible to retire with 10 years of service on that Court irrespective of age.<sup>36</sup> The Government accepts this recommendation. Service as a member of the Supreme Court of Canada is extremely demanding. As the court of last resort, these judges must not only manage a uniquely heavy case load but are required to do so with the highest level of personal commitment and professional rigour. Also, most Supreme Court judges have already served for extensive periods on courts of appeals prior to their appointment to the Supreme Court. In most cases, members of the Supreme Court of Canada would therefore be eligible to retire under the normal “Modified Rule of 80” retirement rule.<sup>37</sup> As a result, this special retirement provision for Supreme Court of Canada judges will not be used frequently.

#### **i) Recommendation 16: Representational Costs**

As indicated above, the Government is not prepared to fully accept the Commission’s recommendation that the judiciary’s current entitlement to reimbursement of legal

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<sup>34</sup> Recommendation 13: The Commission recommends that the partners of judges of the Supreme Court of Canada, the Federal Court, the Federal Court of Appeal and the Tax Court of Canada be reimbursed for incurred expenses in the obligatory relocation, up to an accountable \$5,000 limit.

<sup>35</sup> Recommendation 14: The Commission recommends that there be no change to the entitlement to the post-retirement removal allowance.

<sup>36</sup> Recommendation 15: The Commission recommends that justices of the Supreme Court of Canada be granted the exceptional privilege of eligibility for retirement on the full judicial annuity after 10 years of service on that bench regardless of age.

<sup>37</sup> s. 42(1)(a), *Judges Act*; with at least 15 years of service, when age plus years of service total 80.

representational costs be increased. The Commission recommended that the judiciary be reimbursed for 100% of disbursements and 66% of legal fees.<sup>38</sup>

The current *Judges Act* provision provides for 50% reimbursement of the judiciary's legal costs on a solicitor-client basis as assessed by the Federal Court<sup>39</sup>. It should be recalled that this formula modified the Drouin Commission recommendation for 80% reimbursement of the judiciary's legal representational costs.<sup>40</sup> In its December 13, 2000 Response, the Government justified its modification of the Drouin recommendation on the basis that it would afford the representatives of the judiciary a largely unchecked discretion in deciding what costs would be incurred for legal counsel, expert witnesses and the like in preparation for a Commission. The concern was that the public would be held responsible for the payment of the significant and unpredictable expenditures incurred by the judiciary.

The Government's 50% formula provided a reasonable contribution to the costs of the participation of the judiciary, while at the same time establishing reasonable limits on such expenditures. The equal sharing of costs by public and the judiciary was regarded as fair, given that the members of the judiciary are the immediate beneficiaries of the Commission's recommendations. It also provided an appropriate financial incentive to ensure that the costs are incurred reasonably and prudently.

The Government continues to hold the view that there should be a financial incentive to ensure that representational costs are prudently incurred. This rationale applies equally to disbursements as well as legal fees, especially given that disbursements in these matters – for example in retaining expert compensation consultants – can be quite significant.

Accordingly, the Government will propose that representatives of the judiciary should be entitled to reimbursement of 66% of representational costs, both disbursements and legal fees. These costs would continue to be subject to assessment as currently required.

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<sup>38</sup> Recommendation 16: The Commission recommends that the Government pay 100% of the disbursements and two-thirds of the legal fees (subject to assessment) incurred by the Association and Council in preparing their submissions and bringing them before the Commission.

<sup>39</sup> *Judges Act*, s. 26.3

<sup>40</sup> The Drouin Commission made the following recommendation concerning representational costs: Recommendation 22. The Government pay 80% of the total representational costs of the Conference and Council incurred in connection with their participation in the process of this inquiry as of May 31, 2000, such payments by the Government not to exceed the aggregate amount of \$230,000, inclusive of the amount of \$80,000 already contributed by the Government as of the date of this report and any extraordinary and explicitly identifiable increase to the budget of the Council in order to fund the participation of the Judiciary in the work of this Commission, and that the remainder of such costs be paid by the Conference and Council in such proportion as they deem appropriate.