

# Response of the Government of Canada to the Report of the 2007 Judicial Compensation and Benefits Commission

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## The Constitutional Framework of Judicial Compensation and Benefits

The establishment of judicial compensation is governed by constitutional principles designed to ensure public confidence in the independence and impartiality of the judiciary. At the federal level, s. 100 of the Constitution provides that Parliament establishes judicial salaries and benefits. In addition to the protections of s. 100, the Supreme Court of Canada has established a constitutional requirement for an “independent, objective and effective” commission whose purpose is to depoliticize the process of judicial remuneration and thereby preserve judicial independence.<sup>[1]</sup>

In 1998, the *Judges Act* was amended to provide for a Judicial Compensation and Benefits Commission to be established every four years to inquire into the adequacy of judicial compensation and benefits.<sup>[2]</sup> The *Judges Act* establishes express criteria which govern the Commission’s consideration as well as that of Government and Parliament in determining “adequacy” of compensation:

- the prevailing economic conditions in Canada, including the cost of living, and the overall economic and financial position of the federal government;
- the role of financial security of the judiciary in ensuring judicial independence;
- the need to attract outstanding candidates to the judiciary; and
- any other objective criteria that the Commission considers relevant.

The 2007 Judicial Compensation and Benefits Commission delivered its Report to the Minister of Justice as statutorily required on May 30, 2008. Its key recommendations include:<sup>[3]</sup>

- The salary of *puisne* judges should be set at \$264,300 effective April 1, 2008 (inclusive of statutory indexing effective that date), with an additional 2% increase above statutory indexing effective April 1, 2009, 2010 and 2011.
- Salaries of judges appointed to provincial courts of appeal and to the Federal Court of Appeal should be increased an additional 3% (to \$272,200 effective April 1, 2008) to establish a salary differential for appellate court judges.
- There should be a corresponding 3% increase in the salaries of the Chief Justice of Canada, the Justices of the Supreme Court of Canada, and the chief justices and associate chief justices of the courts of appeal to maintain existing salary differentials for those positions.

This Government’s Response has been delayed to allow the Government to consider the Commission’s Report in light of significant changes to a key criterion in relation to which the Commission developed its recommendations: *the prevailing economic conditions in Canada, including the cost of living, and the overall economic and financial position of the federal government.*

The Government has determined that in view of the significant deterioration in economic conditions in Canada and the financial position of the Government, it would be unreasonable to implement the Commission's recommendations. This Response provides the constitutionally mandated public explanation and justification for this decision, in light of the standard established by the Supreme Court of Canada in *Bodner v. Alberta*.<sup>[4]</sup>

## Changed Economic Conditions

The global economic situation and the financial position of the Government deteriorated significantly after the Commission concluded its inquiry and submitted its recommendations to the Minister of Justice on May 30, 2008. The deterioration of the economic outlook, its implications for Government revenues, and the need for the Government to take extraordinary action to respond to the immediate economic threat while securing Canada's long-term growth and prosperity are outlined in *Budget 2009 – Canada's Economic Action Plan*, announced on January 27, 2009.

*Budget 2009 - Canada's Economic Action Plan* announced measures to stimulate the economy, protect Canadians during the global recession, and invest in long-term growth. It also outlined measures to manage expenditures, including actions to limit discretionary spending by federal departments and agencies, and the introduction of legislation to ensure the predictability of federal public sector compensation during this difficult economic period. Legislation has now been introduced to put in place annual wage increases for the federal public administration (including senior members of the public service, public office holders and Members of Parliament) of 2.3 per cent in 2007-08 and 1.5 per cent for the following three years.

In the Government's view, the public would reasonably expect that judges should be subject to similar restraint measures. The Supreme Court of Canada has established that it is to ensure continued public confidence in the judiciary that judicial remuneration should be subject to measures affecting the salaries of all others paid from the public purse. In *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, Chief Justice Lamer observed that equality of treatment "helps to sustain the perception of judicial independence precisely because judges are not being singled out for preferential treatment".<sup>[5]</sup> He explained:<sup>[6]</sup>

*In my opinion, the risk of political interference through economic manipulation is clearly greater when judges are treated differently from other persons paid from the public purse. This is why we focussed on discriminatory measures in Beauregard. As Professor Renke, supra, has stated in the context of current appeals (at p. 19):*

*. . . if judges were spared compensation decreases affecting other public sector groups, a reasonable person might well conclude that the judges had engaged in some behind-the-scenes lobbying. The judges' exemption could be thought to be the result of secret deals, or secret commitments to favour the government. An exemption of judges from across-the-board pay cuts is as likely to generate suspicions concerning judicial independence as the reduction of judicial compensation in the context of general public sector reductions.*

The Government accepts that judicial compensation is subject to certain unique requirements that do not apply with respect to others paid from the public purse. In particular, it is necessary to ensure that judicial compensation does not fall below the "minimum" required to protect financial security, including through erosion of compensation levels over time. The purpose of this minimum is to avoid the perception that judges might be susceptible to political pressure through economic manipulation as

witnessed in many other countries.<sup>[7]</sup> Superior court judges in Canada are protected against erosion of compensation levels by annual statutory indexing, which will be maintained, as well as the quadrennial review of judicial compensation.

The Government is mindful of the unique quadrennial nature of the judicial compensation process which limits the possibility of interim adjustments during the quadrennial period. However, in the event that the current economic circumstances improve before the next Judicial Compensation and Benefits Commission is established so as to justify salary enhancements, such circumstance could be taken into account by the Commission.

## ANNEX A

### Recommendations of the Third Judicial Compensation and Benefits Commission

- - **Recommendation 1**

- - **The Commission recommends that:**

The salary of *puisne* judges should be set at \$264,300 effective April 1, 2008, inclusive of statutory indexing effective that date; and

The salary of *puisne* judges should be increased by statutory indexing effective April 1, 2009, 2010 and 2011 plus additional 2% effective each of those dates, not compounded (*i.e.*, the previous year's salary should be multiplied by the sum of the statutory indexing and 2%).

- - **Recommendation 2**

- - **The Commission recommends that:**

Interest should not be paid on retroactive salary adjustments to federally-appointed judges.

- - **Recommendation 3**

- - **The Commission recommends that:**

A salary differential should be paid to *puisne* judges appointed to provincial courts of appeal and to the Federal Court of Appeal, and that the salary of *puisne* judges appointed to these courts should be set at \$272,200 effective April 1, 2008, inclusive of statutory indexing effective that date.

- - **Recommendation 4**

- - **The Commission recommends that:**

Salary differentials should continue to be paid to the associate chief justices and chief justices of the trial courts and courts of appeal, and to the Justices of the Supreme Court of Canada and the Chief Justice of Canada;

The salary differential for the associate chief justices and chief justices of the trial courts should be established in relation to the salary of the *puisne* judges appointed to the trial courts;

The salary differential for the associate chief justices and chief justices of the courts of appeal should be established in relation to the salary of the *puisne* judges appointed to the courts of appeal;

The salary differentials of the Justices of the Supreme Court of Canada and the Chief Justice of Canada should be established in relation to the salaries of *puisne* judges appointed to the courts appeal; and

The salaries should be set as of April 1, 2008 inclusive of statutory indexing, at the following levels:

### **Supreme Court of Canada**

Chief Justice of Canada  
Justices

\$ 349,800

\$ 323,800

### **Federal Court of Appeal and Courts of Appeal**

Chief Justices  
Associate Chief Justices

\$ 298,300

\$ 298,300

### **Federal Court, Tax Court and Trial Courts**

Chief Justices  
Associate Chief Justices

\$ 289,700

\$ 289,700

- - **Recommendation 5**
- The Commission recommends that:**

The *Judges Act* be amended so that senior judges of the territorial courts who elect supernumerary status receive the same treatment with regard to their retirement annuities as do chief justices who elect supernumerary status.

- - **Recommendation 6****The Commission recommends that:**

Should measures be taken by the territorial governments to allow a senior judge, not yet entitled to elect supernumerary status, to elect to cease to perform his or her duties as a senior judge and to perform only the duties of a *puisne* judge and receive the salary of a *puisne* judge, that the *Judges Act* be amended so that the retirement annuity of a former senior judge is based on the salary of senior judge.

- - **Recommendation 7****The Commission recommends that:**

The *Judges Act* be amended so that a judge appointed to a court of appeal who subsequently accepts appointment to a trial court, and receives the salary of a trial court judge, receives a retirement annuity based on the salary of his or her former position as a judge of a court of appeal.

- - **Recommendation 8****The Commission recommends that:**

A retirement removal allowance should not be paid to judges of the provincial superior courts and courts of appeal.

- - **Recommendation 9****The Commission recommends that:**

Effective April 1, 2008, representational allowances be increased to \$22,500 for the Chief Justice of Canada, \$15,000 for the Chief Justice of the Federal Court of Appeal and the chief justices of the provinces, \$12,000 for *puisne* judges of the Supreme Court of Canada, \$12,000 for other chief justices and associate chief justices and senior judges, and \$6,000 for Ontario regional senior judges.

- - **Recommendation 10****The Commission recommends that:**

The senior family law judge in Ontario be paid the same representational allowance as the other regional senior judges in the province.

- - **Recommendation 11****The Commission recommends that:**

The provisions in the *Judges Act* relating to the reimbursement of the judiciary's costs for participating in the Quadrennial Commission process remain unchanged.

- - **Recommendation 12****The Commission recommends that:**

Should a future Commission not include a member with experience in the area of compensation, the Commission strongly consider engaging external expert assistance in this area.

○ • **Recommendation 13**  
**The Commission recommends that:**

While continuity of Commission staffing cannot always be ensured, processes be established to allow for the efficient transfer of institutional knowledge between departing and incoming Commission staff.

○ • **Recommendation 14**  
**The Commission recommends that:**

Where consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of demonstrated change, such Consensus be taken into account by the Commission and reflected in the submissions of the parties.

○ • **Recommendation 15**  
**The Commission recommends that:**

The parties consider ways of streamlining the materials produced for future Commissions and, where production of a data set and accompanying analysis is warranted, that such work be undertaken cooperatively.

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- <sup>[1]</sup> *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [ 1997 ] 3 S.C.R. 3, para. 131. (*PEI Judges*)
  - <sup>[2]</sup> *Judges Act*, R.S. 1985, c. J-1, as amended (the “*Judges Act*”), s. 26 (1).
  - <sup>[3]</sup> The Commission’s recommendations are reproduced in Annex A.
  - <sup>[4]</sup> [2005] 2 S.C.R. 286. Acknowledging that decisions about the allocation of public resources belong to legislatures and to governments, the Court held that Commission recommendations may be rejected or modified provided:
    1. They have articulated a legitimate reason for doing so.
    2. The government’s reasons rely upon a reasonable factual foundation.
    3. It can be shown that, viewed globally and with deference to the government’s opinion, the commission process has been respected and the purposes of the commission – namely, preserving judicial independence and depoliticizing the setting of judicial remuneration – have been achieved.
  - <sup>[5]</sup> *PEI Judges*, para 156.
  - <sup>[6]</sup> *Ibid.*, para. 158.
  - <sup>[7]</sup> *Ibid.*, para. 135.