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VIA EMAIL

Reference: 100716/16

Ms. Suzanne Labbé
Executive Director
Judicial Compensation and Benefits Commission
99 Metcalfe Street, 8th floor
Ottawa, ON K1A 1E3

Dear Ms. Labbé:

Re: 2012 Quadrennial Commission on Judicial Compensation

The Commission has requested the parties' views on the elements of a successful Quadrennial Commission process, including at the stage of the Government's response to the Commission's report.

The Government agrees with the submissions made by the judiciary that the constitutional Quadrennial Commission process is fundamentally different from its predecessor, the Triennial Commission process. Governments are now constitutionally required to publicly justify their decisions in relation to judicial compensation. This is a powerful mechanism of public accountability.

In the Government's view, for the Quadrennial Commission process to be successful, it must be independent and objective, and must be effective at both the initial stage of the Commission's inquiry and also at the later stages of the Government's response to the Commission's report and Parliament's implementation of that response. It must fulfill the core constitutional objective of maintaining public confidence that Parliament's responsibility for setting judicial salaries is fulfilled in a manner that protects judicial independence by ensuring that the judiciary is free from the potential for economic manipulation. That is the core constitutional objective of this Commission process.

In the Government's view, the process has been successful in achieving its constitutional and statutory objectives. More details about the markers of success at each stage of the process and the Government's view of how well the current process is performing are set out below.

At the Inquiry Stage

The Government, the judiciary and the Commission itself share the responsibility of ensuring public confidence in the independence, objectivity and effectiveness of the Commission process. The Supreme Court's decision in *Bodner* has set out constitutional principles that guide all participants in the process, but the Commission has asked: What does this require as a practical matter?

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The Quadrennial Commission is not an adversarial proceeding, but a collaborative inquiry based on mutual respect and good faith, which must be conducted in the public interest. Each participant is required to respect the position and unique responsibilities of the other. Success must be measured from the perspective of a reasonable, informed member of the public: would he or she be satisfied that all participants have participated in the process in good faith, and in a respectful and non-adversarial manner that reflects the public interest nature of the proceedings?

To meet this test, the principal parties should be seen to have facilitated the Commission's work by providing detailed and credible evidence and sound analysis addressing all of the statutory criteria, and legitimate reasons supporting their positions. The parties should be responsive to requests from the Commission for information or representations that will assist the Commission in completing its inquiry. The parties should endeavour to ensure that the Commission has the necessary information to complete its mandate, even if that information does not advance the relevant party's salary proposal.

The Government is of the view that there have been many successes in the current process, particularly with respect to the collection of evidence for the Commission. As the Commission has pointed out, these successes may not be known to judges who have not participated directly in that process. Examples include the following:

- The principal parties have worked in a transparent and cooperative manner with the Canada Revenue Agency ("CRA") and Commissioner for Federal Judicial Affairs ("CFJA") to improve the quality of the self-employed lawyers' income and judicial appointment and demographic data presented to the Commission. Counsel for the judiciary were copied on or participated in the Government's communications with these agencies, which had not consistently been the case in past Commission cycles. By working to ensure that the principal parties understand and agree regarding the methodologies used by the CRA and CFJA to collect and report data, the parties have avoided disputes before this Commission about the reliability of core data sets. This is a significant improvement over past Commissions, when the parties presented competing datasets to the Commission and disagreed not only about how to interpret the data, but also which party's data set to use and the reliability of the other party's data. These efforts to work cooperatively have continued in working through the expert evidence with the Commission's and parties' experts, which may facilitate agreement on actuarial methodologies for this and future Commissions.
- The parties agreed that they could make information requests, or discuss the evidence to be submitted to the Commission on a "without prejudice" basis. For example, the Government agreed that if the judiciary asked for certain information, but did not use it, the Government would not take the position that the request was an admission of relevance.
- The Government provided counsel for the judiciary with access to a Department of Justice analyst to assist in statistical analysis to support their submissions.
- The parties worked together to prepare joint materials for the Commission, to reduce duplication and volume as recommended by the Block Commission.

The Government is of the view that such efforts to assist the Commission in a non-adversarial manner have expanded as the process matures, and should continue to grow before this and future Commissions.

The Canadian Superior Court Judges Association and Canadian Judicial Council have asked this Commission to recommend that: “The Commission reiterates the importance of respecting all aspects of the Commission process in order to preserve confidence in and maintain the effectiveness of the Commission process.” The Government agrees that respecting all aspects of the Commission process is a constitutional imperative and is essential to public confidence in the judiciary.

However, with the greatest of respect for the Association and Council, it is neither “politicization” nor “confrontational”, as suggested by the judiciary, for the Government to advance substantive or procedural positions with which the judiciary disagrees. The Government must have legitimate reasons and supporting evidence for its positions, but the success of this process cannot be gauged by whether the Government and judiciary agree on the amount of an adequate salary level.

At the Response Stage

The Government continues to be of the view that this Commission’s mandate is to inquire into adequate future salaries, not to engage in a review of past Government responses to past Commissions.

Moreover, the Government agrees with the judiciary that litigation in relation to Government responses or Commission reports is detrimental to the public interest and should be avoided. However, for the same reasons, the Quadrennial Commission’s inquiries should not become adversarial hearings in which the principal parties, in effect, litigate the adequacy of past Government responses.

The judiciary has characterized certain Government decisions and conduct in relation to earlier government responses as disrespectful of the commission process and/or otherwise “politicized,” such that the Quadrennial Commission process is in danger of imminent failure. A close look at the specific context of these decisions demonstrates that it may be necessary for governments to engage in a respectful balancing of the strict requirements of the Quadrennial Commission process, including timeframes, with other compelling public interest considerations. Such balancing of constitutional responsibilities cannot be fairly characterized as either disrespectful or politicized. Public confidence will be preserved provided that governments act in a manner that reflects a genuine commitment to the Quadrennial Commission process within the overall context of our constitutional democracy.

The Government is of the view that a government response to a Quadrennial Commission report must be provided in a timely manner. However, it is of paramount importance that the response be one that has been informed by extensive and detailed consideration of the Commission’s recommendations and the public interest; for example, it would be more detrimental for a newly-elected government to rush a response to a Commission report without giving it proper consideration than to briefly delay the response to permit meaningful deliberation. There may also be other circumstances in which events in the Canadian democratic process prevent a response within the time provided in the *Judges Act*, or

when a response within that period would not be in the public interest due to exceptional circumstances. Instances of delays, when considered in context, demonstrate that the Government has treated the process with respect while balancing the democratic process and the broad public interest. Following the Drouin Commission, there was a brief delay to December 13, 2000, as a new government had been elected on November 27, 2000. Following the Block Commission Report, there was a longer delay, in the context of the worst financial crisis in more than 60 years. On November 27, 2008 (three days before the Government's response to the Block Commission report was due), the Minister of Finance announced that the Government intended to take steps to protect Canada's fiscal position by introducing legislation to limit public service wage increases to 2.3% for 2007-08 and 1.5% for the following three years.¹ However, Parliament was prorogued on December 4, 2008, returning January 26, 2009. The response was introduced in Parliament on February 11, 2009, 5 days after the introduction and first reading of the *Expenditure Restraint Act*.

The Government is also of the view that if there will be a delay in its response to a Quadrennial Commission report, the judiciary should be given notice. After the Drouin Commission Report, the judiciary and the Commission were advised in writing by the Government on November 30, 2000 that there would be a brief delay, and the Response was released publicly on December 13, 2000. After the Block Commission Report, on November 4, 2008, speaking at the annual meeting of the Canadian Judicial Council in Quebec City, the Minister of Justice advised the Council that the requisite Cabinet consideration of the Block Report and options for response had inevitably been delayed as a result of the intervening election on October 14, 2008 and the establishment of the Government. The Minister specifically invited Council members to advise members of their courts to expect a short delay. (As noted above, the delay was longer than anticipated at that time, due to the escalation of the economic crisis.)

Commission recommendations that have been accepted in a government's response should also be implemented through legislation on a timely basis. However, this may require consultation with the provinces if their constitutional jurisdiction over administration of justice in the province is implicated by a particular recommendation, and may even require legislative changes in affected provinces or territories.

The Government considers that its response must address all of the Commission's recommendations (although a government may address all of a commission's recommendations in the same way, as in 2009). The reasons given in the response must be consistent with the change from the Triennial Commission model to a model requiring public accountability. Accordingly, the response must be complete and must be sufficiently detailed to inform the public of the facts on which the government's decision is based and to demonstrate that the process has been taken seriously and the judicial office has been given appropriate consideration and respect. The response must meet all the substantive requirements set out by the Supreme Court in *Bodner*.

¹ The Honourable James M. Flaherty, P.C., M.P., Minister of Finance, "The Economic and Fiscal Statement 2008" (27 November 2008), online: <http://www.fin.gc.ca/ec2008/Speech/speech-eng.html>.

Finally, the Government agrees with the view expressed by the Commission that the measure of success of this Quadrennial Commission process cannot be a tally of the number of Commission recommendations that governments have agreed to implement. The Constitution requires a process of recommendation and response that maintains public confidence in the administration of justice, not a specific result.

Expressed more generally, the Quadrennial Commission process will be successful if the two branches of government between which this Commission stands respect and advance each other's constitutional roles, while fully discharging their own roles. In the Government's case, this means advancing judicial independence as required by the *PEI Judges Reference*. The Government must do so to the fullest extent that is consistent with the Government's other constitutional duties and the public interest, including its duties to responsibly manage public finances and to respect provincial constitutional authority over the administration of justice.

Yours very truly,



Catherine Béagan Flood

CBE/lpi

c: Pierre Bienvenu
Azim Hussain