IN THE MATTER OF THE JUDGES ACT, R.S.C. 19985, c. J-1, as amended.

QUADRENNIAL JUDICIAL COMPENSATION AND BENEFITS COMMISSION

REPLY SUBMISSIONS OF THE GOVERNMENT OF CANADA

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I. INTRODUCTION

1. The following submissions are made primarily in reply to the Joint Submission of the Canadian Superior Court Judges Association and the Canadian Judicial Council ("Joint Submission"), in addition to such other submissions as are specifically referred to below.

2. As a general observation, Government rejects the judiciary's allegations and oblique inferences that the Government has failed to demonstrate a genuine commitment to the Quadrennial process, or to the important constitutional objectives that it is designed to serve. The Government has prepared for and entered this third Commission process demonstrating serious and sustained efforts to make this Commission process work in an objective and effective manner. We are confident that the significantly improved information base upon which this Commission will be able to undertake its analysis will result in sound and reasonable recommendations.

3. The Government does not intend to reiterate its key arguments and proposals. Rather the Government will address the following matters that have been raised by the Joint Submission:

- The Commission's lack of jurisdiction to consider process reforms;
- The methodological and evidentiary weaknesses of the Joint Submission proposal for judicial salary increases, including the respective weight that should be given to the competing evidence with respect to comparative salary information;

- The reasons why the Commission should not accept the Joint Submission proposals with respect to (i) providing a Removal Allowance for all superior court judges retiring from the Bench; and (ii) increasing the Representational Allowances provided in ss. 27(6) of the *Judges Act*; as well as, (iii) the considerations that must be weighed in making a recommendation to confer the benefits provided in ss. 43(1) and (2) of the *Judges Act* on Senior Judges.

- The reasons why the Commission should not accept the proposal that the judiciary should be reimbursed for 100% of disbursements, or in the alternative that the costs for disbursements or preparation of the Navigant survey should be reimbursed at 100%.

4. In addition, this Reply will set out the reasons why the Government opposes the establishment of a salary differential between superior trial and appeal court judges. These reasons have been advanced by previous Governments and found favour with all prior Commissions.

II. PROCESS REFORM AND GOVERNMENT RESPONSE TO PREVIOUS COMMISSIONS

5. The Joint Submission devotes considerable time to what it characterizes as the failure of the Quadrennial Commission process, and specifically to criticisms of this Government's response to and implementation of the 2003 McLennan Commission Report and Recommendations. The judiciary asks the Commission to exhort the Government to take what can only be described as extraordinary steps in relation to the process for implementation of the Government Response.[1]

6. The Government submits that the Commission has no jurisdiction to consider or make recommendations. As the Supreme Court of Canada clearly indicated in the *PEI Judges Reference,* it is for government and the legislature to determine the institutional design, including procedure, preferably in consultation with the judiciary.[2] Indeed, by stopping short of actually seeking Commission recommendations in relation to process reform, the judiciary has effectively accepted the Government's position that this Commission has no mandate to make such recommendations, and that the Government would be under no legal obligation to respond to any recommendations should they be made.

7. Moreover, there is a more appropriate and effective route through which the judiciary can seek to advance its proposals. The Government has consistently indicated an openness to work with representatives of the judiciary in developing

[1] *Joint Submission*, pp. 50-51, paras. 180-183.
[2] [1997] 3 S.C.R. 3 at para. 167. See *Reply Appendices*, Appendix 1.

policy options that might result in a more expeditious implementation of Commission recommendations accepted by the Government.

8. Those discussions have already begun. However, it is obvious that reforms of the nature being proposed by the judiciary are both highly complex and of a constitutional dimension, raising novel proposals that would affect the interrelationship between, and require action by, all three branches of government. Proposals for modification of Parliamentary procedure, including the House of Commons, the Senate, and the Queen's Representative, affects a much broader set of constitutional interests than judicial compensation, however important that might be.

9. In addition to reiterating that this Commission is not the appropriate forum for discussion of procedural reforms, the Government takes issue with the characterization of some of the purported "failures" attributable to this and prior Governments. For example, the suggestion that the former Government's decision to delay implementation of the supernumerary election on Rule of 80 was an unreasonable and unfair delay fails to acknowledge that this recommendation had significant potential ramifications for provinces and territories that required prior consultation. Not only was this not a "failure" of the process, it is in fact an example of how the Federal Government must take into account the impact of Quadrennial Commission recommendations on provincial and territorial responsibility for administration of justice, including attendant costs.

10. That said, this is not the appropriate forum for consideration of what is or is not a "failure" in either the Commission process itself or the steps required to implement the Government's Response.[3] While the Government remains open to a joint exploration of how to advance these important issues, the Government is not prepared to debate them with the judiciary in the Commission context, either in written submissions or at the public hearings.

[3] The Government is already on public record with respect to many other aspects of the purported process failures and alleged lack of commitment to the Commission process. These include an explanation of the unique confluence of circumstances that resulted in the delay in implementation of the 2003 recommendations, and the reason why such a combination of circumstances is unlikely to recur.

III. JUDICIAL SALARIES

11. The Government submits that the salary increase which the judiciary seeks cannot be supported by reference to any statutory criteria or appropriate comparator. The judiciary seeks consecutive annual increases of 5.9%, 4.6%, 4.8% and 5.0% between April 1, 2008 and April 1, 2011, for a global increase of 21.8% over the four year period.[4] A cumulative salary increase of almost 22% over four years is clearly excessive and cannot be justified in relation to any of the statutory criteria that inform the overarching standard of "adequacy".

(a) Prevailing Economic Conditions

12. Any proposal for judicial salary increase must take into account prevailing economic conditions in Canada, the cost of living, or the overall economic and current financial position of the federal government. In examining Canada's economic position as well as the Government's overall financial position, regard must be had not only to the strength of Canada's economy, but also to the Government's priorities and commitments.

13. However the Joint Submission fails to appreciate or accept that there are competing and legitimate demands the Government must balance. For example, at paragraph 73 the Joint Submission states that the revised projected underlying surplus as of October 30, 2007 is $11.6 billion. No mention is made of the Government's

[4] The judiciary proposes annual salary increases of 3.5%, 2%, 2% and 2%, exclusive of statutory indexation. When the projected statutory indexation increases are factored in, the judiciary's salary proposal becomes 5.9%, 4.6%, 4.8% and 5.0%.

commitment to reduce the federal debt by $10 billion in 2007-08. After taking into account the tax and debt reductions the Government sees as strategically important to secure Canada's continuing prosperity, the Government's planning surplus for 2007-08 shrinks to $1.6 billion.[5]

14. There is need for caution. The Commission can take judicial notice of developments stemming from the U.S. housing sector and mortgage markets which continue to send reverberations through the global economy. This process has greatly accelerated in recent weeks and is being reflected in severe market corrections.[6] The decision of the Bank of Canada and United States Federal Reserve to lower interest rates signals the seriousness of concerns about this potential downturn.[7]

15. The Government must remain attentive to the very real risks these developments represent for the Canadian economy. The Government needs to maintain a healthy reserve in its budget in order to address emerging financial challenges. The contingency amount represents, in essence, an expenditure, made by the democratically elected representatives of the Canadian people. It is not a sum of money that is available for distribution to other needs.

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[5] Government's *Opening Submission*, p. 10, paras. 22-23.
[6] Warning Signs: U.S. Economy teeters on the brink, *Globe & Mail*, Friday, January 18, 2008; World Markets Plunge: Turmoil on the TSX, *Globe & Mail*, Tuesday, January 22, 2008. See *Reply Appendices*, Appendix 2.
[7] Bank of Canada cuts rates by 25 basis points, *Globe & Mail*, Tuesday, January 22,2008. See *Reply Appendices*, Appendix 3.

16. The Government's salary proposal of 4.9% in the first year, inclusive of statutory indexation, with statutory indexing to continue in each of the next three years, is consistent with the current and prospective overall economic circumstances of Canada and the financial position of the Federal Government in these uncertain economic times. The Government advised in the Opening Submission that its salary proposal will cost approximately $29.6 million over the four year period.[8] In contrast, the judiciary's salary proposal would cost approximately $78.6 million.[9]

(b) Role of financial security in ensuring judicial independence

17. Judicial salaries are currently more than what could reasonably be characterized as the required "minimum" to ensure judicial independence. These salaries will be substantially higher than at present, should the Commission accept the Government's recommendation. There is no credible basis upon which to suggest that judicial salaries have fallen to a point where judicial independence might be impaired. There is also no basis to justify an increase of almost 22% over the next four years.

(c) Need to attract outstanding candidates to the Bench

(i) <u>Attraction and Retention</u>

18. Judicial salaries are demonstrably more than adequate to attract outstanding candidates to the Bench. As stated in the Government's Opening Submission

[8] Government's *Opening Submission*, pp. 27-28, para. 71.
[9] Salary Costs Table, prepared by Department of Justice based on information received from the Office of the Chief Actuary, Office of the Superintendent of Financial Institutions Canada. See *Reply Appendices*, Appendix 4.

(paras. 35 to 38), there is no attraction or retention problem in relation to superior court judiciary. There continues to be five recommended candidates for each judicial vacancy. And it is rare for judges to leave the bench. The vast majority of judges remains in office for lengthy careers and retire with a full annuity.

A. Pre-appointment Income of Judges Appointed between 1995 and 2007

19. As discussed in the Opening Submission, the 2003 McLennan Commission expressed frustration with the quality of the information that was available to it in relation to comparators, in particular private sector legal salaries. The Commission also observed that information about the incomes of appointees to the Bench would be highly relevant to its inquiry.

> This information base is particularly important with respect to the income of self-employed lawyers and could be expanded to get some appreciation as to the incomes of those lawyers who are appointed to the judiciary.
>
> There are many ways this could be done: ...statistical evidence could be gathered over time from those who are appointed to the Bench in a way that would preserve their anonymity and privacy....[10]

20. The Government has described the significant efforts that were made to ensure the reliability of CRA data with respect to private sector legal income provided to the Commission. The Government has also, for the first time, compiled information about the *actual* pre-appointment income of judges between 1995 and May 18,

[10] *Judicial Compensation and Benefits Commission Report*, May 31, 2004 (Report), p. 92. See Appendix 5.

2007. Government is confident that this information - which is both reliable and highly relevant - will be of great assistance in the Commission's work.[11]

21. Turning now to the substance of the pre-appointment income study, at the Government's request, CRA developed and applied a methodology that allowed it to provide information regarding the income levels of lawyers appointed to the judiciary. The Government's expert, Haripaul Pannu, has analyzed this information and prepared a report on pre-appointment earnings.[12] The Pannu Report on Pre-appointment Earnings reveals the following:

- 62% of appointees who had been self-employed lawyers received a significant increase in income upon their appointment to the Bench.
- 19% of all appointees were earning less than half of a judicial salary.[13]
- Among the 69% of appointees who had been self-employed prior to appointment, 38% had pre-appointment incomes that exceeded judicial salaries, and 5% had incomes that were more than 275% of a judicial salary.
- Appointees who had been self-employed had much greater variability in incomes than employed appointees, at both the low and high ends of the income scale.

[11] This study analyzed the pre-appointment incomes of a sample of 567 judges appointed after 1994. Up to five pre-appointment incomes were averaged, adjusted via the CPI and compared with the salary of a puisne judge in the first full year after appointment.

[12] *Report on the Pre-appointment Earnings of Judges for the Department of Justice Canada in Preparation for the 2007 Judicial Compensation and Benefits Commission*, January 2008, Haripaul Pannu (Pannu Report on Pre-appointment Earnings). See *Reply Appendices*, Appendix 6.

[13] This study also displaces the methodological assumption used by past Commissions and still advanced by the judiciary that no one who earns less than $60K per annum would apply for or be considered qualified to be appointed a judge.

22. The Joint Submission states at para 126:

> While there are no doubt exceptions, the income derived from private practice by lawyers whom one would characterize as "outstanding" will almost always exceed the judicial salary.

However, the broad range of incomes among outstanding candidates who actually became judges demonstrates that such a statement is unsupportable. Indeed, it is difficult to support the argument that income is a persuasive indicator of the quality of the candidates.

23. There is no empirical basis for the Joint Submission's contention that salaries need to be raised in order to attract better qualified applicants. Rather the pre-appointment income study demonstrates that current judicial salaries are not a disincentive to attracting significant numbers of judges who enjoyed high pre-appointment incomes.

24. This study also demonstrates that compensation is not the only, or even the predominant, attraction of judicial office. It is fair to conclude that for the 38% of self-employed appointees who accepted reduced levels of income, other intangible factors were persuasive, not only the unparalleled security of tenure, but also the desire to make a contribution to public life - and to the development of the law - in the highly respected context of the Canadian superior courts. Appointment to the bench is still considered by many to be the pinnacle of a legal career.

(ii) Comparators

A. Private Practice Lawyers

i. CRA Income Tax Data Concerning Self-employed Lawyers

25. As discussed on the Government's Opening Submission, Government officials and representatives of the judiciary made concerted efforts to improve the quality of the CRA income tax data. The Government is pleased that these efforts have produced a highly reliable and rich resource which is supported by both the principal parties - the CRA Master File Database.[14] This database represents an invaluable tool in the Commission's consideration of the weight to be accorded to the income of self-employed lawyers. However the heightened overall reliability of the Database does not mean that the principal parties agree as to how it should be analyzed.

26. The methodology advocated by the Government considers the incomes of all lawyers between the ages of 41 to 65 across Canada (both urban and rural), consistent with the demographic data concerning appointments to the Bench. This methodology avoids the distortion that results from the erroneous assumption advanced by the judiciary's methodology that all appointees are high income earners between the ages of 44 to 56 practicing law in Canada's largest cities.

27. The Government's compensation expert, Mr. Pannu, considers the entire range of lawyers' incomes, without imposing an income threshold as was done by the past

[14] From this perspective, the Government does not understand the Joint Submission's contention that "CRA was mandated by the Government to assemble a database consisting of the 2005 tax returns..." (para. 133), which suggests that the creation of the database was at the unilateral direction of the Government.

two Commissions.[15] We note here that the pre-appointment income study provides highly relevant information with respect to this methodological factor - income threshold - that has been in debate in the last two Quadrennial Commissions, and continues as a point of difference with the judiciary in relation to analysis of the income tax data. The study reliably demonstrates that it is false to assume that lawyers with income less than a certain threshold ($50K/$60K) would not apply or be recommended for appointment. The pre-appointment income study demonstrates that not only do these lawyers apply, about 7% are in fact appointed to the Bench. Accordingly the methodology proposed by the judiciary, which would exclude lawyers earning below $60,000, must be reconsidered.

28. The Pannu Report demonstrates that the judiciary's reliance on the 75th percentile income of self-employed lawyers in major cities between the ages of 44 and 56 – in effect the application of various "filters" (selection criteria) – isolates as the comparator the top one-twelfth of lawyers in the pool (one-quarter of the top one-third of the true pool).[16] The Government submits that this unrepresentative sample skews a real understanding of the pool from which judges are actually drawn.

29. Mr. Pannu has determined that the age-weighted income of self-employed lawyers in 2005 (most recent tax data year) is $181,278 at the 65th percentile and $248,916

[15] The reference here is to Mr. Pannu's first report, *Report on the Earnings of Self-Employed Lawyers for the Department of Justice Canada in Preparation for the 2007 Judicial Compensation and Benefits Commission, December 2007* (Pannu Report). It may be found at Appendix 10, *Submission of the Government of Canada Appendices*, Vol. II.

[16] Government's *Opening Submission*, p.22, para. 57 and Annex A.

at the 75th percentile. The judicial salary – at $237,400 in 2005 - compares favourably to these benchmarks.

30. The Government also takes issue with the statement in the Joint Submission that the "McLennan Commission found that the income of self-employed lawyers in the larger Canadian cities exceeded the current level of judicial compensation, even when the value of the judicial annuity is factored in" (para. 125). In fact, Table 19 of the McLennan Commission Report show shows that this fact was true only in relation to Toronto, Montreal and Calgary at the 75th percentile, after imposing a $60K threshold and excluding lawyers under 44 and over 56.[17] The Pannu Report looks at this issue with 2005 CRA data and concludes that the judicial salary including the value of the annuity exceeds the 70th percentile in Canada's ten largest cities - with the exception only of Toronto - where the judicial salary including the value of the annuity would still be in the 65th to 70th percentile range.[18]

ii. Navigant Survey

31. The judiciary retained Navigant Consulting Inc. (Navigant) to conduct a survey of private-sector lawyers' incomes in Canada (the Survey). Before explaining the Government's concerns with the methodology and reliability of the Survey, it is necessary to offer some preliminary observations.

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[17] *Report*, p. 48, Table 19. See *Reply Appendices*, Appendix 7.
[18] Pannu Report, p. 12. See *Submission of the Government of Canada Appendices*, Vol. II, Appendix 10.

32. The Government's request to be informed of and comment on the proposed methodology for the survey was rejected. Representatives of the judiciary were aware that the Government had undertaken an earlier feasibility study for a similar a survey which might have assisted in informing a more reliable methodology. This is relevant in relation to the judiciary's argument that this Survey should be accorded special status in respect of costs.[19]

33. Turning to the Survey itself, the report of the Government's expert, Dr. Cam Davis, discloses various survey design and methodological problems which impair the survey's reliability.[20] In addition, the report of David Bilinsky, a legal practice management expert, highlights concerns about the accuracy and usefulness of measuring "annual gross income from practicing law" as an indicator of a private practice lawyer's income.[21]

34. Dr. Davis states that a number of "flags" are raised concerning the quality of the research and the reliability and validity of the Survey results. He identifies the main concerns to be:

- It would appear that over one-third of practising lawyers (36%) were not included in the survey population.
- There may be a bias between lawyers who participated in the survey and those who did not.

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[19] As discussed below, the Government opposes this proposal, for this as well as more general reasons as to disbursements.

[20] *A Review of the Survey Methodology in the Report "A Review of Canadian Private-Sector Lawyer Income" conducted by Navigant Consulting*, Dr. Cam Davis, January 25, 2008. See *Reply Appendices*, Appendix 8.

[21] *Report on the "Review of Canadian Private-Sector Lawyer Income" for the third Judicial Compensation and Benefits Commission*, David J. Bilinsky, January 25, 2008 (Bilinsky Report). See *Reply Appendices*, Appendix 9.

- The Survey generated a response rate of only 5% - not enough is known about those invited to participate in the survey and those who did not respond.
- It was difficult to replicate the income results through other external sources.
- The sizeable difference between the CRA income data for lawyers and the Survey income results is an issue.
- There may be a difference in the characteristics of respondents who answered the income questions and those who did not - this could bias the results.
- It would appear that a number of recognized best practices were not adhered to including practices such as conducting a pre-test to improve the wording of questions.
- There were numerous inconsistencies in the way the data were presented in the report and displayed in the Excel database.

35. Dr. Davis concludes that the income results should be interpreted with caution. Given the low response rate and fact that one third of eligible lawyers in Canada were not included, Dr. Davis does not have confidence that the Survey results can be generalized to the whole population of lawyers under consideration.

36. A further concern with the Survey is addressed by David Bilinsky, a legal practice management expert. He suggests that Survey respondents may have interpreted "annual gross income from practising law" in a variety of ways – rendering its reliability as a measure of income highly suspect.

37. The Navigant Report at page 8 explains the definition of income used in the Survey in these words:

> The income questions (questions 13 and 14) requested income defined as: "annual gross income from practicing law (include you partnership income for tax purposes, T4 – salary, bonuses, stipends, teaching law, and all other cash compensation) for the year." In short, we captured exactly what the lawyer earned from the practice of law.

38. Mr. Bilinsky opines that most partners in law firms would read Questions 13 and 14 and unintentionally focus on their *gross billings* or *revenues* from practicing law (a "top line" or revenue metric), rather than the smaller number, being their *net income from practicing law* (a "bottom line" or profit metric) that is highly dependent on tax and other financial accounting adjustments.

39. Mr. Bilinsky explains that these two numbers – gross billings and revenues – are continually emphasized to lawyers in their partnership (and associate) reports. Compensation is based on these numbers. Mr. Bilinsky's report explains that a lawyer's net taxable income is at least two steps removed from these numbers.

40. Mr. Bilinsky concludes that most partners in law firms would read Questions 13 and 14 and unintentionally focus on their gross billings or revenues from practising rather than on their net income from practicing law. This renders any conclusions based upon this data, as a measure of "exactly what the lawyer earned from the practice of law", to be highly suspect and unreliable.

41. Furthermore, even assuming the Survey was able to generate reliable results in relation to gross income, Mr. Bilinsky points out that net income can vary widely, making gross income an unreliable measure of net income. He states:

> ...net income, as compared to gross income, can vary highly by area of practice, geographic location (firms in downtown locations generally having much higher costs than rural practices), size and type of firm, leverage factors, staffing and rental costs (i.e. whether to locate the firm in a Class "A" building or practice in a lower-cost location), implementation of technology and other overhead factors. Indeed, the general rule of thumb is that overheads in law firms can be between 40 – 70% of gross income (and in some cases, even higher). This wide range in variability of overheads that factor into the determination of net income makes gross income an unreliable measure of net income.[22]

42. In sum, the Government submits that its experts have demonstrated significant flaws in the design, methodology and execution of the Survey that makes it an unreliable indicator of the income levels of self-employed lawyers in Canada. The CRA Master File Database and the pre-appointment income study provide a significantly richer and more reliable source of information about private sector legal income in general. It also provides more reliable data about the actual income of private practitioners who are appointed to the bench. These should clearly be preferred by the Commission in undertaking its analysis of this comparator.

B. Public Sector Comparator

i. Deputy Minister (DM) Comparator

43. The Government rejects the Joint Submission argument that the only appropriate public sector comparator is the remuneration of the most senior deputy ministers,

[22] *Ibid.*, p. 1.

namely DM-3s and DM-4s. The Government urges the Commission to adopt the position of the McLennan Commission in relation to this argument:

> We also question the wisdom of confining the examination to the DM-3 level, rather than considering the entire group of deputy ministers from DM-1 to DM-4. The passage quoted earlier from the Courtois and Scott Commissions, and accepted by the Drouin Commission, referred to deputy ministers, not DM-3s. It is apparent that the large majority of those who reach the DM-3 level have come up from the DM-1 and DM-2 levels, and that, on average, those who reach the DM-1 and DM-2 levels are public servants of long experience and demonstrated ability.[23]

44. The Government's reiterates its position that the relevant public sector comparator group is the full spectrum of senior public officials (EX 1-5; DM 1-4; Senior Government Lawyers). These are the professionals who share capacity, skills and abilities comparable to judges, as well as the commitment to making a contribution to public life. Like judges, they choose to make this commitment despite a reduced level of overall compensation that would otherwise be earned in the private sector. Reference to the senior public sector cadre is also merited because the financial position of the Government is reflected in part in the salaries it is prepared to pay its most senior employees.[24]

45. The judiciary advance an argument that has to date not been raised in relation to public sector comparators. They judiciary say that comparison to DM-3 and DM-4 is necessary because it would "upset the political equilibrium" between Executive and Judicial branches of government if judges did not earn at the same general level as these two categories of senior officials.

[23] Report, p. 28. See *Reply Appendices*, Appendix 10.
[24] Government's *Opening Submission*, p. 18, paras. 47-48.

46. The Government considers this novel, indeed unprecedented, assertion to be not only wrong in law by irrelevant to the Quadrennial Commission exercise. To the degree that senior public servants are relied on as comparators, the analysis is about relative capacity and quality. It has nothing to do with the relationship between the Executive – that is the Prime Minister and his Cabinet - and the judiciary.

47. Moreover the implications of this assertion for the other branch of government, Parliament, must also be considered. Would the judiciary also assert that its compensation must maintain an "equilibrium" with Parliamentarians? That equilibrium would currently be retained by limiting judicial salary increases to annual statutory indexing, which is what Parliamentarians, including Ministers of the Crown, currently receive.[25] The Government submits that introducing this irrelevant consideration simply muddies the waters and diverts the Commission from its primary focus on adequacy in light of the statutory criteria.

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[25] As explained in the Government's Opening Submission at paragraph 14, all judicial salaries are indexed automatically pursuant to s. 25 of the *Judges Act*. Judicial salaries are increased by the percentage change in the Industrial Aggregate from one year to the next year. Parliamentarians' salaries, on the other hand, are indexed automatically by reference to another index:

> The index…for a calendar year is the index of the average percentage increase in base-rate wages for the calendar year, resulting from major settlements negotiated with bargaining units of 500 or more employees in the private sector in Canada, as published by the Department of Human Resources and Skills Development within three months after the end of that calendar year.

Parliament of Canada Act, R.S.C. 1985, c. P-1, as amended, s. 67.1; *Salaries Act*, R.S.C. 1985, c. S-3, as am., s. 4.2. See *Reply Appendices*, Appendix 11.

ii. Midpoint of the DM Salary Range

48. In addition to rejecting the proposed focus on DM3-4 as the exclusive public sector comparator, the Government does not accept the judiciary's assertion that it would be "more accurate" to reply upon the *average* salary, as opposed to the *midpoint* of the DM salary range. The average salary figure will fluctuate depending upon the seniority of the complement. This is significant, particularly where the pool is relatively small.[26]

49. For example, when the DM-3 complement is composed of officials with long standing experience, the average salary will tend to be higher because all the individuals have progressed well through the salary range. The addition of just one new appointee to the complement with a salary at the lower end of salary band will lower the average salary of the whole DM-3 complement. Thus, it preferable to use the midpoint of the salary range because it provides a comparison point that does not shift depending on composition of DM complement.

50. The Government made reference to the salary midpoint in its submissions concerning the range of senior level executives who are suitable comparators for the judiciary.[27] The Government submits that reference to the midpoint of the salary range maintains the objectivity of the public sector comparator.

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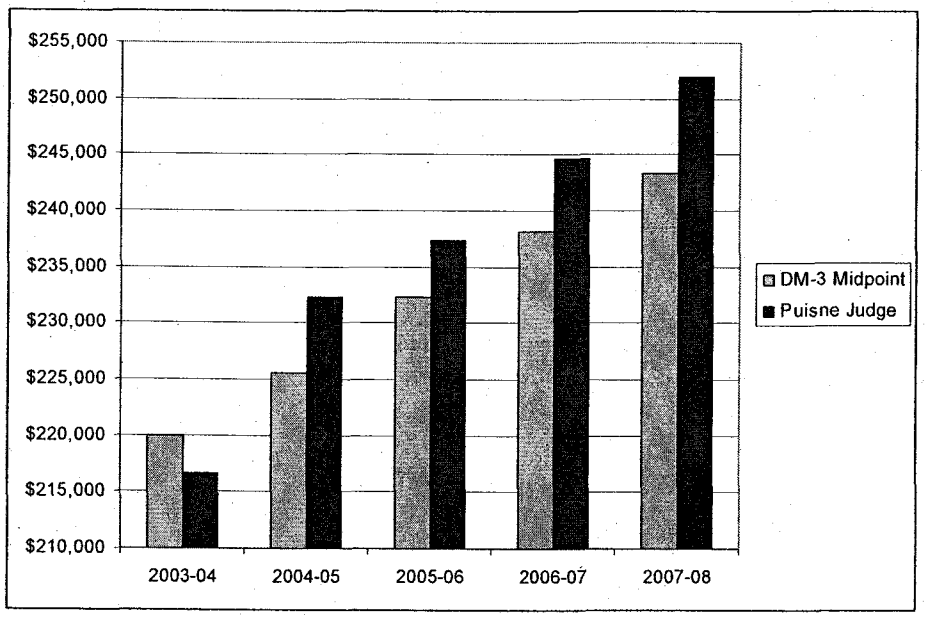
[26] In 2006-07 there 10 DM-3s and 2 DM-4s. See *Submission of the Government of Canada Appendices*, Vol. II., Appendix 13.
[27] Government's *Opening Submission*, p. 19, para. 50.

51. It should also be noted that the graph at paragraph 119 and Appendix F of the Joint Submission purports to illustrate DM-3 midpoint salaries. In fact this graph actually demonstrates DM-3 midpoint salaries plus estimated average at-risk pay awards.

52. And finally, the statement in the Joint Submission that there is an increasing disparity between the salary of *puisne* judges and the midpoint of the DM-3 salary range is not correct. As the graph below illustrates, the judicial salary actually surpasses the DM-3 midpoint ($252,000 vs. $243,300).



iii. At-risk Pay

53. The Government once again rejects the judiciary's claim to entitlement to the equivalent of at-risk pay for senior public servants. At-risk pay is an amount that senior public servants, including lawyers, "re-earn" in each year based on the

achievement of specific organizational commitments during a particular performance cycle. It is a lump-sum payment, approved by the Governor-in-Council, which does not increase an individual's base salary.[28]

54. The Strong Committee has described at-risk pay as "...a variable component of compensation that is tied to corporate and individual achievement against targets...".[29] At-risk pay is an integral part of the overall system of risk and reward for Deputy Ministers. It is tied to the seminal distinction between judges and Deputy Ministers. Deputy Ministers hold office at pleasure of the Governor in Council. More significant than the risk that poor performance will result in diminished at-risk pay, is the risk that poor performance can lead to termination of a DM appointment without notice.

55. By contrast judges enjoy an unparalleled level of security of tenure and financial security not enjoyed by any other public office holder in Canada. The security as well as the personal autonomy judges enjoy is undoubtedly a significant factor in attracting outstanding lawyers who want to leave behind the risk and stresses inherent in the practice of law.

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[28] *2007-2008 Performance Management Program Guidelines*. See *Submission of the Government of Canada Appendices*, Vol. II, Appendix 12.
[29] *Advisory Committee on Senior Level Retention and Compensation, First Report: January 1998,* p. 14. See *Reply Appendices,* Appendix 12.

(iii) Payment of Interest

56. The Government rejects the Joint Submission's proposal for the payment of interest on retroactive salary increases. To the degree that this proposal is premised on concerns about the timeliness of the implementation of the 2003 Quadrennial Commission recommendations, we note that the implementation of its Response to the McLennan Commission recommendations was the subject of a unique confluence of circumstances in the course of the democratic process that is not likely to be repeated. The Government takes seriously the requirement to act with "due dispatch" in moving the necessary *Judges Act* amendments through the Parliamentary process. Moreover, we have already stated that the Government is open to discussing how the overall process might be improved.

57. However, our democratic process cannot always move as quickly as Canadians, including judges, might wish it. Elections interrupt Parliamentary schedules and the progress of legislation that would confer benefits on a wide range of Canadians. A change of government, by its nature, requires policy review of a broad spectrum of initiatives. This can be time-consuming. And minority governments can require a greater degree of consultation among parties about the establishment of House and Senate priorities, scheduling of Committee hearings, etc. Such delays understandably create frustrations and uncertainty for those anticipating the benefits of social and economic programs and initiatives.

58. The judiciary enjoys significant constitutional protections afforded by the Judicature provisions, and in particular of section 100. The founders of the Constitution conferred on Parliament the authority to fix and provide for judicial compensation in order to protect judicial independence from both executive influence at the federal level and local political influence at the provincial and territorial level. These protections may occasionally come at unavoidable cost of delay in the passage of the required *Judges Act* amendments. However it must be recognized that, unlike those Canadians whose receipt of any entitlement can be delayed by the inevitable vagaries of the democratic process, judges are assured the significant continued financial security of annual statutory indexing adjustments while the legislation makes its way through the process.

VI. OTHER ISSUES

1. Relocation Upon Retirement

59. The Joint Submission proposes that all superior court judges be entitled to a Removal Allowance upon retirement from the Bench. The Government does not consider this to be a reasonable demand.

60. It is true that judges of the Supreme Court of Canada, Federal Courts, Tax Court of Canada and territorial superior courts are currently entitled to a Removal Allowance upon retirement which reimburses the judge for relocation expenses when the judge moves within two years of retirement. The policy rationale for this benefit is specific to the geographic requirements and circumstances of these Courts which do not apply to judges of other superior courts.

61. The Removal Allowance provisions for judges of the federally constituted courts reflect the fact that these are national courts whose judges are required to reside in the National Capital Region. The specific removal allowance reflects a desire to ensure that judges are attracted from all regions of the country to these national courts by minimizing the personal cost of such a decision. Similarly the allowance recognizes that the pool of qualified candidates for the territorial superior courts is made up of lawyers from across Canada who are likely to need to relocate from their community to take up office. The Removal Allowance in effect removes what

might otherwise be a financial disincentive for qualified candidates considering an appointment to these courts.

62. The Government does not accept that any such disincentive arises with respect to other superior courts across Canada. Judges who are required to move to take up residency in another area of a province already receive generous removal allowances.[30] There is no evidence that otherwise qualified applicants are deterred from seeking judicial office because they are not assured that their relocation costs will be defrayed on retirement.

2. Senior Judges' Annuity

63. The Government acknowledges the Joint Submission proposal that Senior Judges of the territorial superior trial courts should enjoy the benefits conferred in subsections 43(1) and 43(2) of the *Judges Act* that currently benefit only chief justices and associate chief justices.

64. Subsection 43(1) allows a chief justice to relinquish the office of chief justice and elect supernumerary status. A former chief justice then holds the office of a supernumerary judge and is paid as a *puisne* judge. However on retirement, he or she receives an annuity based on the salary of a chief justice. Subsection 43(2) is similar in that it allows a chief justice - who is not yet entitled to elect supernumerary status - "to step down" into the office, and with the salary, of *puisne*

[30] *Judges Act*, para. 40(1)(a). See *Submission of the Government of Canada Appendices*, Vol. 1, Appendix 1.

judge. However, the retirement annuity of the former chief justice is based on the salary of a chief justice on date of retirement.

65. The Government recognizes that this proposal may be regarded as consistent with the rationale for the McLennan Commission recommendation that Senior Judges receive the same salary as Chief Justices, a recommendation which has now been implemented. However, subsections 43(1) and (2) are contingent on not just Federal but also Territorial Government support and legislative action. Currently the Senior Judge is defined as the judge with the greatest seniority on the Court. Therefore, it is not legally possible for the judge to "step-down" and allow the next junior judge in line to assume those functions. There are also consultations required to ensure that the territories have taken the necessary legislative steps to ensure that there is a position, whether a vacancy or additional office into which the Senior Judge can be appointed. Accordingly, the Government is not in a position to support this proposal.

3. Increase in Representational Allowances

66. The Joint Submission proposes that the Representational Allowances provided in subsection 27(6) of the *Judges Act* be increased by approximately 20%. The request includes a proposal that Representational Allowance for Ontario regional senior judges should be extended to the senior family law judge, and be increased to $5,600.

67. The Government does not accept that these increases are necessary to ensure adequacy of the judicial compensation. Representational allowances were increased substantially in response to the recommendations of the 1999 Commission. The current allowances are generous.[31] The allowances are in addition to travel and related expenses incurred by Chief Justices when participating in various judicial educational and administrative conferences, including meetings of the Canadian Judicial Council meeting.

[31] The Chief Justice of Canada currently receives an allowance of $18,750 (vs. $10,000 in 1999), the Chief Justices of the Federal Court of Appeal and of each province receive $12,500 (vs. $7,000 in 1999), while the *puisne* judges of the Supreme Court of Canada, remaining Chief Justices and Associate Chief Justices, and Senior Judges receive $10,000 (vs. $5,000 in 1999). Regional Senior Judges in Ontario receive a representational allowance of $5,000.

V. COSTS

68. The Government again rejects the proposal that the judiciary should be reimbursed 100% of its disbursements before the Commission.

69. Currently, pursuant to section 26.3 of the *Judges Act*, identified representatives of the judiciary are entitled to two-thirds of their costs on a solicitor-client basis, as assessed by the Federal Court. The entitlement to legal costs was increased from one-half to two-thirds by Bill C-17.[32] Moreover this entitlement to reimbursement of legal costs is based on solicitor-client costs, rather then the less generous party-party costs.

70. At the same time it increased the entitlement to legal costs, the Government modified the McLennan Commission recommendation for reimbursement of 100% of the judiciary's disbursements. This modification was based on a very legitimate concern that full reimbursement of disbursements would remove a necessary incentive for the judiciary to be prudent in relation to incurring of significant expenses for expert witnesses and other disbursements. The Government remains firmly of the view that the public ought not to be expected to support the entire cost of significant and unpredictable expenditures incurred by the judiciary.

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[32] *An Act to amend the Judges Act and certain other Acts in relation to courts*, S.C. 2006, c. 11, s. 5. See *Reply Appendices*, Appendix 13.

71. The judiciary has proposed, in the alternative, that 100% of the specific cost of the Navigant Survey should be reimbursed. As discussed above, the Government is of the view that the Survey was undertaken without consultation with the Government and indeed rejecting the Government's request to contribute to the survey design based on Government officials' earlier experience. We have also demonstrated that despite what we accept were best efforts on behalf of representatives of the judiciary and the survey consultants, the results of the Survey are both methodologically and statistically unreliable.

72. It would not be reasonable in these circumstances to recommend the proposed payment of the costs of this Survey on the basis that it was prepared to assist the Commission. All the preparatory work undertaken by the principal parties is undertaken for that sole purpose. The Government maintains its position that reimbursement of 66% of disbursements is appropriate and fair. The Commission should not recommend any specific or general increase to 100%.

VI. APPELLATE JUDGES' SUBSMISSION SEEKING SALARY DIFFERENTIAL

73. The Government does not object to the Commission considering the proposal by a number of appellate court judges for the establishment of a salary differential between *puisne* judges of the trial and appellate superior courts. However, as the Government has stated in the past two Commissions, a recommendation to this effect has potential ramifications for provincial and territorial governments in relation to the structure and hierarchy of their superior court. These are matters that fall within their authority for administration of justice pursuant to subsection 92(14) of the *Constitution Act, 1867*.[33] Therefore, the Government would not move unilaterally to implement such a change, but would first undertake consultations with the provincial and territorial governments.

74. Jurisdiction aside, the Government reiterates the substantive policy rationale for its objections to this proposal that have been made to two successive Quadrennial Commissions.

[33] In many jurisdictions, trial judges are regularly called upon to perform appellate functions. For example, puisne judges of Alberta and the territories often serve as *ex officio* members of their Court of Appeal. Puisne judges in Ontario comprise the membership of the Divisional Court of Ontario that has extensive appellate jurisdiction.

75. There currently exist only three salary differentials among superior court judges in Canada. They all relate to the additional demands and level of responsibility of the functions undertaken by the affected judges. Chief justices receive about 10% more than *puisne* judges, which recognizes their judicial functions as well as their core judicial duties. *Puisne* judges of the Supreme Court of Canada are paid a higher salary in recognition of the particular exigencies of judicial service on that Court, including workload demands. And the Chief Justice of Canada receives a differential in relation to the SCC *puisne* judges to recognise her management role and her role as the representative of the judiciary in Canada and abroad.

76. The proposal for a differential cannot be justified in light of the criteria prescribed by section 26(1.1) of the *Judges Act*. As with earlier proposals, the appellate judges offer no objective indicators that such a differential is necessary either to secure the independence of an appellate judge, nor to attract outstanding candidates for appointment to courts of appeal.[34] Rather the proposal is once again premised on hierarchical arguments.

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[34] The McLennan Commission stated:

> ...we are obligated to consider what steps ought to be taken to ensure judicial independence including financial security and to promote a high quality of candidates for appointment to judicial office. There is no foundation for the thesis that altering the historical situation of the court of appeal judges, from a compensation perspective, would have any impact whatsoever on those considerations. Accordingly, we are obligated, in our view, to refuse to recommend the proposal made on behalf of the members of the court of appeal for differentiation in the compensation they currently receive from that of trial judges.

Report, p. 55. See also p. 54. See *Reply Appendices*, Appendix 14.

77. The Government does not accept the core assumption for the proposed appellate differential. This assumption is based, at its core, on the notion that the work of appellate judges is of greater importance than that of trial judges. It is well understood and accepted that the skills of a good trial judge are different from those of a good appellate judge. Trial judges undertake the important functions of fact-finding and assessing credibility of witnesses. Appellate judges, many of whom have been superb trial judges, generally have a more academic inclination with an appetite to clarify the application of the law. It is fair to ask whether it would necessarily be a good step from a public policy perspective to encourage excellent trial court judges to seek a "promotion" to a function to which they are not necessarily best suited. Yet this could be the effect if the motivation of a salary increase or the attraction of the underlying message that they will be considered more "important" than their trial court colleagues becomes predominant.

78. Every superior trial court in Canada is operating at full capacity. The current judicial workload is demonstrably challenging.[35] Individual decision-making at the trial level can be demanding and stressful. Trial judges are often faced with complex and difficult fact situations. These demands are comparable to and often exceed the demands faced by appellate judges who have the benefit of collegial

[35] Bill C-31, *An to Amend the Judges Act*, is currently before Parliament. It seeks to increase the number of judicial salaries that may be paid under the *Judges Act*, thereby permitting the appointment of 20 new superior court judges.
Bill C-31, News Release and Backgrounder "The Government of Canada Tables Legislation to Increase Number of Judges in Provincial Superior Courts", November 28, 2007. See *Reply Appendices*, Appendix 15.

decision-making. While trial and appellate judges differ in the nature of their functions, their contributions are of equal value to the Canadian public. The Government calls on the Commission to recognize this fact by rejecting this proposal.

All of which is respectfully submitted at Ottawa, this 29th day of January, 2008.

Donald J. Rennie

"Michael Morris"

Michael Morris

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