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.