

IN THE MATTER OF THE JUDGES ACT, R.S.C. 1985, c. J-1, as amended.

**2007 JUDICIAL COMPENSATION
AND BENEFITS COMMISSION**

SUBMISSION OF THE GOVERNMENT OF CANADA

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PART I - INTRODUCTION AND OVERVIEW

1. The importance of an impartial and independent judiciary in securing the rule of law is universally recognized as essential to maintaining a free and democratic society. Canada enjoys an international reputation as having a judiciary whose quality and commitment is unparalleled, and whose independence is secured constitutionally and statutorily.
2. The Government of Canada recognizes the importance of ensuring an adequate level of compensation, not only to ensure the financial security of the superior court judiciary but, as importantly, to maintain its high level of excellence.
3. The Government of Canada is committed to the Judicial Compensation and Benefits Commission process (the “Quadrennial Commission” process), mandated by the Supreme Court of Canada and established under the *Judges Act*, the underlying purpose of which is to maintain the public confidence in the impartiality of the judiciary by ensuring that the courts are protected from perceived political interference through economic manipulation.
4. It is well understood by the Government and the judiciary that the Quadrennial Commission process is unique in that its fundamental purpose is to serve the public interest by upholding judicial independence. Both the Government and the judiciary (the “principal parties”) have recognized and accepted their shared responsibility to

ensure that the Commission is able to fulfill its mandate in the most effective manner.

This commitment is reflected in the collaborative manner in which preparations for this Commission have been undertaken by the principal parties.

5. The 1999 and 2003 Commissions and the principal parties have had to grapple with the inadequacies and inconsistencies in the evidence available. In particular, concern had been repeatedly expressed about the lack of a common reliable set of data in relation to the incomes of self-employed lawyers, who constitute an important source of appointments to the superior court Bench.
6. As discussed more fully below, in preparation for this Commission, the Government shared with the judiciary a wide range of information related to compensation of its most senior cadre. The principal parties agreed to work together to develop a common set of data generated by the Canada Revenue Agency (the "CRA") upon which to base their respective submissions. It is the parties' hope that the resulting data will help to avoid the controversy and considerable frustration experienced in earlier Commission processes.
7. The Government is confident that the constructive approach taken by the parties, particularly in the development of improved evidence, will assist the Commission in the fulfillment of its mandate.

8. However, as important as the efforts are to improve the quality and reliability of the evidence before it, and as previous Commissions have observed, the assessment of the adequacy of judicial compensation is not and cannot be a formulaic exercise of mathematical analysis. It is in the end an exercise of informed judgment in relation to all of the statutory criteria established by Parliament in subsection 26(1.1) of the *Judges Act*.

9. The Government's submission is premised on three main arguments. First, adequacy of judicial compensation must be considered in light of the range of demands on the public purse. Second, it should be roughly proportional to overall compensation trends required to attract and retain other professionals of the highest capacity and caliber who choose to work in the public sector and contribute to the public interest. Third, tangible remuneration, including salaries, annuity, and other benefits are not the sole, or indeed the predominant, reason why outstanding candidates seek judicial office. The intangible benefits of judicial office can be as important in the decision to go to the bench. These include the desire to make a contribution to public life, the challenge and inherent interest of the work, including the opportunity to directly influence the development of the law, not to mention the recognition, status and quality of life associated with service on the Bench. These considerations underpin the Government's key submission that judicial compensation and in particular salary trends should track those of the most senior cadres of federal public officials whose compensation is based on the same broad considerations.

PART II - COMMISSION MANDATE

10. Section 26 of the *Judges Act*¹ establishes the “Quadrennial” Judicial Compensation and Benefits Commission. The Commission’s task is to inquire into the adequacy of judicial salaries and benefits for superior court judges and report its recommendations.
11. Superior court judges are those judges appointed and paid by the federal Government. They sit on the Supreme Court of Canada, Federal Court of Appeal, Federal Court, Tax Court of Canada, and the superior trial and appellate courts in every province/territory. There are approximately 1,047 superior court judges², of whom 1,003 are *puisne* judges.³
12. The *Judges Act* provides statutory criteria to guide the Commission in making its inquiry. Subsection 26(1.1) directs the Commission to consider the following factors in its inquiry:
- (a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
 - (b) the role of financial security of the judiciary in ensuring judicial independence;

¹ R.S.C. 1985, c. J-1, as amended (<http://laws.justice.gc.ca/en/index.html?noCookie>). See Appendix 1.

² Number of judges on the Bench as of December 1, 2007, based on information provided by the Office of the Commissioner for Federal Judicial Affairs.

³ A *puisne* judge is a judge not designated a Chief Justice, an Associate Chief Justice, or a judge of the Supreme Court of Canada.

- (c) the need to attract outstanding candidates to the judiciary; and
- (d) any other objective criteria that the Commission considers relevant.

13. These statutory criteria provide the analytical framework within which the adequacy of judicial salaries and benefits are to be assessed. The constitutional principles identified in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (“*P.E.I. Judges Reference*”)⁴ inform the interpretation and application of the statutory criteria.

⁴ <http://scc.lexum.umontreal.ca/en/1997/1997rcs3-3/1997rcs3-3.html>

PART III - CURRENT ENTITLEMENTS

14. As of April 1, 2007, *puisne* judges receive a salary \$252,000.⁵ All judicial salaries are indexed automatically pursuant to section 25 of the *Judges Act*. Based on the Industrial Aggregate (IA), which is a measure of average weekly earnings (AWE), an indexation increase is applied on April 1 of each year.⁶
15. All judges are also entitled to a broad array of benefits including an incidental allowance, health and dental benefits, life insurance, and considerable retirement benefits and options.⁷

⁵ Chief Justices/Associate Chief Justices/Senior Judges, Supreme Court of Canada judges, and the Chief Justice of Canada receive salaries of \$276,200, \$299,800 and \$323,800, respectively (a proportionate increase at each level of 9.6%, 8.5%, and 8.0%, respectively).

⁶ Judicial salaries are increased by the percentage change in the IA from one year to the next year. For example, the AWE reported for 2005 was \$725.41 and for 2006 was \$747.08. The percentage change between the two figures, 3.0%, is the IA. Applying this 3.0% on April 1, 2007 raised the salary of a *puisne* judge from \$244,700 to \$252,000.

⁷ Under the *Judges Act*, superior court judges' benefits include:

- Incidental allowance of \$5000 per year (s. 27(1)) (Federal Court and Tax Court judges receive an additional \$2000 per year, s. 27(3));
- Insurance comparable to that available under the Public Service Management Insurance to executives, including life insurance, supplementary life insurance, post-retirement life insurance, dependants' insurance; and accidental death and dismemberment insurance (s. 41.2);
- Coverage under the Public Service Health Care Plan, the Public Service Dental Care Plan and after retirement coverage under Public Service Health Care Plan and the Pensioners' Dental Services Plan (s. 41.3);
- An annuity at two thirds salary (s. 42(1)):
 - after fifteen years in office when combined age and number of years in judicial office is not less than eighty
 - if afflicted with a permanent infirmity
 - at age of retirement after ten years in judicial office (pro-rated if less than 10 years)
- Early retirement option at fifty-five and 10 years in office (s. 43.1)
- Survivor's annuity equal to one-third of a judicial salary (s. 44) with option to elect for enhanced annuity (s. 44.01); dependent's annuity (s. 47); option to elect an optional survivor annuity (s. 44.2) if relationship commences after the judges' retirement.
- Option to elect supernumerary status (s. 28, s. 29)

16. The task for this Commission is to assess the adequacy of the judicial salary and benefits in light of the statutory criteria set out in subsection 26(1.1). The Government will address each criterion in turn.

PART IV - ANALYSIS**(a) Prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government**

17. Canada's economic position as well as the Government's financial position are important contextual elements in the determination of the "adequacy" of judicial compensation. The Government accepts that the nature of the judicial office and function imposes unique considerations in terms of claims on public resources. However, the first criterion is premised on the recognition that judges are paid from the public purse which is subject to many competing and legitimate demands outlined below.
18. The 2003 Commission suggested that this criterion required it to ask "...whether the state of economic affairs in Canada would or should inhibit or restrain us from making the recommendations we would otherwise consider appropriate."⁸ The Government does not agree with this approach. Rather, in the Government's view, the Commission must undertake its analysis in light of Canada's economic position and the overall state of the Government's finances and economic and social priorities of its mandate. Secondly, any increases in judicial compensation must be reasonable and justifiable in light of the expenditure priority that the Government has accorded to attracting and retaining professionals of similarly high, indeed outstanding, qualities and capacity within the federal public sector.

⁸ *Judicial Compensation and Benefits Commission Report (Report)*, May 31, 2004, p. 9. (<http://www.quadcom.gc.ca/rpt/report.20040531.html>) . See Appendix 2.

19. On October 30, 2007 the Minister of Finance tabled the Government's Economic Statement⁹ in the House of Commons setting out the Government of Canada's assessment of the current state of the Canadian economy and the current and future position of the Government of Canada, and includes economic forecasts based on the average of private sector forecasts surveyed by the Department of Finance in October 2007.
20. The Economic Statement demonstrates the continued robustness of the Canadian economy, but also notes that recent turbulence in global financial markets, stemming largely from developments in the U.S. housing sector and mortgage markets, and the rapid appreciation of the Canadian dollar have led to increased uncertainty regarding the near-term growth in Canada and abroad.
21. Reflecting these developments private sector forecasters expect real economic (GDP) growth to moderate from 2.8% in 2006 to 2.5 % in 2007 and 2.4% in 2008. In the longer-term growth is forecast at 2.7%, 2.9% and 3.1% for 2009 to 2012 respectively. Inflation (based on the Consumer Price Index) increased by 2.0 % in 2006 and is projected to increase by 2.3 % in 2007 and 2.2 % in 2008. However, the GST reduction effective January 1, 2008 is likely to result in a downward revision of this projection. Inflation for 2009 to 2012 is forecast at 2.0%.¹⁰

⁹ Economic Statement, tabled in the House of Commons by the Honourable Jim Flaherty, October 30, 2007 (http://www.fin.gc.ca/budtoce/2007/ec07_e.html). See Appendix 3.

¹⁰ Letter from Mr. Paul Rochon, Assistant Deputy Minister, Economic and Fiscal Policy Branch, Department of Finance, dated December 11, 2007. See Appendix 4.

22. To off-set the potential downside risks to the economy described in paragraph 20 above, the Government is taking measures which include improving Canada's business tax advantage to bolster confidence and encourage investment, and reducing personal taxes. The Government also remains committed to reducing the federal debt by \$10 billion in 2007-08, and \$3 billion in 2008-09 and each year thereafter. These tax and debt reductions illustrate the range of demands on the fiscal framework.
23. After taking into account the tax and debt reductions that the Government sees as strategically important to secure Canada's continuing prosperity, the Government's planning surplus is forecast at \$1.6 billion, \$1.4 billion, \$1.3 billion and \$4.5 billion for 2007-08 to 2010-11 respectively.¹¹ This is the amount available to fund any and all new government priorities and unexpected liabilities, based on current information. From the planning surplus, the Government must determine its priorities from among many competing demands, including increases to judicial compensation.
24. In addition to debt reduction the key priorities of the Government are outlined in the March 2007 Budget, and include: strengthening the federation by restoring the fiscal balance to permit provinces and territories to better provide services and infrastructure, providing tax relief for working families, preserving the environment, improving health care, supporting Canadian troops and supporting Canadian farmers. These priorities demonstrate the breadth of demands on the planning surplus.

¹¹ Economic Statement, *supra*, at page 47.

25. In sum, while Canada's economic fundamentals are strong, there are potential downside risks to which the Government must remain attentive. To this end, the Government continues its unflinching commitment to overall fiscal responsibility in order to ensure our future economic health and prosperity. Within this context, the adequacy of the judicial salary must be analyzed.

(b) The role of financial security of the judiciary in ensuring judicial independence

26. In assessing the "adequacy" of the judicial compensation, it is necessary to consider if the compensation is adequate to secure the financial security of the judiciary.

27. The *P.E.I. Judges Reference* identifies three components of financial security:

- (1) the requirement of an independent, objective and effective commission;
- (2) the avoidance of negotiations between the judiciary and the executive; and,
- (3) the requirement that judicial salaries not fall below a minimum level.¹²

28. While the first two components of financial security relate to process, the third component of financial security is substantive. Judicial salaries must not fall below a minimum level in order to protect the judiciary from interference through economic manipulation. Public confidence in the administration of justice is preserved when judicial salaries are adequate, because the public remains confident that the judiciary

¹² [1997] 3 S.C.R. 3 at paras. 131-135. See Appendix 5.

is not adjudicating cases in a particular way in order to secure a higher salary from the executive or legislature or to receive benefits from one of the litigants.¹³

29. A *puisne* judge salary rose 41% between March 31, 2000 and April 1, 2007, rising from \$178,100 to its current level of \$252,000.¹⁴ There can be no serious suggestion that judicial salaries have fallen below an acceptable minimum.

30. Indeed annual statutory indexing, which has provided a cumulative increase of 10.4%¹⁵ since 2003, and the statutory requirement for a quadrennial review of compensation, operate to ensure that such a possibility is avoided.

(c) The need to attract outstanding candidates to the judiciary

31. The Government recognizes the important public interest in continuing to attract outstanding candidates to the judiciary. The pool of potential candidates from which the judiciary is drawn consists of a specialized group of professionals who typically enjoy a much higher income than the average Canadian.

32. The demographic information obtained from the Commissioner for Federal

¹³ *P.E.I. Judges Reference*, [1997] 3 S.C.R. 3 at para. 193. See Appendix 5.

¹⁴ Salary Increases between March 31, 2000 and April 1, 2007, prepared by the Department of Justice. See Appendix 6.

¹⁵ *Ibid.* The increase of 7.25% in 2004 was inclusive of indexing. The 10.4% figure assumes that 1.3% of the 2004 increase was attributable to the IA.

Judicial Affairs¹⁶ demonstrates that an appointment to the Bench is highly attractive to the full range of outstanding candidates, that is, those who have been recommended by Judicial Appointments Advisory Committees for appointment to judicial office. By way of illustration, of the 141 appointments between April 1 2004 and March 31 2007, 78% of new judges came from private practice, representing a wide range in terms of area of practice and size of firm. Among the 22% coming from outside private practice, 32% of new judges were in some form of government service,¹⁷ 32% were provincial court judges or superior court masters, and 16% of new judges were from academia. These new judges came from all regions in Canada, rural and urban, ranged in age from 41 to 65, and 34% were female.¹⁸

33. There is no difficulty in attracting private practice self-employed lawyers to the Bench at the current salary levels. A significant number of appointees had been private practice self-employed lawyers prior to their appointments (78%), signalling the high desirability of a judicial appointment for this segment of the legal profession.
34. In light of the demographic information demonstrating the range of practice settings, age at appointment, and regional distribution of the appointees to the Bench, the Government does not agree that the comparator for the judges should be defined

¹⁶ Tables for period of April 1, 2004 to March 31, 2007 concerning appointees' age at appointment; gender; size of firm; place of practice/employment by city, province, territory; private practice in main cities; predominate area of practice; private practice predominate area of practice; non-private practice predominate area of practice; information linked by judge. Prepared by the Office of the Commissioner for Federal Judicial Affairs. See Appendix 7.

¹⁷ This includes prosecutors and legal aid lawyers, as well as a member of a tribunal and a complaints resolution manager.

¹⁸ See Appendix 7.

as the highest earning self-employed lawyers, located in the major cities, between the ages of 44 to 56. The issue of the comparators will be addressed separately below.

(i) Attraction and Retention

35. The statistical information from the Commissioner for Federal Judicial Affairs¹⁹ demonstrates that there is no deficit of qualified candidates for the Bench.
36. From June 2003 to October 31, 2007, of the 2,491 applications were received, 983 candidates were recommended by the Judicial Appointments Advisory Committees (JAAC). Provincial/territorial judges who apply are deemed qualified without assessment by the JAAC. There have been 203 applications from provincial/territorial judges.²⁰
37. Since 2003, 229 judges have been appointed from a pool of 1,186 recommended candidates,²¹ a ratio of five to one. This qualified pool of applicants/appointees demonstrates that outstanding candidates are attracted to the superior courts at the current compensation levels.
38. Similarly, there can be no suggestion that the current levels of judicial

¹⁹ Advisory Committees on Judicial Appointments, January 1, 2003 to October 31, 2007, prepared by the Office of the Commissioner for Federal Judicial Affairs. See Appendix 8.

²⁰ *Ibid.* Under the Federal Judicial Appointments Process, provincial and territorial court judges who apply for appointment to the superior court are deemed qualified and not assessed by Judicial Advisory Appointments Committees (JAACs). The number of such applicants is determined by subtracting from the total number of applications received, those assessed by the JAACs (2491– (983 + 1305) = 203).

²¹ 983 recommended candidates + 203 provincial/territorial court judges = pool of 1,186.

compensation are causing a retention problem. Between 1997 and November 23, 2007, a mere eight judges elected to retire from judicial office before they were eligible to receive an annuity benefit. Even assuming some judges decide to take early retirement because of dissatisfaction with compensation (and there are many other possible reasons for electing early retirement), during this period only 12 judges opted for the pro-rated, early retirement annuity.²² The high retention of superior court judges further supports the attractiveness of the current judicial salary and other benefits.

(ii) Benefits other than Salary

39. It is indisputable that the judicial annuity is a significant incentive to those considering applying for judicial appointment. The judicial annuity is equal to two-thirds of the judge's salary for life. A judicial annuity equal to two-thirds of \$252,000 would be \$168,000.
40. Most judges retire under the rule provided in paragraph 42(1)(a) of the *Judges Act*, which states that a judge may retire with a full annuity when, with a minimum of 15 years in judicial office, the judge's age and years of service total at least eighty. For example, a judge appointed at age 50 could retire with a full annuity at age 65.²³

²² Retirements from 1997 through November 23, 2007, prepared by the Department of Justice based on information provided by the Office of the Commissioner for Federal Judicial Affairs. See Appendix 9.

²³ s. 42, *Judges Act*. See Appendix 1.

41. Most of the judicial annuity is government-funded, with judges contributing 7% of their salary to the annuity benefit.²⁴
42. The average value of the government-paid portion of the judicial annuity (not including disability benefits) is 24.6% of salary.²⁵ Accordingly, if the value of the annuity is taken into account, the current judicial salary for a *puisne* judge of \$252,000 would equate to \$313,992. This value of the judicial annuity is in addition to the other significant elements of the compensation and benefits which accompany judicial office, noted earlier at paragraph 15.
43. The value of the security that is provided by the annuity entitlement should not be under-estimated. A judge who becomes disabled at any time, even the day after appointment, is immediately entitled to an annuity of two thirds the judicial salary, for life. The partner of a judge who dies at any time, even the day after appointment, is entitled to half of that pension, for life.
44. A further incentive that is unique to judicial office is the ability of a superior court judge to elect supernumerary status upon attaining eligibility for retirement. A judge who elects this status continues to receive a full salary but carries a reduced workload, generally understood to be half that of a regular judge. The attractiveness that the flexibility this arrangement permits a judge at the latter part of his or her

²⁴ s. 50, *Judges Act*. See Appendix 1.

²⁵ *Report on the Earnings of Self-employed Lawyers for the Department of Justice Canada in Preparation for the 2007 Judicial Compensation and Benefits Commission*, Haripaul Pannu, (Pannu Report) at p. 11. See Appendix 10.

career to continue at full salary but to “ramp down”, is demonstrated by the fact that the historical rate of supernumerary election is 85% for those judges reaching eligibility, and 93% of those who do elect, do it within a year of becoming eligible.²⁶

(iii) Compensation Comparators

45. The evidence clearly indicates that there is currently no difficulty in either attracting or retaining judges at the current compensation level. At the same time, the Government recognizes that it is appropriate to have regard to compensation trends in other relevant comparator groups. Successive judicial compensation commissions have grappled with the challenge of finding appropriate “comparator” positions against which the judicial salary can be assessed, given the *sui generis* nature of judicial office, with its unique functions and constitutional status.
46. Because of the lack of direct comparators, Commissions have historically been required to consider the relevance and weight to be accorded to a broad array of information, particularly in relation to the remuneration of senior officials and lawyers in the federal public service, as well as private-sector lawyers. These comparator groups will be considered in sequence. The Government is of the view that public sector comparators are more relevant than the private sector comparators.

²⁶ Based on an examination of the full historical record up until December 2002. The eligibility requirements for supernumerary status were modified (to allow for election on attaining “modified rule of 80” for a maximum period of 10 years) by *An Act to amend the Judges Act and certain other Acts in relations to courts*, (Royal Assent December 14, 2006). There is insufficient data as of yet to determine whether the election rates would be affected by the new eligibility rules.

This is because increases to judicial compensation should be roughly proportional to overall compensation trends required to attract and retain senior professionals of the highest capacity and caliber who choose to work in the public sector and contribute to the public interest.

A. Public Sector Compensation Trends

47. In the Government's view, the most relevant public sector comparator group is that of the most senior federal public servants (EX 1-5; DM 1-4; Senior LA [lawyer cadre]). While the 1999 Drouin Commission and earlier Triennial Commissions had historically relied on the DM-3 salary midpoint as a comparator, the 2003 Commission noted that many officials in this broad spectrum of senior government officials, and not just those at the DM-3 level, potentially have a level of experience and capacity comparable to that of candidates for appointment to the Bench.²⁷
48. The Government agrees that comparability to this broader spectrum of senior officials is merited because these executives share capacity, skills and abilities comparable to judges, as well as a commitment to making a contribution to public life. Of equal force, reference to the senior executive cadre is merited because the financial position of the Government is reflected in part in the salaries it is prepared to pay its most senior employees.

²⁷ Report, pp. 28-29. See Appendix 2.

49. With respect to salary increases, senior officials within the EX/DM community have received annual increases over the past four years of 2.5% (2004-05), 3.0% (2005-06), 2.5% (2006-07) and 2.1% (2007-08).²⁸ These percentage increases are important, because they provide an indication of the financial capacity of the Government to compensate and the priority the Government accords to compensate senior professionals of high ability who have chosen service in the public interest over the private sector.
50. It is clear that the current judicial salary of \$252,000 compares very favourably to salaries earned by EXs²⁹ and DMs³⁰. As of April 1, 2007, the weighted mid-point salary of EX-1 to EX-5 is \$115,129. The weighted salary mid-point for DM-1 to DM-4 is \$212,186; for DM-2 to DM-4 is \$225,348; and, for DM-3 to DM-4 is \$248,150.³¹
51. The EX/DM salary increases relied on do not include an at-risk pay component.³² Past Quadrennial Commissions appear to have taken average at-risk pay into account

²⁸ Executive Group Rates of Pay and Population Count, April 2004 to April 2007, prepared by Executive Management Policies Directorate, Canada Public Service Agency, July 19, 2007. See Appendix 11.

Regarding negotiated annual increases in the federal public service, see Appendix 12.

²⁹ For EX salary ranges, see Appendix 11.

³⁰ Income Information Regarding Deputy Ministers, At-risk Pay for DMs, Deputy Ministers (DM-3) Summary of Benefits, prepared by Senior Personnel and Special Projects, Privy Council Office, October 2007. See Appendix 13.

³¹ 2007-08 Executive and Deputy Minister Salary Ranges, prepared by the Department of Justice. See Appendix 14.

³² 2007 – 2008 Performance Management Program Guidelines, Senior Personnel and Special Projects Secretariat, Privy Council Office, November 2007. Page 6 of the *Guidelines* defines “at-risk pay” and “bonus”, the lump-sum awards which are dependent upon performance. See Appendix 15.

in calculating the DM-3 salary mid-point. The Government takes issue with this approach as there are clear distinctions between deputy ministers and superior court judges which make it inappropriate to include at-risk pay in the public sector salary comparator:

- First, deputy ministers are appointed at pleasure; they do not have security of tenure. By contrast, superior court judges have the highest guarantee of security of tenure. Under the Constitution, a superior court judge holds office during good behaviour and may only be removed by the Governor General upon the advice of the Senate and House of Commons.³³ This unequalled security of tenure is one of the undisputed benefits of judicial office, and must be accorded significant weight in making comparisons between judicial and deputy minister compensation.
- Second, while judges' salaries receive automatic indexation on their salaries, deputy ministers do not. The annual Industrial Aggregate adjustment delivers a generous salary increase, and its value in according a real salary increase every year should not be overlooked.
- Third, the at-risk portion of a deputy minister's salary is dependant upon the achievement of specific organization commitments. This amount is a lump sum which is assessed and re-earned annually, and is at-risk. By comparison, superior court judges receive a guaranteed salary which is not dependant upon the attainment of performance objectives.

³³ *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), s. 99. See Appendix 16.

52. In the Government's view, pay dependent upon annual assessed performance should not enter into the comparison. An annual performance pay award is a concept foreign to judicial salaries, since it would be at odds with the principle of judicial independence.
53. Evidence respecting public sector lawyers'³⁴ salaries is also relevant as these lawyers form a significant component of appointments to the Bench. Concerning appointment of federal Government lawyers to the superior courts since 2004, the pre-appointment salary of these judges ranged from between \$92,255 - \$117,620 (Senior Counsel salary range) to \$137,600 - \$167,800 (Chief Legal Counsel salary range).³⁵ To the extent that provincial/territorial Crown lawyers have also been appointed to the Bench, there is significant diversity in these pre-appointment salary ranges. For example, the CC-3 lawyer level in Ontario carries a salary range of \$106,253 to \$174,000, while the Legal Officer 4 level in Alberta carries a salary range of \$139,512 to \$153,444.³⁶

B. Private Sector Compensation Trends

54. As indicated in the Introduction, the 2003 Commission expressed frustration with the lack of reliable data in relation to private sector legal income. In response to these

³⁴ Public sector lawyers refer to those lawyers' in government service. It includes prosecutors, legal aid lawyers, a member of a tribunal, and a complaints resolution manager. It does not include provincial court judges. (See Table 8, Appointees Not in Private Practice, Predominate Area of Practice, April 1, 2004 to March 31, 2007 at Appendix 7.)

³⁵ LA Law Group Salary Ranges, prepared by the Department of Justice based on information on Treasury Board Secretariat website (http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/RatesofPay/rapaceexunem2_e.asp#_Toc476385565). See Appendix 17.

³⁶ Provincial and Territorial Lawyer Salary Ranges, prepared by the Department of Justice. See Appendix 18.

concerns, significant efforts by the principal parties have been made to improve the quality of the data and information upon which the Commission will be asked to make its recommendations.

55. The Government is confident that this data will provide the Commission with a resource upon which to rely in undertaking its analysis and making its recommendations. A description of the Master File Database created by CRA officials to provide a broad and reliable data set is attached at Appendix 19³⁷.
56. Past Quadrennial Commissions adopted a methodology to analyze income tax data of private practice lawyers that identified as the comparison point the 75th percentile income of self-employed lawyers in major cities between the ages of 44 and 56, after excluding lawyers earning below a specified amount. (The “income threshold” used by Drouin Commission excluded lawyers earning less than \$50,000, while the McLennan Commission excluded lawyers earning less than \$60,000).
57. The Government does not agree with this approach because the resulting comparator does not reflect the true pool from which appointments are made. It has the effect of distorting the true picture of judicial appointments by ignoring two out of three appointees who tend to have considerably lower incomes. As Annex A to this submission illustrates, after all the “filters” (selection criteria) are applied, the

³⁷ *Masterfile on Incomes of Self-employed Lawyers, Terms, Definitions, Methodology and Documentation*, Canada Revenue Agency. See Appendix 19.

methodology in effect isolates as the comparator group the top one-twelfth of lawyers in the pool (one-quarter of the top one-third of the true pool).

58. A critical issue for the Government is the choice of methodology for assessing the relevant comparative information.
59. The Government has retained the actuary and compensation expert, Haripaul Pannu, who supported the Government in its 2003 submission. Mr. Pannu reviewed the data CRA produced on the incomes of self-employed lawyers for 2002 through 2005 and satisfied himself of the internal consistency and reliability of the data for use in the context of judicial salaries. His report is attached as Appendix 10.³⁸
60. Mr. Pannu sets out a methodology to analyze the lawyer income data in relation to the true pool from which judges are drawn. This methodology is to be preferred because it reflects the diversity of all self-employed legal professionals who are appointed to the Bench. It avoids distorting the true picture of appointments because it does not assume that all appointees are high income earners between the ages of 44 to 56 practicing law in Canada's largest cities.
61. Mr. Pannu analyzes the whole range of incomes. By contrast, the 2003 Commission did not look at lawyers earning \$60,000 or less. In the Government's view, incomes of lawyers earning less than \$60,000 should not be excluded from the

³⁸ *Report on the Earnings of Self-employed Lawyers for the Department of Justice Canada in Preparation for the 2007 Judicial Compensation and Benefits Commission, Haripaul Pannu, (Pannu Report).*

analysis because there is no evidence to support the assumption that a lawyer earning at this level could not be appointed to the Bench.

62. Mr. Pannu also considers the full age range of appointees to the Bench, consistent with the demographic information which demonstrated that appointees have ranged in age from 41 to 65 years. Mr. Pannu assigns lawyers' incomes in a given age bracket (e.g. 44 to 48) a weight in the analysis that corresponds to the proportion of lawyers appointed from that age bracket to the Bench (an age-weighted analysis).
 63. Mr. Pannu states that income at the 65th and 75th percentiles are commonly relied on by compensation professionals as a benchmark for an attractive compensation level.
 64. Following this methodology, 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 at the 75th percentile. The judicial salary, as it stood in 2005, of \$237,400 compares favourably to these benchmarks.
 65. As stated earlier, the judicial annuity has a value of 24.6% of salary. Thus the 2005 judicial salary of \$237,400 would correspond to a self-employed income of \$295,777. In sum, Government submits that the current judicial salary and benefits is clearly attractive in relation to compensation trends in the private sector for self-employed lawyers.
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(d) Any other objective criteria that the Commission considers relevant

66. As previously mentioned, it is important to recognize that judicial candidates should not be regarded as being exclusively, or even primarily, motivated by considerations of salary. In assessing the “adequacy” of the judicial salary, the Government submits that the Commission must weigh in the balance both the tangible and intangible benefits of judicial office.
67. A survey undertaken in Great Britain confirms the importance of considerations other than salary in the decision to seek judicial office. The survey, entitled “Survey of Pre-appointment Earnings of Recently Appointed Judges and Earnings of Experienced Barristers”, canvassed the factors which influenced acceptance of judicial appointment.³⁹ The three most common reasons judges listed as to why they had accepted a judicial appointment were: the challenge/to achieve ambitions; interesting work/greater job satisfaction; and to contribute to society and the development of the law.
68. There is little question that Canadian judges, like their British counterparts are equally motivated by non-compensatory incentives, including a desire to make a contribution to the public life of the nation, a wish to attain what many see as the natural culmination of a career in law and to shape its development, an unparalleled

³⁹ Office of Manpower Economics, *Survey of Pre-appointment Earnings of Recently Appointed Judges and Earnings of Experienced Barristers*, Report by Ipsos Public Affairs, June 2005. (<http://www.ome.uk.com/review.cfm?body=4&page=2&all#documents>). See Appendix 20.

security of tenure, and the recognition, status and quality of life associated with service on the Bench.

PART V - GOVERNMENT PROPOSAL

69. After considering all the factors under subsection 26(1.1) of the *Judges Act*, the existing level of salaries and benefits, coupled with automatic annual adjustments, are more than adequate. That said, it is reasonable for judges to expect that salaries should increase at a level generally consistent with overall compensation trends that is roughly proportional to overall compensation trends in the federal public sector. As explained, these increases reflect the priority that the Government accords to the public interest in attracting and retaining professionals of the highest capacity and caliber who choose to work in the public sector and contribute to the public interest.
70. Over the past four years, the annual salary increases to the EX/DM community, exclusive of performance pay, have ranged between 2.1% to 3.0%, for an average annual increase of 2.5%. Accordingly, the Government proposes an increase of 4.9% in the first year (2008-09), inclusive of indexation under the Industrial Aggregate (projected to be 2.4% on April 1, 2008).
71. An increase of 4.9% will raise a *puisne* judge salary to \$264,300. This will result in a 48% increase since the first Quadrennial Commission cycle began. The Government further proposes the continuation of annual indexing in the following three years (2009-10 to 2011-12). The Industrial Aggregate annual adjustments are projected to be 2.6% in 2009-10, 2.8% in 2010-11 and 3.0% in 2011-12.⁴⁰ The

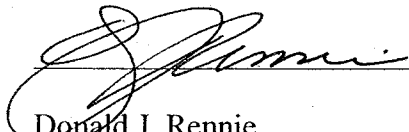
⁴⁰ Industrial Aggregate projections provided by the Office of the Chief Actuary, Office of the Superintendent of Financial Institutions.

overall cost of the Government proposal from the years 2008-09 to 2011-12 is approximately \$29.6 million.

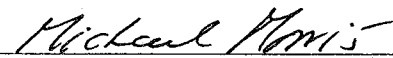
PART VI

ALL OF WHICH is respectfully submitted.

DATED at Ottawa, this 14th day of December, 2007.



Donald J. Rennie



Michael Morris

Counsel for the Attorney General of Canada

ANNEX A

Critique of Use of the 75th Percentile Incomes of Private Practice Lawyers Aged 44-56 from Major Cities with a \$60K Low-Income Threshold as a Reference Point for Establishing Judicial Salaries

Past Quadrennial Commissions have considered a methodology which uses as a reference point the 75th percentile income among private practice lawyers between the ages of 44 and 56 in major cities, after having applied a low-income threshold (most recently \$60,000). While the rationale behind this approach may appear reasonable at first glance, it has the net effect of ignoring the circumstances of almost 70% of appointees. And the one-third who remain in the reference group have considerably higher incomes than those who have been filtered out by this procedure.

According to statistics provided by the Office of the Commissioner for Federal Judicial Affairs⁴¹, 78% of judges appointed between April 2004 and the end of March 2007 came from private practice, 67% were in the 44-56 age category, and 64% lived in one of Canada's ten largest Census Metropolitan Areas. However, only 33% satisfied all three criteria; 67% fell outside this focus. Furthermore, as each successive criterion is applied, the income distribution of the remaining group shifts up.

The data generated by CRA⁴² on the incomes of self-employed lawyers clearly demonstrate that those between the ages of 44 and 56 have higher incomes than those outside that range. Lawyers in large cities also tend to have much higher incomes.

In sum, the methodology that focuses on the incomes of self-employed lawyers between 44 and 56 from large cities shrinks the comparator group to the 33% of lawyers who have the highest incomes and ignores the 67% of appointments that are made outside that ambit. This methodology obviously distorts the true picture of judicial appointments by ignoring two out of three appointees who tend to have considerably lower incomes. Finally, by taking the 75th percentile of the rarified one-third of lawyers remaining after all the selection criteria are applied, the methodology in effect refers to the top one-twelfth of lawyers of the pool (one-quarter of the top one-third of the true pool).

⁴¹ See Appendix 7.

⁴² CRA Data Tables, prepared by the Canada Revenue Agency. See Appendix 21.