REPLY SUBMISSION OF
THE GOVERNMENT OF CANADA

TO

THE JUDICIAL COMPENSATION
AND BENEFITS COMMISSION

I. INTRODUCTION

1. The following submissions are made primarily in reply to the joint submissions of the Canadian Superior Courts Judges Association and the Canadian Judicial Council ("Joint Submission"), in addition to such other submissions as are specifically referred to herein. As set out in paragraph 43 of the Government's main submission, the parties agreed to deal with income trends in the private sector in their respective reply submissions. The parties have subsequently agreed, subject to the permission of the Commission, to deal with this issue in a second reply submission to be provided to the Commission on January 30, 2004. In its January 30th reply, the Government will also provide its response to the submission of Mssrs. Poitras and Bisson, of which it became aware on January 21, 2004.

II. JUDICIAL SALARIES

(a) General

2. The salary increase which the judiciary seeks cannot be supported by reference to any statutory criteria or appropriate comparator. The proposed increase of $37,280 (approximately 17.21%) in the first year alone, even apart from the additional proposal for unspecified annual increases, cannot in any sense be said to be necessary to maintain the adequacy of judicial salaries, nor can it be justified in relation to any of the statutory criteria that inform the overarching standard of "adequacy".

3. The Office of the Superintendent for Financial Institutions ("OSFI") has provided its opinion as to the cost of the salary proposals made by the Government and in the Joint Submission. OSFI has determined that the Government would incur an additional liability of $35.3 million over the next four years under its salary proposal. In comparison, the salary increase proposed in the Joint Submission would cost $150.4 million over the next four years.[1]

[1] Salary Cost Table (see Appendix 1 to the Government's Reply Submission) and Salary Costs based on the Appellate Judges' Submission (see Appendix 2 to the Government's Reply Submission). The tables were prepared by the Department of Justice based on the costing provided by OSFI. OSFI has reviewed and approved the tables.

(b) Prevailing Economic Conditions

4. The judicial salary proposal cannot be supported by reference to prevailing economic conditions in Canada, the cost of living, or the overall economic and current financial position of the federal government.

5. The Government's salary proposal of 4.48 per cent in the first year, inclusive of indexation under the Industrial Aggregate, reflects the economic and financial conditions referenced in the November 2003 Economic and Fiscal Update presented to the House of Commons Standing Committee on Finance.[2] It is in light of that information that the Government's main submission points out that increases in judicial salaries will occur in the context of difficult policy choices as to new spending, reduction of the national debt, and tax relief. The economic and fiscal position of the Government is sound but necessitates both caution and restraint if the priorities of the Canadian public are to be achieved.

6. Subsequent events underscore the need for caution. The Government's December 16, 2003 announcement of cost control measures and expenditure review demonstrates the gravity of the Government's concerns and commitment to restraint across the federal public sector.[3] Among other measures, the Government announced immediate freezes on the size of the public service, major capital projects and reclassifications. The Expenditure Review Committee will conduct an extensive and rigorous review of all the Government's spending before the 2005 budget.

7. As recently noted by the Honourable Ralph Goodale, Minister of Finance,

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[2] *The Economic and Fiscal Update: Presentation by the Honourable John Manley to the House of Commons Standing Committee on Finance*, delivered on November 3, 2003 (see Appendix 4 to the Government's Main Submission).

[3] *Government Takes Action to Control Spending*, Press Release issued jointly by Treasury Board of Canada Secretariat and the Department of Finance, on December 16, 2003 (see Appendix 3 to the Government's Reply Submission).

> "…[In 2003] Canada was hit by an unprecedented series of economic blows, ranging from the severe acute respiratory syndrome outbreak and a major power blackout in Ontario to forest fires in British Columbia, a hurricane in Atlantic Canada and mad cow disease on the Prairies.
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> … The rising Canadian dollar contributed to a decline in the volume of our exports over the past four quarters.
>
> These developments cut heavily into Canada's growth in 2003. Private sector forecasters now believe our economy grew by 1.6 per cent last year, which is about half as much as originally forecast in the 2003 budget.
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> . . .
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> On balance, private sector forecasters predict that Canada is likely to achieve economic growth of close to 3 per cent this year. While that is an improvement over 2003, it is still below the 3.5 per cent forecast in the last budget. And, when combined with the weak 2003 economy, it leaves us with the sizeable gap relative to Canada's potential performance. Until this ground is regained, it has a direct impact upon our fiscal situation.[4]

8. In other words, economic growth rates have slowed in 2003 by comparison to years 1997 to 2002. It would take a sustained growth rate of more than 5 per cent in 2004 for Canada to make up all the ground lost recently.[5] In light of these economic developments, the Government faces fiscal pressures not just in 2004 but also over the next two to three years. Although for 2003-04, the federal government forecast a surplus of $2.3 billion, up to $2 billion will be provided to the provinces and territories for health care. This would leave approximately $300 million in contingency funding between now and the end of the fiscal year which is considered to be a small cushion.[6]

(c) Role in ensuring judicial independence

9. Judicial salaries are clearly more than adequate to satisfy the requirements of judicial independence. Since 1999, the federally appointed judiciary has enjoyed a salary increase of 21.6%. *Puisne* judges salaries have increased from $178,100 to $216,600.

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[4] Speech by the Honourable Ralph Goodale, Minister of Finance, to the Board of Trade of Metropolitan Montreal, delivered on January 13, 2004 ("January 13, 2004 Speech") (see Appendix 4 to the Government's Reply Submission).

[5] Speech by the Honourable Ralph Goodale, Minister of Finance, to the Regina & District Chamber of Commerce at the launch of pre-budget consultations for 2004, delivered on January 12, 2004 (see Appendix 5 to the Government's Reply Submission).

[6] January 13, 2004 Speech, *supra*, note 4.

(d) Other Objective Criteria

10. An important point of clarification is required in terms of the method relied on by the judiciary in developing the proposal of a 17.21% pay increase. The Joint Submission suggests that the Drouin Commission relied for its recommendation on a specific formula for calculating the "midpoint of compensation for DM-3s."[7] It recommends that this Commission adopt that approach. While the Drouin Commission clearly considered this as a possible approach, it did not, in fact, base its recommendation on such a calculation. The Drouin Commission recommended an increase of 11.2% in the first year to $198,000 (inclusive of statutory indexing). If the Drouin Commission had relied on the product of the formula set out in Appendix "A" to the Joint Submission, it would have recommended a 14.3% salary increase to $203,686.

11. As stated in the Government's Main Submission, the Drouin Commission's salary recommendations were intended to ensure that judges' salaries maintain a relatively consistent relationship with overall compensation trends in the federal public sector , including salaries of DM-3s. The Government's salary proposal to this Commission would be effective in achieving that continued objective.[8]

(i) Public Sector Comparison - at-risk pay

12. The Government reiterates the position taken before the Drouin Commission that, in comparing the salaries of DM-3s and judges, it is inappropriate to consider the at-risk pay available to DM-3s.[9] At-risk pay is an amount that Deputy Ministers "re-earn" in each year based on the achievement of specific organizational commitments during a particular

[7] Appendix "A" to the Joint Submission, paras. 3-5.
[8] See Trends in Judges and DM-3 Salaries 1998-99 to 2003-04, prepared by the Department of Justice (Appendix 11 to the Government's Main Submission).
[9] The Government's Main Submission, para. 37.

performance cycle.[10] It is a lump-sum payment, approved by the Governor-in-Council, which does not increase an individual's base salary.

13. At-risk pay cannot be divorced from the overall system of risk and reward inherent in the Deputy Minister position. In accepting a Deputy Minister appointment, an individual assumes the risk that poor performance may lead to termination of the individual's appointment,[11] in addition to non-payment of at-risk pay. The corresponding reward for successful performance is the opportunity to earn at-risk pay.

14. This is in distinct contrast to judicial office. Assessing and linking compensation to a judge's individual performance is a concept foreign to the judicial role and antithetical to the concept of judicial independence.

15. On assuming judicial office, a judge immediately benefits from a level of security of tenure and financial security not enjoyed by any other public office holder in Canada. Subject to the requirements of good behaviour, judges are answerable to no other person or influence, not even their Chief Justices. Such security is undoubtedly a significant factor for the majority of judges who are appointed from the private sector, and who leave behind the risk and stresses inherent in the practice of law.

16. The adequacy of judicial remuneration should not be assessed based on the variable standard of average at-risk pay which is dependent on the efforts of ten individuals, i.e., DM-3s, who are members of the executive branch of government. If reference is to be had to DM-3s' remuneration, it should be to a standard that does not vary with the performance of particular individuals, i.e., the midpoint of the salary range.

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[10] *Performance Management Program – Guidelines for Deputy Ministers and Associate Deputy Ministers*; *Performance Management Program: Deputy Minister – Ongoing Commitments*; and *Deputy Minister Performance Agreements: Corporate Priorities for the Public Service of Canada (2003-2004*), prepared by the Privy Council Office (see Appendix 6 to the Government's Reply Submission).

[11] In these circumstances, a transitional arrangement is usually agreed upon, leading possibly to another appointment better suited to the individual's talents, resignation to pursue other career opportunities, or retirement.

III. SUPERNUMERARY STATUS

17. The Government regrets that the Canadian Superior Courts Judges Association ("Association") and Council have found it necessary to submit, in paragraphs 14-18 of their Joint Submission, that the Government failed to respond in a complete or timely fashion to the Drouin Commission recommendations.

18. The Government has, in fact, demonstrated its full commitment to the Commission process and will continue to do so.

19. The Government accepted without qualification 20 of the 22 recommendations which the Drouin Commission made and acted promptly to bring those recommendations before Parliament, where it successfully supported their implementation through the necessary amendments to the *Judges Act.*

20. The Government also provided a reasonable justification for a modification to the Drouin Commission's recommendation with respect to representational costs. Payment to judicial representatives was promptly made following implementation of the necessary statutory change.

21. The only recommendation not immediately implemented was Recommendation 8. The rationale for this decision was explained in the Government's Response to the Drouin Report in December 2000, which stated:

> As discussed, the Commission itself has identified the need for better information gathering with respect to the contribution of supernumerary judges to the workload of the courts. In the Government's view, this should be one element of the broader study that we have proposed be undertaken <u>in preparation for the next quadrennial Commission</u>. This would also provide an opportunity for appropriate consultation with provincial and territorial governments in shaping federal government proposals as they relate to supernumerary judges. <u>Those governments would also have the opportunity to make their views known before the next Commission.</u> [emphasis added]

22. A careful reading shows that the Government expressly indicated that the consultations would be undertaken with the intent of bringing this issue to this Commission. It was recognized at the time of the Response that the *Mackin* decision,[12] released in February 2002, would establish important constitutional parameters in terms of any changes to supernumerary status. Accordingly, all governments – provincial, territorial and federal – would need to consider carefully the implications of that decision for their own courts before informed consultations could be undertaken.

23. In addition, it bears noting that the Drouin Commission recommended that the Canadian Judicial Council ("Council") "actively collect relevant information in this area with a view to making it available for future quadrennial reviews". This information was also necessary to ensure a fully informed discussion with respect to the implications of Recommendation 8. The Council forwarded correspondence to the Minister of Justice concerning the workload of supernumerary judges in October 2002. Consultations with the provinces and territories were completed in early 2003.

24. In addition to provincial and territorial considerations, the Government was also required to consider how Recommendation 8 would be factored into the proposed comprehensive judicial annuity study. While supernumerary status is not technically determined in relation to annuity entitlements, it constitutes an important element in judicial retirement planning. As indicated in the Government's Submission, in the late Spring 2003, the Government, has agreed to forgo the comprehensive study.

25. It was following this decision, and in light of the totality of the information derived from the various consultations, that the Government advised the judiciary of its intention to implement the Drouin Commission's supernumerary recommendation as part of the necessary package of *Judges Act* amendments which would follow this Commission's Report.

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[12] *Mackin* v. *New Brunswick (Minister of Finance); Rice* v. *New Brunswick*, [2002] 1 S.C.R. 405.

26. It is also worth noting that on October 22, 2003, the Judiciary for the first time raised its expectation of early implementation. In subsequent discussions, judicial representatives were advised that, in light of the Government's overall legislative agenda, the Government was not prepared to proceed with the immediate introduction of a single amendment to the *Judges Act*. Rather the Government will proceed to implement Recommendation 8 as a part of the legislative package which will follow the Government's Response to this Commission.

IV. OTHER ISSUES

(a) Incidental Allowances

27. The proposal for increases to incidental allowances cannot be supported.[13] The judges received a 100% increase in the incidental allowance, from $2,500 to $5,000, effective April 2000. The Drouin Commission accepted the judicial proposal on the basis that the increase was to "better reflect the cost of goods in today's marketplace".

28. The judges' proposal for an additional $1,000 in each of 2004 and 2006 represents a further increase of 20% in 2004 and 16.7% in 2006. This would far outstrip any possible increase in the costs of the goods related to judicial office. Moreover, provision of the kinds of materials and tools referred to in the Joint Submission is first and foremost the responsibility of the provinces and territories in the administration of the courts and administration of justice. There is no justification for transferring such additional cost to the Federal Government.

[13] The Joint Submission's proposal to increase the incidental allowance would cost an additional $6.7 million over four years.

(b) Removal Allowances

(i) Extension of Time to Sell the Former Residence

29. The Joint Submission requests that the Removal Allowance Order be amended to provide for more than one extension in the 6-month time period for a judge to sell his or her residence upon relocation.

30. The Order provides for reimbursement of the following:

(a) moving and travel expenses;
(b) interest on loans, i.e., bridge financing;
(c) home sale assistance;
(d) maintenance expenses; and
(e) normal expenses incurred in the purchase and sale of a residence.[14]

31. The Government submits that the Removal Allowance Order currently provides adequate and appropriate flexibility to permit judges to sell their former residence within a reasonable period of time.[15] In the ordinary course, the Order provides six months during which the former home should be sold. Where the residence remains unsold as a result of unfavourable conditions

[14] "Moving and travel expenses" permits the judge six months from the "trigger event" (e.g., appointment) in which to complete the move to the new home. All moving expenses are reimbursed.

"Interest on loans ("bridge financing")" permits the judge to be reimbursed for the interest cost of bridge financing – when a loan is secured against the equity in the former home to provide the down payment on a new home – for a period of six months from the date that the bridge financing is first extended.

Where the judge's house is sold for less than the fair market value, "home sale assistance" permits the judge to obtain reimbursement of up to 10% of the difference between the sale price of the home and its fair market value.

"Maintenance expenses" allows reimbursement for mortgage interest payments, insurance, property taxes, and heating on the former residence for a period of up to six months from the date the judge vacates the residence.

"Normal expenses relating to the purchase and sale of a residence" covers the normal types of expenses a judge could incur in the course of the purchase and sale of a residence including: travel expenses for house hunting trips at the new location; legal fees for the purchase and sale; penalties relating to mortgage discharge or lease cancellation; land transfer tax; costs of transporting and storing household effects; and, any other reasonable expenses incurred in the sale or purchase of the residence. There is no time limitation on these expenses.

[15] See Appendix "C" to the Joint Submission.

in the real estate market, pursuant to subsection 3(2) of the Removal Allowance Order, the Governor in Council has the discretion to grant "an additional period" to carry out the sale. Guidelines issued by the Office of the Commissioner for Federal Judicial Affairs and approved by the Minister of Justice, which administers the Removal Allowance Order. The Guidelines indicate that in the absence of unusual circumstance, any additional extension will be limited to one additional year.[16]

32. The Removal Allowance Order is intended to limit the personal costs to the judge of necessary relocation to assume judicial office. It is not, however, intended to insulate a judge from any and all circumstances that may result in a sale of a residence at a price less than satisfactory to the judge. What the judges are proposing is essentially a potentially unlimited period of time during which the public will bear the cost of a judge's inability to sell a property at a price that is satisfactory to the judge. This is a clearly unreasonable expectation in light of the considerable costs which could be incurred.

33. The Order already provides a generous level of assistance – both in terms of costs specifically related to the move and to the sale of the original residence as well as in terms of significant additional expenses which may be claimed until the judge's move is finalized. For example, the judge is in "travel status" until the move is complete, meaning that he or she is entitled to reimbursement for expenses such as meals hotels and incidental expenses, as well as the cost of travel (for example, by air, rail or automobile) to and from his or her residence. Even the current extension period of up to one year can result in considerable additional cost.

34. The six-month period, together with the possibility of one additional extension, provides reasonable protection against losses due to precipitous sales, while providing a reasonable incentive to ensure that the former residence is sold in a timely fashion and that the cost to the public is circumscribed. To accede to the Joint Submission request that "additional periods" be available to complete the sale of the former residence will reduce the incentive to expedite the

[16] *Guidelines Concerning Relocation Expenses Under the Judges Act*, prepared by the Office of Commissioner for Federal Judicial Affairs, July 1995 (see Appendix 7 to the Government's Reply Submission).

sale of the home and place the full brunt of an unfavourable real estate market on the Government. This cannot be justified, particularly given the other generous benefits to help offset poor real estate conditions.

(ii) Relocation Expenses Within Two Years of Retirement

35. The Joint Submission requests that judges be reimbursed for relocation expenses incurred within two years prior to but in anticipation of retirement.

36. Paragraphs 40(c) and (e) of the *Judges Act* provide that judges of the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court, the Tax Court of Canada and the Territorial superior courts are entitled to be reimbursed for the cost of relocation within two years following retirement. This reflects the fact that judges of these courts come from across Canada and in taking office are most often required to relocate from their community. With the exception of those who sit on the Territorial superior courts, these judges are statutorily required to reside in Ottawa. Judges who sit on the Territorial superior courts have sometimes been appointed from southern jurisdictions due to the small population in the Territories. The removal allowance provides an incentive for those judges to accept an appointment on the understanding that they will be able to relocate upon retirement.

37. The Joint Submission proposes that this entitlement be modified to allow a judge to be reimbursed for the cost of such relocation within two years either before or after retirement. This would permit judges to structure their affairs so as to relocate in anticipation of retirement.

38. The Government would not oppose this proposal provided that two conditions are met. The first is that implementation of the proposal should not conflict with the statutory residency requirements which apply to the judges who benefit from this entitlement. A judge who takes advantage of this early relocation opportunity must ensure that he or she continues to fulfill the statutory residency obligations.

39. Secondly, such an amendment to the current entitlement should not result in any additional costs to the public. The removal entitlement should be one time only. For instance, following the example in paragraphs 91 and 92 of the Joint Submission, where Justice Jones is reimbursed for removal expenses to a new home in Toronto purchased in 2004 in anticipation of retirement, she should not be entitled to seek reimbursement for any additional cost of moving from her interim apartment to Toronto upon retirement in 2006.

40. Furthermore, any additional travel and living costs which might result from a judge's choice to relocate early should not be reimbursable. In the example above, Justice Jones should not be considered on "travel status" during the two-year period that her new residence is being maintained.

41. From a practical perspective, the two-year rule may create difficulties for the judge. For example, a judge may plan to take retirement on a particular date, perhaps the first date of eligibility, but subsequently have a change of mind and wish to continue serving. Consideration would need to be given to whether such a judge would be required to repay the relocation allowance, and what, if any, other administrative implications there might be to this proposal.

(iii) Relocation Expenses for All Superior Court Judges

42. The submission of Mr. Justice Wright proposes that the entitlement to post- retirement removal allowance, currently provided to members of the Supreme Court of Canada, Federal Court of Appeal, Federal Court and Tax Court, and northern judges, be extended to all superior court judges. In the Government's view, such a change is not warranted.

43. The purpose of the removal allowance is referred to above. The removal allowance applies to Supreme Court of Canada, Federal Court of Appeal, Federal Court and Tax Court of Canada judges because they are all statutorily required to reside in Ottawa. In the case of judges in the north, it reflects the fact that sometimes, due to the small population of those jurisdictions, judges have been appointed from southern jurisdictions. Providing assistance to allow a judge to

relocate post-retirement reduces the disincentive of such residency requirements. As such, it may be seen as intended to assist in attracting outstanding candidates to these courts.

44. The majority of federally appointed judges are not subject to such statutory residency requirements. Moreover, provision of such a post retirement relocation entitlement to all superior court judges to any place in Canada to which the judge wishes to reside would be represent an inordinate additional cost to the public and would not be reasonable.[17]

(c) Resident Labrador judge's allowance

45. The Joint Submission proposes that the superior court judge resident in Labrador be entitled to receive the Northern Allowance currently provided to the judges of the northern Territories. Firstly, as a point of clarification, the Isolated Post Directive was replaced, effective April 1, 2003, by the Isolated Post and Government Housing Directive ("IPD").[18] Reference to the updated IPD was provided to the representatives of the judiciary on October 31, 2003. As a result of apparent reliance on the earlier version of the IPD, the figures quoted in Appendix "D" of the Joint Submission are incorrect.

46. The express policy underlying the statutory provision of the Northern Allowance to judges of the territorial superior courts is to compensate for "the higher cost of living in the territories". The Government recognizes that the situation of the judge living in Labrador, in particular its significant isolation, is similar to that of the judges in the Northern territories. It is that degree of isolation which arguably distinguishes this location from that of any other judicial place of residence outside the Territories.

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[17] Wayne Osborne, Director, Office of the Commissioner for Federal Judicial Affairs, advised that $100,000 per judge per relocation is used for budgetary estimate purposes.

[18] *Isolated Post and Government Housing Directive* (see Appendix 8 to the Government's Reply Submission). See Appendix 9 to the Government's Reply Submission for a comparison of the benefits under the former directive with the benefits under the new Isolated Posts and Government Housing Directive. The comparison has been prepared by the National Joint Council.

47. However, it is important to note that the establishment of compensation differentials based on regional disparities in cost of living is a complex issue which must be considered carefully in the specific context of any proposal. Should the Commission consider making a favourable recommendation with respect to this proposal, the Government submits that such recommendation should be expressly confined to this specific circumstance.

(d) Representational Allowance for Senior Regional Judges in Ontario

48. The Joint Submission proposes the establishment of a representational allowance for the Senior Regional Judges in Ontario.

49. The Government does not dispute that the administrative responsibilities of the senior regional judges in Ontario are significant. However, this does not in and of itself justify the need for representational allowances for each of the eight Senior Regional Judges. Moreover, the broader implications of providing such a benefit to judges of only one province must be considered.

50. The express purpose of the representational allowance is to help defray the costs of the Chief Justices and Associate Chief Justices in formally representing the Court at Court related functions. As these functions relate to the management and administration of the courts in the provinces under section 91 of the *Constitution Act, 1867*, this allowance in effect constitutes a federal contribution in an area that is primarily the responsibility of the provinces and territories. It is important to note that these expenses are in addition to those paid where judges attend court meetings, educational seminars, etc. In the latter case, expenses are paid under the ordinary travel or conference expense provisions.

51. The Chief Justice and Associate Chief Justice of the Superior Court of Ontario are each entitled to $10,000 as a representational allowance for a total annual cost of $20,000. Providing a $5,000 representational allowance to each of the eight senior regional judges, for a total of

$40,000, would represent a 200% increase in expenses related to the representational duties of the Ontario courts.

52. The broader cost implications of such a proposal must also be considered. Various other jurisdictions provide for delegation of the administrative duties and responsibilities of Chief Justices to other members of the Court, although Ontario to date is the only province that has created a specific office.[19] While it is clearly the prerogative of the provinces and territories to structure their courts as they see fit, it is not reasonable to expect the Federal Government to assume responsibility for all the representational costs that might arise from that choice.

(e) Retirement Age of the Supreme Court of Canada Judges

53. The Joint Submission proposes that Supreme Court of Canada judges be permitted to retire after ten years of service, irrespective of age.

54. In 1998, the *Judges Act* was amended to permit the justices of the Supreme Court of Canada ("SCC") to retire with a full annuity upon reaching the age of 65 with ten years service. This amendment followed in the wake of the Scott Commission Report (1996) which recommended that SCC justices be eligible to retire on ten years service with the Court, with no age restriction. The Government accepted the reduced years of service on the basis of the unique nature of judicial service on the SCC, in terms of the depth of responsibility and the significant workload of the Court. However, it maintained the age requirement on the ground that this was consistent with the overall judicial annuity scheme. SCC judges are also entitled to retire earlier than 65 if they satisfy the modified Rule of 80 which was also implemented in 1998.[20]

55. It is now proposed that the age 65 requirement for eligibility to retire from the Supreme Court of Canada also be removed. The Government is not prepared to support this proposal.

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[19] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 14(2); *Court of Appeal Act*, R.S.B.C. 1996, c. 77, ss. 11 and 12; and *Judicature Act*, R.S.N.L. 1990, c. J-4, s. 49(1).

[20] "Modified Rule of 80" refers to the situation where a judge has at least 15 years of service and his or her age plus years of service total no less than 80.

Age related criteria remain an element of current eligibility to obtain an annuity, with two exceptions: 1) retirement with a permanent disability (section 42(c)) and 2) retirement that is conducive to the better administration of justice or is in the national interest (section 42(b)). The question whether it is appropriate to "de-link" age from entitlement to an annuity is not isolated to the specific circumstances of SCC judges but has broader policy implications. As such it ought not to be dealt with except in the context of a comprehensive review of the judicial annuity scheme, which the judiciary has indicated should not be undertaken – and which the Government has indicated it will not seek – at this time.

V. APPELLATE JUDGES' SUBMISSION – SALARY DIFFERENTIAL FOR APPELLATE JUDGES

56. Those appellate judges who support the submission, i.e., 74 out of 142 appellate judges, have proposed that court of appeal judges receive a higher salary than trial judges. The position of the Government with respect to the proposal for establishment of a separate higher level of pay for appellate judges remains as stated before the Drouin Commission. Such a differential is neither necessary nor justified in light of the criteria prescribed by section 26(1.1) of the *Judges Act*. There are no objective indicators to suggest that such a differential is necessary either to secure the independence of an appellate judge or to attract outstanding candidates for appointments to courts of appeal.

57. The judges' arguments themselves demonstrate the change that such a differential might engender in the judicial culture and context. It is by no means generally accepted that the work of appellate judges is either more significant or more demanding than that of their colleagues on the trial benches. It is well understood that the skills and strengths of a good trial judge may very well differ from those of an appellate judge. Some judges are better suited to the important functions of fact-finding and assessing credibility of witnesses than to the more academic and collegial functions of an appeal court judge. This does not, however, mean that one function is more or less important than the other. In fact, many of the most important judicial skills must be exercised by both types of judges. It is worth noting that in some jurisdictions, trial judges are

regularly called upon to perform appellate functions, either as *ex officio* members of their Court of Appeal, as in Alberta, or as members of an intermediate appeal body, such as the Divisional Court in Ontario.

58. Nor can it be said that the exigencies and stresses of individual decision-making at the trial level, based on complex and difficult fact situations, are less taxing than the demands faced by appellate judges. Although trial and appellate judges may differ in responsibilities in a number of ways, they perform functions of equal value and which are equally onerous.

59. The appellate judges' proposal is premised on the assumption that hierarchy alone is sufficient reason to establish the differential. The argument relies on the importance of the appeal process to public confidence and to the principles of *stare decisis* as justification for additional remuneration. It also suggests that such additional remuneration would motivate trial judges to seek elevation to higher office.

60. The Commission should not recommend a salary differential in the absence of objective evidence that appellate judicial salaries are inadequate. At a minimum, there should be some clear indicators to suggest that the work of appellate judges is more onerous or of greater value than that of a trial judge, based on a careful assessment of the responsibilities of both appellate and trial judges.

61. The appellate judges' submission relies primarily on an argument that hierarchy should determine compensation. In support, it refers to hierarchy as being a common justification for salary differentials in the public and private sectors. However, public and private sector workplaces – and the processes to establish remuneration in these workplaces – are fundamentally different from the judicial context.

62. Differential salaries within an organization are typically driven by market forces, such as the demand for labour in particular job classifications and the supply of labour available to meet this demand. As a result, it is not always the case that salaries rise as one ascends the hierarchy

in an organization. However, to the extent that this does happen, it happens because higher salaries are required to recruit and retain employees with the required qualifications for higher-level positions.

63. The appellate judges' submission also relies on salary differences between provincial/territorial court judges and federally appointed judges, and between justices of the peace and provincial/territorial court judges. It would be inappropriate, however, to base a recommendation upon the existence of these differentials, as the salaries for these judges and judicial officers are neither established nor paid for by the federal government and cannot be seen as a part of an accepted hierarchy of federally appointed judges.

64. In terms of federally appointed judges, there are at present only two salary differentials sanctioned by the legislation – between *puisne* judges and chief justices, and between justices of the Supreme Court of Canada and justices of other superior courts. The salary differential is established for Chief Justices in recognition of the judicial management and representative functions they carry out in respect of their courts, in addition to their judging duties. Justices 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.[21]

VI. SUBMISSION OF JUSTICES RICHARD, BROWNE AND VEALE – SALARY LEVEL FOR SENIOR JUDGES IN THE TERRITORIES

65. The Government is not prepared to accede to the proposal by the Senior Judges of the Northern Territories that they receive the same salary as Chief Justices. The fact that these judges perform administrative functions similar to those of Chief Justices is not a sufficient justification for the salary differential. As discussed above, there are other examples of judges who assume these kinds of responsibilities, without additional remuneration. In some cases, these judges are responsible for administering the assignment of a much larger number of judges.

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[21] A cost table illustrating the additional cost under the Government salary proposal and the Judges' salary proposal of the appellate judges' submission is appended for comparative purposes (see *supra*, note 1 and Appendix 2 to the Government's Reply Submission).

It is also noteworthy that the Senior Judges of the Northern Territories already receive a representational allowance to defray those kinds of expenses related to their administrative functions.

66. In broader terms, a decision to change the status of the Senior Judges to that of Chief Justice must be jointly supported by the Federal and Territorial Governments. To date, the Federal Government has not agreed to support such a change.

VII. SUBMISSION OF JUSTICE DESJARDINS – SURVIVOR'S BENEFITS AND THE SINGLE JUDGE

67. Madam Justice Desjardins has proposed that single judges be able "to designate a family member as beneficiary of their share of the survivors' benefits under the *Judges Act*."[22] It is the Government's understanding that this submission is directed specifically at the annuities granted to judges' survivors. However, should Madam Justice Desjardins intend to include a broader range of benefits within her submission, the Government's position, as outlined below, would apply to such additional benefits as well.

68. The need for a coordinated approach to the issue of "single" pension plan members was recognized by the Drouin Commission, which was sympathetic to the same general principle raised by Madam Justice Desjardins at that time. At the same time, the Drouin Commission felt that a change of this nature would have far-reaching implications for many social programs. As a result, the Drouin Commission advised that it was unable to make such a recommendation.

69. In the field of employment and social benefits entitlements, there is a wide range of contexts in which the issues of dependency, interdependency and personal relationships arise. These raise a host of important and complex policy questions. Any government position involving the extension of survivor's benefits to a broader pool of potential beneficiaries would have to be developed in a consistent and coherent fashion across all government departments,

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[22] *Submission Regarding Survivors' Benefits and the Single Judge* by Madam Justice Desjardins, page 6.

taking into consideration the spectrum of benefit plans and populations. Sound policy decisions in this regard cannot be reached by focusing on the judicial context in isolation.

70. A government-wide approach was used in relation to the extension of benefits and obligations to same-sex common-law partners. The result was the *Modernization of Benefits and Obligations Act*,[23] which was introduced in Parliament during the course of the Drouin Commission's proceedings. The Drouin Commission considered Bill C-23 in the context of survivor's benefits under the judicial annuity scheme. However, the scope of the Bill extended broadly to encompass a wide range of legislated benefits. From a policy perspective, such a change could likely not have been made solely in relation to the *Judges Act*.

VIII. COSTS

71. The Joint Submission seeks reimbursement of 80% of the judiciary's representational costs before the Commission.

72. Currently, pursuant to section 26.3 of the *Judges Act*, identified representatives of the judiciary are entitled to 50% of their costs on a solicitor-client basis, as assessed by the Federal Court. This provision was enacted in 2001, following a recommendation from the Drouin Commission that the Government pay 80% of the judiciary's representation costs. In the Government's view, the formula proposed by the Drouin Commission – which is requested again by the judiciary before this Commission – is unreasonable.

73. As noted in the Government's December 2000 Response to the Drouin Report, "it would afford the representatives of the judiciary a largely unchecked discretion in deciding what costs would be incurred for legal counsel, expert witnesses and the like in preparation for a Commission, with the public being held responsible for the payment of the significant and unpredictable expenditures incurred by the judiciary." The judiciary did not challenge the

[23] *Modernization of Benefits and Obligations Act*, S. C. 2000, c. 12 ("Bill C-23").

Government's variance of the Drouin Commission's recommendation.

74. Aside from section. 26.3 of the *Judges Act*, there is no obligation – constitutional or otherwise – to fund the participation of the judiciary before the Commission. In the Government's view, 50% of assessed costs on a solicitor-client basis provides the judiciary with ample assistance to defray its representational costs. The formula provided in section 26.3 of the *Judges Act* provides certainty as to the level of reimbursement, so that the judiciary may plan its representational expenditures in a reasonable and prudent fashion. The formula further ensures that costs are shared equally by the public and the judiciary, the immediate beneficiaries of the Commission's recommendations and benefits.