

**SUBMISSION OF THE GOVERNMENT OF CANADA**  
**TO**  
**THE JUDICIAL COMPENSATION AND BENEFITS COMMISSION**

**I. COMMISSION MANDATE**

1. In 1998, Parliament amended the *Judges Act* to establish a “Quadrennial” Judicial Compensation and Benefits Commission.<sup>1</sup> These amendments were intended to establish an “independent, effective and objective” process for determining judicial compensation, as required by the Supreme Court of Canada in the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (the “*P.E.I. Reference*”).<sup>2</sup>

2. Section 26 of the *Judges Act* provides that the Commission is to inquire into the adequacy of judicial salaries and benefits, and report its recommendations. 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;
- (c) the need to attract outstanding candidates to the judiciary; and
- (d) any other objective criteria that the Commission considers relevant.

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<sup>1</sup> *Judges Act*, R.S.C. 1985, c. J-1, as amended (see Appendix 1).

<sup>2</sup> *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (the “*P.E.I. Reference*”) (see Appendix 2).

3. These criteria provide the analytical framework for the Commission's assessment of the adequacy of judicial salaries and benefits and of the proposals for their alteration. The constitutional principles identified in the *P.E.I. Reference* may assist the Commission in interpreting and applying the statutory criteria. The focus of the inquiry is whether the existing scheme of salaries and benefits is adequate.

## **II. POSITION OF THE GOVERNMENT OF CANADA**

4. The Government of Canada is committed to the principle of judicial independence, which is a foundation of our legal system and of our democracy. All Canadians benefit from having an independent and effective judiciary. Adequate judicial salaries, allowances and annuities preserve judicial independence. They also promote the effectiveness of the judiciary by, among other things, attracting outstanding candidates to judicial positions.

5. Outstanding candidates may be found in the private sector, academia, or government service. They may and do reside in all of the regions of Canada, both in urban and non-urban settings. They are male and female, relatively youthful, or of many years experience. Their previous economic backgrounds and earnings histories are diverse.

6. The Government of Canada is also committed to ensuring that its financial resources are allocated in a prudent and responsible fashion across a wide range of competing government priorities – from health care to public security, from income security programs to national defence.

7. Adequate provision for salaries and benefits of the judiciary is now not only an important priority, but a constitutional imperative. However, what is an adequate judicial salary or benefit must be assessed in the context of the wide range of legitimate and competing demands on the public purse.

8. In the Government's submission, there can be no question that the current scheme of salaries, allowances, annuities and other benefits is sufficient to afford the financial security necessary to ensure judicial independence. Moreover, the existing scheme is sufficient to attract outstanding candidates to the judiciary. In order to ensure that this continues to be the case, the Government is proposing a modest increase in judicial salaries which maintains a reasonable relationship to trends in the federal public service and in the private sector.

9. The Government is also proposing a mechanism for the division of judicial annuities in cases of relationship breakdown, and has accepted Recommendation 8 of the first Quadrennial Commission (the "Drouin" Commission), with regard to supernumerary status.

10. This brief sets out the matters which the Government proposes that the Commission consider in its inquiry into the adequacy of judicial salaries and benefits. Issues and arguments that might be raised by other interested persons will be addressed in the Government's Reply Submission.

### **III. THE FIRST QUADRENNIAL COMMISSION**

11. The Report of the Drouin Commission, issued in May 2000, made 22 recommendations to improve judicial salaries, annuities, allowances and other benefits. Among the recommendations were: an 11.2 per cent increase in the base salary for *puisne* judges in the first year; a \$2,000 increase in each of the following three years, in addition to the existing statutory indexation; increased incidental allowances and northern allowances; introduction of early retirement; and increased flexibility in electing survivor's benefits and life insurance.

12. In its December 2000 Response to the Drouin Commission Report, the Government accepted without qualification 20 of the 22 recommendations. With respect to the judiciary's representational costs before the Commission (Recommendation 22), the Government agreed to pay these costs at a level of 50 per cent, rather than the 80 per cent recommended by the Commission. With respect to the right to elect supernumerary status upon attaining eligibility

for a full pension (Recommendation 8),<sup>3</sup> the Government indicated that it was not prepared to accept the recommendation at that time, without further information and consultation. As explained more fully below, the Government now accepts Recommendation 8.

#### **IV. SALARIES**

13. As noted above, the Drouin Commission determined that an 11.2 per cent increase in the base salary of puisne judges, effective April 1, 2000, with a further increase of \$2,000.00 in each of the following three years, in addition to the existing statutory indexing of such salaries, would result in an adequate salary for those judges.

14. The Commission noted that it had received information from Government that the economy was robust and the financial position of the federal government healthy. From this, it concluded that there was no fiscal constraint that should impact on the ability of Parliament to ensure that the compensation was adequate. This allowed the Commission to recommend without constraint what it felt to be appropriate.<sup>4</sup>

15. Current judicial salaries fully reflect such increases, and continue to be automatically adjusted effective April 1<sup>st</sup> of each year to reflect increases in the Industrial Aggregate Index. As of the 2003 –2004 year, puisne judges' salaries are in the amount of \$216,600.00.

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<sup>3</sup> Judicial Compensation and Benefits Commission Report, May 31, 2000, Section 4.8, pages 77-78 (“Drouin Report”) (see Appendix 3).

<sup>4</sup> Drouin Report, *supra*, page 9 (see Appendix 3).

**(a) Prevailing economic conditions in Canada and current financial position of the federal government**

16. The Commission is, of course, required to consider, pursuant to subsection 26(1.1) of the *Judges Act*, the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government.

17. The Economic and Fiscal Update presented to the House of Commons Standing Committee on Finance on November 3, 2003 by the Minister of Finance sets out the Government of Canada's assessment of the state of the Canadian economy, and the current and future financial position of the federal government.<sup>5</sup> It notes that, in general, Canada's economic fundamentals remain strong and the economy is well placed to show sustained growth over the medium term.

18. Private sector economists are forecasting average real economic growth slightly over three per cent per year over the next four years (2004-2008).<sup>6</sup> That would be about the same pace as that recorded, on average, in the previous four years. Inflation is expected to remain low over the next five years.

19. While fiscal surpluses are anticipated to 2008-2009, no planning surplus is predicted until 2008-2009. Planning surplus refers to the amount available to fund any and all new government priorities and unexpected liabilities, based on current information.

20. This absence of a planning surplus means that any increase in judicial compensation in excess of the rate of inflation would be one of many claims on Government which could not be accommodated without offsetting actions elsewhere. This is in contrast to the fiscal

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<sup>5</sup> *The Economic & 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).

<sup>6</sup> Letter from Jeremy Rudin, General Director, Economic and Fiscal Policy Branch, Department of Finance, dated December 11, 2003 (see Appendix 5).

circumstances of the Government at the time of the Drouin Commission, when a fiscal planning surplus of \$2 billion for 1999-2000 and \$5.5 billion for 2000-2001 had been identified.

21. The average of the September private sector forecasts for inflation in the Consumer Price Index is 2.8% for 2003, 1.7% for 2004, 1.9% for 2005 and 1.9% for 2006–2008. Since 1990, the Industrial Aggregate, to which judges salaries are indexed, has slightly outpaced the rate of CPI inflation, so that indexation to this measure should protect purchasing power over a number of years. Reference to the Cost of Living does not, therefore, support the proposition that existing arrangements regarding judicial salaries are inadequate.

22. In the above circumstances, there is a fiscal constraint, which, in the Federal Government's submission, the Commission must consider in its deliberations. As Chief Justice Lamer recognized in the *P.E.I. Reference*, the allocation of public resources is an inherently political matter: see paras. 142-145 and 176. 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.

**(b) Role of financial security of the judiciary in ensuring judicial independence**

23. In determining the role of financial security in ensuring judicial independence, the Commission should be guided by the approach taken by the Supreme Court of Canada in the *P.E.I. Reference*, in particular paras. 131-135. The Chief Justice identifies three components of financial security, two of which relate to process.<sup>7</sup> The third component is substantive: judicial salaries may not fall below an acceptable minimum level. The reasoning of the Court is set out at para. 193:

I have no doubt that the Constitution protects judicial salaries from falling below an acceptable minimum level. The reason it does is for financial security to protect the judiciary from political interference through economic manipulation, and to thereby ensure public confidence

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<sup>7</sup> The requirement of an independent, objective and effective commission, and the avoidance of negotiations between the judiciary and the executive.

in the administration of justice. If salaries are too low, there is always the danger, however speculative, that members of the judiciary could be tempted to adjudicate cases in a particular way in order to secure a higher salary from the executive or the legislature or to receive benefits from one of the litigants...<sup>8</sup>

In the submission of the Federal Government, it is clear that the current judicial salary is far removed from the minimum level at which a need to protect the judiciary from political interference through economic manipulation would be relevant. The current salary of the federally appointed judiciary is significantly above the level at which such a need might be perceived to arise. Indeed, the automatic indexing of such salaries to the Industrial Aggregate offers a substantial protection against the erosion of judicial salaries to such unacceptable levels.

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

24. There can be no doubt that outstanding candidates continue to be appointed to the federal judiciary. Many more candidates apply than are selected. Appointees who are not already judges are chosen from the list of candidates described as recommended or highly recommended by Judicial Appointments Advisory Committees, established by the Minister of Justice.

25. By way of illustration, from December 1999 to June 2003, 1,322 applications were received.<sup>9</sup> Of these, 537 candidates were either recommended or highly recommended by the Advisory Committees. Ultimately, 120 were appointed to the Bench. The ratio of applications to appointments was therefore in excess of 11 candidates for every appointment, and the ratio of recommended or highly recommended applicants to appointments was in excess of four candidates per appointment. This compares to a ratio of 8.5 candidates per appointment and more than three recommended or highly recommended candidates for every appointment in the January 1, 1989 to November 30, 1999 period.<sup>10</sup>

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<sup>8</sup> *P.E.I. Reference, supra*, para. 193 (see Appendix 1).

<sup>9</sup> Letter from the Office of the Commissioner of Judicial Affairs, dated June 24, 2003 (see Appendix 6).

<sup>10</sup> Candidates for Judicial Appointments, 1989-1999, prepared by the Secretariat to the Advisory Committees on Judicial Appointments (see Appendix 7).

26. Candidates for appointment to the Bench should not be regarded as being exclusively, or even primarily, motivated by considerations of salary. A number of other considerations may be equally compelling, such as the desire to serve the public and to make a contribution to society, or the wish to attain what many see as the natural culmination of a career in the law. Security of tenure and the attractions of a generous retirement annuity, together with the recognition and status accorded to judges and the quality of life associated with service on the bench, are also significant considerations.

27. Nor can it be said that applications originate exclusively or primarily from the minority of members of the Bar associated with the largest national law firms, who are commonly understood to earn in the highest percentiles of lawyers' incomes. In reality, the population of applicants for appointment is quite broad based. Of 364 appointments between January 1, 1997 and November 14, 2003, 252 came from private practice, and 66 from government service. Seven were academics, four from legal aid clinics and three from corporate legal departments.<sup>11</sup> Only 18 appointees practiced with firms of more than 60 lawyers. Forty-five were from firms of between 41 and 60 lawyers, and 36 from firms of 25 to 40 lawyers. One hundred and fifty-two appointees practiced with firms of 24 or fewer lawyers, among whom 75 had practiced in firms of five or fewer lawyers.

28. Among those in private practice, figures provided by the Office of the Commissioner for Federal Judicial Affairs indicate that 46 were engaged in family/matrimonial law as their predominant area of practice at the date of appointment. Thirty-nine engaged in criminal/quasi criminal law, 38 civil litigation, 24 administrative law and 22 corporate/commercial law.

29. The major urban centers of Toronto, Montreal, Vancouver, Ottawa, Halifax, Calgary, Edmonton and Winnipeg accounted for 189 of the 364 appointments during the period, or approximately 52 per cent. One hundred and four appointments, or approximately 29 per cent,

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<sup>11</sup> Letter from the Office of the Commissioner of Judicial Affairs, dated December 3, 2003 with Tables (see Appendix 8).



were from outside Canada's urban centers, with the balance of 71 appointments, or some 19 per cent being from the smaller Canadian cities.

30. A significant proportion of appointees appear to come from the traditionally less highly paid areas of legal practice, from either non-urban or smaller urban centers, and from mid-sized to small law firms, where earnings on average may be reasonably anticipated to be in the lower ranges. Thus, it is very difficult to find appropriate comparisons between judicial remuneration and earnings in the private sector. Indeed, the proposition that high levels of salary are necessary to attract outstanding candidates is itself far from self-evident.

31. One objective of the Government is to achieve a federally appointed bench that is more reflective of Canadian society as a whole. Candidates from a wealth of varied backgrounds and geographical locations, and no doubt, from equally varied economic backgrounds have been attracted to the judiciary. A central question for this Commission is whether existing salary arrangements for judges are adequate, in light of the factors contained in subsection 26(1.1) of the *Judges Act*. Given the wide variety of backgrounds of the current judiciary, it is of little assistance to compare judicial salaries with the higher percentiles of earnings in the legal profession. The question is whether outstanding candidates are being attracted in sufficient numbers to preserve judicial independence and ensure an effective judiciary on an ongoing basis. In the submission of the federal Government, the answer to this question is a clear yes.

**(d) Any other objective criteria that the Commission considers relevant**

32. The legislation invites the Commission to consider other criteria, so long as the criteria are relevant to the adequacy of judicial salaries and they are objective. The historical challenge for past Judicial Compensation Commissions, including the Drouin Commission, has been to find appropriate comparators in light of the unique functions and constitutional status of the judiciary. As a result, many Commissions have resorted to consideration of compensation trends in both the public and private sector.

**(i) Trends in the public sector**

33. In the public sector, the mid-point of the DM-3 salary range has at times been considered as a rough benchmark.

34. DM-3s are the most senior deputy ministers in the federal government, save for the Clerk of the Privy Council and the Deputy Minister of Finance, who belong to the recently implemented DM-4 category. However, application of the DM-3 range is itself quite limited. Only 10 deputy ministers of the 60 in the federal government are in the DM-3 category.<sup>12</sup>

35. It is submitted that the DM-3 range is in fact a relatively poor comparator for the purpose of establishing the adequacy of judicial salaries. While it may be said that the DM-3 range and mid-point reflect "...what the market place expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges",<sup>13</sup> the inquiry does not end there. The fact is that there are very clear distinctions between the situations of the two groups.

36. Unlike judges, DM-3s do not have security of tenure. Instead, they are appointed at pleasure.

37. Judges' salaries are automatically indexed, while those of Deputy Ministers are not. In addition, a significant proportion of the salary of a deputy minister is dependant upon the achievement of specific organizational commitments. This amount is a lump sum, which is assessed and re-earned annually, and is at risk.<sup>14</sup> This treatment is antithetical to that accorded judges, with regard to whose financial security there is a constitutional protection.

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<sup>12</sup> Deputy Minister Salaries and Benefits, information prepared by Senior Personnel Secretariat of the Privy Council Office (see Appendix 9).

<sup>13</sup> *Report and Recommendations of the 1992 Commission on Judges' Salaries and Benefits*, page 11 (see Appendix 10).

<sup>14</sup> Trends in Judges and DM-3 Salaries, 1998-99 to 2003-04, prepared by the Department of Justice (see Appendix 11).

38. As indicated above, 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. Current judicial salaries are clearly sufficient to satisfy the requirements of financial security of the judiciary. Outstanding candidates continue to apply for appointment to the bench in numbers many times greater than available judicial positions.

39. Overall compensation trends in the federal public sector provide an indicator of the financial capacity and priorities of the Government. In the executive and deputy minister ranks of the federal public service, annual salary increases during the past three years have been 3.1 per cent (2001-02), 2.3 per cent (2002-03) and 2.5 per cent (2003-04). Overall, in the federal public service, negotiated annual increases during the same period of time have been in the order of 2.5 per cent to 2.7 per cent.<sup>15</sup>

40. Since implementation of the Drouin Commission recommendations, judicial salaries have in fact maintained a rough equivalence to the DM-3 mid-point, as set out in Appendix 9. The Government is of the view that increases to judicial salaries should continue to be consistent with overall compensation trends in the federal public sector, including DM-3s.

41. Accordingly the Government proposes an increase of 4.48 per cent in the first year (2004-05), inclusive of indexation under the Industrial Aggregate. An increase of 4.48 per cent will bring judges' salaries to \$226,300.

42. The Government recognizes that the \$2,000 annual increment recommended by the Drouin Commission has been effective in maintaining the rough equivalency between judicial and DM-3 salaries during the period between Quadrennial Commissions. The Government is therefore proposing that this adjustment mechanism should be continued, and that judicial salaries should be further increased in each year of the following three years (2005-06, 2006-07,

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<sup>15</sup> Trends in Judges and DM-3 Salaries, *supra* (see Appendix 11).

2007-08) by \$2,000 in addition to annual indexing. The overall cost of the Government's proposal from the years 2004-05 to 2007-08 is approximately \$34.8 million.

**(ii) Trends in the private sector – earnings in the legal profession**

43. The parties have worked towards being able to provide the Commission with updated information with regard to income trends in the private sector, and submissions concerning any such trends. The data continues to be refined and it is the expectation of the parties that they will be in a position to provide this material at the time of delivery of their reply submissions to the Commission.

**V. ANNUITIES**

**(a) Comprehensive Review**

44. The current judicial annuity scheme is unique in Canada. Various incremental reforms to the judicial annuity scheme have been made throughout the last two decades to adapt to evolving pension policy and judicial demographics.

45. Before the Drouin Commission, the judiciary advanced proposals for a broad range of enhancements to the current annuity scheme. In response to what was seen as significant judicial dissatisfaction with the current scheme, the Government proposed that the fundamental assumptions and policies underlying the scheme should be the subject of a comprehensive review in light of evolving pension policy and changing judicial demographics.

46. In its Report, the Drouin Commission recommended a small number of changes to the annuity scheme, all of which were subsequently accepted and implemented by Government. However, in accepting those recommendations, the Government reiterated its intention to proceed with a comprehensive review of the annuity scheme.

47. Representatives of the judiciary have advised that as a result of the most recent amendments, there is general satisfaction with the current scheme. Both the Canadian Judicial Council and the Canadian Association of Superior Court Judges have formally resolved not to seek further improvements to the annuity scheme for the foreseeable future.

48. In light of the stated satisfaction of the judiciary with the existing scheme, the Government will not be seeking a comprehensive review at this time. If the judiciary's position in this regard changes in the future, the Government will revisit the need to carry out a comprehensive review.

**(b) Division of Annuity on Relationship Breakdown**

49. There is a common understanding between the judiciary and the Government that one discrete element of the judicial annuity scheme should be revised at this time. The *Judges Act* is the only federal sector pension arrangement that does not provide a mechanism to divide retirement assets upon breakdown of a conjugal relationship.

50. Most federal pension plans provide for division of pension assets, with the federal *Pension Benefits Division Act* (“PBDA”) setting out the method by which this division is achieved. Under the PBDA, a spouse or common-law partner may receive up to 50% of the present lump-sum value of benefits earned by a plan member during the relationship. Alternatively, if the plan member has not satisfied a minimum service requirement (i.e. has not “vested”), the spouse or partner can receive up to 50% of the member’s contributions to the plan during the relationship.

51. The Department of Justice commissioned Mr. David Crane of HayGroup consultants to recommend changes to the *Judges Act* and related legislation to facilitate division of the judicial annuity upon conjugal breakdown.<sup>16</sup> Based upon the outline provided in the report, it is the

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<sup>16</sup> Report to the Department of Justice on Division of Judicial Annuity Following Conjugal Breakdown, prepared by David Crane of HayGroup, December 5, 2003 (“HayGroup Report”) (see Appendix 13).

Government's view that the mechanisms and procedures that operate under the PBDA could also be applied to division of the judicial annuity. The PBDA would ensure that division of the judicial annuity is handled in accordance with the same principles and practices as the division of any other retirement income provided by the Federal Government.

52. Both the PBDA and retirement income plans in the private sector require a vesting period and a benefit formula to determine how much pension has accrued during the conjugal relationship. The judicial annuity currently does not have an explicit vesting period or benefit accrual formula. However, the *Judges Act* does provide a pro rata Early Retirement annuity to a judge who retires after attaining age 55 and at least 10 years of judicial office. This provision implicitly defines both a vesting period and a benefit accrual formula.

53. The implied vesting and accrued benefit formula defined within the early retirement provision of the *Judges Act* could be adapted to the purpose of judicial annuity division within the discipline of the PBDA. Specifically:

- Benefits accrued during the conjugal relationship could be defined in terms of the pro rata portion of a full judicial annuity equal to 2/3rds of salary established using the "Modified Rule of 80".
- Vesting for the purposes of deciding whether to share either the judge's contributions or the actuarial present value of benefits accrued during the relationship could be deemed to be attainment of age 55 and completion of ten years of judicial office.
- Lump sum payments to a separated spouse could be treated for tax purposes in a manner consistent with the *Income Tax Act* by deeming all or part of the payment (defined by a formula) to be a payment from a registered pension plan.<sup>17</sup>

54. The Government therefore proposes that the scope of the PBDA be extended to include the *Judges Act* as generally outlined above, with the necessary consequential amendments to the *Judges Act* and its regulations.

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<sup>17</sup> HayGroup Report, *supra*, page 3 (see Appendix 13).

55. Ultimately, this amendment to the judicial annuity scheme would allow the federally-appointed judiciary to be treated in a manner consistent with most non-judge pension plan members, as well as most provincially-appointed judges. Further, creating this mechanism to facilitate division of the judicial annuity would protect the interests of the judges' spouses and common-law partners, and would assist in the resolution of family disputes involving judges.

## **VI. SUPERNUMERARY STATUS**

56. Currently, federally appointed judges can elect supernumerary status upon reaching either the age of 65 with 15 years' service or the age of 70 with ten years' service. As noted above, the Drouin Commission recommended that judges be entitled to elect supernumerary status at the time they become eligible to retire with a full annuity, and to continue that status for a maximum of 10 years (Recommendation 8).<sup>18</sup> This in effect means that a judge could elect supernumerary status when the judge has at least 15 years of service and their age plus years of service total no less than 80.

57. In its Response to the recommendations of the first Quadrennial Commission, the Federal Government indicated that it was not prepared to accept Recommendation 8 for three reasons: its implications for the provincial and territorial governments in terms of the administration of justice; its relationship to judicial remuneration was yet to be determined in the case of *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, [2002] 1 S.C.R. 405; and the contribution of supernumerary judges to the workload of the courts was not fully understood. The Government proposed that the question of better information gathering with respect to the contribution of supernumerary judges to the workload of the courts be one element of a broader study to be undertaken in preparation for this current Commission.

58. The Government has since had the opportunity to consult with the provinces and territories as to the impact of Recommendation 8. In addition, it has received information as to

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<sup>18</sup> Drouin Report, *supra*, pages 77-78 (Section 4.8) (see Appendix 3).

the commonly understood workload of supernumerary judges. Further, the Supreme Court of Canada has rendered its decision in *Mackin and Rice*, which held that the ability to elect supernumerary status constitutes an economic benefit to judges. The Court stated that proposals to eliminate supernumerary status must, therefore, be referred to a judicial compensation and benefits commission.

59. In light of this information, the Government has advised the judiciary that it is prepared to accept Recommendation 8. The Government intends to make the necessary amendments to implement Recommendation 8 as part of an overall package of *Judges Act* amendments following the Government's response to this Commission's Report.

## **VII. CONCLUSION**

60. The Government respectfully requests that the Commission consider the matters set out above and make recommendations consistent with these submissions.

61. The Government seeks to support the Commission in its work and will make every effort to provide any additional information or advice which the Commission considers would be of assistance.