



Department of Justice
Canada

Ministère de la Justice
Canada

Response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission

May 29, 2006

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On May 31, 2004, the 2003 Judicial Compensation and Benefits Commission delivered its Report as required by the *Judges Act*. In its Response on November 30, 2004, the former Government accepted all of the Commission's recommendations, except one which it accepted in modified form.¹ Bill C-51, which was introduced on May 20, 2005, would have implemented the Response, died on the order paper when the House of Commons was dissolved on November 29, 2005.

On assuming office in early February 2006, the Minister of Justice, on behalf of the new Government, made it a priority to review the Commission Report and Recommendations in light of the constitutional principles and the statutory criteria that govern the process, discussed more fully below. The Government has accepted the recommendation of the Minister of Justice to move quickly to accept all of the Commission's recommendations as proposed in Bill C-51, with the exception of the salary proposal.² This Response will explain the reasons for the Government's decision to depart from the Commission recommendation that judicial salaries increase by 10.8% effective April 1 2004. It will also provide the rationale for the proposed alternative increase of 7.25% effective April 1, 2004.

1. The Constitutional Framework of Judicial Compensation and Benefits

The establishment of judicial compensation is governed by constitutional principles designed to ensure public confidence in the independence and impartiality of the judiciary. At the federal level, s. 100 of the Constitution requires that Parliament, and not the Executive alone, establish judicial compensation and benefits following full and public consideration and debate.³

In addition to the protections of s. 100, the Supreme Court of Canada has established a constitutional requirement for an "independent, objective and effective" commission whose purpose is to depoliticize the process of judicial remuneration and thereby preserve judicial independence.⁴ This applies to both federal and provincial judicial appointments. These judicial compensation commissions make non-binding recommendations to governments, and governments must publicly respond within a reasonable period of time. A government which rejects or modifies a recommendation must provide a justification for the departure that meets the standard of rationality.

¹ The November 30, 2004 *Response* can be found at www.canada.justice.gc.ca/en/dept/pub/jcbrj/index.html. The Commission's recommendations are attached as Annex 1. The full Commission Report, entitled *Judicial Compensation and Benefits Commission Report*, May 31, 2004 ("*Report*") can be found on the Commission's web site at www.quadcom.gc.ca.

² The Government accepts Recommendation 16 relating to judicial representational costs, as modified by and for the same reasons as provided by the former Government, which may be found in its November 30, 2004 *Response*, under the heading "Recommendation 16, Representational Costs".

³ *Constitution Act, 1867*, s. 100.

⁴ *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3 (*P.E.I. Judges Reference*), para. 131.

In July 2005, the Supreme Court of Canada clarified the standard against which the reasonableness of a government or legislative response to a commission report will be assessed. In *Bodner v. Alberta*,⁵ the Court clearly acknowledged that decisions about the allocation of public resources belong to legislatures and to governments. Governments are entitled to reject or modify Commission recommendations provided:

1. They have articulated a legitimate reason for doing so.
2. The government's reasons rely upon a reasonable factual foundation.
3. It can be shown that, viewed globally and with deference to the government's opinion, the commission process has been respected and the purposes of the commission – namely, preserving judicial independence and depoliticizing the setting of judicial remuneration – have been achieved.

Governments and legislatures are required to take the requisite steps to implement commission recommendations, as modified if necessary, with “due diligence and reasonable dispatch”.⁶

In 1998, the *Judges Act* was amended to provide for a Judicial Compensation and Benefits Commission to be established every four years to inquire into the adequacy of judicial compensation and benefits.⁷ The *Judges Act* establishes express criteria which govern the Commission's consideration as well as that of the Government and Parliament in determining “adequacy” of compensation:⁸

- a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and 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.

The Commission is required to Report with recommendations to the Minister of Justice within nine months of commencement. The Minister must table the Report in Parliament and must respond within six months of receipt.⁹ As indicated, the former Government responded in November, 2004, but did not table a Bill until May 2005. The Bill did not proceed beyond First Reading and subsequently died on the Order Paper.

⁵ [2005] 2 S.C.R. 286.

⁶ *P.E.I. Judges Reference*, para. 179.

⁷ *Judges Act*, R.S. 1985, c. J-1, as amended (the “*Judges Act*”), s. 26(1).

⁸ *Ibid.*, s. 26(1.1).

⁹ *Ibid.*, ss. 26(2), (6).

2. Response of the Present Government

The Government is fully committed to the important constitutional principles that govern the establishment of judicial compensation. We recognize that significant time has already passed since the Commission Report and recommendations, and that the integrity and effectiveness of the Commission process require that we take the necessary steps to move this matter forward to Parliament as quickly as possible to complete the 2003 Commission process.

At the same time, the Government is firmly of the view that we have a responsibility to consider the Report and Recommendations of the Commission in light of the mandate and priorities upon which we have been elected. We have undertaken this review with all reasonable dispatch, and in light of the applicable legal standards including the statutory criteria established by Parliament. As we shall discuss, we have given particular consideration to the first and third criteria, which are: “1. the prevailing economic conditions in Canada, including the cost of living, and the overall economic and financial position of the federal government” and “3. the need to attract outstanding candidates to the judiciary”.

Before turning to a detailed elaboration of our response with respect to the Commission salary recommendation, some preliminary observations with respect to the Commission Report are warranted.¹⁰ The Commission is to be congratulated for its efforts to encourage public participation and to engage in a full and transparent process of deliberation.¹¹ The Commission has clearly conducted a thoughtful consideration of the relevant issues and produced a comprehensive and thorough report based on the evidence and arguments presented. This is critical to ensuring public confidence in the independence and objectivity of the process.

¹⁰ The Commission was established on September 1, 2003. As required by the *Judges Act*, the judiciary and the Government each nominated one member of the Commission. Those two members nominated a third member to serve as Chair of the Commission. The three members, Chairman Roderick McLennan, Q.C., and Commissioners Gretta Chambers, C.C., O.Q., and Earl Cherniak, Q.C., were appointed by the Governor in Council to hold office for a term of four years on good behaviour. (www.quadcom.gc.ca).

The Commission sought and received written submissions, supported by expert and other evidence, from a broad range of interested persons, including representatives of the judiciary and the Government. Two days of public hearings were held in February 2004. The Commission heard submissions from representatives of the Government, the Canadian Judicial Council and the Canadian Superior Court Judges Association, and all others who chose to make oral submissions. In addition to the expert evidence provided in the various submissions, the Commission retained its own consultants to assist its deliberations.

¹¹ The Commission published a public notice inviting written submissions in 48 newspapers in Canada having national, regional and local coverage. The text of the public notice and the list of newspapers is found at Appendix 4 of the Commission Report, <http://www.quadcom.gc.ca/rpt/appendix4.html>. A list of submissions from organizations and individuals is found at Appendix 5 of the Commission Report, <http://www.quadcom.gc.ca/rpt/appendix5.html>.

It is also clear that the Commission undertook a detailed assessment and analysis of data and information available with respect to the relevant comparators for establishing the overall adequacy of judicial compensation. This has been a perennial challenge with which all previous federal judicial compensation commissions have grappled. As successive commissions and governments have discovered, it is as much an art as a science. There is no readily available mathematical formula to apply and a high degree of well-informed judgement is ultimately involved.

As we shall discuss, ultimately the Commission formed its judgement based on compensation methodology involving a number of assumptions in relation to available comparators. It is the relative weight that the Commission gave to the various factors -- and to one particular assumption that appears to have been especially persuasive in its ultimate salary recommendation -- with which this Government does not fully accord. In essence we have arrived at a different judgement as to the manner in which various considerations should be weighed. We now turn to provide a more specific explanation for our response.

3. Salary Proposals

(a) *The Commission's Recommendation*

The Commission recommended a 10.8% salary increase effective April 1, 2004, inclusive of statutory indexing after considering submissions from the Government and the judiciary.¹² The proposed salary of a *puisne*¹³ judge would rise from \$216,600 to \$240,000 as of April 1, 2004. There would be equivalent increases for Chief Justices and judges of the Supreme Court of Canada.¹⁴ Statutory indexing would continue effective April 1 in each of the following years.

¹² Recommendation 1: The Commission recommends that the salary of *puisne* judges be established as follows. Effective April 1, 2004, \$240,000, inclusive of statutory indexing on that date, and for the next three years: \$240,000 plus cumulative statutory indexing effective April 1 of each of those years. ("Statutory indexing": under the *Judges Act*, judicial salaries are indexed to the Industrial Aggregate Index.)

¹³ "*puisne*" refers to a judge who does not hold the office of Chief Justice.

¹⁴ Recommendation 2: The Commission recommends that the salaries of the justices of the Supreme Court of Canada and the chief justices and associate chief justices should be set as of April 1, 2004, and inclusive of statutory indexing, at the following levels:

Supreme Court of Canada:	
Chief Justice of Canada	\$308,400
Justices	\$285,600
Federal Court and Tax Court of Canada:	
Chief Justices	\$263,000
Associate Chief Justices	\$263,000
Appeal Courts, Superior Courts and Courts of Queen's Bench:	
Chief Justices	\$263,000
Associate Chief Justices	\$263,000

(b) *Economic Conditions and the Overall Economic and Financial Position of the Government*

The Commission's analysis of this criterion is found at pages 9 to 11 of its Report. The Commission's overall approach to this factor is summarized as follows: "[w]e interpret this direction as obliging us to consider whether the state of economic affairs in Canada would or should inhibit or restrain us from making the recommendations we would otherwise consider appropriate".¹⁵

We do not accept such a narrow characterization of this criterion. In particular, we do not agree that paragraph 26(1.1)(a) is simply directed at establishing whether the Government has sufficient funds to pay for whatever amount the Commission might otherwise think is appropriate. Rather, the Government's economic and financial position is a key contextual element in the determination of the "adequacy" of judicial compensation. The Commission is required to undertake its analysis in light of the overall state of the Government's finances and in view of the other economic and social priorities of the Government. In other words, all of the factors must be considered in an integrated fashion, rather than isolating the economic criterion and applying it only as a negative consideration after a proposed quantum has been otherwise determined.

In its 2006 Budget, the Government identified its key priorities, including measures to enhance accountability, create greater opportunity for Canadians, invest in our families and communities, protect Canadians' security and restore fiscal balance.¹⁶ Among other measures, the Government has committed to reducing the Goods and Services Tax, lowering personal and corporate income taxes, introducing Canada's Universal Child Care Plan, investing in Canada's military, hiring more Royal Canadian Mounted Police officers and working to develop a Patient Wait Times Guarantee.¹⁷

At the same time, and as importantly, the Government is committed to ongoing fiscal responsibility in order to ensure our future economic health and prosperity. Accordingly, we have committed to reducing the national debt by \$3 billion each year, starting in this fiscal year, as well as to reducing growth in federal spending to a more sustainable level. The President of the Treasury Board has been tasked with identifying \$1 billion of savings in 2006-07 and 2007-08 in order to support new and on-going program expenses that are expected to grow by 5.4% in 2006-07 and 4.1% in 2007-08.¹⁸

This is not to deny that the particular nature of the judicial office and function imposes unique considerations in terms of claims on public resources. However the first statutory criterion itself recognizes that legitimate expectations in terms of judicial compensation are conditioned by the fact that judges are paid from the public purse – upon which there are many competing and legitimate demands. Canadians expect that any expenditure

¹⁵ *Report*, p. 9.

¹⁶ Budget 2006 documents can be found at www.fin.gc.ca/budtoce/2006/budliste.html.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

from the public purse should be reasonable and generally proportional to all of these other economic pressures and fiscal priorities. In sum, the Government does not believe that the Commission's salary recommendation pays adequate heed to this reality, as embodied in the first statutory criterion.

(c) *The Need to Attract Outstanding Candidates to the Judiciary*

This Government recognizes that it is in the public interest to attract outstanding candidates to the judiciary and acknowledges that 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. It is because of the unique nature of judicial office that judicial compensation commissions have always faced the challenge of finding appropriate "comparator" positions against which the judicial salary can be assessed. This Commission was no exception, receiving a broad array of information concerning remuneration of private-sector lawyers and senior officials appointed to the federal public service, including all levels of deputy ministers and other Governor-in-Council appointees.

It is noteworthy that this Commission appears to have placed less weight on what had become a more traditional comparator for judicial salaries, that of the mid-point of the Deputy Minister 3 level of senior public servants. And while the Commission was prepared to consider a broader spectrum of the Deputy Minister community (levels 1 through 4), it also took the step of considering the full average of "at-risk" pay in calculating DM salaries.¹⁹ We believe that step was misguided. According the full equivalent of at-risk pay for comparative purposes is in our view completely inconsistent with the unequalled security of tenure which is one of the undisputed benefits of judicial office, even though established for constitutional purposes.

In the Government's view, the Deputy Minister comparator is one that should be accorded significant weight. It bears noting that the financial position of the Government is reflected in part in the salaries it is prepared to pay its most senior employees. The Commission heard evidence that annual salary increases, excluding at-risk pay, in the executive and deputy minister ranks of the public service were in the range of 2.5% to 3.1% in the three years prior to the Report.²⁰ This trend has continued since the publication of the Report, with increases of 2.5%, effective April 1, 2004, and 3.0 per cent, effective April 1, 2005.²¹

The Commission placed greatest analytical weight and emphasis on lawyers in the private-sector – described by the Commission as "perhaps the most important"

¹⁹ The first "quadrennial" Judicial Compensation and Benefits Commission – the 1999 Drouin Commission – also took at-risk pay into consideration.

²⁰ *Report*, p. 26.

²¹ Public Service Human Resources Management Agency of Canada, *News Release*, December 13, 2004, available at http://www.hrma-agrh.gc.ca/media/20041213-nr_e.asp; Public Service Human Resources Management Agency of Canada, *News Release*, June 29, 2005, available at http://www.hrma-agrh.gc.ca/media/20050629-nr_e.asp.

comparator.²² The Commission regarded private sector legal income as critical because most appointees to the bench are drawn from senior lawyers from the Bar.²³ And in considering private sector candidates, the Commission observed:

The rationale, of course, is that it is in the public interest that senior members of the Bar should be attracted to the bench, and senior members of the Bar are, as a general rule, among the highest earners in private practice. While not all the “outstanding” candidates contemplated by s.26(1.1)(c) of the *Judges Act* will be senior lawyers in the higher earning brackets, many will, and they should not be discouraged from applying to the bench because of inadequate compensation.²⁴

The Government agrees with the Commission that private practice lawyer incomes are an important comparator. However, judicial appointments are not made exclusively from the ranks of private-sector lawyers. Fully 27.2% of appointees between January 1, 1997 and March 30, 2004 came from non-private practice settings.²⁵ The Government believes that due account should be given to the fact that a sizeable percentage of appointees are not private practice lawyers.

However, the fact that the Commission has given predominant, almost exclusive weight, to the income of self-employed lawyers is not the primary concern from our perspective. Rather it is apparent that the Commission not only focussed on the higher end of private sector legal incomes, it utilized an even narrower subset of those incomes, drawn from the eight largest urban centers in Canada (Calgary, Edmonton, Montreal, Ottawa, Québec, Toronto, Vancouver, and Winnipeg). The impact of concentrating on this subset of urban lawyers must be considered in light of the fact that it excludes almost half (48.1%) of private practitioners, many undoubtedly as experienced and capable as their urban counterparts. Lawyers from the eight largest urban centers comprised only 51.9% of appointees to the bench between January 1, 1997 and March 30, 2004.²⁶

In explaining its reliance on the income data from urban centers, the Commission observed:

[T]he fact remains that most appointees do come from private practice. It is also fair to say that many appointees do come from the higher-income brackets, and come from those centres where the income for self-employed lawyers is the highest. There will always be lawyers who earn significantly more than the 75th percentile of lawyers’ professional income that we use for this comparator group and, while many in that group may choose not to seek judicial office, many highly qualified persons in that group do accept the financial sacrifice involved, because of the other attractions of judicial life. It is important,

²² *Report*, p. 41.

²³ *Report*, pp. 31-32.

²⁴ *Report*, p. 32.

²⁵ Table 2, *Report*, p. 17.

²⁶ Table 5, *Report*, p. 19.

we believe, to establish a salary level that does not discourage members of that group from considering judicial office.²⁷

The effect of what the Government considers to be undue weight having been given to legal incomes from the urban subset can be seen in the Commission's representation of the resulting data.²⁸ Examining Table 17 in the Commission's Report, which illustrates average income by province, it is notable that the proposed salary of \$240,000 exceeds, in some cases to a significant degree, the 75th percentile of self-employed income in every province with the exception of Alberta and Ontario.²⁹

Moreover, when the value of the judicial annuity (22.5% of salary) is included in the \$240,000, effective April 1, 2004, the real value would be \$294,000, exceeding by a significant degree the 75th percentile for Canada overall and for every province except Alberta and Ontario.³⁰ And the value of the security that is provided by such an annuity entitlement should not be underestimated. 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.

The Government has other concerns about the validity of the methodology and assumptions on which the Commission has relied. In analyzing the income of lawyers in private practice, the Commission used data from the income-tax filings of those who identified themselves to the Canada Revenue Agency as self-employed lawyers, and adopted a compensation methodological approach of using the 75th percentile of overall income. However, contrary to the Government's submission, the Commission also excluded from consideration lawyers who had incomes below \$60,000, on the assumption that they would not be likely candidates for office, and lawyers who were outside the age range of 44-to-56, using the rationale that this is the age group from which the large majority of judicial appointments are made.³¹ The effect of doing so was to introduce a statistical bias into the data in favour of lawyers who earn higher incomes.

In the end, it remains difficult to identify with any degree of certainty the cumulative assumptions that led the Commission to make its salary recommendation. Indeed, while the former Government accepted the salary recommendation of the Commission, it is noteworthy that its November, 2004 Response included a very strong caveat that acceptance of the Commission salary recommendations should not to be taken as a

²⁷ *Report*, pp. 48-49.

²⁸ Table 19, *Report*, p. 48 illustrates incomes at the 75th percentile of legal practitioners in large urban centres.

²⁹ *Report*, p. 46. Note that Table 17 calculates the 75th percentile using the age range of 44-56 and excluding lawyers whose income is below \$60,00 – two methodologies with which the Government takes issue in this Response. If these methodologies are not used, the \$240,000 figure is higher than the 75th percentile in all provinces. Table 17 is attached to this Response as Annex 2. Note that information is not presented for Prince Edward Island or Newfoundland and Labrador.

³⁰ *Report*, pp. 46, 58. Even in Alberta, the 75th percentile is only slightly higher – at \$297,700. The value of the annuity was calculated by the Commission's expert as 22.5% of salary: see *Report*, P. 58.

³¹ *Report*, p. 43.

complete acceptance of all of the assumptions made by the Commission with respect to the comparative analysis undertaken.³²

Ultimately, the present Government accepts that the Commission was required to rely on data that was unsatisfactory from a variety of perspectives, and that it was therefore not unreasonable to rely on private sector income data for comparative purposes. However we are of the view that the Commission put excessive weight on the income of lawyers from the eight urban centers, resulting in an inflated income proposal that is well beyond what is reasonable across Canada.

In reviewing the Commission's salary recommendation and in deciding to modify it, the Government has taken into account its overall economic and financial position and considered all of the various comparators set out by the Commission, including the income of lawyers in private practice and all levels of Deputy Minister. In terms of income from lawyers in private practice, a more reasonable approach in our judgement and one that better accords with all the statutory criteria, including current economic and fiscal considerations, is to consider incomes at the 75th percentile across all provincial centers, urban and rural, as illustrated in Table 17 (Annex 2).

It is also highly relevant that there is no indication that the current judicial salary is a deterrent to high-quality lawyers applying for judicial office. During the period from 1988 to March 2004, the number of recommended and highly recommended candidates for judicial office exceeded the number of candidates appointed by a factor of approximately 3.3:1.³³ In Ontario, where eight positions are currently vacant, there are 36 highly recommended candidates, 114 recommended candidates, and 25 provincial court judges currently qualified for appointment. Similarly, in Alberta, where there are currently 2 vacancies, there are 5 highly recommended candidates, 22 recommended candidates, and 5 provincial court judges qualified for appointment.³⁴ Provided that excellent candidates continue to seek judicial office and that the Canadian public is well served by committed and experienced individuals, the fact that some of the highest paid lawyers, who might be otherwise interested in applying, may not do so due to salary expectations remains entirely a matter of personal choice. It should also be emphasized that compensation is only one in a range of factors for those considering applying for judicial office.

In sum, the Government believes that the Commission's salary recommendation places undue emphasis on the third statutory criterion and overshoots the mark in defining the level of salary increase necessary to ensure outstanding candidates for the judiciary. Instead, the Government is proposing a modified judicial salary proposal for *puisne* judges of \$232,300, or 7.25%, as of April 1, 2004, with statutory indexing to continue

³² *Response*, p. 5.

³³ Table 6, *Report*, p. 21.

³⁴ Information provided by the Office of the Commissioner for Federal Judicial Affairs.

effective April 1 in each of the following years.³⁵ The Chief Justice of Canada, the Justices of the Supreme Court and the Chief Justices of the superior courts would receive a salary that maintains a proportionate relationship with *puisne* judges.³⁶

4. Conclusion

It is ultimately for Parliament and not the Government to decide whether the Commission recommendation, the Government's proposal or some other salary increase is to be established. This remains Parliament's function under s. 100 of the *Constitution Act*, 1867. The Government calls on all parliamentarians to assume and carefully discharge their important constitutional responsibilities in light of the constitutional and statutory principles that are engaged. In the current circumstances in which implementation has been delayed for a number of reasons, however legitimate, it is of critical importance that we move forward with all possible dispatch to complete the 2003 Judicial Compensation and Benefits Commission process, so that planning can begin for the next quadrennial process in September, 2007. We will therefore immediately move to introduce the necessary proposals to amend the *Judges Act* and refer the matter to Committee for immediate consideration. We call on all parties to agree to make this Bill a priority so that our constitutional duty to address this issue with necessary dispatch is honoured. The integrity of the process requires no less.

As the Supreme Court of Canada recognized in *Bodner*³⁷, respect for the integrity of the Commission process is key to ensuring public confidence in the independence and objectiveness of the process, and as a result, confidence in the independence and impartiality of our judiciary. The effectiveness of the Commission is not in our view measured by whether all its recommendations are implemented unchanged, but rather by whether it played a central role in informing the ultimate determination of judicial compensation.

In its deliberations on this matter, the Government has both relied on and responded to the central role played by the Commission in the establishment of judicial compensation. The Commission's work and guidance, informed by the case law and the relevant statutory criteria, has been critical in the Government's deliberations. Even more

³⁵ It is worth noting that the Government's proposed salary, even excluding the value of the annuity, compares favourably with the 75th percentile in most of the provinces, based on the elements of the Commission's methodology that are most favourable to higher salaries.

Supreme Court of Canada:	
Chief Justice of Canada	\$298,500
Justices	\$276,400
Federal Court and Tax Court of Canada:	
Chief Justices	\$254,600
Associate Chief Justices	\$254,600
Appeal Courts, Superior and Supreme Courts and Courts of Queen's Bench:	
Chief Justices	\$254,600
Associate Chief Justices	\$254,600

³⁷ *Bodner*, para. 38 and generally.

importantly, it will be critical to Parliament as it engages in its s. 100 constitutional functions.

The Government looks forward to participating in the consideration of the Commission Report in Parliament and particularly in the Commons Justice and Human Rights Committee in what we anticipate will be an informed and respectful deliberation of the Government's response. This will be an important opportunity for Parliamentarians and the public to hear from the Commissioners and others with respect to the evidence and the analysis that has gone into all of the Commission's recommendations, including the salary proposal. This will enable Canadians to better understand the unique context of judicial office, as well as to more fully appreciate the basis and justification that are ultimately provided for the proposals that are finally accepted and implemented by Parliament.