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GOVERNMENT RESPONSE TO THE 2011 JUDICIAL COMPENSATION AND BENEFITS COMMISSION

Canada

RESPONSE OF THE GOVERNMENT OF CANADA TO THE REPORT OF THE 2011 JUDICIAL COMPENSATION AND BENEFITS COMMISSION

This is the Response of the Government of Canada to the Report of the fourth Judicial Compensation and Benefits Commission, dated May 15, 2012. It is issued pursuant to s. 26(7) of the *Judges Act*.

The Government wishes to thank the Commission members for their commitment to this important public interest process, and for addressing the issues raised before them in a timely manner.

I. Background

The establishment of judicial compensation is governed by constitutional provisions and principles designed to ensure public confidence in the independence and impartiality of the judiciary. At the federal level, s. 100 of the *Constitution Act, 1867* requires that Parliament, rather than the Executive, fix judicial compensation and benefits. Judicial compensation and benefits are established by the *Judges Act.* However, in *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3, the Supreme Court of Canada held that before any changes are made to judicial compensation, the adequacy of judicial compensation must be considered by an "independent, objective and effective" commission.

Section 26(1) of the *Judges Act* provides for the establishment of the Judicial Compensation and Benefits Commission every four years. The Commission's mandate is to inquire into and make recommendations regarding the "adequacy" of judicial compensation and benefits of federally appointed judges.

Section 26(1.1) of the *Judges Act* provides that the adequacy of judicial compensation and benefits is to be considered in light of the following criteria:

(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.

The Commission must report to the Minister of Justice within nine months and the Government must respond publicly to the Commission's report and recommendations within six months of receipt of the Report (s.26(7)). Although Commission recommendations are not binding, the Supreme Court of Canada held in *Bodner v. Alberta*, [2005] 2 S.C.R. 286 that a government that proposes to reject or modify a Commission's recommendations must provide a rational justification for so doing, based on the following three-stage test:

(1) Has the government articulated a legitimate reason for departing from the commission's recommendations?
(2) Do the government's reasons rely upon a reasonable factual foundation? and
(3) Viewed globally, has the commission process been respected and have the purposes of the commission — preserving judicial independence and depoliticizing the setting of judicial remuneration — been achieved?

The current Commission (the "Levitt Commission") was convened on September 1, 2011 and is composed of Brian Levitt (Chair, appointed by the other two nominees), Paul Tellier (Judicial nominee) and Mark Siegel (Government nominee). The Levitt Commission delivered its Report to the Minister of Justice on May 15, 2012 and the Report was tabled in Parliament on May 17, 2012. A list of the Commission's recommendations follows the Response.

By way of summary, the Commission made the following salary and benefits recommendations:

(a) Recommendation 1 and part of Recommendation 3: no salary increases for the judiciary above statutory indexing for the Quadrennial Period (April 1, 2012 to March 31, 2016). (Pursuant to s. 25 of the *Judges Act*, judicial salaries are automatically indexed every April 1 based on the Industrial Aggregate Index ("IAI").).
(b) Recommendations 2 and 6, and part of Recommendation 3: the judges of appellate courts receive a salary differential of 3% above the current judicial salary in order to reflect the importance of their role and functions, and receive a judicial annuity based on that salary, including if the judge later accepts appointment to a trial court.
(c) Recommendations 4 and 5: all retirement benefits currently enjoyed by chief and associate chief justices be extended to the 3 senior northern judges, who perform the functions of chief justices for the territorial courts.
(d) Recommendation 7: the senior family law judge in Ontario receive the same representational allowance of $5000 as all Ontario senior regional judges.

The Commission also made certain recommendations regarding process (Recommendations 8-11).

II. Government Response

The Government accepts the Levitt Commission Recommendations 1, 4, 5 and 7, and those portions of Recommendation 3 that flow from Recommendation 1. The Government does not accept Recommendations 2 and 6, and those portions of Recommendation 3 that flow from Recommendation 2. In terms of the Commission's Recommendations 8-11, while not legally required to respond to process recommendations, the Government will offer some brief comment.

(a) Commission Recommendations 1, 3 (in part), 4, 5 and 7: Salaries and Benefits

The Commission recommendation that statutory indexing pursuant to s. 25 of the *Judges Act* continue during the current quadrennial period of April 1, 2012 to March 31, 2016 would maintain the status quo. The Government is satisfied that in making these recommendations the Commission has demonstrated that due consideration was given to each of the *Judges Act* criteria. Of particular importance is the careful attention the Commission gave to the economic and fiscal considerations advanced by the Government in rejecting the judiciary's proposals for an increase in salary of over 20% over the four years of the quadrennial period.

The Government accepts the Commission's findings that, despite continuing global uncertainty, current economic conditions in Canada appear less grave than they did at the time of the February 2009 Response to the 2007 Commission, when the Government maintained statutory indexing for the quadrennial period of April 1, 2008 to March 31, 2012. Accordingly, the Government accepts the Commission recommendation that statutory indexing pursuant to s. 25 of the *Judges Act* continue during the current quadrennial period of April 1, 2012 to March 31, 2016.

The Government also accepts the Commission's recommendations to extend retirement benefits currently enjoyed by chief and associate chief justices to the three senior northern judges. These judges perform essentially similar functions to those of chief justices and are currently paid the salary of a chief justice. The Commission's recommendation that Ontario's senior family law judge be paid the same representational allowance as all Ontario regional senior judges is also reasonable, in that it recognizes that the senior family law judge performs functions equivalent to those of regional senior judges.

(b) Commission Recommendations 2, 3 (in part) and 6: Court of Appeal Salary Differential

Having considered the Levitt Commission's reasons for recommending an appellate salary differential, the Government respectfully declines to follow Recommendations 2 and 6 and those
portions of Recommendation 3 that flow from Recommendation 2.

Currently, all superior court judges in Canada, including trial judges and appellate judges, are paid the same salary. This excludes Chief Justices, Associate Chief Justices or Senior Judges who assume additional administrative duties as well as judges of the Supreme Court of Canada.

The question of whether judges of appellate courts should be paid more than judges of trial courts raises difficult issues regarding public perception of the quality of justice received from those courts as well as issues of equity and collegiality within the judiciary. It is an issue that has historically been the subject of considerable controversy within the judiciary. Indeed, in submissions before past commissions, judges of the

Courts of Appeal have been divided on whether receiving a higher salary would be in the public interest

A request for a salary differential for appellate judges was received by the 1996 Scott Commission (the last "triennial" commission). It raised serious concerns about the potential impact of such a change on Canada's court system and stated that:

While some interesting points, in substance, in favour of the concept are advanced, a very persuasive case would have to be made to depart from the present regime which assumes that *the burden of judicial office, while different in nature as between the trial and appellate court levels of our courts, nonetheless requires an equivalent discipline and dedication on the part of the judges at both court levels. The cultural impact on the system in the event of such differentiation would have to be very carefully weighed*. *(*Emphasis added.*)*

All four of the Quadrennial Commissions have also considered the issue of a salary differential for trial and appellate judges. The 1999 Drouin Commission considered that there were merits to the arguments made both for and against a differential. However, it concluded that further review and information would be needed to make a recommendation.

The 2003 McLennan Commission refused to recommend a salary differential, finding:

In short, there is no support for the proposition that the current method of compensating *puisne* judges equally, as they have been, has not been an entirely satisfactory arrangement to the functioning of the courts or the availability of suitable candidates to staff this country's courts of appeal. *There is, on the other hand, some evidence that the creation of such a differential would be harmful*. (Emphasis added.*)*

The McLennan Commission also concluded that a differential would not "have any impact whatsoever" on the role of financial security of the judiciary in ensuring judicial independence (*Judges Act*, s. 26(1.1)(b)), or the need to attract outstanding candidates to the judiciary (s.26(1.1)(c)).

The 2007 Block Commission received a request for a differential on behalf of 99 of the 141 judges of Canadian Courts of Appeal, and 18 submissions opposing the request, including the Ontario Superior Court Judges' Association representing close to 300 superior court judges in Ontario. As had been the case before all previous commissions, the Canadian Judicial Council and the Canadian Superior Court Judges Association remained neutral with respect to the appellate differential issue.

The Block Commission accepted the McLennan Commission's conclusion that a salary differential would have no impact on the financial security of appellate judges nor on the need to attract outstanding candidates to the judiciary (s. 26(1.1)(b) and (c) of the *Judges Act*) and found that the issue was whether another objective criterion could be identified

under s. 26(1.1)(d) of the *Judges Act*. The Block Commission also rejected differences in the workload of trial and appellate judges as a basis for a different salary.

The only criterion that the Block Commission found to support a differential was a conclusion that there is a substantive difference in the role and responsibilities of judges who are appointed to appellate courts, in that their essential functions are: (1) correcting injustices or errors made at first instance; and (2) stating the law. The Block Commission did not make any finding that the role and responsibilities of appellate court judges were more onerous or added a greater value to the Canadian public than the role and responsibilities of trial court judges. Indeed, in response to the concern expressed by a large number of trial judges that a differential would be divisive, the Commission stated that it did "not in any way wish to undermine or diminish the value of the important work undertaken by trial judges across the country."

The Government did not implement any of the recommendations of the Block Commission, due to the significant deterioration in economic conditions in Canada and the financial position of the Government that occurred after the Commission delivered its Report.

Prior to receiving submissions from any party, the Levitt Commission issued a notice indicating that in the absence of a change in facts or circumstances, it intended to make the same recommendations as the Block Commission with respect to, *inter alia*, the appellate differential. While the Canadian Judicial Council and Canadian Superior Court Judges Association had remained neutral in all previous Commissions, they now submitted that the Levitt Commission should adopt the recommendations of the Block Commission including the appellate salary differential. However, apart from relying on the Block Commission's consideration of the issue, they made no substantive submissions supporting the merits of the requested recommendation, and did not file any evidence. Unlike prior commissions, no oral or written submissions were made by any court or judge in support of, or opposing, an appellate differential. The Government submitted that it was not open to the Commission to adopt the Block Commission's recommendations without an independent and objective assessment of all relevant factors, and that the parties representing the judiciary had not presented any substantive submissions or evidence for the Government to respond to.

On the basis of the submissions made "before it" (which did not address the merits of an appellate differential) and a review of a summary of the Block Commission transcript (but apparently not the written submissions to that Commission), the Levitt Commission recommended a 3% salary differential between trial and appellate judges. It appears that the Commission accepted the findings of both the McLennan and Block Commissions that a court of appeal differential would not be necessary either to ensure judicial independence or to attract outstanding candidates to the judiciary as required by subsections 26(1.1)(b) and (c) of the *Judges Act*. Its recommendation appears to be based solely upon s. 26(1.1)(d) "any other objective criteria that the Commission considers relevant." The Commission stated that its jurisdiction to recommend an appellate differential "reflects a judgment made by the Commission as to a difference in the impact

on the administration of justice of the work of the appellate court judges as compared to that of the work of judges of the trial courts."

With respect, the Government does not accept that recommendation. The roles of trial and appellate judges are different in nature, but not in importance. Judges of courts of appeal make final decisions on questions of law, subject to appeal to the Supreme Court of Canada. Trial judges have the primary role in determining questions of fact, and while their determinations of law are subject to appeal, in the vast majority of cases they are not appealed. Trial judges have a much greater role in interacting directly with litigants, including non-represented litigants and have the difficult task of assessing the credibility of witnesses. While the Levitt Commission is correct that appellate decisions have a greater sense of finality and are consistently applied by lower courts, the doctrine of *stare decisis* does not make the salaries of appellate court judges inadequate**.** There is a hierarchy of judicial decisions and courts but the responsibilities of individual judges, whether trial or appellate, are equivalent in terms of their obligation to fairly, impartially and independently decide each case. As the Scott Commission found, "the burden of judicial office ... requires an equivalent discipline and dedication on the part of the judges at both court levels." The submission of certain appellate court judges to the Block Commission stated that it would be unseemly to justify salary differentials on the basis that different courts work harder or accomplish tasks of greater value than others. Many of the other submissions from judges indicated that the work of both trial and appellate courts is important, challenging and demanding, and raised concerns about public perception of any diminished valuation of trial judges. The Government is of the view that the work of judges of the trial courts is, and should be perceived by the public to be, of equal importance to that of appellate court judges. While the Commission has highlighted a number of significant functions carried out by appellate court judges, its analysis does not demonstrate a corresponding consideration of the key responsibilities and contributions of trial court judges.

The Block Commission noted that in some jurisdictions status distinctions as between trial judges and court of appeal judges have been indicated by order of rank and precedence. To the extent that the Commission's recommendations for an appellate differential are premised on hierarchical considerations involving status distinctions, regardless of differences in the value of the work undertaken, in the Government's view status alone bears no relation to the "adequacy of judicial compensation and benefits". They are accordingly beyond the Commission's jurisdiction as established by section 26 of the *Judges Act*.

Moreover, apart from economic considerations, the Levitt Commission did not refer to any of the other reasons not to implement a salary differential for appellate court judges. These include:

- the lack of consensus among the 1103 superior court judges including appellate judges;
- the real risk of negatively affecting the goodwill and collegiality among trial and appellate judges;

- trial courts or trial judges at times perform appellate functions;
- trial judges at times sit on courts of appeal;
- some of the work done by courts of appeal in one province may be done by trial courts in another (e.g. the Ontario Divisional Court);
- trial judges bear sole responsibility for their decisions, whereas appellate court judges sit in panels, and thus share workload and responsibility;
- a differential would create an incentive for judges whose skills are better-suited to trial work to seek an appellate appointment;
- a differential could deter an appellate court judge from transferring to a trial court when such a transfer contributes to the better administration of justice; and
- a new differential would affect the equities of current salary differentials.

The Government considers that these are legitimate concerns that further support its conclusion that the current salaries of all superior court judges including appellate court judges (as increased in part II (a) above) are adequate, and an appellate differential would not advance the proper administration of justice or the broader public interest.

Finally, the Government does not accept the Levitt Commission's reasoning in terms of criterion 26(1.1)(a) (the prevailing economic conditions in Canada, including the cost of living, and the overall economic and financial position of the federal government). The Commission justified the additional cost of the court of appeal salary differential on the basis that it would involve "minimal costs in relation to overall government expenditures". However, this statement fails to take into account that deficits are tackled and budgets balanced as a result of a large number of decisions regarding amounts of money that may in themselves appear minimal when compared to total government expenditures. The Supreme Court has recognized in the *Bodner* decision that while governments and legislatures must respect and protect judicial independence, they also have the constitutional responsibility of deciding how public resources are to be allocated. The Government is of the view that Recommendations 2 and 6, which would involve an additional public expenditure of about $6 million over the quadrennial period, cannot be justified at a time when fiscal restraint has required reduction of a wide range of other government program expenditures.

(c) Commission Recommendations 8-11: Process

The Commission dedicated Chapter 5 to a discussion of process issues and made certain recommendations for improvements to its effectiveness. The Government agrees with the Commission that the process for setting judicial remuneration is intended to be non-adversarial and effective, and agrees with the Commission's Recommendation 11 that the Government and judiciary should examine methods whereby the Commission process can be made less adversarial and more effective. Moreover, the Government agrees with the Commission that building confidence in the Commission process requires a constructive focus on the future, rather than the past, and requires that all of the stakeholders in the process approach it with reasonable expectations and with respect for each other's reasonable concerns and perspectives.

Consistent with that focus on the future, the Government will refrain from responding in detail to Chapter 5 of the Commission's Report with which it disagrees. However, it is necessary to observe that the Government remains bound by the Supreme Court's directions in the *PEI Judges Reference* and *Bodner* decisions and the provisions of the *Judges Act*. In particular, with respect to Recommendation 8, while the perspective of a reasonable, informed member of the judiciary is important, it is clear from the Supreme Court's guidance that the test for judicial independence, including the sufficiency of a Government response, is assessed from the perspective of the ultimate beneficiaries of that independence – the litigants and members of the general public who depend upon a fair and impartial system of justice.

With respect to Recommendation 10 of the Commission's Report, the Government continues to be of the view that as a matter of law, to meet the constitutional requirements of independence, objectivity and effectiveness, each commission must turn its mind to the evidence and submissions before it and cannot simply adopt unimplemented recommendations of a prior commission without conducting its own independent and objective analysis. Moreover, there is only a "consensus" on an issue if all parties before the Commission have agreed on that issue. The joint goal of both the Government and the judiciary to achieve a less adversarial and more effective process is not advanced by compounding a disagreement on a particular issue with an additional disagreement about whether there was a consensus about that issue in the past. Rather, a less adversarial and more efficient process can be achieved by seeking and building upon genuine consensus, and the Government agrees with the Commission that the parties should explore additional methods for doing so.

In preparing this Response, the Government has considered the three stages of the test set out by the Supreme Court in *Bodner*, including the third stage, as noted in the Commission's Recommendation 9. The Government is of the view that, overall, the 2011 Quadrennial Commission process has succeeded in achieving the objectives established by the Supreme Court of Canada in the *PEI Judges Reference* and *Bodner*. That said, the Government will propose certain amendments to the *Judges Act* that will improve both the timeliness and effectiveness of the process, by reducing the time for the Government Response from six months to four months and by establishing an express obligation to introduce implementing legislation in a timely manner. In addition, the Government remains open to exploring with the judiciary approaches that would make the process less adversarial and thereby improve its overall effectiveness.

III. Conclusion

The Government is mindful of the importance of publicly demonstrating its commitment to the timeliness and effectiveness of the Quadrennial Commission process. The Government moved quickly to table the Commission's Report in Parliament within two days of receipt, and has now issued this Response well in advance of the statutory deadline of November 15, 2012. In addition, the Government is prepared to take steps to ensure early implementation of the Commission's recommendations by introducing the necessary amendments to the *Judges Act* at the earliest opportunity. These steps will

ensure continued public confidence in the Quadrennial Commission process and through it the independence of the federally appointed judiciary in Canada.

LIST OF THE RECOMMENDATIONS OF THE 2011 JUDICIAL COMPENSATION AND BENEFITS COMMISSION

Recommendation 1

The Commission recommends that: Effective April 1, 2012, the salary of federally appointed *puisne* judges sitting in all Canadian trial courts should be set, inclusive of statutory indexation, at $288,100. The statutory indexation pursuant to s. 25 of the *Judges Act* should be applied to the judicial salaries for each subsequent year of the Quadrennial Period.

Recommendation 2

The Commission recommends that: *Puisne* judges sitting on provincial and federal appellate courts should be given a salary differential of 3% above *puisne* judges sitting on provincial and federal trial courts. Effective April 1, 2012, their salaries should be set, inclusive of statutory indexation, at $296,700.

Recommendation 3

The Commission recommends that: Salary differentials should continue to be paid to the Chief Justice of Canada, the Justices of the Supreme Court of Canada, the chief justices and associate chief justices of the trial and appellate courts;

> The salary differential for the chief justices and associate chief justices of the trial courts should be established in relation to the salary of the *puisne* judges appointed to the trial courts;
>
> The salary differential for the chief justices and associate chief justices of the appellate courts should be established in relation to the salary of the *puisne* judges appointed to the appellate courts;
>
> The salary differentials of the Chief Justice of Canada and the Justices of the Supreme Court of Canada should be established in relation to the salaries of *puisne* judges appointed to trial courts;

and Effective April 1, 2012, the salaries should be set, inclusive of statutory indexation, at the following levels:

<u>Supreme Court of Canada</u>
Chief Justice of Canada $370,300
Justices $342,800

<u>Federal Court of Appeal and Provincial Courts of Appeal</u>
Chief Justices $325,300
Associate Chief Justices $325,300

Federal Court, Tax Court and Trial Courts

Chief Justices $315,900

Associate Chief Justices $315,900

Recommendation 4

The Commission recommends that: The *Judges Act* should be amended so that senior judges of the territorial courts who elect supernumerary status receive the same treatment with regard to their retirement annuities as chief justices of both trial and appellate courts who elect supernumerary status.

Recommendation 5

The Commission recommends that: The *Judges Act* should be amended so that the retirement annuity of a senior judge of a territorial court who ceases to perform the duties of a senior judge and performs only the duties of a *puisne* judge, receiving the salary of a *puisne* judge, be granted a retirement annuity based on the salary of a senior judge.

Recommendation 6

The Commission recommends that: The *Judges Act* should be amended so that a *puisne* judge of an appellate court who accepts an appointment to a trial court, receiving the salary of a trial court judge, be granted a retirement annuity based on the salary of his or her former position as an appellate court judge.

Recommendation 7

The Commission recommends that: All regional senior judges in Ontario, including the senior family law judge, should be paid the same representational allowance.

Recommendation 8

The Commission recommends that: In formulating its response to this Report, the Government give weight to the importance of the perspective of reasonable, informed members of both the public and the judiciary.

Recommendation 9

The Commission recommends that: The Government give careful consideration to the third stage for assessing the rationality of a government response introduced by the Supreme Court of
Canada's decision in *Bodner*: "Viewed globally, has the commission process been respected and have the purposes of the commission – preserving judicial independence and depoliticizing the setting of judicial remuneration – been achieved?"

Recommendation 10

The Commission recommends that: Where consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of demonstrated change, such consensus should be taken into account by the Commission, and reflected in the submissions of the parties.

Recommendation 11

The Commission recommends that: The Government and the judiciary examine methods whereby the Commission process can be made less adversarial and more effective.