

S-116854

No. \_\_\_\_\_  
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA  
IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT*,  
R.S.B.C. 1996, C. 241

BETWEEN:

PROVINCIAL COURT JUDGES' ASSOCIATION OF BRITISH COLUMBIA

PETITIONER

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT

**PETITION TO THE COURT**

THIS IS THE PETITION OF:

Provincial Court Judges' Association of British Columbia  
c/o Arvay Finlay  
1350 – 355 Burrard Street  
Vancouver BC V6C 2G8

ON NOTICE TO:

Attorney General of British Columbia  
1001 Douglas Street  
PO Box 9280 Stn Prov Govt  
Victoria BC V8W 9J7

**This proceeding has been started by the petitioner(s) for the relief set out in Part 1 below.**

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner(s)
  - (i) 2 copies of the filed response to petition, and

- (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

**Orders, including orders granting relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.**

**Time for response to petition**

A response to petition must be filed and served on the petitioner(s),

- (a) if you reside anywhere within Canada, within 21 days after the date on which a copy of the filed petition was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed petition was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed petition was served on you, or
- (d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is:	800 Smithe Street Vancouver BC V6Z 2E1
(2)	The ADDRESS FOR SERVICE of the petitioner is:	Arvay Finlay Barristers 1350 – 355 Burrard Street Vancouver BC V6C 2G8  Fax number for service (if any) of the petitioner: 604.687.1941  E-mail address for service (if any) of the petitioner: <a href="mailto:jarvay@arvayfinlay.com">jarvay@arvayfinlay.com</a>
(3)	The name and office address of the petitioner's lawyer is:	Joseph J. Arvay, Q.C. Arvay Finlay Barristers 1350 – 355 Burrard Street Vancouver BC V6C 2G8

**Part 1: ORDERS SOUGHT**

1. An order in the nature of *certiorari* quashing the resolution of the Legislative Assembly made May 31, 2011, which rejected seven of the fifteen recommendations contained in the Final Report of the 2010 Judges Compensation Commission.
2. A declaration that the governmental response to the recommendations of the 2010 Judges Compensation Commission did not conform to the standard set out in the *Judicial Compensation Act*, S.B.C. 2003, c. 59, and embodied in the constitutional principle of judicial independence for rejecting the recommendations of a judicial compensation commission.
3. A declaration that the judges of the Provincial Court are entitled to the remuneration, allowances and benefits recommended by the 2010 Judges Compensation Commission.
4. In the alternative, an order remitting the Final Report of the 2010 Judges Compensation Commission to the Attorney General for reconsideration in accordance with the reasons for judgment of this Court within the time limited by s. 6 of the *Judicial Compensation Act*.
5. Costs.
6. Such other and further relief as to this Court may seem just.

**Part 2: FACTUAL BASIS**

1. The Petitioner represents the judges of the Provincial Court of British Columbia as an advisory and consultative body to governments and other agencies on matters relating to law reform, judicial education, judicial independence and compensation.
2. As of May 2010, there were 111 full-time and 35 part-time judges of the Provincial Court, presiding at approximately 100 locations in 88 communities throughout British Columbia. The Provincial Court adjudicates almost all criminal charges laid in British Columbia; the Court also has jurisdiction in family law and child protection cases, and in civil claims up to \$25,000.

3. The Judges Compensation Commission (“JCC”) is an independent tribunal formed every three years with a mandate under the *Judicial Compensation Act*, S.B.C. 2003, c. 59 (the “*Act*”) to report to the Attorney General and the Chief Judge on all matters respecting the remuneration, allowances and benefits of the judges of the Provincial Court, and to make recommendations with respect to those matters.
4. Meaningful and effective JCC proceedings are constitutionally required; their purpose is to protect the public interest in an independent judiciary by depoliticizing the setting of judicial remuneration. The Government may reject or vary the recommendations of a JCC, provided that legitimate reasons are given; however, the Government must act in good faith, demonstrate respect for the process and deal with the recommendations of the JCC in a meaningful way.
5. In the case of the 2010 JCC, the Government failed to deal with the process and the issues in good faith. Its response to the JCC consisted of irrational and unreasonable expressions of rejection and disapproval. In the place of the recommendations of the JCC, the Government imposed its bargaining position with public sector unions on the judges of the Provincial Court. Both overall and in respect of specific recommendations of the 2010 JCC, the Government failed to conform to the standard set out in the *Act* and embodied in the constitutional principle of judicial independence for rejecting the recommendations of a judicial compensation commission.

### **The 2010 JCC**

6. The 2010 JCC was appointed pursuant to s. 2 of the *Act* as amended. Prior to the amendments, the JCC was constituted under the *Act* as a three person tribunal. One member was appointed by the Attorney General, one by the Chief Judge in consultation with the Petitioner, and these two members appointed a third, who sat as the chair.
7. The Chief Judge appointed Chris Considine, Q.C., to the JCC in 2004 and again in 2007. Mr. Considine is a senior member of the Bar and was, from 2002 to 2005, a commissioner of the Judicial Council continued under s. 21 of the *Provincial Court Act*, R.S.B.C. 1996, c. 379.

8. The Judicial Council is an independent body with a statutory mandate to improve the quality of judicial service by vetting judicial nominees, facilitating education and addressing complaints.
9. On October 7, 2009, without any consultation with the Petitioner, the Government introduced amendments to the *Act* that would:
  - a. increase the size of the JCC to five members;
  - b. stipulate that, of the two members appointed by each party, no more than one could be a practicing or former lawyer;
  - c. disqualify any member or former member of the Judicial Council.
10. On October 20, 2009, Acting Chief Judge Threlfall wrote to the Attorney General naming Mr. Considine as the nominee of the Chief Judge to the 2010 JCC under the then current statutory provision.
11. On October 29, 2009, the *Miscellaneous Statutes Amendment Act 2009*, S.B.C. 2009, c. 22, received Royal Assent, and brought the amendments to the appointment provisions of the *Act* into force.
12. On November 30, 2009, Acting Deputy Attorney General McHale, citing the amendments to the *Act*, refused to accept the appointment of Mr. Considine as valid.
13. The Acting Chief Judge subsequently appointed Brian Kenning and Robin McFee, Q.C., to the 2010 JCC. The Attorney General appointed John Dunstan and Geoffrey Cowper, Q.C. These four members appointed George Morfitt, F.C.A., who sat as the chair of the JCC.
14. As set out in s. 5(1) of the *Act*, the mandate of the JCC was to report to the Attorney General and the Chief Judge on all matters respecting the remuneration, allowances and benefits of the judges of the Provincial Court, and to make recommendations with respect to those matters for each of the three fiscal years beginning April 1, 2011, 2012 and 2013.

15. Section 5(5) of the *Act* required the JCC, in preparing its report, to consider all of the following:
  - a. the current financial position of the Provincial government;
  - b. the need to provide reasonable compensation to the judges;
  - c. the need to maintain a strong court by attracting qualified applicants;
  - d. the laws of British Columbia;
  - e. any other matter the JCC considered relevant.
16. The JCC invited submissions from the public and solicited submissions from a number of parties on all matters relating to salaries and benefits of Provincial Court judges. The JCC received written submissions from the Petitioner, the Government of British Columbia, Chief Judge Crabtree, the Judicial Council of British Columbia, the Law Society of British Columbia and the Canadian Bar Association, British Columbia Branch.
17. The JCC conducted public hearings on June 21, 22 and 25, 2010, and heard oral presentations by Judge Higinbotham and three other judges of the Provincial Court on behalf of the Petitioner, Assistant Deputy Attorney General Fyfe on behalf of the Government, Chief Judge Crabtree on his own behalf and representatives of the Judicial Council and the Canadian Bar Association. The JCC also received written materials and heard testimony from Donald Smith, a pensions and benefits actuary; Ian McKinnon, a consultant in public policy and statistical analysis; and Graham Whitmarsh, the Deputy Minister of Finance.
18. In its submissions to the JCC, the Government stated that it recorded a deficit of \$2.775 billion in 2009/10, and that deficits were projected for the next three years, followed by a return to balanced budgets in 2013/14. Deputy Minister Whitmarsh, in his testimony before the JCC, substantiated these statements and projections. In fact, in its release of Public Accounts for 2009/10 on July 12, 2010, the Government reported a deficit of only \$1.779 billion, almost \$1 billion less than Deputy Minister Whitmarsh told the JCC.

## The JCC Report

19. The JCC delivered its report to the Attorney General and the Chief Judge on August 28, 2010. The JCC structured the report in four main parts: a review of the Commission's purpose and mandate; a summary of the 2007 JCC report; a review of the issues before the 2010 JCC; conclusions on the criteria it was required by s. 5(5) of the *Act* to consider; and a set of recommendations.
20. On the criteria set out in s. 5(5) of the *Act*, the JCC concluded that:
  - a. Significant enhancements to judicial salaries and benefits are not supportable for 2011/12 and 2012/13; however, it is reasonable to expect that the Provincial government will be in a position to support increases in the 2013/14 fiscal year to ensure fair and reasonable compensation for Provincial Court judges.
  - b. The Provincial Court's jurisdiction is expanding, its caseload is increasing and the cases that come before it are increasingly complex and varied in nature. Despite efforts to create efficiencies, the workload of Provincial Court judges continues to increase steadily, and travel is a regular and rigorous feature of the work of judges who sit outside the Lower Mainland.
  - c. While there are differences between the types of cases and functions of the Provincial Court and the Supreme Court, each plays a very important role in the administration of justice in British Columbia.
  - d. Provincial Court judges are paid less and receive lower benefits than Supreme Court judges.
21. On the evidence before it, the JCC could not reach any conclusion as to whether the disparity in compensation has had a material effect on recruitment of qualified applicants; however, it recognized the importance of setting Provincial Court salaries with a view to minimizing the wage disparity between the two courts.

22. The JCC recommended:

- a. no salary increase for Provincial Court judges in 2011/12 or 2012/13;
- b. effective April 1, 2013, *puisne* judges of the Provincial Court receive a salary increase equal to the accumulated increase in the B.C. Consumer Price Index (“CPI”) over the preceding three years, compounded annually;
- c. the Chief Judge salary remain at a *puisne* judge salary plus 12%, and the Associate Chief Judge salary remain at a *puisne* judge salary plus 6%;
- d. an increase in the pension accrual rate to 3.5% effective April 1, 2013, so as to allow judges to accrue the maximum pension benefit of 70% after 20 years of service;
- e. no change in the pension plan contribution rates as between the judges and the Government;
- f. an increase in the pension contribution period from age 71 to age 75 effective April 1, 2011;
- g. funding for long term disability coverage to age 75 from outside the budget of the Office of the Chief Judge;
- h. no increase in the annual leave period of 30 days;
- i. an extension of long term disability coverage to age 75 effective April 1, 2011;
- j. an extension of life insurance coverage to age 75, with adjustments to benefit levels for the 65-69 age group to be agreed upon between the Government and the Association based on actuarial evidence, so as to extend coverage to the age 70-75 cohort in a manner that is cost neutral;
- k. no new medical screening program;
- l. enrolment of judges in a flexible benefit plan; and

- m. an expansion of the senior part-time judges program.

### **The Government Response**

- 23. The Attorney General received the report of the JCC on or about August 31, 2010. The next session of the Legislative Assembly opened on February 14, 2011, and adjourned on February 17, 2011, without the report having been tabled. The Legislative Assembly resumed sitting on April 27, 2011.
- 24. On May 3, 2011, the Attorney General tabled the JCC Report and advised the Legislative Assembly that, if a recommendation in the report was not rejected within 28 days, then pursuant to s. 6(3) of the *Act*, judges of the Provincial Court would be entitled to receive the salary or benefit proposed by that recommendation beginning on April 1 of the following year.
- 25. On May 25, 2011, Attorney General Penner was quoted in the *Globe and Mail* newspaper as follows:
  - “Mr. Penner said the cost of meeting the recommended wage hikes from the Judges Compensation Commission would be \$7 million, but he noted there are 680 other people on the government payroll who have their wage rates tied to those of provincial court judges. It meant that Crown counsel and independent officers of the legislature would also see their salaries rise, putting the total cost at \$13 million.”
- 26. On May 30, 2011, the Attorney General moved that the Legislative Assembly reject seven of the recommendations in the 2010 JCC Report as unfair and unreasonable for the reasons outlined in the Government Response to the 2010 Judges Compensation Commission filed in the House that day.
- 27. In the Response (the “Response”), the Government provided the following reasons for rejecting the recommendations by the JCC:
  - a. The JCC’s recommendation of a salary increase in 2013/14 to take into account accumulated inflation contradicted its rationale for recommending no salary increases in 2011/12 and 2012/13; the practical effect, according to the

Government, was to provide compensation increases for 2011/12 and 2012/13, but defer implementation to 2013/14.

- b. The Government had determined that it must limit compensation paid by public funds and established a “net-zero” mandate in public sector labour negotiations. A compensation package that provides Provincial Court judges with protection against inflation was not consistent with this mandate; protection against inflation had not been offered to employees in the public sector.
- c. Judicial compensation had increased significantly in recent years, from \$161,250 in 2004, to \$231,138 in 2010.
- d. In light of the present uncertain fiscal situation, no increase for 2013/14 was fair and reasonable; the financial impacts the government may face as a result of the Harmonized Sales Tax (“HST”) referendum being conducted in June 2011 was cited as a further consideration in the uncertainty.
- e. Maintaining judicial salaries at their current level through 2013/14 would not result in a salary that falls below a level necessary to attract high-quality candidates to the provincial bench or otherwise harm judicial independence.
- f. It would be unfair and unreasonable to depart from the Government’s two-year “net-zero” mandate and provide increased benefits to judges during this period; accordingly, the recommendations for an extension of long term disability coverage to age 75 and enrolment in the flexible benefit plan should be varied so as to commence April 1, 2013.
- g. The recommended expansion of the senior part-time judges program provided more discretion to the Chief Judge than necessary to achieve the goals advanced by the Chief Judge.
- h. The recommended increase in the pension accrual rate to 3.5% was unfair and unreasonable because the current 3% rate is already higher than the 2% accrual rate that applies to most members of the public service, and it should be expected

that judges will have saved for retirement, if they came from the private bar, or already contributed to the public sector plan, if they came from the public sector.

- i. The recommended increase in the pension contribution period from age 71 to age 75 was unfair and unreasonable because this recommendation would mean either that the Government would be required to make 100% of the contributions or, alternatively, the judges' contributions would not be tax deductible.
- j. The recommendation that long term disability coverage to age 75 be funded separately from the budget of the Chief Judge was outside the mandate of the JCC.

28. On May 30, 2011, the Legislative Assembly, by resolution made pursuant to s. 6(2) of the *Act*:

- a. rejected the recommended salary increase in 2013/14, and set the salary increase for the fiscal year 2013/14 at zero;
- b. rejected the recommended increase in the pension accrual rate from 3% to 3.5%, and set the accrual rate at 3%;
- c. rejected the recommended increase in the pension contribution period from age 71 to age 75, and set the contribution period at age 71;
- d. rejected the recommendation that the cost of long-term disability benefits for judges be funded outside the budget of the Office of the Chief Judge, and directed that funding for long-term disability benefits remain within the budget of the Office of the Chief Judge;
- e. rejected the recommendation that long-term disability benefits be extended to age 75 commencing April 1, 2011, and substituted in its place an extension to age 75 commencing April 1, 2013;

- f. rejected the recommendation that judges be enrolled in the flexible benefits program commencing April 1, 2011, and substituted in its place enrolment commencing April 1, 2013;
- g. rejected the recommendation that the Senior Judges Program be expanded, and substituted in its place a more limited recommendation; and
- h. accepted the remaining recommendations in the JCC Report.

**Part 3: LEGAL BASIS**

- 1. The Petitioner relies on:
  - a. Sections 5 and 6 of the *Act*;
  - b. the principle of judicial independence, as articulated in the common law and entrenched in s. 11(d) of the *Canadian Charter of Rights and Freedoms* and the preamble and ss. 96-100 and 129 of the *Constitution Act, 1867*; and
  - c. section 52 of the *Constitution Act, 1867*.
- 2. Section 6(2) of the *Act* provides that the Legislative Assembly may reject a recommendation of the JCC only if it is unfair and unreasonable. The constitutional principle of judicial independence dictates that the Government and the Legislative Assembly must not reject or vary the recommendations of the JCC on these grounds unless:
  - a. the Government articulates a legitimate reason for departing from the commission's recommendations;
  - b. the Government's reasons rely upon a reasonable factual foundation; and
  - c. viewed globally, the commission process has been respected and the purposes of the commission – preserving judicial independence and depoliticizing the setting of judicial remuneration – have been achieved.

3. In the circumstances set out herein:

- a. having gone through the process of the JCC, the Government simply imposed, in the form of the net-zero mandate, a negotiating position it has adopted as a matter of policy in labour negotiations with public sector unions;
- b. the Government failed to respond in a meaningful way to findings, conclusions and recommendations by the JCC, and failed to apply to its own reasoning the statutory criteria set out in s. 5(5) of the *Act*;
- c. the recommendations of the JCC were not unfair and unreasonable within the meaning of s. 6(2) of the *Act*;
- d. the Government did not articulate legitimate reasons for departing from the recommendations of the JCC, having regard to the standard set out in s. 6(2) of the *Act* or the constitutional requirements of judicial independence;
- e. it was neither rational nor reasonable for the Government to rely on the stated facts to justify rejecting the recommendations of the JCC;
- f. viewed globally, the commission process was not respected and the purposes of the commission were not achieved. Specific examples of the Government's disrespect for the process include:
  - i. the Government amended the appointment provisions of the *Act*, not to further the purposes of the JCC, but rather to preclude the chosen representative of the judiciary and improve the Government's chances before the JCC;
  - ii. the Government failed to place the Report of the JCC before the Legislative Assembly within the time limit under s. 6(1)(b) of the *Act*;
  - iii. the Government provided information to the JCC about the size of the deficit which was to its knowledge inaccurate.

4. Further particulars are as follows.

**Recommended Salary Increase in 2013/14**

5. The Government's reasoning that the practical effect of the recommended salary increase in fiscal year 2013/14 is to provide compensation increases in 2011/12 and 2012/13, but defer the implementation to 2013/14, is incorrect and unreasonable because it fails to account for the fact that a cumulative increase in year three represents a substantial cost saving to the Government over increases in each of the three years.
6. The Government's reliance on its "net-zero" mandate and its statement that protection against inflation has not been offered to other employees in the public sector:
- a. fails to account for the fact that judges, although they must ultimately be paid from public funds, are not public sector employees, but rather an independent branch of government;
  - b. grounds the response in a negotiating position and government policy, rather than an across-the-board measure the Government was required to implement in response to economic factors;
  - c. extends to three years, in the case of judicial salaries, a policy which the Government described as a two-year mandate;
  - d. fails to respond to the JCC's conclusion on the evidence that it is reasonable to expect that the Provincial government will be in a position in the third year to support increases to ensure fair and reasonable compensation for Provincial Court judges; and
  - e. restates a position which was rejected by the JCC.

7. The Government's conclusion that a freeze in judicial salaries over the next three years is fair and reasonable:
  - a. fails to respond to the JCC's finding that the workload of Provincial Court judges continues to increase;
  - b. fails to respond to the JCC's recommendation that the Government should continue to move toward parity between Provincial Court and Supreme Court salaries; and
  - c. restates a position which was rejected by the JCC.
8. The Government's reliance on "the present uncertain fiscal situation for government:"
  - a. fails to respond to the JCC's conclusion on the evidence that, despite the current uncertainty, it is reasonable to expect that the Provincial government will be in a position by the 2012/13 fiscal year to support increases to ensure fair and reasonable compensation for Provincial Court judges; and
  - b. in respect of the specific reference to the HST referendum:
    - i. advances as a reason to reject a recommendation of the JCC grounds that were not raised in the JCC proceedings, based on an asserted concern to which the judges did not have an opportunity to respond;
    - ii. rests on speculation, rather than fact.
9. The Government's rejection of the recommended salary increase for judges was also based, in part, on the cost consequences to the Government of a 12-year collective agreement with the Crown Counsel Association which provides for annual salary increases based on what judges obtain through the JCC process plus 1.27%, which consideration was irrelevant and inappropriate given that it formed no part of the JCC proceedings or Government's Response to the JCC Report.

### **Recommended Increase to the Pension Accrual Rate**

10. The Government's reasoning that the current 3% pension accrual rate for judges is higher than the 2% accrual rate that applies to most members of the public service:
  - a. fails to acknowledge that the pension accrual rate for Members of the Legislative Assembly is 3.5%;
  - b. fails to account for the differences in the age of appointment and expected length of service between judges and most public sector employees;
  - c. restates a position which was rejected by the JCC.
  
11. The Government's reasoning that judges will have saved for retirement, if they came from the private bar, or already contributed to the public sector plan, if they came from the public sector:
  - a. rests on an assumption unsupported by any evidence that judges as a class do not require a full pension to retire because they have other resources;
  - b. fails to respond to the JCC's recommendation that the Government should provide, through an adjustment to the accrual rate, some incentive for judges to retire before reaching the mandatory retirement age of 75; and
  - c. fails to respond to the JCC's conclusion that an increase in the accrual rate is a reasonable cost and one that would serve to narrow the disparity between the Supreme Court and Provincial Court judicial compensation packages.
  
12. The Government's rejection of the recommended increase in the accrual rate salary was also based, in part, on a false assertion that the JCC failed to consider the Government's proposal to examine the possibility of increasing the accrual rate if the contribution rates were re-balanced so that the effect was cost-neutral. The JCC considered that proposal and rejected it because there was no evidence that would justify a change in the contribution ratio.

### **Recommended Pension Contributions Beyond Age 71**

13. The Government's reasoning that an increase in the pension contribution period from age 71 to age 75 would require either that it make 100% of the contributions or, alternatively, that the judges' contributions not be tax deductible:
  - a. is incorrect and unreasonable because the only result of the recommendation would be that judges aged 71 would continue on with contributions in the same fashion and with the same tax-deductibility as they enjoyed prior to reaching that age; and
  - b. rejects a recommendation of the JCC on grounds that were not raised in the JCC proceedings, based on asserted facts to which the judges did not have an opportunity to respond.

### **Recommended Extension of Long-Term Disability Benefits to Age 75 with Funding Outside the Budget of the Office of the Chief Judge**

14. The Government's change to the recommendation by the JCC that long-term disability benefits be extended to age 75, so as to commence April 1, 2013 was based on an absolute net-zero policy, without regard to the actual cost, benefit, fairness or reasonableness of the recommendation. In deferring the recommendation to 2013, the Government failed to give any reason why this benefit should be different at any time for judges aged 70 to 75 than it is for judges aged 65 to 69.
15. The only reason given by the Government for rejecting the recommendation that long term disability coverage be funded separately from the budget of the Chief Judge is that the recommendation was outside the mandate of the JCC. Contrary to the Government's reasoning, the recommendation was clearly within the jurisdiction of the JCC under s. 5(1) of the *Act* to make recommendations on "all matters respecting the remuneration, allowances and benefits of the judges of the Provincial Court." The Government's refusal to recognize the jurisdiction of the JCC to make recommendations as to how the salary and benefits of Provincial Court judges are to be paid was irrational and disrespectful of the JCC process.

16. In directing that long term disability coverage be funded by the Office of the Chief Judge, the Government failed to respond to the JCC's finding that the current method of funding this benefit may be detrimental to the delivery of judicial services. The effect of the Government's refusal to fund long term benefits to the age of retirement outside the salary budget of Office of the Chief Judge, is that, for every judge between ages 65 and 75 who receives long term disability benefits, the funds available to the Chief Justice to deliver judicial services, including his ability to pay sitting judges or hire new appointees to replace a disabled judge, diminishes.
17. The Government's response to the JCC is irrational in so far as:
  - a. it is unclear what the Government accepted and what it rejected;
  - b. on one interpretation, the Government imposed the two-year "net zero" policy on the extension of long term disability benefits to judges aged 70 to 75, but then, inconsistently, stipulated that the funding for those benefits must be found within the budget of the Office of the Chief Judge;
  - c. on another interpretation, the Government accepted responsibility, beginning in 2013, for funding the extension of long term disability benefits to judges aged 70 to 75 outside the budget of the Chief Judge, but then, inconsistently, stipulated that the funding for benefits for judges aged 65 to 69 must remain within the budget of the Office of the Chief Judge.
18. Further, the Government's response perpetuates the deficiencies of an ad hoc administrative arrangement in which the Chief Judge is required to determine entitlement to and duration of benefits, and no provision is made for the waiver of pension contributions and the continuing accrual of pensionable time.

#### **Recommended Enrolment in the Flexible Benefits Plan**

19. The Government's change to the recommendation by the JCC that judges be enrolled in the flexible benefits plan, so as to commence April 1, 2013, is based on an absolute

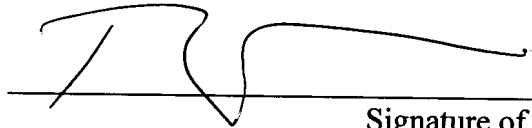
net-zero policy, without regard to the actual cost, benefit, fairness or reasonableness of the recommendation.

**Part 4: MATERIALS TO BE RELIED UPON**

1. Affidavit #1 of Donald Smith, made 03 Oct 2011;
2. Affidavit #1 of Robert Higinbotham, made 06 Oct 2011;
3. Affidavit #1 of Ian McKinnon, made 08 Oct 2011; and
4. such other affidavits as counsel will advise and serve.

The petitioner estimates that the petition will take 3 days.

Dated: 12 Oct 2011



Signature of  petitioner(s)  
 lawyer for petitioner  
**JOSEPH J. ARVAY, Q.C. and**  
**BRUCE ELWOOD**

***To be completed by the court only:***

Order made

- in the terms requested in paragraphs \_\_\_\_\_ of Part 1 of this petition
- with the following variations and additional terms:

.....

.....

.....

Date: .....

.....  
 Signature of  Judge  Master

