IN THE MATTER OF THE *JUDGES ACT*, R.S.C. 1985, c. J-1

2015 QUADRENNIAL JUDICIAL COMPENSATION AND BENEFITS COMMISSION

RESPONSE OF THE GOVERNMENT OF CANADA TO THE REQUEST FOR FULL FUNDING BY FEDERAL COURT PROTHONOTARIES

ATTORNEY GENERAL OF CANADA
Department of Justice
50 O'Connor St, Suite 500
Ottawa, Ontario
K1A 0H8

Per: Anne M. Turley
Kirk G. Shannon

Tel: (613) 670-6291
(613) 670-6270
Fax: (613) 954-1920

Email: anne.turley@justice.gc.ca
kirk.shannon@justice.gc.ca

Counsel for the Government of Canada

TABLE OF CONTENTS

A. Overview

1. The Federal Court prothonotaries' request that this Commission make an "immediate" recommendation for full representational funding is not a matter that should be considered at this preliminary stage. Rather, the question falls squarely within the core mandate of the Commission to consider the adequacy of amounts payable under the *Judges Act* (the *Act*) and judges' benefits generally.

2. Without a recommendation from the Commission, the Government of Canada cannot unilaterally alter the representational funding structure set out in the *Act.* Following full written submissions from all interested parties and a hearing on the issue, the Commission may ultimately decide to recommend that Parliament amend the representational funding structure set out in the *Act.* Absent, however, all the information and evidence that would become available to the Commission in the course of its inquiry, the Commission should not consider issuing the requested recommendation.

B. Jurisdiction Regarding Representational Costs

3. The *Act* allows the Commission to identify representatives of the judiciary whose costs of participation in the Commission process will be paid to a maximum of two-thirds on a solicitor-client basis.

26.3 (1) The Commission may identify those representatives of the judiciary participating in an inquiry of the Commission to whom costs shall be paid in accordance with this section. (2) A representative of the judiciary identified under subsection (1) who participates in an inquiry of the Commission is entitled to be paid, out of the	26.3 (1) La Commission identifie les représentants de la magistrature qui participent à une enquête devant elle et auxquels des dépens peuvent être versés en vertu du présent article. (2) Sous réserve du paragraphe (1), le représentant de la magistrature qui participe à une enquête de la Commission a droit au paiement sur le Trésor des deux

Consolidated Revenue Fund, two thirds of the costs determined under subsection (3) in respect of his or her participation. (3) An assessment officer of the Federal Court, other than a judge or a prothonotary, shall determine the amount of costs, on a solicitor-and-client basis, in accordance with the Federal Courts Rules. (4) This section applies to costs incurred in relation to participation in any inquiry of the Commission conducted after September 1, 1999.	tiers des dépens liés à sa participation, déterminés en conformité avec le paragraphe (3). (3) Un officier taxateur de la Cour fédérale, exception faite d'un juge ou d'un protonotaire, détermine le montant des dépens, sur une base avocat-client, en conformité avec les Règles des Cours fédérales. (4) Le présent article s'applique à la détermination des dépens liés aux enquêtes de la Commission effectuées après le 1er septembre 1999.

4. Pursuant to the recent amendments to the *Act*, these provisions equally apply to the Federal Court prothonotaries.[1]

5. Based on its mandate to consider the adequacy of "amounts payable under the *Judges Act*", the Commission has the requisite jurisdiction to inquire into the "adequacy" of the present representational funding structure set out in the *Act*.[2] The Commission may make a recommendation to the Minister of Justice for a change thereto should it conclude one is warranted. The Commission may also consider recommending that any change to the funding formula set out in the *Act* be made retroactive to the commencement of this present process.

6. The "adequacy" inquiry, however, must be made with reference to the criteria prescribed by s. 26(1.1) of the *Act*: (1) the prevailing economic conditions in Canada; (2) the role of financial security; (3) the need to attract outstanding candidates to the judiciary; and (4)

[1] *Judges Act*, RSC 1985, c J-1, as amended, s 2.1(1), **Tab 1**
[2] Judicial Compensation and Benefits Commission Report, May 30, 2008 (Block Commission Report), para 196, p 68, online: http://www.quadcom.gc.ca/Media/Pdf/2007/RapportFinalEn.pdf, **Tab 2**

other objective criteria.[3] As such, the prothonotaries' request is not the proper subject of a "preliminary" determination in the same manner as the evidentiary matter raised by the Government regarding the proposal for a pre-appointment income study.

C. The Way Forward: An Amendment to the *Judges Act*

7. The Government disagrees that s. 26.3 of the *Act* simply sets out an "entitlement to payment" of the two-thirds amount and thus does not preclude the Minister from providing additional funding where required.

8. Before the Government can make changes to judicial compensation including all payments made under the *Act* and judges' and prothonotaries' benefits generally, the Government must first have the benefit of the Commission's recommendations.[4]

9. The *Act* contemplates and three of the last four Commissions have expressly recognized that there is only one procedural vehicle through which the adequacy of representational funding can be addressed. As part of its report to the Minister of Justice, the Commission can recommend a new funding formula.[5]

10. The recommendation is then reviewed by the Minister, Parliament and a Parliamentary Committee and, if accepted, a new funding structure could be introduced by way of an amendment to the *Judges Act.*[6] This was the process followed by the Government in

---

[3] *Judges Act*, *supra*, s 26(1.1), **Tab 1**
[4] *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3, paras 179-180, **Tab 3**
[5] Judicial Compensation and Benefits Commission Report, May 31, 2000 (Drouin Commission Report), pp 101-111, online: http://www.quadcom.gc.ca/archives/1999/index_en.html, **Tab 4**; Judicial Compensation and Benefits Commission Report, May 31, 2004 (McLennan Commission Report), pp 87-88, online: http://www.quadcom.gc.ca/archives/2003/rpt/report.20040531.pdf, **Tab 5**; and Block Commission Report, *supra*, paras 191-196, pp 67-68, online: http://www.quadcom.gc.ca/Media/Pdf/2007/RapportFinalEn.pdf, **Tab 2**
[6] *Judges Act*, *supra*, s 26(7), **Tab 1**

response to the 1999 Drouin Commission Report and the 2003 McLennan Commission Report recommendations regarding representational funding changes. [7]

11. Similarly, the Commission may, as part of its mandated inquiry, consider the adequacy of representational funding for the prothonotaries and make a recommendation for a different funding formula as part of its report to the Minister of Justice. However, in the absence of all of the information and evidence which would only become available to the Commission in the course of a full inquiry, it is neither appropriate nor prudent to make such a recommendation at this juncture.

12. Further, to the extent they seek a recommendation for change, it is incumbent on the prothonotaries to articulate how the current formula established by the *Act* fails to meet the prescribed statutory criteria for the determination of the adequacy of amounts payable under the *Act*.[8] The prothonotaries have not addressed the statutory criteria, nor demonstrated that the payment of full costs is essential to their effective participation in the process.

13. By requesting a preliminary recommendation, the prothonotaries are seeking to circumvent the constitutionally mandated process established by the Supreme Court of Canada. As Chief Justice Lamer noted in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, the Commission must be "fully informed before deliberating and

---

[7] Government Response to the 1999 Judicial Compensation and Benefits Commission, p 6, online: http://www.quadcom.gc.ca/archives/1999/Response-English-Final_2000.pdf, **Tab 6**; Government Response to the 2003 Judicial Compensation and Benefits Commission, pp 9-10, online at http://www.quadcom.gc.ca/archives/2003/gouv/reponse_2004_en.pdf, **Tab 7**

[8] Block Commission Report, *supra*, para 196, p 68, online: http://www.quadcom.gc.ca/Media/Pdf/2007/RapportFinalEn.pdf, **Tab 2**

making its recommendations".[9] The process contemplated by the *Act* provides for a full opportunity to ensure this obligation is met.

14. It is premature for the Commission to consider the issue at this juncture. Even if the Commission were to make a recommendation for a legislative amendment at this preliminary stage, the Government, should it accept the recommendation, would have to introduce amendments to the *Act* for consideration by Parliament. This process would undoubtedly take several months and would therefore be both impractical and ineffective.

15. Based on the foregoing, contrary to the prothonotaries' position, the proper way to proceed with their request for full funding of their representational costs is as part of the Commission's full inquiry into the adequacy of judicial compensation. The adequacy of the prothonotaries' representational costs cannot and should not be considered in isolation at this preliminary stage of the process.

D. ***Ex Gratia*** **Payment is not Appropriate**

16. The prothonotaries suggest that there may be alternate ways of providing representational funding in addition to the two-thirds amount provided for in the *Act*. As explained below, in light of the statutory provision establishing the formula for determining such costs, the Government's position is that an *ex gratia* payment is not an appropriate vehicle.

17. The relevant Treasury Board Directives and Guidelines specifically state that e*x gratia* payments are not intended to be used in certain circumstances, such as to fill a perceived gap or compensate for a limitation in governing legislation:

> The Directive [on Claims and Ex-Gratia Payments] is **not used to fill perceived gaps or compensate for the apparent limitations in any act, order, regulation, policy, agreement or other governing instruments**-if, for example, a particular

[9] *PEI Judges*, *supra*, para 173, **Tab 3**

> subject is governed by another instrument and that instrument does not provide for such a payment, the Directive cannot be used to expand that instrument and an exception to the governing instrument would need to be sought.[10] (emphasis added)

18. Here, Parliament has spoken and the *Act* explicitly provides for two-thirds representational funding. The remaining one-third thus constitutes a "gap" or "limitation" as contemplated by the Treasury Board Guidelines. In the circumstances, it would not be appropriate to make a payment under the *ex gratia* directive to top-up the two-thirds funding provided for in the *Act*.

19. Rather, as explained in paragraphs 8-14 above, the proper process is for the Commission to consider a recommendation for an amendment to the funding formula set out in s. 26.3(2) of the *Act* as part of its full inquiry into the adequacy of judicial compensation.

20. The prothonotaries' reference to *ex gratia* payments made to military judges or prothonotaries in past compensation processes is inapposite. The regulatory provisions governing the Military Judges Compensation Committee[11] and Order-in-Councils governing the prior inquiries of the Special Advisors on Federal Court Prothonotaries' Compensation[12] were silent as to representational funding. As a result, the *ex gratia* payments made during those processes did not fill a gap in the legislated representational funding scheme. Rather, there was no scheme.

---

[10] Treasury Board of Canada Secretariat, *Guideline on Claims and Ex Gratia Payments*, October 1, 2003, s 7.4, online: http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=17068, **Tab 8**

[11] Past Military Judges Compensation Committees were established in accordance with s 165.22 of the *National Defence Act*, RSC 1985 c N-5 and ss 204.23-204.24 of the *Queen's Regulations and Orders* (Chapter 204, PC 2000-1419). **Tab 9** The *National Defence Act* has since been amended and the process governing the Military Judges Compensation Committees is now provided for in ss 165.33-165.37. **Tab 10**

[12] The two Special Advisor processes were established by Orders-in-Council PC 2007-1015 and PC 2012-0991. **Tab 11**

21. Upon being included within the ambit of the *Act* by legislative amendment in 2014, the prothonotaries became subject to the Quadrennial Commission process and the representational funding scheme under the *Act.* As a result, e*x gratia* payments can no longer be provided to the prothonotaries to supplement the two-thirds funding they are entitled to receive under s. 26.3 of the *Act*.

E. Conclusion

22. A legislative amendment is required to change the funding formula prescribed in the *Act*. It is, therefore, premature for the Commission to consider whether full representational funding is required to ensure the adequacy of the prothonotaries' compensation. The Commission must be fully informed before deliberating and making any such recommendation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa, Ontario this 28th day of January, 2016.

Anne M. Turley
Kirk G. Shannon
Department of Justice
#500-50 O'Connor Street
Ottawa, ON K1A 0H8

Tel: 613-670-6291 / 670-6270
Fax: 613-954-1920

Counsel for the Government of Canada

Judges Act

R.S.C., 1985, c. J-1

An Act respecting judges of federal and provincial courts

Application to prothonotaries

2.1 (1) Subject to subsection (2), sections 26 to 26.3, 34 and 39, paragraphs 40(1)(*a*) and (*b*), subsection 40(2), sections 41, 41.2 to 42, 43.1 to 56 and 57, paragraph 60(2)(*b*), subsections 63(1) and (2) and sections 64 to 66 also apply to a prothonotary of the Federal Court.

Commission

26 (1) The Judicial Compensation and Benefits Commission is hereby established to inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges' benefits generally.

Factors to be considered

(1.1) In conducting its inquiry, the Commission shall consider

- **(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.

Loi sur les juges

L.R.C. (1985), ch. J-1

Loi concernant les juges des cours fédérales et provinciales

Application aux protonotaires

2.1 (1) Sous réserve du paragraphe (2), les articles 26 à 26.3, 34 et 39, les alinéas 40(1)*a*) et *b*), le paragraphe 40(2), les articles 41, 41.2 à 42, 43.1 à 56 et 57, l'alinéa 60(2)*b*), les paragraphes 63(1) et (2) et les articles 64 à 66 s'appliquent également aux protonotaires de la Cour fédérale.

Commission d'examen de la rémunération des juges fédéraux

26 (1) Est établie la Commission d'examen de la rémunération des juges chargée d'examiner la question de savoir si les traitements et autres prestations prévues par la présente loi, ainsi que, de façon générale, les avantages pécuniaires consentis aux juges sont satisfaisants.

Facteurs à prendre en considération

(1.1) La Commission fait son examen en tenant compte des facteurs suivants :

- **a)** l'état de l'économie au Canada, y compris le coût de la vie ainsi que la situation économique et financière globale du gouvernement;
- **b)** le rôle de la sécurité financière des juges dans la préservation de l'indépendance judiciaire;
- **c)** le besoin de recruter les meilleurs candidats pour la magistrature;
- **d)** tout autre facteur objectif qu'elle considère pertinent.

Response to report (7) The Minister of Justice shall respond to a report of the Commission within four months after receiving it. Following that response, if applicable, he or she shall, within a reasonable period, cause to be prepared and introduced a bill to implement the response.	**Suivi** (7) Le ministre donne suite au rapport de la Commission au plus tard quatre mois après l'avoir reçu. S'il y a lieu, il fait par la suite, dans un délai raisonnable, établir et déposer un projet de loi qui met en oeuvre sa réponse au rapport.

Judicial Compensation and Benefits Commission

CANADA

Commission d'examen de la rémunération des juges

Chairperson/Présidente

Sheila Block

Commissioners/Commissaires

Paul Tellier P.C., C.C., Q.C.
Wayne McCutcheon

99 Metcalfe Street
Ottawa, Ontario K1A 1E3

Executive Director/
Directrice générale
Jeanne N. Ruest

Tel./Tél. : 613-992-4304
e-mail/courriel :
info@quadcom.gc.ca

May 30, 2008

The Honourable Robert Douglas Nicholson
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8

Dear Minister:

Pursuant to the provisions of Section 26.(2) of the *Judges Act*, I am pleased to submit the report and recommendations of the third Judicial Compensation and Benefits Commission.

Yours truly,

Sheila Block

Sheila Block
Chair

Encl.

CHAPTER V

COSTS FOR THE JUDICIARY TO PARTICIPATE IN THE COMMISSION'S INQUIRY

191. Section 26.3 of the *Judges Act* provides that identified representatives of the judiciary participating in an inquiry of the Commission are entitled to be paid two-thirds of their costs on a solicitor-client basis, as assessed by the Federal Court.

192. The Association and Council urge the Commission to make the following recommendation:

> That the Government should reimburse 100 % of the disbursements and two-thirds of the legal fees of the judiciary.
>
> Alternatively,
>
> That by way of exception to the formula set out in s. 26.3(2) of the *Judges Act*, the fees and expenses of Navigant Consulting, Inc. in connection with the survey of Canadian private-sector lawyers' income be reimbursed in full to the Association.[154]

193. The Association and Council note that the Drouin Commission recommended that the Government pay 80 % of the total representational costs of the Association, but that the Government amended the *Judges Act* to provide for payment of only 50 % of judicial representational costs. The Association and Council further note that the McLennan Commission recommended that the Government pay 100 % of the disbursements and two-thirds of the legal fees incurred by the judiciary. The McLennan Commission reasoned that "[w]e do not believe that the participation of the judiciary should become a financial burden on individual judges".[155] The Government subsequently amended the *Judges Act* to read as it does today.

194. The Government is of the view that "full reimbursement of disbursements would remove a necessary incentive for the judiciary to be prudent in relation to [the] incurring

---

[154] A&C Submission, *supra* note 47 at para. 194.
[155] McLennan Report, *supra* note 22 at 88.

of significant expenses for expert witnesses and other disbursements".[156] With regard to the reimbursement of the full cost of the Navigant Survey, the Government reiterates its view that the results of the survey are unreliable and asserts that:

> [T]he Survey was undertaken without consultation with the Government and indeed rejecting the Government's request to contribute to the survey design based on Government officials' earlier experience.[157]

195. The Government, therefore, is of the view that it would not be reasonable for the Commission to recommend the reimbursement of the full cost of the survey.

196. We believe that it is within our jurisdiction to make a recommendation on this matter, since section 26.(1) of the *Judges Act* states that the Commission shall inquire into "the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges' benefits generally". Since there are no limitations placed on the judiciary with regard to the work it undertakes to prepare submissions for the Commission, we find that reimbursement of two-thirds of the costs is adequate. We believe that the payment of full costs is not essential to the financial security of the judiciary in ensuring judicial independence or to the attraction of outstanding candidates to the judiciary. In our view, this matter could best be dealt with by the Association and Council and the Government working together cooperatively to design, conduct and fund surveys they consider would be of assistance to the Commission. If such studies were done jointly, the Government could fund the entire cost, as appropriate.

Recommendation 11

The Commission recommends that:

> **The provisions in the *Judges Act* relating to the reimbursement of the judiciary's costs for participating in the Quadrennial Commission process remain unchanged.**

---

[156] Government Reply Submissions, *supra* note 85 at para. 70.
[157] *Ibid.* at para. 71.

Indexed as:

Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island
R. v. Campbell; R. v. Ekmecic; R. v. Wickman
Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)

IN THE MATTER of a Reference from the Lieutenant Governor in Council pursuant to Section 18 of the Supreme Court Act, R.S.P.E.I. 1988, Cap. S-10, Regarding the Remuneration of Judges of the Provincial Court of Prince Edward Island and the Jurisdiction of the Legislature in Respect Thereof
AND IN THE MATTER of a Reference from the Lieutenant Governor in Council pursuant to Section 18 of the Supreme Court Act, R.S.P.E.I. 1988, Cap. S-10, Regarding the Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island
Merlin McDonald, Omer Pineau and Robert Christie, appellants;
v.
The Attorney General of Prince Edward Island, respondent;
and
The Attorney General of Canada, the Attorney General of Quebec, the Attorney General of Manitoba, the Attorney General for Saskatchewan, the Attorney General for Alberta, the Canadian Association of Provincial Court Judges, the Conférence des juges du Québec, the Saskatchewan Provincial Court Judges Association, the Alberta Provincial Judges' Association, the Canadian Bar Association and the Federation of Law Societies of Canada, interveners;
And between
Her Majesty The Queen, appellant;
v.
Shawn Carl Campbell, respondent;
And between
Her Majesty The Queen, appellant;
v.
Ivica Ekmecic, respondent;

And between
Her Majesty The Queen, appellant;
v.
Percy Dwight Wickman, respondent;
and
The Attorney General of Canada, the Attorney General of Quebec, the Attorney General of Manitoba, the Attorney General of Prince Edward Island, the Attorney General for Saskatchewan, the Canadian Association of Provincial Court Judges, the Conférence des juges du Québec, the Saskatchewan Provincial Court Judges Association, the Alberta Provincial Judges' Association, the Canadian Bar Association and the Federation of Law Societies of Canada, interveners;
And between
The Judges of the Provincial Court of Manitoba as represented by the Manitoba Provincial Judges Association, Judge Marvin Garfinkel, Judge Philip Ashdown, Judge Arnold Conner, Judge Linda Giesbrecht, Judge Ronald Myers, Judge Susan Devine and Judge Wesley Swail, and the Judges of the Provincial Court of Manitoba as represented by Judge Marvin Garfinkel, Judge Philip Ashdown, Judge Arnold Conner, Judge Linda Giesbrecht, Judge Ronald Myers, Judge Susan Devine and Judge Wesley Swail, appellants
v.
Her Majesty The Queen in right of the province of Manitoba as represented by Rosemary Vodrey, the Minister of Justice and the Attorney General of Manitoba, and Darren Praznik, the Minister of Labour as the Minister responsible for The Public Sector Reduced Work Week and Compensation Management Act, respondent;
and
The Attorney General of Canada, the Attorney General of Quebec, the Attorney General of Prince Edward Island, the Attorney General for Saskatchewan, the Attorney General for Alberta, the Canadian Judges Conference, the Canadian Association of Provincial Court Judges, the Conférence des juges du Québec, the Saskatchewan Provincial Court Judges Association, the Alberta Provincial Judges' Association, the Canadian Bar Association and the Federation of Law Societies of Canada, interveners.

[1997] 3 S.C.R. 3

[1997] 3 R.C.S. 3

[1997] S.C.J. No. 75

[1997] A.C.S. no 75

File Nos.: 24508, 24778, 24831, 24846.

Supreme Court of Canada

1996: December 3, 4; 1997: September 18 *.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.

ON APPEAL FROM THE PRINCE EDWARD ISLAND SUPREME COURT, APPEAL DIVISION ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

* Reasons for judgment on rehearing reported at [1998] 1 S.C.R. 3.

Constitutional law -- Judicial independence -- Whether express provisions in Constitution exhaustive written code for protection of judicial independence -- True source of judicial independence -- Whether judicial independence extends to Provincial Court judges -- Constitution Act, 1867, preamble, ss. 96 to 100 -- Canadian Charter of Rights and Freedoms, s. 11(d).

Constitutional law -- Judicial independence -- Components of institutional financial security -- Constitution Act, 1867, s. 100 -- Canadian Charter of Rights and Freedoms, s. 11(d).

Courts -- Judicial independence -- Provincial Courts -- Changes or freezes to judicial remuneration -- Provincial governments and legislatures reducing salaries of Provincial Court judges as part of overall economic measure -- Whether reduction constitutional -- Procedure to be followed to change or freeze judicial remuneration -- Canadian Charter of Rights and Freedoms, ss. 1, 11(d) -- Provincial Court Act, R.S.P.E.I. 1988, c. P-25, s. 3(3) -- Provincial Court Judges Act, S.A. 1981, c. P-20.1, s. 17(1) -- Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94 -- Public Sector Reduced Work Week and Compensation Management Act, S.M. 1993, c. 21, s. 9(1).

Constitutional law -- Charter of Rights -- Independent and impartial tribunal -- Provincial Courts -- Institutional financial security -- Changes or freezes to judicial remuneration -- Provincial governments and legislatures reducing salaries of Provincial Court judges as part of overall economic measure -- Whether reduction infringed judicial independence -- If so, whether infringement justifiable -- Procedure to be followed to change or freeze judicial remuneration -- Canadian Charter of Rights and Freedoms, ss. 1, 11(d) -- Provincial Court Act, R.S.P.E.I. 1988, c. P-25, s. 3(3) -- Provincial Court Judges Act, S.A. 1981, c. P-20.1, s. 17(1) -- Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94 -- Public Sector Reduced Work Week and Compensation Management Act, S.M. 1993, c. 21, s. 9(1).

Rather, all that Valente held is that s. 11(d) does not, as a matter of principle, automatically provide the same level of protection to provincial courts as s. 100 and the other judicature provisions do to superior court judges. In the particular circumstances, though, s. 11(d) may in fact provide the same level of protection to provincial court judges as the judicature provisions do to superior court judges.

163 The relevance of the judicature provisions, and s. 100 in particular, to the interpretation of s. 11(d) emerges from their shared commitment to judicial independence. The link between these two sets of provisions can be found in Beauregard itself, where the Court developed the distinction between individual independence and institutional independence by reference to Valente. I also alluded to the link between these two sets of provisions in my separate reasons in Cooper. As I have suggested, this link arises in part as a function of the fact that both ss. 11(d) and 100 are expressions of the unwritten principle of judicial independence which is recognized and affirmed by the preamble to the Constitution Act, 1867.

164 What the link between s. 11(d) and the judicature provisions means is that certain fundamental aspects of judicial independence are enjoyed not only by superior courts, but by provincial courts as well. In my opinion, the constitutional parameters of the power to change or freeze judges' salaries under s. 100, as defined by Beauregard and developed in these reasons, fall into this category.

165 In conclusion, the requirements laid down in Beauregard and developed in these reasons with respect to s. 100 and superior court judges, are equally applicable to the guarantee of financial security provided by s. 11(d) to provincial court judges. Just as Parliament can change or freeze the salaries of superior court judges, legislatures and executives of the provinces can do the same to the salaries of provincial court judges.

(ii) Independent, Effective and Objective Commissions

166 Although provincial executives and legislatures, as the case may be, are constitutionally permitted to change or freeze judicial remuneration, those decisions have the potential to jeopardize judicial independence. The imperative of protecting the courts from political interference through economic manipulation is served by interposing an independent body -- a judicial compensation commission -- between the judiciary and the other branches of government. The constitutional function of this body is to depoliticize the process of determining changes or freezes to judicial remuneration. This objective would be achieved by setting that body the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature, responding to the particular proposals made by the government to increase, reduce, or freeze judges' salaries.

167 I do not wish to dictate the exact shape and powers of the independent commission here. These questions of detailed institutional design are better left to the executive and the legislature, although it would be helpful if they consulted the provincial judiciary prior to creating these bodies. Moreover, different provinces should be free to choose procedures and arrangements which are suitable to their needs and particular circumstances. Within the parameters of s. 11(d), there must be scope for local choice, because jurisdiction over provincial courts has been assigned to the provinces by the Constitution Act, 1867. This is one reason why we held in Valente, supra, at p. 694, that "[t]he standard of judicial independence for purposes of s. 11(d) cannot be a standard of uniform provisions".

168 Before proceeding to lay down the general guidelines for these independent commissions, I must briefly comment on Valente. There is language in that decision which suggests that s. 11(d) does not require the existence of independent commissions to deal with the issue of judicial remuneration. In particular, Le Dain J. stated that he did "not consider the existence of such a committee to be essential to security of salary for purposes of s. 11(d)" (p. 706). However, that question was not before the Court, since Ontario, the province where Valente arose, had an independent commission in operation at the time of the decision. As a result, the remarks of Le Dain J. were strictly obiter dicta, and do not bind the courts below and need not today be overruled by this Court.

169 The commissions charged with the responsibility of dealing with the issue of judicial remuneration must meet three general criteria. They must be independent, objective, and effective. I will address these criteria in turn, by reference, where possible, to commissions which already exist in many Canadian provinces to set or recommend the levels of judicial remuneration.

170 First and foremost, these commissions must be independent. The rationale for independence flows from the constitutional function performed by these commissions -- they serve as an institutional sieve, to prevent the setting or freezing of judicial remuneration from being used as a means to exert political pressure through the economic manipulation of the judiciary. It would undermine that goal if the independent commissions were under the control of the executive or the legislature.

171 There are several different aspects to the independence required of salary commissions. First, the members of these bodies must have some kind of security of tenure. In this context, security of tenure means that the members of commissions should serve for a fixed term, which may vary in length. Thus, in Manitoba, the term of office for the Judicial Compensation Committee is two years (Provincial Court Act, s. 11.1(1)), whereas the term of office for British Columbia's Judicial Compensation Committee and Ontario's Provincial Judges Remuneration Commission is three years (Provincial Court Act, R.S.B.C. 1979, c. 341, s. 7.1(1); Courts of Justice Act, R.S.O. 1990, c. C.43, Schedule (Appendix A of Framework Agreement), para. 7), and in Newfoundland, the term of its salary tribunal is four years (Provincial Court Act, 1991, S.N. 1991, c. 15, s. 28(3)). In my opinion, s. 11(d) does not impose any restrictions on the membership of these commissions. Although the independence of these commissions would be better served by ensuring that their membership stood apart from the three branches of government, as is the case in Ontario (Courts of Justice Act, Schedule, para. 11), this is not required by the Constitution.

172 Under ideal circumstances, it would be desirable if appointments to the salary commission were not made by any of the three branches of government, in order to guarantee the independence of its members. However, the members of that body would then have to be appointed by a body which must in turn be independent, and so on. This is clearly not a practical solution, and thus is not required by s. 11(d). As we said in Valente, supra, at p. 692:

> It would not be feasible... to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s. 11(d) of the Charter....

What s. 11(d) requires instead is that the appointments not be entirely controlled by any one of the branches of government. The commission should have members appointed by the judiciary, on the one hand, and the legislature and the executive, on the other. The judiciary's nominees may, for example, be chosen either by the provincial judges' association, as is the case in Ontario (Courts of

Justice Act, Schedule, para. 6), or by the Chief Judge of the Provincial Court in consultation with the provincial judges' association, as in British Columbia (Provincial Court Act, s. 7.1(2)). The exact mechanism is for provincial governments to determine. Likewise, the nominees of the executive and the legislature may be chosen by the Lieutenant Governor in Council, although appointments by the Attorney General as in British Columbia (Provincial Court Act, s. 7.1(2)), or conceivably by the legislature itself, are entirely permissible.

173 In addition to being independent, the salary commissions must be objective. They must make recommendations on judges' remuneration by reference to objective criteria, not political expediencies. The goal is to present "an objective and fair set of recommendations dictated by the public interest" (Canada, Department of Justice, Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits (1996), at p. 7). Although s. 11(d) does not require it, the commission's objectivity can be promoted by ensuring that it is fully informed before deliberating and making its recommendations. This can be best achieved by requiring that the commission receive and consider submissions from the judiciary, the executive, and the legislature. In Ontario, for example, the Provincial Judges' Remuneration Commission is bound to consider submissions from the provincial judges' association and the government (Courts of Justice Act, Schedule, para. 20). Moreover, I recommend (but do not require) that the objectivity of the commission be ensured by including in the enabling legislation or regulations a list of relevant factors to guide the commission's deliberations. These factors need not be exhaustive. A list of relevant factors might include, for example, increases in the cost of living, the need to ensure that judges' salaries remain adequate, as well as the need to attract excellent candidates to the judiciary.

174 Finally, and most importantly, the commission must also be effective. The effectiveness of these bodies must be guaranteed in a number of ways. First, there is a constitutional obligation for governments not to change (either by reducing or increasing) or freeze judicial remuneration until they have received the report of the salary commission. Changes or freezes of this nature secured without going through the commission process are unconstitutional. The commission must convene to consider and report on the proposed change or freeze. Second, in order to guard against the possibility that government inaction might lead to a reduction in judges' real salaries because of inflation, and that inaction could therefore be used as a means of economic manipulation, the commission must convene if a fixed period of time has elapsed since its last report, in order to consider the adequacy of judges' salaries in light of the cost of living and other relevant factors, and issue a recommendation in its report. Although the exact length of the period is for provincial governments to determine, I would suggest a period of three to five years.

175 Third, the reports of the commission must have a meaningful effect on the determination of judicial salaries. Provinces which have created salary commissions have adopted three different ways of giving such effect to these reports. One is to make a report of the commission binding, so that the government is bound by the commission's decision. Ontario, for example, requires that a report be implemented by the Lieutenant Governor in Council within 60 days, and gives a report of the Provincial Judges' Remuneration Commission statutory force (Courts of Justice Act, Schedule, para. 27). Another way of dealing with a report is the negative resolution procedure, whereby the report is laid before the legislature and its recommendations are implemented unless the legislature votes to reject or amend them. This is the model which has been adopted in British Columbia (Provincial Court Act, s. 7.1(10)) and Newfoundland (Provincial Court Act, 1991, s. 28(7)). The final way of giving effect to a report is the affirmative resolution procedure, whereby a report is laid be-

fore but need not be adopted by the legislature. As I shall explain below, until the adoption of Bill 22, this was very similar to the procedure followed in Manitoba (Provincial Court Act, s. 11.1(6)).

176 The model mandated as a constitutional minimum by s. 11(d) is somewhat different from the ones I have just described. My starting point is that s. 11(d) does not require that the reports of the commission be binding, because decisions about the allocation of public resources are generally within the realm of the legislature, and through it, the executive. The expenditure of public funds, as I said above, is an inherently political matter. Of course, it is possible to exceed the constitutional minimum mandated by s. 11(d) and adopt a binding procedure, as has been done in some provinces.

177 For the same reasons, s. 11(d) does not require a negative resolution procedure, although it does not preclude it. Although the negative resolution procedure still leaves the ultimate decision to set judicial salaries in the hands of the legislature, it creates the possibility that in cases of legislative inaction, the report of the commission will determine judicial salaries in a binding manner. In my opinion, s. 11(d) does not require that this possibility exist.

178 However, whereas the binding decision and negative resolution models exceed the standard set by s. 11(d), the positive resolution model on its own does not meet that standard, because it requires no response to the commission's report at all. The fact that the report need not be binding does not mean that the executive and the legislature should be free to ignore it. On the contrary, for collective or institutional financial security to have any meaning at all, and to be taken seriously, the commission process must have a meaningful impact on the decision to set judges' salaries.

179 What judicial independence requires is that the executive or the legislature, whichever is vested with the authority to set judicial remuneration under provincial legislation, must formally respond to the contents of the commission's report within a specified amount of time. Before it can set judges' salaries, the executive must issue a report in which it outlines its response to the commission's recommendations. If the legislature is involved in the process, the report of the commission must be laid before the legislature, when it is in session, with due diligence. If the legislature is not in session, the government may wait until a new sitting commences. The legislature should deal with the report directly, with due diligence and reasonable dispatch.

180 Furthermore, if after turning its mind to the report of the commission, the executive or the legislature, as applicable, chooses not to accept one or more of the recommendations in that report, it must be prepared to justify this decision, if necessary in a court of law. The reasons for this decision would be found either in the report of the executive responding to the contents of the commission's report, or in the recitals to the resolution of the legislature on the matter. An unjustified decision could potentially lead to a finding of unconstitutionality. The need for public justification, to my mind, emerges from one of the purposes of s. 11(d)'s guarantee of judicial independence -- to ensure public confidence in the justice system. A decision by the executive or the legislature, to change or freeze judges' salaries, and then to disagree with a recommendation not to act on that decision made by a constitutionally mandated body whose existence is premised on the need to preserve the independence of the judiciary, will only be legitimate and not be viewed as being indifferent or hostile to judicial independence, if it is supported by reasons.

181 The importance of reasons as the basis for the legitimate exercise of public power has been recognized by a number of commentators. For example, in "Developments in Administrative Law: The 1992-93 Term" (1994), 5 S.C.L.R. (2d) 189, at p. 243, David Dyzenhaus has written that

> what justifies all public power is the ability of its incumbents to offer adequate reasons for their decisions which affect those subject to them. The difference between mere legal subjects and citizens is the democratic right of the latter to require an accounting for acts of public power.

Frederick Schauer has made a similar point ("Giving Reasons" (1995), 47 Stan. L. Rev. 633, at p. 658):

> ... when decisionmakers... expect respect for decisions because the decisions are right rather than because they emanate from an authoritative source, then giving reasons... is still a way of showing respect for the subject....

182 I hasten to add that these comments should not be construed as endorsing or establishing a general duty to give reasons, either in the constitutional or in the administrative law context. Moreover, I wish to clarify that the standard of justification required under s. 11(d) is not the same as that required under s. 1 of the Charter. Section 1 imposes a very rigorous standard of justification. Not only does it require an important government objective, but it requires a proportionality between this objective and the means employed to pursue it. The party seeking to uphold the impugned state action must demonstrate a rational connection between the objective and the means chosen, that the means chosen are the least restrictive means or violate the right as little as reasonably possible, and that there is a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgment of the right.

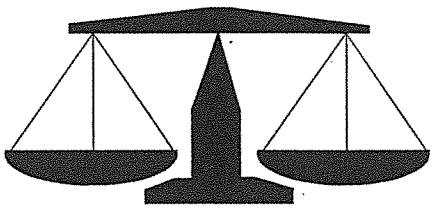
183 The standard of justification here, by contrast, is one of simple rationality. It requires that the government articulate a legitimate reason for why it has chosen to depart from the recommendation of the commission, and if applicable, why it has chosen to treat judges differently from other persons paid from the public purse. A reviewing court does not engage in a searching analysis of the relationship between ends and means, which is the hallmark of a s. 1 analysis. However, the absence of this analysis does not mean that the standard of justification is ineffectual. On the contrary, it has two aspects. First, it screens out decisions with respect to judicial remuneration which are based on purely political considerations, or which are enacted for discriminatory reasons. Changes to or freezes in remuneration can only be justified for reasons which relate to the public interest, broadly understood. Second, if judicial review is sought, a reviewing court must inquire into the reasonableness of the factual foundation of the claim made by the government, similar to the way that we have evaluated whether there was an economic emergency in Canada in our jurisprudence under the division of powers (Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373).

184 Although the test of justification -- one of simple rationality -- must be met by all measures which affect judicial remuneration and which depart from the recommendation of the salary commission, some will satisfy that test more easily than others, because they pose less of a danger of being used as a means of economic manipulation, and hence of political interference. Across-the-board measures which affect substantially every person who is paid from the public purse, in my opinion, are prima facie rational. For example, an across-the-board reduction in salaries that includes judges will typically be designed to effectuate the government's overall fiscal priorities, and hence will usually be aimed at furthering some sort of larger public interest. By contrast, a measure directed at judges alone may require a somewhat fuller explanation, precisely because it is directed at judges alone.

JUDICIAL COMPENSATION AND BENEFITS COMMISSION

REPORT

May 31, 2000



SUBMITTED TO THE
MINISTER OF JUSTICE OF CANADA

CHAPTER 6

FUNDING OF REPRESENTATIONAL COSTS OF JUDGES

In their initial submissions, the Conference and Council requested a decision by the Commission authorizing reimbursement by the Government of all costs incurred by the Conference and Council concerning their participation in the process of the Commission, payable in a manner analogous to a solicitor and client award of costs in a court proceeding. This scale of costs contemplates full reimbursement of all actual and proper expenditures, including fees and out-of-pocket disbursements for legal counsel and experts, inclusive of applicable taxes.

The Government argued that the Commission lacks jurisdiction both to order that the Government provide such funding to the Conference and Council and, further, to determine questions of law, including the question of whether the Government has any legal obligation to fund the participation of the Conference and Council before the Commission. It was argued, in any event, that the Government had no obligation to fund the participation of the Conference and Council, particularly where participation of the Judiciary, while desirable, was not required.

When the Commission met in public session on March 20, 2000 the respective positions of the involved parties on the funding issue were further clarified. It emerged that there was no dispute among the parties on the following:

i) while the Commission does not have jurisdiction to direct or require that representational funding be provided by the Government to the Conference and Council, the Commission could make a recommendation to the Minister of Justice in that regard; and

ii) the Government had contributed $80,000 to the costs incurred by the Conference and Council in respect of their participation before the Commission. This payment was described by the Government as an "*ex gratia*" payment.

6.1 The Jurisdictional Question

As noted, all involved parties were agreed that there was no impediment to the Commission making a recommendation to the Minister of Justice on the matter of funding the representational costs of the Conference and Council, should the Commission conclude that such a recommendation was warranted. The making of such a recommendation, of course, is quite different from directing that reimbursement of representational costs be made by the Government. In either event, the Commission recognizes that consent of the parties cannot confer jurisdiction on the Commission if such jurisdiction does not otherwise legally exist.

The ability of an advisory tribunal to make a recommendation to government that reimbursement be made by the state of the representational costs of persons appearing before the tribunal, was clearly recognized in *Jones et al. v. RCMP Public Complaints Commission.*[1] In that case, the RCMP Public Complaints Commission declined to order the payment of funds to student complainants to allow them to be represented by counsel at an inquiry to be conducted by that tribunal. In addition, however, the tribunal concluded that it lacked jurisdiction to recommend to the federal government that such funding be provided and, accordingly, it declined to do so. On judicial review before the courts, the tribunal's decision was set aside and a declaration was granted that the tribunal had the authority to make the requested recommendation concerning funding, although there was no duty on it to do so. Rather, the decision whether to make such a recommendation was a matter within the complete discretion of the tribunal, as was the manner in which any such recommendation for funding might be made.

We are satisfied that similar reasoning applies to this Commission such that we are not precluded from making a funding recommendation if we determine that such a recommendation is advisable in the circumstances.

---

[1] (1998), 154 F.T.R. 184 (Federal Court of Canada, Trial Division).

6.2 Whether Provision of Funding is Obligatory

As noted, the Government asserted that there is no legal obligation, constitutional or otherwise, to fund the participation of the Conference and Council before the Commission. It also argued that the Commission lacks jurisdiction to determine whether an obligation to provide funding exists and, if so, on what basis, because such a determination involves a question of law and the determination of questions of law is beyond our legal authority.

In contrast, the Conference and Council argued that an obligation to provide representational funding to the Judiciary does exist and the entire issue of representational funding should be expressly recognized and dealt with by the Commission in its report.

We agree that it is important that we deal with the matter of representational funding in our report. For the reasons set out below, however, it is unnecessary for us to express a view on whether there is an affirmative legal obligation on the Government to provide representational funding to the Judiciary for the purposes of inquiries contemplated by section 26 of the *Judges Act* and further, on whether this Commission has the legal authority to determine such a question. We have concluded that some reimbursement of representational costs is both desirable and necessary to ensure the efficacy of the Commission's proceedings. Our recommendations in this regard are not dependent on any determination of whether an obligation to provide such funding exists in law.

6.3 The Desirability of Participation: A Threshold Consideration

Much has been said in the submissions of the involved parties concerning the desirability of, or necessity for, participation by the Judiciary in the quadrennial review process. This issue goes to the heart of the Commission's process and its ability to discharge its obligations under the *Judges Act*. We agree with the following observation by Madam Justice Reed in *Jones et al. v. RCMP Public Complaints Commission*, made by her in the context of determining whether authority existed to make a recommendation that funding be provided:

> *The consideration that I would think would be crucial for the Commission is whether legal representation of the complainants would improve the quality of the proceedings before it. My observation is that when decision-makers have before them one party who is represented by conscientious, experienced and highly competent counsel, [as applied in that case], they prefer that the opposite party be on a similar footing. They prefer that one party not be unrepresented. An equality in representation usually makes for easier and better decision-making.*[2]

In the *PEI Reference Case,* Chief Justice Lamer stressed that recommendations by independent compensation commissions on judges' remuneration must be made with reference to objective criteria, not political expediencies. For this reason, he indicated that, although not required as a matter of constitutional law, such a commission's "*objectivity can be promoted by ensuring that it is fully informed before deliberating and making its recommendations. This can be best achieved by requiring that the commission receive and consider submissions from the judiciary, the executive, and the legislature...*".[3] There is no requirement under the *Judges Act*, as amended to date, that we receive and consider submissions from each of the Judiciary, the executive and the legislature. Nonetheless, there can be no doubt that the proceedings of this Commission have been materially improved by the fact of active participation by both the Conference and Council, and Government. The participation of members of the Judiciary and Government has directly contributed to our understanding of the issues and has improved the information base available to us for our deliberations. This is consistent with the spirit and direction of the Supreme Court of Canada's decision in the *PEI Reference Case.*

We also have had regard to the decision of Mr. Justice Roberts of the Newfoundland Supreme Court in *Newfoundland Association of Provincial Court Judges v. Newfoundland.*[4] In that case, in ordering funding for the judges of the Provincial Court of Newfoundland before either a compensation tribunal or the courts should that become necessary, Mr. Justice Roberts stated:

> *Constitutionally, our political system is composed of three branches of government -- executive, legislative and judicial. The importance of the independence of the judicial branch from the other two branches has already been canvassed. Despite this independence, judges are paid from public funds controlled by the executive and/or the legislature.*

---

[2] *Ibid.*, at 191, para. 25.
[3] *Supra,* Chapter 1, fn. 4, at para. 173.
[4] (1998) 160 D.L.R. (4th) 337 (Nfld. S.C.).

> *That is why, as Lamer, C.J.C. has stated, the process of determining compensation for judges must be depoliticized. The independent tribunal or commission envisaged by the Supreme Court of Canada in the Provincial Court Judges Case [the PEI Reference Case], a version of which has existed in Newfoundland since 1992, permits the necessary dialectic at one step removed from the judges themselves. That dialectic is critical to arriving at the synthesis which will be a fair and adequate remuneration, while at the same time preserving judicial independence, both in perception and substance. For this dialectic to function, the judges have to be represented before the independent commission and/or the courts, if necessary, in the same way as the executive and/or the legislature must be represented. Is it right and just, then, that the executive and/or legislative branches of government be represented by persons who services are paid for out of the public purse while those who represent the judicial branch are not? I think not. ...*
>
> ...
>
> *For the system to work as envisaged, equity dictates that both parties to the process be funded, not just one.*[5]

It seems clear to us that it is highly desirable that members of the Judiciary participate fully in the process of this Commission. For the purposes of this quadrennial review, they have done so chiefly through the involvement of the Conference and Council. Were the Judiciary not to be engaged in this Commission's process it could call into question both the efficacy of our proceedings and the objectivity of our recommendations. There is a strong argument to be made, therefore, that their participation is a necessary precondition if the process of this Commission is to be effective and objective, as required by the *PEI Reference Case*.

In any event, as a practical matter, without the participation of the Judiciary and the benefit of their submissions in addition to those of the Government and other interested persons, we are not confident that we would have gained sufficient understanding of the scope and potential impact of all of the issues raised before us.

That does not resolve the question, however, as to whether participation of the Judiciary must be funded participation. In our view, consideration of this aspect of the matter gives rise to at least the following issues:

---

[5] *Ibid.*, at paras. 69 and 70.

i) whether the decision-making process of the Commission would be improved by participation of the Judiciary and, if so, whether such participation could be assured in the absence of funding;

ii) whether the participation of the Judiciary is connected to the Commission's ability to carry out an independent, effective and objective process for the determination of judicial remuneration;

iii) whether, absent a recommendation from the Commission, public funding would otherwise be available to the Judiciary for participation in the Commission's process;

iv) whether both the reality and appearance of fairness in relation to the Commission's process would be affected if public funding of the Judiciary's participation is not assured;

v) whether the Government has elected to contribute to the representational costs of the Judiciary, by *ex gratia* payment or otherwise and, if so, whether the amount(s) of such contribution(s) is adequate in the circumstances;

vi) in relation to disbursements incurred by the Judiciary for the cost of experts, whether the work performed by the experts was not otherwise available and whether, once undertaken, it was made available to all interested parties; and

vii) whether the amount of representational costs was reasonable in the circumstances.

6.4 Analysis of Relevant Factors

As determined by the *PEI Reference Case*, the existence of this Commission and the special process envisaged by the *Judges Act* for its inquiries, are constitutionally mandated. The process of the Commission is specifically designed to establish an independent, effective and objective means for the determination of judicial remuneration in consequence of the constitutional prohibition precluding judges from negotiating their remuneration directly with representatives of the executive or the legislature.

Under this construct, while neither the Government nor the Judiciary is expressly deemed by statute to be a party to the Commission's proceedings, in practical terms they are the two principal actors before the Commission. In addition, although the *Judges Act* does not specifically require the participation of the Judiciary in the proceedings of the Commission, the

Act does expressly contemplate the involvement of the Judiciary at key stages of the process. Thus, for example, the involvement of the Judiciary is necessary under subsection 26.1(1) of the *Judges Act* in the nomination process which serves as the means by which the Commission is constituted. Similarly, under subsection 26(3) of the *Judges Act*, the Judiciary must be involved if the Commission seeks to postpone the date of commencement of its inquiry under subsection 26(1). These two features of the *Act* provide evidence of a legislative intention that the Judiciary be engaged in the special process required by the *PEI Reference Case* for the determination of judicial remuneration.

In *R. v. Campbell et al.*[6] the Supreme Court of Canada was asked to provide directions on whether the Province of Alberta was required to pay the reasonable expenses of the Alberta judiciary incurred in participating in Alberta's provincial remuneration commission process, or litigation relating thereto. In a unanimous decision, the Court held:

> *The composition and the procedure established for hearings before the independent, effective and objective commissions may vary widely. So will the approach to the payment of the representational costs of the judges. In some instances the resolution of the payment of representational costs will be achieved by agreement. Often the commission will have to determine the issue subject to an appeal to the court. In those circumstances the position adopted in the reasons of Roberts J. in Newfoundland Assn. of Provincial Court Judges, supra, may be appropriate, a matter upon which we need not comment in this motion. Suffice it to say, whatever may be the approach to the payment of costs it should be fair, equitable and reasonable.*[7]

As appears from this passage, the Supreme Court of Canada specifically had regard in *R. v. Campbell et al.* to the earlier decision of Mr. Justice Roberts in *Newfoundland Association of Provincial Court Judges v. Newfoundland.* In the latter case, as earlier noted, Mr. Justice Roberts concluded that judges have to be represented before independent compensation commissions if the depoliticized process intended for such commissions is to function properly. In consequence, he held on equitable principles that both parties to the process must be funded. The Supreme Court of Canada, in *R. v. Campbell et al.*, expressly refrained from commenting on

---

[6] (1998), 169 D.L.R. (4th) 231.
[7] *Ibid.*, at 233, para. 5.

the notion that funding was obligatory. The Court did not hold, although it left open the future possibility of holding, that the payment by government of the representational costs of judges in respect of participation before remuneration commissions is required at law, either in consequence of constitutional principles or in the interests of equity and fairness. What the Court did establish, however, is that the approach to the payment of representational costs of judges must be fair, equitable and reasonable.

In this case, both the Government and the Judiciary were represented throughout the Commission's process by able and experienced counsel. In the case of the Government, all of its representational costs were paid from public funds. In addition, the Government had available to it, also at public expense, the services of a variety of government experts, as required or thought desirable by the Government. In contrast, the Commission has been informed that the representational costs of the Judiciary have been paid for in equal shares to date by the Council and Conference, save as offset by the $80,000 *ex gratia* payment made by the Government.

The Council is a statutory body under the *Judges Act* and is generally funded by Parliament through the Commissioner for Federal Judicial Affairs based on Parliamentary appropriations. The Commission is not aware of whether the budget of the Council was increased specifically to compensate the Council for its anticipated expenditures in relation to this Commission's inquiry.

In contrast, the Conference receives no public funding and is financed solely by its members. The Commission has been informed that there are 950 members of the Conference, at present, which represents approximately 94% of the Judiciary. Membership statistics vary from year to year and, in the past, have been as low as 850. The current annual membership fee is $300, increased in 1999 from the previous amount of $150 to take into account the costs of establishment of a permanent office for the Conference and the engagement of staff for that office, and in contemplation of this quadrennial review process. The Conference's objects extend beyond representation of its members before this or similar commissions. The Conference was founded before the establishment of the triennial review process. Its activities include, where appropriate, involvement in the process of compensation commissions relating to the Judiciary, as well as the determination of policy for the continuing education of judges,

among other matters. From time to time the Conference engages the services of outside counsel and other professionals to advise on issues unrelated to the quadrennial review process. [8]

The Commission was informed that the $80,000 *ex gratia* payment received from the Government was made on account of the representational costs of both the Conference and Council and, upon receipt, was applied in full against outstanding invoices rendered by legal counsel for the Conference and Council.[9]

The Judiciary has not always been represented by legal counsel before past remuneration commissions. In our view, the participation of the Judiciary in the process of this Commission is as important and as beneficial as is the participation of the Government. As noted above, the quality of the Commission's decision-making and the efficacy of its process have been enhanced by the participation of both the Judiciary and Government. We are concerned, therefore, to ensure that no avoidable financial barriers to the future participation of the Judiciary before this inquiry, however constituted, are created. We also wish to ensure that public funds are expended only as necessary to defray the representational costs of the Judiciary.

We are generally of the view that the burden of paying the representational costs of the Judiciary attributable to participation in this quadrennial review process, should not be borne by individual judges. However, one of the stated reasons for recently increasing the annual membership fee for members of the Conference was associated with the costs to be incurred by the Conference through participation in the process of this inquiry. Accordingly, those members of the Conference who paid the increased annual membership fee presumably did so on the express understanding that a portion of that fee would be utilized to pay costs associated with participation in the quadrennial review. This factor must be taken into account.

Finally, we do not believe that the participation of the Judiciary should be dependent on the goodwill of the government of the day in authorizing *ex gratia* payments. If this were the case, the independence of the Judiciary from government would be undermined and the participation of the Judiciary in commission proceedings would be rendered uncertain.

---

[8] Letter from Ogilvy Renault to the Commission, dated April 14, 2000, at 4.
[9] *Ibid.*, at 3.

6.5 Conclusions and Recommendations

The Conference and Council provided us with a full breakdown of their representational costs as of the end of April, 2000, inclusive of legal fees and disbursements, and costs associated with experts. These costs were approximately $270,000.00. We reviewed that breakdown and all related particulars in detail and concluded, for the purposes of our inquiry, that the costs incurred were reasonable.

We recognized that the costs of participating in the process of this inquiry were considerable. They included costs related to participation in the public hearings, the preparation of various written submissions and responding to inquiries by the Commission for additional information. The question is not whether such costs can be paid by the judges who belong to the Conference and Council but, rather, what proportion of these costs fairly and equitably should be borne by the Conference and Council or their members. We agree with the proposition recognized by Mr. Justice Roberts in *Newfoundland Association of Provincial Court Judges v. Newfoundland*, previously referenced, that it is neither right nor just that the executive and/or legislative branches of government be represented before a compensation commission by persons and experts whose services are paid for out of the public purse, while those who represent the judicial branch are not. On the other hand, we also believe that some contribution should be made by the Judiciary to their overall representational costs, through application of a portion of their membership fees in the Conference. Finally, we were conscious that any recommendation by us concerning payment of representational costs will apply only to this quadrennial review, and that future commissioners will be free to determine the issue as they think fit, having regard to the facts and circumstances applicable to their inquiries.

On the basis of all of the information available to us, the factors outlined above, and the circumstances which applied to the conduct of this quadrennial review, we concluded that the Government should be responsible for payment of 80% of the total representational costs incurred by the Conference and Council in respect of their participation in the process of this inquiry, as detailed for our consideration.

Recommendation 22

The Commission recommends that the Government pay 80% of the total representational costs of the Conference and Council incurred in connection with their participation in the process of this inquiry as of May 31, 2000, such payment by the Government not to exceed the aggregate amount of $230,000, inclusive of the amount of $80,000 already contributed by the Government as of the date of this report and any extraordinary and explicitly identifiable increase to the budget of the Council in order to fund the participation of the Judiciary in the work of this Commission, and that the remainder of such costs be paid by the Conference and Council in such proportion as they deem appropriate.

Judicial Compensation and Benefits Commission

CANADA

Commission d'examen de la rémunération des juges

Chairperson/
Président
Roderick A. McLennan, Q.C.

Commissioners/
Commissaires
Gretta Chambers, CC, OQ, LLD
Earl A. Cherniak, Q.C.

Executive Director/
Directrice générale
Jeanne N. Ruest

99 Metcalfe Street
Ottawa, Ontario K1A 1E3

Tel./Tél. : (613) 992-4304
Fax/Téléc. : (613) 947-4442
e-mail/courriel : info@quadcom.gc.ca

May 31, 2004

The Honourable Irwin Cotler
Minister of Justice and Attorney General of Canada
Department of Justice
East Memorial Building
284 Wellington Street
Ottawa, Ontario K1A 0H8

Dear Minister:

Pursuant to the provisions of Section 26(2) of the *Judges Act*, I am pleased to submit the report of the second Judicial Compensation and Benefits Commission.

Yours truly,

Roderick A. McLennan, Q.C.
Chair

Encl.

5.2 Representational Costs For Judges to Participate in the Quadrennial Commission Review Process

The Association and Council seek reimbursement of 80 % of the judiciary's representational expenses in bringing their position on remuneration and other issues before the Commission.

At the present time, pursuant to s. 26(3) of the *Judges Act*, the judiciary is entitled to 50 per cent of their costs on a solicitor-client basis, as assessed by the Federal Court. The provision was enacted in 2001 following a recommendation from the Drouin Commission that the Government pay 80 % of the judiciary's representational costs. At the time, the Government considered the formula proposed by the Drouin Commission to be, as it said, unreasonable.

While the Association and Council did not judicially review the decision of the government not to implement the recommendation of the Drouin Commission, they have come back to us with the same request. And for similar reasons: that the proceedings had been materially improved by the active participation of both the judiciary and the Government, the latter of whose representational costs are paid out of public funds. This should also apply to all reasonable costs incurred by the Association and Council in connection with their participation in the Quadrennial Commission process.

There is agreement between the Association and Council and the Government on the principle of sharing the burden of cost. The Government argues that 50 % of assessed cost provides the judiciary, which is "the immediate beneficiary of the Commission's recommendations", with ample assistance to defray its representational costs and guards the public purse against "any largely unchecked discretion in deciding what costs would be incurred for legal counsel, expert witnesses and the like in preparation for a Commission."

The Association and Council, on the other hand, claim that their participation in the process is hardly at "their unchecked discretion", since the costs are reviewed by a Federal Court of Canada Assessment Officer and that it is unfair for them to have to pay half the expenses of a process they cannot control.

The constitutional context of Judicial Compensation and Benefits Commissions is to avoid direct, head-to-head negotiations between the federal government and federally appointed judges over the latter's remuneration by putting in place an independent, apolitical process that protects the independence of the judiciary and shields the government from accusations of trade-offs or any undue pressure (a constitutional imperative). What judges are paid is part and parcel of their standing in society. The economy and, therefore, the government's ability to pay will always have a bearing on the salaries of the judiciary. The value of the judiciary cannot be measured in terms of economic benefits or barter. It is measured by the role it plays in our society and, as such, it is in the public interest to ensure its remuneration is in line with the public trust.

Both the Government and the Association and Council were represented before this Commission by able and experienced counsel. As pointed out by the Drouin Commission and equally today, in the case of the Government, all of its representational costs are covered by public funds. In addition, it had available to it, also at public expense, the services of a variety of experts, as required or considered desirable by it and paid for by the government. We do not believe that the participation of the judiciary should become a financial burden on individual judges.

Recommendation 16:

The Commission recommends that the Government pay 100% of the disbursements and two-thirds of the legal fees (subject to assessment) incurred by the Association and Council in preparing their submissions and bringing them before the Commission.

GOVERNMENT RESPONSE TO THE 1999 JUDICIAL COMPENSATION AND BENEFITS COMMISSION

This is the Response to the Report of the Judicial Compensation and Benefits Commission, dated May 31, 2000, by the Minister of Justice on behalf of the Government pursuant to s. 26(7) of the *Judges Act*.

1. Background: Supreme Court of Canada Independence Decision and a Revised Judicial Compensation and Benefits Process

On November 18, 1997, the Supreme Court of Canada rendered its decision in the *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*.[1] That decision established new constitutional requirements in support of the principle of judicial independence. Every Canadian jurisdiction is required to have "an independent, objective and effective" commission to consider and make recommendations to government regarding the compensation and benefits of judges. The purpose of the commission is to depoliticize the process of judicial remuneration, so that the "courts are both free and appear to be free from political interference through economic manipulation by the other branches of government".[2]

While a commission's recommendations are not binding, governments are required to respond publicly to a commission's report. In the event that recommendations are not accepted, or where it is proposed that a recommendation should be modified, the government concerned must provide a reasonable justification for its decision. The reasonableness of the government's response is reviewable in a court of law and must meet the legal standard of "simple rationality", measured by the reasons and the evidence offered in support by the government.
A statutorily mandated federal judicial compensation commission had been in place prior to the decision in the *P.E.I Judges Reference.* Following that decision, the *Judges Act* was amended in order to reinforce the independence, objectivity and effectiveness of the commission process. The new Judicial Compensation and Benefits Commission ("Commission") is now required to convene every four years, and to make a report with recommendations within nine months of the commencement of its work.

The statutory mandate of the Commission is to inquire into the adequacy of judicial compensation and benefits.[3] In doing so the Commission is directed by statute to consider:[4]

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 *Judges Act* requires that the Minister of Justice respond publicly on behalf of the Government of Canada within six months of receipt of the Commission Report.[5] However the ultimate response will come from Parliament. Section 100 of the *Constitution Act, 1867* requires that the salaries and allowances of the federally appointed judiciary be established by Parliament. Accordingly, the Government will introduce a Bill at the earliest reasonable opportunity, proposing amendments to the *Judges Act* to implement this Response.

2. Report of the First Quadrennial Judicial Compensation and Benefits Commission

The first new quadrennial Commission was established on September 1, 1999. To ensure the independence of the Commission, as required by the *Judges Act,* its three members were appointed by the Governor in Council to hold office for a term of four years on good behaviour.[6] 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 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 on February 14 and March 20, 2000 during which the Commission heard extensive argument from representatives of the Government, the Canadian Judicial Council and the Canadian Judges Conference, 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.

The Commission delivered its Report to the Government on May 31, 2000. An excerpt from the Report setting out the text of the Commission's recommendations is attached as Annex A.[7]

3. Response to the Report

Before responding to the Commission's recommendations, the Government wishes to acknowledge and thank the Chair and the Commissioners of this first quadrennial Commission: Chairman Richard Drouin, and Commissioners Eleanore Cronk and Fred Gorbet. The procedure adopted by the Commission in consultation with the Government and representatives of the judiciary provided the transparency and accessibility necessary to ensure public confidence in the independence of the Commission and in the objectivity of its recommendations. The care with which the Commission undertook its preparations and deliberations is evident in its Report. While the Government may not share all the Commission's conclusions, it is clear that the Commission has made a great effort to offer reasons that are carefully explained and supported by evidence, to the extent that evidence was available. The quality and thoroughness of the Report will set the hallmark for future quadrennial Commissions in dealing with the important and often complex issues of judicial compensation.

The Government is committed to the principle of judicial independence and to the effectiveness of the Judicial Compensation and Benefits Commission process in support of that principle. The Government recognizes the particular importance of this first formal Response to these recommendations of the newly constitutionalized quadrennial Commission, both in terms of ensuring public perception of the legitimacy of the process and in reinforcing judicial confidence in the new process. In light of all these factors, the Government is prepared to accept Recommendations 1-7 and 9-21 of the Judicial Compensation and Benefits Commission, and will propose the necessary amendments to the *Judges Act* at the earliest reasonable opportunity. Certain of the recommendations are accepted subject to reasonable qualifications or criteria described below.

However, as also explained below, the Government is not prepared to accept the Commission's recommendations in their entirety. Specifically, Recommendation 8 relating to supernumerary judges will be deferred until further work has been done.[8] The Government does not accept Recommendation 22 relating to judicial representational costs and will propose that an alternative formula for the provision of such costs be established in the *Judges Act.*[9]

a. **Salaries and Allowances: Recommendations 1-5**

The Commission recommends that the salaries of puisne judges be increased from $178,100 to $198,000 inclusive of annual statutory indexing[10] effective April 1, 2000; with an increase of $2,000 in addition to statutory indexing for each of the following years until 2003[11] Equivalent adjustments to the salaries of Chief Justices, Associate Chief Justices and judges of the Supreme Court of Canada are recommended. The Commission further recommended that incidental, Northern and representational allowances be increased.[12]

While the Commission recommends a higher salary increase (11.2%)[13] than the Government had proposed in its written submission (5.7%), the recommended increase is significantly less than that sought by the representatives of the judiciary (26.3%). From this perspective, the recommended increases are within the range of what would be considered reasonable, given the difficulties inherent in assessing the adequacy of judicial salaries. Like Commissions before it, the Commission faced the perennial challenge in establishing a true salary comparator for the judiciary. Below the Government proposes that steps should be taken to address this information deficit in time for the next quadrennial review. However, on the basis of the evidence and the analysis currently available, it would be difficult to clearly demonstrate a substantive basis to challenge the recommendations. The Government will therefore propose to Parliament that the Commission's recommendations relating to salaries and allowances be implemented.

The Government does not accept all the assumptions made or comparators used by the Commission. In particular it appears that the Commission's recommendation for an annual increment above statutory indexing is based on an assumption about how compensation trends will develop over the next three years. This assumption may or may not be borne out by experience. It will be necessary to revisit this approach at the next quadrennial Commission, in light not only of actual trends but also through consideration of an improved information base upon which future assumptions and comparisons can be made. It is to this latter critical challenge that we now turn.

The first quadrennial Commission, like commissions before it, relied on a combination of comparative factors in arriving at its salary recommendations, including the earnings of private sector lawyers, the salaries and performance bonuses of the most senior federal Deputy Ministers, and the significance of judicial annuities in recruiting outstanding candidates to the bench. However, the Commission was required to make the best of a largely unsatisfactory information base, a fact which is to some degree acknowledged in the Report itself. The Commission recognized the insufficiency of the evidence that is currently available as it relates to the compensation of lawyers in private practice.[14] The Commission proposed that the Commission should develop a relevant income measure that would allow the tracking over time and in a consistent way of the relationship between judges' compensation and a compensation measure for the private bar. The Commission further suggested that it should be provided with the necessary resources to conduct a survey of private practitioner incomes on a regular basis.

The Government wholeheartedly agrees that better information is required in order to understand fully the role that compensation plays in the decision to seek judicial office. In the Government's view, relevant factors include not only financial remuneration such as the specific value of salaries, pensions and allowances, but as importantly, the other "quality of life" issues that are indisputably influential in a decision to seek judicial office. For example, what consideration is given by potential candidates to such issues as relative workload including hours of work, vacation and leave benefits? How do candidates take into account tenure considerations including security and risk? What weight is given to the availability of "end of career" options such as early retirement and supernumerary status? And how is a potential reduction of financial remuneration by some candidates weighed against a less tangible but very significant factor: the deep personal satisfaction that comes from the opportunity to make a public contribution in one of the most highly respected offices in Canadian life? How important is the quality of judicial work in a collegial context that allows for intellectual reflection on important or novel issues of legal principle, often a luxury for a practicing lawyer?

Given the unique nature of the federally appointed judiciary, such an analysis will admittedly not be easy. For example, obtaining the information necessary to assess the relative earnings and quality of life expectations of candidates for judicial office will be a new and difficult exercise. Developing an objective measure against which private sector and judicial workloads can be compared will also present a significant methodological challenge. In terms of judicial workload, such an undertaking will require the close co-operation of the federal Government and the provincial and territorial governments who are responsible for administration of justice in their respective jurisdictions. It will also require the active and co-operative participation of the federally appointed judiciary, and in particular Chief Justices, who are for the most part the holders of the information that would be required to develop a workable system capable of producing meaningful results.

It should be noted that another area of necessary information gathering and analysis is identified below in relation to the discussion of the Commission's recommendation relating to supernumerary judges. The Commission reiterated the suggestion of the 1993 Crawford Commission that the Canadian Judicial Council "actively collect relevant information in this area with a view to making it available for future quadrennial commissions".[15] It seems inevitable that any analysis of the impact of the contribution of supernumerary judges to the overall workload of a court will raise similar questions. An assessment that a supernumerary judge "normally works 50% of the time" arguably begs the question unless the workload expectations for a full-time judge are well understood.

---

b) Judicial Annuities and Other Benefits: Recommendations 6,7, 9-21

Generally, federally appointed judges who have served fifteen years on the bench can retire with an annuity of two-thirds of their salary. However, a judge who leaves the bench at any time before fulfilling the fifteen year requirement is not entitled to any annuity at all.[16] The Government is prepared to accept the Commission's recommendations for certain modest improvements to the current judicial annuity scheme, including that a judge be entitled to take early retirement with a pro-rated pension after 10 years on the bench. However, in so doing it is important to note that the Commission's recommendations be considered in the context of the pension proposals made on behalf of the judiciary and the Government's position in response before the Commission.

In their Joint Submission to the Commission dated December 20, 1999, representatives of the Canadian Judicial Council and the Canadian Judges' Conference proposed extensive and costly changes to the current judicial annuities scheme. The Government's position was that no additional *ad hoc* changes should be made to fundamental aspects of the scheme. The Government proposed instead to formally refer the issue of judicial annuity reform to the Commission after June 1, 2000 for a comprehensive review in light of the modern pension policy.

The judiciary withdrew, for purposes of this quadrennial review, many of their more extensive and expensive proposals for enhanced annuity options. In the end, the Commission was not persuaded to defer entirely its consideration of annuity improvements until the proposed comprehensive review. However, in the result, the Commission made only limited recommendations in this area. It recommended the provision of an early retirement option based on a pro-rated benefit.[17] The Commission also recommended the pension contribution rate be reduced from 7% to 1% when a judge becomes eligible to retire, which the Government had proposed.[18] In addition, it recommended the reinstatement of entitlement to contribute to RRSPs at the time the judge becomes eligible to retire.[19]

While the Government is prepared to implement these annuity-related recommendations, it remains of the opinion that a comprehensive review of the current judicial annuity regime is needed. The Government continues to believe that there is a need for a thorough re-examination of the basic policy objectives and assumptions that underlie the annuity scheme. Such a study would lay the groundwork for a longer term reform of the judicial annuity scheme, consistent with the *Judges Act* requirement of "adequacy" in support of judicial independence, the current or changing demographics of the judiciary, and the evolution of contemporary pension policy in response to societal changes.

Properly framed, this comprehensive review would include all aspects of pension policy. In addition to the range of annuity proposals made by the judiciary in the Joint Submission, the review would revisit earlier amendments to the *Judges Act* scheme. This would include issues such as the appropriateness and level of annuity contributions, and early retirement options such as the Rule of 80, as well as the current Commission recommendations. Such a study would also provide the opportunity to consider other important pension-related issues, such as pension-splitting within current family law regimes, the continued merits of the current rules relating to retirement on grounds of "permanent disability" in light of advances in modern medicine, and plan restructuring to achieve consistency with contemporary income tax and pension policy.

A comprehensive review of this kind would likely require a staged approach and should ideally be designed with input from all interested persons and groups. The Government will be seeking the views of the Commission and the judiciary as to the most effective way to begin this important undertaking in order to be prepared to address these issues before the next quadrennial Commission.

Before leaving the area of annuities, it should be noted that the Government also accepts the Commission's Recommendations 13-15 relating to enhanced survivor benefits, subject to certain requirements. The Commission's intention is to provide greater flexibility without increasing cost. The Government will propose terms designed to minimize the cost and ensure that the election will be as close to cost neutral as possible.[20]

The Government is also prepared to accept Recommendations 17-21.[21] In terms of Recommendation 17 with respect to insurance, the Commission has called for prompt creation of a separate life insurance plan. However, in Recommendation 18, the Commission recommends that the plan be compulsory for new judges. The requirement for compulsory participation means that this recommendation must be implemented by legislation. The Government will seek the necessary amendments to the *Judges Act*. In terms of the recommendation that the plan be created under the general framework of the Public Service Management Insurance Plan ("PSMIP"), the Government will take all steps that are within its power to implement the recommendation in this manner.[22] If for legal reasons the Government is unable to do so, it will take all necessary steps to provide an alternative plan at as reasonable a cost and taxable benefit to the judiciary as possible.

c) Supernumerary Status: Recommendation 8

The Commission recommends that a judge be entitled to elect supernumerary status upon satisfying the Rule of 80, that is when the judge's combined age and years of service add up to 80.[23]

The Government is not prepared to accept Recommendation 8 at this time, for a number of reasons. Implementation of this recommendation would have implications not only for the federal Government but also for the provinces and territories. As part of their constitutional responsibility for administration of justice, the provinces and territories determine the structure of the superior courts in each jurisdiction. [24] In so doing they decide the number and nature of judicial positions on those courts. It is for the provinces and territories to determine whether, as a policy matter, it is appropriate to create the office of supernumerary judge in the first instance. It is only where a province has enacted such legislation that the authority to pay supernumerary judges pursuant to the *Judges Act* is engaged.[25]

Recommendation 8 has the potential of increasing significantly the number of federally appointed supernumerary judges.[26] A number of jurisdictions have for some years expressed concerns about the growing numbers of supernumerary judges and their implications for the costs associated with provision of facilities and support services to those judges. In discussions with representatives of provincial and territorial governments, it has been proposed that the role of supernumerary judges and their contribution to the workload of the Canadian courts merit a more systematic review.

At the same time, important constitutional issues relating to the status of supernumerary judges will soon be considered by the Supreme Court of Canada.[27] The Court's decision may provide important guidance with respect to the capacity of governments to legislate in this area in the future.

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

d) Representational Costs: Recommendation 22

The Commission recommends that the Government pay 80% of the total representational costs incurred by the judiciary in connection with their participation in the Commission process, subject to a certain maximum.[28]

The Government does not accept Recommendation 22. There is no constitutional obligation on the Government to pay legal or other representational costs of the judiciary incurred as a result of participation in the Commission process.[29] As a policy matter, the Government recognized the public benefit of judicial participation in the Commission process and made an $80,000 *ex gratia* payment to representatives of the judiciary as a fair contribution to the participation of the judiciary before the Commission.

It is the Government's view that, as a matter of policy, the payment formula recommended by the Commission is not reasonable. That formula would afford the representatives of the judiciary a largely unchecked discretion in deciding what costs would be incurred for legal counsel, expert witnesses and the like in preparation for a Commission, with the public being held responsible for the payment of the significant and unpredictable expenditures incurred by the judiciary.

Instead the Government proposes an alternative formula which would provide for a reasonable contribution to the costs of the participation of the judiciary, while at the same time establishing reasonable limits on such expenditures. The costs would be shared equally by the public and the judiciary, the immediate beneficiaries of the Commission's recommendations as to compensation and benefits. The formula would be established by the *Judges Act*, so that the judges would have the benefit of knowing in advance the level of their responsibility, without having to await the recommendation of each quadrennial Commission. The representatives of the judiciary will take that responsibility into account in incurring costs reasonably and prudently.

Accordingly, the Government will propose that 50% of judicial representational costs be paid on a solicitor/client basis, subject to taxation in the Federal Court of Canada.[30] Under the proposed *Judges Act* amendment, this formula would apply to costs incurred before this Commission, as well as future commissions.

ANNEXE "A"

The Commission recommends that:

Recommendation 1

The salary of puisne judges be established as follows:
Effective April 1, 2000: $198,000, inclusive of statutory indexing effective that date;
Effective April 1, 2001: $200,000, plus statutory indexing effective that date;
Effective April 1, 2002 and 2003, respectively: the salary of puisne judges should be increased by an additional $2,000 in each year, plus statutory indexing effective on each of those dates.

(Section 2.4)

Recommendation 2

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, 2000 and inclusive of statutory indexing effective that date, at the following levels:

Supreme Court of Canada:	
Chief Justice of Canada	$254,500
Justices	$235,700
Federal Court and Tax Court:	
Chief Justices	$217,100
Associate Chief Justices	$217,100
Superior and Supreme Courts and Courts of Queen's Bench:	
Chief Justices	$217,100
Associate Chief Justices	$217,100

As of April 1 in each of 2001, 2002 and 2003, these salaries should be adjusted to maintain the same proportionate relationship with the salary of puisne judges established as of April 1, 2000.

(Section 2.6)

Recommendation 3

Incidental Allowances be adjusted to a level of $5,000 per year effective as of April 1, 2000.

(Section 3.1)

Recommendation 4

Northern Allowances be adjusted to a level of $12,000 per year effective as of April 1, 2000.

(Section 3.2)

Recommendation 5

Effective as of April 1, 2000, Representational Allowances be set as follows:

Chief Justice of Canada	$ 18,750
Chief Justices of the Federal Court of Canada and the Chief Justice of each province	$ 12,500
Supreme Court of Canada Puisne Judges, Trial Chief Justices, Other Designated Chief Justices and Senior Judges	$ 10,000

(Section 3.3)

Recommendation 6

Effective as of April 1, 2000, contributions toward a judicial annuity be reduced from 7% of salary to 1% of salary for the period during which a judge is entitled to receive a full annuity but continues to work in either a full-time or supernumerary capacity.

(Section 4.6)

Recommendation 7

Effective as of April 1, 2000, the relevant regulations under the *Income Tax Act* be amended to afford judges the opportunity to contribute to RRSPs at the time they121
cease making contributions to the judicial annuity scheme, on the same basis as public servants are now allowed to do.

(Section 4.7)

Recommendation 8

Effective as of April 1, 2000, judges have the right to elect supernumerary status for a period not exceeding 10 years upon attaining eligibility for a full pension.

(Section 4.8)

Recommendation 9

Effective as of April 1, 2000, to be eligible for early retirement with a pro-rated pension, a judge must serve at least 10 years and must be at least 55 years of age.

(Section 4.9)

Recommendation 10

Effective as of April 1, 2000, a pro-rated pension, available to any judge who has served at least 10 years and is at least 55 years of age, be calculated as 2/3 of salary in the year that early retirement is elected, multiplied by the number of years of service divided by the number of years which the electing judge would have been required to serve in order to earn a full annuity.

(Section 4.9)

Recommendation 11

Effective as of April 1, 2000, the pro-rated pension not be payable without actuarial reduction prior to the judge attaining age 60 and that the amount of the pension be indexed by the Consumer Price Index in each year that it is deferred.

(Section 4.9)

Recommendation 12

Should a judge who is eligible for early retirement wish to elect a pro-rated annuity that is payable immediately, the value of the annuity be reduced by 5% per year for every year that the annuity is paid in advance of age 60.

(Section 4.9)

Recommendation 13

Effective as of April 1, 2000, the annuity provisions of the *Judges Act* be amended to provide judges with the option to elect a survivor's benefit of 60% of the judicial annuity, with a consequent reduction in the initial benefit calculated to minimize any additional cost to the annuity plan.

(Section 4.10)

Recommendation 14

Effective as of April 1, 2000, judges have the further flexibility to elect a survivor's benefit of up to 75% of the annuitant's pension, with an actuarial reduction to initial benefits that will make the election as close to cost neutral as possible.

(Section 4.10)

Recommendation 15

Subsection 44(3) of the *Judges Act* be repealed.

(Section 4.10)

Recommendation 16

Effective as of April 1, 2000, a Justice of the Supreme Court of Canada who retires and who, with the certification of the Chief Justice is required to participate in judgments for up to six-months following retirement, be compensated at full salary (calculated at the time of retirement) for the time that he or she so serves, and be entitled to an appropriate portion of the Incidental and Representational Allowances.

(Section 4.12)

Recommendation 17

A separate plan, under the general framework of the PSMIP, be created promptly for the Judiciary so as to provide the Judiciary with basic life insurance, post-retirement life insurance, and supplementary life insurance benefits that are, in all material respects, the same as those now enjoyed by members of the Executive Plan.

(Section 5.1)

Recommendation 18

Incumbent judges, at the time of introduction of the new plan, have the option, at their sole discretion, of opting out of insurance coverage or electing to accept coverage of 100% of salary, rather than 200% of salary.

(Section 5.1)

Recommendation 19

The Government take all available steps with the trustees of the applicable health benefits plan to effect a change under the plan to the hospital benefits available to the Judiciary, so as to increase such hospital benefits from $60.00 per day to $150.00 per day at no cost to judicial participants in the plan.

(Section 5.2)

Recommendation 20

Effective as of April 1, 2000, survivors of members of the Judiciary who die by accident or an act of violence occurring in the course of, or arising out of, the performance of their judicial duties should receive survivor benefits at the maximum level and on the same basis as now provided for the most senior category of public servants for whom such benefits are currently provided.

(Section 5.3)

Recommendation 21

When the dental plan is amended to provide coverage to retirees, retired judges be eligible to participate on the same terms and conditions as other retirees.

(Section 5.4)

Recommendation 22

The Government pay 80% of the total representational costs of the Conference and Council incurred in connection with their participation in the process of this inquiry as of May 31, 2000, such payment by the Government not to exceed the aggregate amount of $230,000, inclusive of the amount of $80,000 already contributed by the Government as of the date of this report and any extraordinary and explicitly identifiable increase to the budget of the Council in order to fund the participation of the Judiciary in the work of this Commission, and that the remainder of such costs be paid by the Conference and Council in such proportion as they deem appropriate.

(Section 6.5)

---

[1] [1998] 1 S.C.R. 3. (*P.E.I. Judges Reference*)
[2] *Ibid.* 88, para. 131.
[3] *Judges Act*, R.S. 1985, c. J-1, as amended (the *"Judges Act"*), s. 26 (1).
[4] *Ibid.*, s. 26(1.1).
[5] *Ibid.*, s. 26(7).
[6] *Ibid.*, s. 26.1. The Chair of the Commission is Richard Drouin, O.C., Q.C and the Commissioners at the time of the Report were Eleanore Cronk and Fred Gorbet. Ms. Cronk resigned her position on the Commission on October 12, 2000.
[7] The interim and final Commission Reports, written submissions and supporting materials can be found at www.quadcom.gc.ca .
[8] The further work that is required is described *Infra.,* Section 3(c).
[9] The alternative formula is discussed *Infra.*, Section 3(d).
[10] Section 25(2) of the *Judges Act* provides for an annual adjustment to salaries based on the Industrial Aggregate to protect against inflation. The Industrial Aggregate ("IA") is a measure of average weekly wages and salaries across Canada produced by Statistics Canada. On April 1st of each year, judges receive an increase based on the increase in the IA over the previous twelve months, to a maximum of 7%.
[11] The last salary increase was effective April 1, 1998. The IA on April 1, 2000 was 0.67%, resulting in an all inclusive percentage increase (salary increase plus statutory indexing) of 11.2% as of April 1, 2000.

The $2000 per year incremental salary increases represents a percentage increase of approximately 1% in each year.

[12] The incidental allowance (s. 27(1), *Judges Act*) permits the judiciary to purchase items and equipment, such as robes, law books and computers, which assist in the execution of judicial functions. This allowance has not been increased since 1989. The Northern allowance (s. 27(2), *Judges Act*) is intended to contribute to the higher cost of living in the territories; it has not been increased since 1989 either. Finally, representational allowances (s. 27(6), s. 27(7), *Judges Act*) reimburse Chief Justices and other like senior judges for travel and other expenses actually incurred as they discharge their special extra-judicial obligations such as representing their courts at conferences and public events. Representational allowances have not been increased since 1985.

[13] The 11.2% is inclusive of statutory indexing as set out in Fn. 11.

[14] *Report of the Judicial Compensation and Benefits Commission* ("*Report*"), May 31, 2000, at 116-117.

[15] *Ibid.*, at 78.

[16] Section 42(1) of the *Judges Act* sets out the eligibility requirements for retirement with a full annuity. Section 42(1)(c may be seen as an exception to the general rule of holding judicial office for a minimum period of years in that a judge who resigns as a result of a permanent disability may still receive a full annuity.

[17] In Recommendations 9 to 12, the Commission has recommended that the pro-rated, early retirement option be available as of April 1, 2000, effectively making its application retroactive. However, it is not feasible to make the early retirement option retroactive; for example, a judge can not elect a retroactive retirement date of April 2, 2000 when in reality the judge held judicial office from April 2, 2000 to the date of election. Accordingly, the *Judges Act* will be amended to implement Recommendations 9 to 12, but provide that the amendments be effective upon the coming into force of the legislation.

[18] Recommendation 6.

[19] Recommendation 7. This is consistent with the treatment afforded to members of regular employer-sponsored pension plans (including federal public servants) who cease to accrue benefits while still employed.

[20] The option would be exercisable at the time of retirement. (A limited time period will also be extended to retired judges to elect an enhanced survivor benefit.) Exercise of the option would be void if the judge dies within the first year, with original entitlements reinstated. The formula for actuarial reduction would be established by regulation based on mortality tables adjusted over time based on actual experience with the judicial constituency. Finally, although the Commission has recommended that Recommendations 13 and 14 be implemented as of April 1, 2000, it is not feasible to provide for retroactive application. Therefore, the *Judges Act* will be amended to provide an effective date upon the coming into force of the legislation.

[21] Recommendation 20 addresses benefits for accidental death and death caused by act of violence (also known as "slain on duty"). Dependents of judges would be provided an accidental death benefit and a slain on duty benefit equivalent to the level of benefit that is available to the dependents of the most senior category of public servants, being Executive 5. The entitlements would be implemented by statute, with the specifics of the formula provided by regulation. The accidental death benefit would be consistent with the benefit derived using formula provided in the *Government Employee Compensation Act*. The slain on duty benefit would be consistent with the benefit derived using a formula similar to the "Public Service Income Benefit Plan for Survivors of Employees Slain on Duty". Although the Commission recommended that Recommendation 20 be implemented as of April 1, 2000, as it is not feasible to make Recommendation 20 retroactive, the *Judges Act* will be amended to provide an effective date upon the coming into force of the legislation.

[22] PSMIP is a plan which is established and insured contractually with a private insurer. It is administered by a Board of Trustees. Both the consent of the insurer and the concurrence of the Board is required to establish a new plan under PSMIP. Recommendation 19, on the other hand, engages the Public Service Health Care Plan (PSHCP); Treasury Board Secretariat will extend 100% employer-paid coverage under the PSHCP for family hospital provisions Level III ($150/day) to all active judges.

[23] Currently, a judge must be a minimum of age 65 to elect supernumerary status (s. 28(2), *Judges Act*).

[24] The Parliament of Canada establishes the structure of the Federal Court of Canada and the Tax Court of Canada, including the creation of supernumerary offices (s. 28(1), *Judges Act*).

[25] S. 29 (1) of the *Judges Act* provides: Where the legislature of a province has enacted legislation establishing for each office of judge of a superior court or courts of the province the additional office of

supernumerary judge of the court or courts and a judge of such a court has notified the Minister of Justice of Canada and the attorney general of the province of his election to give up regular judicial duties and hold office only as a supernumerary judge, the judge shall thereupon hold only the office of supernumerary judge of that court and shall be paid the salary annexed to that office until he reaches the age of retirement, resigns or is removed from or otherwise ceases to hold office.

[26] Eighty-three (83) additional judges would be eligible to elect supernumerary status. (*Report*, Appendix 9, at 2).

[27] *Rice v. New Brunswick* (1999), 181 D.L.R. (4th) 643 (N.B.C.A.); *Mackin v. New Brunswick (Minister of Finance)* (1999), 40 C.P.C. (4th) 107 (N.B.C.A.); leave to appeal granted 2000 S.C.C.R. No. 21 (QL).

[28] Representational costs include the costs of legal services and disbursements such as expert consultant fees, travel expenses, photocopying and related administrative costs. The Commission recommended that the payment not exceed the aggregate amount of $230,000, inclusive of the amount of $80,000 already contributed by the Government.

[29] The Government's position is explained in its submission to the Commission dated February 3, 2000.

[30] In essence, the judiciary's legal representational costs would be reviewed by an assessment officer of the Federal Court of Canada for reasonableness, and the Government would then pay 50% of the resulting total.

This is the Response to the Report of the Judicial Compensation and Benefits Commission, dated May 31, 2004, by the Minister of Justice on behalf of the Government pursuant to s. 26(7) of the *Judges Act*.

1. Background: Supreme Court of Canada Independence Decision and a Revised Judicial Compensation and Benefits Process

The current federal Judicial Compensation and Benefits Commission (the Commission) was established in 1998 to meet the constitutional requirements established in support of the principle of judicial independence in the *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*.[1] The purpose of this independent, objective and effective commission is to depoliticize the process of judicial remuneration, so that the "courts are both free and appear to be free from political interference through economic manipulation by the other branches of government".[2]

The Commission is required to convene every four years, and to issue a report with recommendations within nine months of the commencement of its work. The statutory mandate of the Commission is to inquire into the adequacy of judicial compensation and benefits.[3] In doing so the Commission is directed by statute to consider:[4]

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's recommendations are not binding. However the Government is required to respond publicly to the Commission's report. Where recommendations are not accepted, or where it is proposed that a recommendation should be modified, the government must provide a reasonable justification for its decision. The reasonableness of the government's response is reviewable in a court of law and must meet the legal standard of "simple rationality", measured by the reasons and the evidence offered in support by the government.

It should be noted that while the Minister of Justice is responding publicly today on behalf of the Government of Canada,[5] it will be for Parliament to consider and approve the Government's proposed amendments to the *Judges Act*. Section 100 of the *Constitution Act, 1867* requires that the salaries and allowances of the federally appointed judiciary be established by Parliament. The Government will introduce a Bill for consideration by Parliament at the earliest reasonable opportunity.

---

[1] [1998] 1 S.C.R. 3 (*P.E.I. Judges Reference*)
[2] *Ibid.* 88, para. 131.
[3] *Judges Act*, R.S. 1985, c. J-1, as amended (the *"Judges Act"*), s. 26 (1).
[4] *Ibid.*, s. 26(1.1).
[5] *Ibid.*, s. 26(7).

2. Report of the 2003 Quadrennial Judicial Compensation and Benefits Commission

The current 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.[6]

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.

The Commission delivered its Report[7] to the Government on May 31, 2004. An excerpt from the Report setting out the text of the Commission's recommendations is attached as Annex A.

3. Response to the Report

At the outset, the Government wishes to acknowledge and thank the Chair and the Commissioners for their comprehensive report on the full range of submissions received by the Commission. The Commission process was transparent and accessible, which contributed in an important way to public perception of the Commission's independence and objectivity in developing its recommendations. The thorough and thoughtful explanations provided in the Report reflect the seriousness with which the Commission approached its mandate and the care it took in its deliberations and recommendations.

As indicated throughout the Commission proceedings, the Government is fully committed to ensuring the effectiveness of the Judicial Compensation and Benefits Commission process in support of the principle of judicial independence. The Government regards this public Response to the Commission recommendations as a critical element in ensuring public confidence in the legitimacy of this constitutionally mandated process.

---

[6] *Ibid.*, s. 26.1. The Commissioners' curriculum vitae can be found on the Commission website (www.quadcom.gc.ca)

[7] *Judicial Compensation and Benefits Commission Report*, May 31, 2004 ("*Report*"). The *Report*, written submissions and supporting materials can be found at www.quadcom.gc.ca.

Briefly, for reasons set out below, the Government is prepared to accept all of the recommendations of the 2003 Judicial Compensation and Benefits Commission, with one exception. As also explained below, the Government does not fully accept Recommendation 16 relating to judicial representational costs, but rather will propose a modified costs formula. [8] The Government will propose to Parliament that the necessary amendments to the *Judges Act* be implemented at the earliest reasonable opportunity.

a) Recommendations 1-2: Salary Adjustments

The Commission recommended a 10.8% salary increase effective April 1, 2004, inclusive of statutory indexing[9]. The proposed salary of a puisne[10] 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.[11] Notably, the Commission declined to recommend a continuation of an additional annual salary component for the following three years, other than statutory indexing effective April 1 of each year.

In arriving at its salary recommendation, the Commission engaged in a careful balancing of all the factors listed in s. 26(1.1), including the prevailing economic conditions in Canada, the role of financial security in ensuring judicial independence, and the need to continue to attract outstanding candidates to the judiciary.

---

[8] The alternative formula is discussed *infra.*, Recommendation 16, Representational Costs.

[9] 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 Wage.)

[10] "puisne" refers to a judge who does not hold the office of Chief Justice.

[11] 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 and Supreme Courts and Courts of Queen's Bench:	
Chief Justices	$263,000
Associate Chief Justices	$263,000

As with past Commissions, this Commission grappled with the challenge of identifying appropriate salary comparators given the unique nature of the judicial role. In arriving at its salary recommendations, the Commission had regard to a wide range of information concerning remuneration in both the public and private sector provided by the Government, the judiciary, and its own compensation experts. In addition to examining the traditional comparator of the DM-3[12] salary mid-point, the Commission broadened its consideration to the compensation of other senior officials appointed by the federal Government, including all levels of deputy ministers and other Governor in Council appointees.

However, the Commission regarded private sector legal income as "...an important, and perhaps the most important, comparator..."[13], because most appointees to the bench are drawn from senior lawyers from the Bar.[14] The specialized professional nature of the pool from which the judiciary is drawn is one aspect of its unique nature. Accordingly the Commission gave particular consideration and weight to available information about the incomes of lawyers in private practice.

The Government is prepared to accept the Commission's salary recommendations for several reasons.

The proposed increase appears reasonable when considered as an increase of approximately 2.7% per year, above annual indexing, over the relevant four-year period (April 1, 2004 to March 31, 2008) given that the Commission declined to recommend the continuation of the annual salary increment that was implemented following the Drouin Commission's recommendations[15] and that had been proposed by both the Government and judiciary.[16]

Such annual increases are within a reasonable range of general compensation trends for senior members of the federal public service.

---

[12] Deputy Minister, Level 3

[13] p. 41, *Report*

[14] pp. 31-32, *Report*

[15] The 1999 Judicial Compensation and Benefits Commission was chaired by Richard Drouin, Q.C., and the other Commissioners were Eleanore Cronk and Fred Gorbet.

[16] The Government proposal was for a 4.48% increase in the first year, with a $2,000 annual increment plus statutory indexing in the next three years. The judiciary's proposal was for a 17.2% first year increase, with a $3,000 annual increment plus statutory indexing in the next three years.

While the Commission's recommended increase (10.8%) is greater than what the Government proposed (4.48%, plus an annual increment of $2,000), it is nevertheless significantly less than the increase sought by the judiciary (17.2%, plus an annual increment of $3,000).

In light of all these factors, the Government is of the view that the Commission's salary recommendations are reasonable and will propose their implementation to Parliament.

It is important to note however that the Government's acceptance of the Commission salary recommendations should not taken as a complete acceptance of all of the assumptions made by the Commission with respect to the comparative analysis undertaken. The Commission itself identified the particular difficulty of assessing trends in the incomes of private practice lawyers. While significant efforts and progress had been made by both the Government and the judiciary in developing improved data and analysis, the Commission was left to do the best it could in light of the unsatisfactory nature of the information that is currently available in this area.

The Commission has in fact made a number of constructive suggestions to improve the process for future Commissions, particularly in relation to the development, under the auspices of the Commission itself, of more detailed and reliable comparative information in advance of the next Commission. As indicated, the Government is committed to ensuring that the Commission process is both objective and effective, and therefore welcomes these suggestions. The Government is fully prepared to participate in any discussions and joint efforts with the Commission and judiciary that would serve to improve the timeliness and reliability of information upon which the next Commission can rely.

b) Recommendation 3: Salaries for Senior Judges of the North

The Government accepts the Commission recommendation that the Senior Judges of the Northern Territories receive the same salary as provincial superior court Chief Justices.[17] At the same time the Government is pleased to take this opportunity to announce that the Government will also propose that the necessary amendments be made to designate the northern Senior Judges as Chief Justices of their respective courts.

---

[17] Recommendation 3: The Commission recommends that the senior northern judges receive equivalent compensation to that of a chief justice until such time as chief justices are appointed in those jurisdictions.

c) Recommendation 4: Salary Differential between Trial and Appellate Judges

The Commission declined to recommend a salary differential between trial judges and court of appeal judges as had been proposed by some members of Court of Appeal.[18] The Government accepts and endorses the Commission's reasons in this regard.

d) Recommendation 5: Division of Annuity on Relationship Breakdown

As proposed by the Government, and supported by the judiciary, the Commission recommended a mechanism to divide the judicial annuity in the event of a relationship breakdown.[19] The annuity scheme for the federally appointed judiciary is unique in failing to provide for such a mechanism.

The Commission's recommendation largely mirrors the Government's own proposal, but for one aspect, the deemed accrual period. Unlike most pension plans, the judicial annuity scheme does not provide for an annual accrual formula. In order to calculate the division of an annuity on relationship breakdown, a "notional" accrual period must be established. The Government had proposed that the deemed period of accrual would cease on the date the judge became entitled to a full annuity.

The Commission's recommendation would calculate the accrual period based on the expected period of judicial service. In the Commission's view, this formula would be fairer for both judges and spouses, as it can accommodate the annuity being shared with a spouse in the circumstances of a second conjugal breakdown. The Government is prepared to accept that the Commission's recommended approach represents a reasonable, cost-neutral mechanism for dividing the judicial annuity.

---

[18] Recommendation 4: The Commission does not recommend a salary differentiation between puisne judges who sit on courts of appeal and puisne judges who preside at trials.

[19] Recommendation 5: The Commission recommends that the *Judges Act* be amended to provide for:

- the possibility of dividing, upon conjugal breakdown, the judicial annuity deemed to accrue during a relationship, up to a 50% limit;
- the judicial annuity to be deemed to accrue over the judge's entire period of judicial service, for the purpose of determining the portion of the judicial annuity that is subject to division upon conjugal breakdown;
- a lump sum settlement option, to ensure a clean break and the possibility of deferring such settlement until the date when the judge will have attained age 55 and completed 10 years of service, if applicable; and
- the demographic assumptions used for the most recent *Actuarial Report on the Pension Plan for the Federally Appointed Judges* to be used for purposes of determining the value of the judicial annuity and the expected retirement date of a judge in calculating the portion of the judicial annuity subject to division.

The Commission also recommends that the government amend the *Judges Act* and the *Income Tax Act*, as necessary, to allow the transfer of a portion of the former spouses' lump-sum settlements to RRSPs as if the judicial annuity were a registered pension plan, at least for the portion of the judicial annuity up to the defined benefit pension limits applicable to registered pension plans under the *Income Tax Act*.

e) Recommendation 6: Survivor Benefits for Single Judges

The Commission declined to recommend a change in the provision of survivor benefits for single judges.[20] In doing so, the Commission accepted the Government's submission in this regard.

f) Recommendation 7: Enhanced Annuity for Judges who Retired between 1992-1997

The Commission also accepted the Government's position with respect to, and declined to recommend, proposed changes to annuities payable to judges who retired during the period of fiscal restraint between 1992 and 1997.[21]

g) Recommendations 8-14: Allowances

The Commission recommended that the Incidental Allowance[22] remain unchanged[23]. The Government accepts the reasons given by the Commission in this regard.

The Commission recommended that Regional Senior Judges[24] of Ontario receive a representational allowance[25] of $5,000 per year[26]. In view of Ontario's size and the distribution of its population, Regional Senior Judges take on responsibilities in representing their courts within defined geographical areas of the province that are akin to the duties undertaken by Chief Justices and other senior judges. In light of all of the circumstances, the Government accepts this recommendation.

---

[20] Recommendation 6: The Commission recommends that there be no change in the provision for survivor benefits for single judges until the matter is addressed by the government in the wider federal context.

[21] Recommendation 7: The Commission declines to recommend any change to the judicial annuities payable to the judges who retired during the 1992-97 time period.

[22] The incidental allowance of $5,000 per year (s. 27(1), *Judges Act*) permits the judiciary to purchase items and equipment, such as robes, law books and computers, which assist in the execution of judicial functions.

[23] Recommendation 8: The Commission recommends that the Incidental Allowance of $5,000 per annum for each judge remain unchanged.

[24] "...Ontario has divided the province into eight judicial regions, with a regional senior judge administering the judges in each of those regions." (p. 76, *Report*)

[25] A representational allowance (s. 27(6), s. 27(7), *Judges Act*) reimburses Chief Justices and other like senior judges for travel and other expenses actually incurred as they discharge their special extra-judicial obligations such as representing their courts at conferences and public events.

[26] Recommendation 9: The Commission recommends that effective April 1, 2004, s. 27(6) of the *Judges Act* be amended such that regional senior judges in Ontario be added to the judges entitled to a representational allowance under that section, and that the representational allowance for such regional senior judges be set, in s. 27(7), at an accountable maximum yearly amount of $5,000.

The Government also accepts the Commission recommendation that a Northern Allowance[27] should be paid to the superior court judge resident in Labrador.[28] This allowance is merited given that the higher cost of living and isolation experienced in Labrador is similar to that experienced by judges currently entitled to the Northern Allowance.

The Commission made a number of recommendations concerning relocation expenses[29] for judges. Presently, the *Removal Allowance Order*[30] provides a six-month time period for a judge to sell his or her home. In specific circumstances, that six-month period may be extended for "an additional period" which can run up to a year.[31] The judiciary had requested that this period of time be extended. The Commission declined to make this recommendation, but did recommend that the Commissioner for Federal Judicial Affairs have the discretion to provide an additional period time in the case of "unusual" circumstances.[32] In the Government's view, the current Removal Allowance Order guidelines provide sufficient discretion so that such an additional period may be granted where circumstances warrant.

The Government also accepts Recommendation 12,[33] that judges of the federally constituted courts and superior courts in the Northern territories be reimbursed for relocation expenses incurred within two years prior of the judge becoming eligible to retire. Judges of these courts are required to comply with statutory residency requirements when they accept their appointments, and many will incur relocation expenses upon their retirement as they return to the parts of Canada in which they resided prior to appointment. The recommendation is designed to be cost-neutral, and will

---

[27] The Northern Allowance (s. 27(2), *Judges Act*) of $12,000 is intended to contribute to the higher cost of living in the territories.

[28] Recommendation 10: The Commission recommends that the *Judges Act* be amended to provide for the payment of an isolated post allowance to the resident Labrador judge in the amount of $12,000 per annum, in conformity with the isolation allowances provided to the judges of the Northern Territories.

[29] Pursuant to s. 40 of the *Judges Act*, certain judges are entitled to reimbursement of moving expenses in prescribed circumstances, such as upon appointment to a place other than where the judge resided at the date of appointment.

[30] The *Removal Allowance Order* is the regulation made under the *Judges Act* which guides the specific entitlements to reimbursement of moving expenses.

[31] p. 81, *Report*

[32] Recommendation 11: The Commission recommends that the requested extension not be granted and that the Office of the Commissioner of Federal Judicial Affairs be mandated to deal with any circumstances that in the Commissioner's view can reasonably be deemed 'unusual'.

[33] Recommendation 12: The Commission recommends that, notwithstanding paragraphs 40(1)(c) and (e), claims under these paragraphs for expenses made in anticipation of a relocation, but prior to retirement or resignation from office, shall be reimbursable by a removable allowance, provided that:

(i) the anticipated expenses are incurred no earlier than two years prior to the judge becoming eligible to retire, and

(ii) that all relocation expenses connected with that relocation be paid within the timeframes currently provided in the Removal Allowance Order and that no later expenses should be reimbursed.

provide flexibility to these judges to aid their retirement planning. The Government therefore accepts this proposal.

The Commission also recommended that the partners of judges of the federally constituted courts be reimbursed for expenses incurred in an obligatory relocation, up to an accountable $5,000 limit[34]. The Government accepts this recommendation on the understanding that "partners" mean married spouses and common-law partners, and the expenses in question relate to expenses incurred as a result of a disruption in the partner's employment.

The Government accepts Recommendation 14[35], wherein the Commission declined to recommend that all superior court judges be entitled to relocation expenses to permit relocation to any part of Canada upon retirement.

h) Recommendation 15: Supreme Court of Canada Retirement after Ten Years

The Commission recommended that judges of the Supreme Court of Canada should be eligible to retire with 10 years of service on that Court irrespective of age.[36] The Government accepts this recommendation. Service as a member of the Supreme Court of Canada is extremely demanding. As the court of last resort, these judges must not only manage a uniquely heavy case load but are required to do so with the highest level of personal commitment and professional rigour. Also, most Supreme Court judges have already served for extensive periods on courts of appeals prior to their appointment to the Supreme Court. In most cases, members of the Supreme Court of Canada would therefore be eligible to retire under the normal "Modified Rule of 80" retirement rule.[37] As a result, this special retirement provision for Supreme Court of Canada judges will not be used frequently.

i) Recommendation 16: Representational Costs

As indicated above, the Government is not prepared to fully accept the Commission's recommendation that the judiciary's current entitlement to reimbursement of legal

---

[34] Recommendation 13: The Commission recommends that the partners of judges of the Supreme Court of Canada, the Federal Court, the Federal Court of Appeal and the Tax Court of Canada be reimbursed for incurred expenses in the obligatory relocation, up to an accountable $5,000 limit.

[35] Recommendation 14: The Commission recommends that there be no change to the entitlement to the post-retirement removal allowance.

[36] Recommendation 15: The Commission recommends that justices of the Supreme Court of Canada be granted the exceptional privilege of eligibility for retirement on the full judicial annuity after 10 years of service on that bench regardless of age.

[37] s. 42(1)(a), *Judges Act*; with at least 15 years of service, when age plus years of service total 80.

representational costs be increased. The Commission recommended that the judiciary be reimbursed for 100% of disbursements and 66% of legal fees.[38]

The current *Judges Act* provision provides for 50% reimbursement of the judiciary's legal costs on a solicitor-client basis as assessed by the Federal Court[39]. It should be recalled that this formula modified the Drouin Commission recommendation for 80% reimbursement of the judiciary's legal representational costs.[40] In its December 13, 2000 Response, the Government justified its modification of the Drouin recommendation on the basis that it would afford the representatives of the judiciary a largely unchecked discretion in deciding what costs would be incurred for legal counsel, expert witnesses and the like in preparation for a Commission. The concern was that the public would be held responsible for the payment of the significant and unpredictable expenditures incurred by the judiciary.

The Government's 50% formula provided a reasonable contribution to the costs of the participation of the judiciary, while at the same time establishing reasonable limits on such expenditures. The equal sharing of costs by public and the judiciary was regarded as fair, given that the members of the judiciary are the immediate beneficiaries of the Commission's recommendations. It also provided an appropriate financial incentive to ensure that the costs are incurred reasonably and prudently.

The Government continues to hold the view that there should be a financial incentive to ensure that representational costs are prudently incurred. This rationale applies equally to disbursements as well as legal fees, especially given that disbursements in these matters – for example in retaining expert compensation consultants – can be quite significant.

Accordingly, the Government will propose that representatives of the judiciary should be entitled to reimbursement of 66% of representational costs, both disbursements and legal fees. These costs would continue to be subject to assessment as currently required.

---

[38] Recommendation 16: The Commission recommends that the Government pay 100% of the disbursements and two-thirds of the legal fees (subject to assessment) incurred by the Association and Council in preparing their submissions and bringing them before the Commission.

[39] *Judges Act*, s. 26.3

[40] The Drouin Commission made the following recommendation concerning representational costs: Recommendation 22. The Government pay 80% of the total representational costs of the Conference and Council incurred in connection with their participation in the process of this inquiry as of May 31, 2000, such payments by the Government not to exceed the aggregate amount of $230,000, inclusive of the amount of $80,000 already contributed by the Government as of the date of this report and any extraordinary and explicitly identifiable increase to the budge of the Council in order to fund the participation of the Judiciary in the work of this Commission, and that the remainder of such costs be paid by the Conference and Council in such proportion as they deem appropriate.

Government of Canada Gouvernement du Canada Canada

Treasury Board of Canada Secretariat (http://www.tbs-sct.gc.ca/index-eng.asp)

Guideline on Claims and Ex Gratia Payments

1. Effective date

1.1 This guideline takes effect on October 1, 2009.

1.2 It replaces appendices A, B and D of the *Policy on Claims and* Ex Gratia *Payments* (revised June 1, 1998)

2. Context

2.1 The purpose of this guideline is to assist managers and staff to make better decisions and increase the efficiency, expediency and timeliness for settling and paying of claims by or against the Crown and against its servants and for processing *ex gratia* payments.

2.2 This guideline supports the *Directive on Claims and Ex-Gratia Payments* (/pol/doc-eng.aspx?id=15782) (hereafter referred to as the Directive).

2.3 Though this guideline elaborates on the Directive, it does not present any new mandatory requirements.

2.4 Claims can be classified as follows:

Claims within a department

When an incident resulting in damage to public property occurs within a department, compensation and restoration are the responsibility of the department. In very exceptional circumstances, interim financing may be available through Treasury Board Contingency Vote 5.

Claims between departments

As established under the Directive, one department of government cannot claim damages and receive payment from another department of the same government; therefore, as a general rule, damages are dealt with in a manner that precludes departments from seeking damages from each other (e.g., on the basis of mutual forbearance).

Claims between departments and Crown corporations

The Directive does not apply to claims between departments and Crown corporations. Nevertheless, parties to such claims are encouraged to arrive at a negotiated settlement. When a claim is pursued, it is recommended that each party voluntarily supply the other with all information in its possession.

When it is found impossible to agree by correspondence on the claim's merits and liability, it is recommended that legal officers of the department and of the corporation attempt to arrive at an agreement.

As established by the Directive, if negotiation fails, the issues of fact and law on which there is disagreement are referred to the Deputy Attorney General of Canada, who could arbitrate the dispute through Department of Justice officials or appoint a third party to arbitrate the dispute.

2.5 Exceptions include the following:

- The Directive does not apply to the relocation of household property and travel claims, or to the traditional remedies for settling bidding or contract performance disputes. These are treated in the Treasury Board's *NJC Relocation Directive* (/pol/doc-eng.aspx?id=14662), *Travel Directive* (http://www.njc-cnm.gc.ca/directive/travel-voyage/index-eng.php) and *Contracting Policy* (/pol/doc-eng.aspx?id=14494).
- However after reviewing or applying traditional remedies in a contracting case, if there exist exceptional circumstances and the Crown has no liability, an *ex gratia* payment may be considered under the Directive. The approval of such a payment would be subject to the deputy head's discretion to designate authorized officials and determine the need for a legal opinion, while also taking into account the Directive's requirements governing liability and *ex gratia* payments and the sensitive nature of *ex gratia* cases.
- Claims for recovery of losses of public money are governed by the *Directive on Losses of Money and Property* (/pol/doc-eng.aspx?id=15792).

3. Definitions

Definitions of terms used in the guideline can be found in Appendix A (/pol/doc-eng.aspx?id=15782#appA) of the Directive.

4. General

4.1 After an incident has occurred risk management is a normal part of dealing with any claim that may arise between a department and other entities.

4.2 A claim might result in an amount due (or alleged to be due) or the launch of an action for damages sustained by the Crown or a claimant.

4.3 A clear distinction is drawn between settlement and payment of a claim. Settlement is the process whereby an agreement is reached through negotiation between the respective parties. Payment is the disbursement of money in respect of the settlement or a judgement of the relevant court.

4.4 Generally, claims are broadly categorized as those in tort and those in contract.

4.5 Claims in tort are those for which there is no form of written, oral or implied contractual agreement between the Crown and claimants and for which the Crown may be liable, as determined by the Department of Justice.

4.6 Claims in contract are to be dealt with according to the terms of the contract and the applicable law. Departments are to ensure that the interests of the Crown are protected and all legal rights are exercised.

4.7 When a claim is made in tort (all provinces except Quebec) or extra-contractual liability (Quebec only), it is subject to the requirements of the *Directive on Claims and Ex-Gratia Payments*.

4.8 Generally claims by or against the Crown or against its servants are negotiated without recourse to the courts by, or in conjunction with, the Department of Justice in accordance with the relevant authorities and procedures.

4.9 A high level overview of the process for claims by the Crown and claims against the Crown is included in Appendix B and Appendix C, respectively.

5. Claims under the Canadian Human Rights Act

5.1 The negotiation and payment of settlements and Tribunal Orders under the *Canadian Human Rights Act* (http://laws-lois.justice.gc.ca/en/h-6/) (CHRA) are subject to the requirements of the Directive whereas the CHRA applies with respect to investigation and conciliation requirements.

5.2 The Directive's requirements do not apply to equal pay for work of equal value complaints lodged under section 11 of the CHRA. Such complaints are dealt with through Treasury Board personnel policy or other separate authorities.

5.3 A discriminatory practice, as defined by the CHRA, is not a tort, though it is recommended that departments deal with a complaint lodged under the CHRA as if it were a tort.

5.4 For Tribunal Orders which are made Federal Court Orders, the *Federal Courts Act* (http://laws-lois.justice.gc.ca/eng/acts/F-7/) stipulates that payments are a statutory charge against the Consolidated Revenue Fund.

5.5 Deputy heads may designate payment approval authorities within their departments consistent with departmental practices and the sensitive nature of human rights issues.

6. Investigations

6.1 As established by the Directive, departmental security officers (DSO) are generally responsible for conducting or directing departmental claims investigations or assisting managers with the conduct of such investigations except when departments have special organizations established for this purpose. DSOs are also responsible for dealing with the appropriate law enforcement agency on such cases. Claims investigations are based on the type of incident and the dollar amount involved.

6.2 Further to the Directive's requirement that managers investigate incidents that could lead to a claim by or against the Crown or against a servant, it is recommended that the investigation be conducted at the earliest reasonable opportunity and that a report be prepared. While the level of investigation is to be commensurate with the dollar amount involved, it is recommended that the investigation includes, as is appropriate, the following:

- A full statement of the duties and responsibilities of any servant involved;
- Detailed information relating to the use of the Crown property and the relevant authority for such use;
- Statements about the incident from servants and other persons having any knowledge of the circumstances;
- Copies of any reports made to the police in connection with the incident;
- A complete account of the incident including a who was involved, what happened, where it happened, when it happened, how it happened and why it happened;
- Plans, sketches or photographs, as necessary, to contextualize or explain the nature and extent of the incident;
- Any additional information and material that may be required for a legal opinion;
- The assistance of the Royal Canadian Mounted Police; and
- The assistance of private sector claims adjustment services or collection agencies.

7. Claims against the Crown and ex gratia payments

7.1 Claimant's position

Under the Directive, when a claim is made against the Crown for an incident, managers are responsible for, without prejudice and without admitting liability, requesting the following from the claimant:

- A detailed statement of the facts upon which the claim is based;
- A detailed statement showing how the claim is calculated; and
- Original copies of documents confirming all disbursements.

7.2 Legal opinion

When claims, including the report of the investigation and any information received from the claimant, are referred to Legal Services in compliance with the Directive, it is recommended that the legal opinion requested address the following:

- Liability of the Crown;
- The steps, if any, to be taken to resolve the claim, bearing in mind the cost-effectiveness of any such steps; and
- The terms and conditions on which it would be advisable to resolve the claim, when it is advisable to settle.

7.3 Claims for servants' effects

Under the Directive, managers are to conduct investigations of reported incidents involving claims for servants' effects that are damaged, lost, stolen or destroyed. Claims for servants' effects are not to be treated as ex gratia payments. It is recommended that managers apply the following criteria to determine liability for payment:

- Servants' effects include only those items that are considered to be reasonably related to the performance of a servant's duties at the time of the loss or damage; and

- Compensation is based on the full cost to replace the effects with effects of the same or equivalent quality or the reasonable cost to repair them, whichever is most appropriate.

7.4 Ex gratia payment

As required under the Directive, managers with delegated authority to requisition payment are responsible for considering the following when deciding whether to make an *ex gratia* payment:

- Compensation from other sources, such as federal or provincial statutes, private or public programs, contract provisions and commercial insurance or recovery from third parties;
- The Directive is not used to fill perceived gaps or compensate for the apparent limitations in any act, order, regulation, policy, agreement or other governing instruments-if, for example, a particular subject is governed by another instrument and that instrument does not provide for such a payment, the Directive cannot be used to expand that instrument and an exception to the governing instrument would need to be sought;
- If there does not appear to be a governing instrument, all other possible sources of compensation are reviewed (e.g., statutory or regulatory schemes, other Treasury Board policies or directives, program funding, and grants or contributions);
- Payment may be made *ex gratia* if, after the review, there is no other source of funds or the sources provide incomplete compensation, no liability on the part of the Crown, and no limitation, restriction or prohibition imposed in existing schemes; and
- The amount of the payment may be reduced when the acts or omissions of any person, including persons for whom a payment is being considered, contributed to the damages or loss incurred.

7.5 Releases

In compliance with the Directive, managers are to obtain a release in consideration of payment for a negotiated settlement, except when it would not be administratively expedient and the manager is confident that the payment will resolve the claim. The release may be in the form shown in Appendix A, or as directed by Legal Services. For *ex gratia* payments, a release is not normally required.

7.6 Disbursements

Further to the Directive's disbursement requirements, in accounting for disbursements related to claims against the Crown and *ex gratia* payments, managers with delegated authority to make payments are responsible for considering the following:

- Part II of the *Crown Liability and Proceedings Act* (http://laws-lois.justice.gc.ca/eng/acts/C-50/) requires that judgements against the Crown in either federal or provincial court for matters falling within the scope of this Act be paid out of the Consolidated Revenue Fund as statutory expenditures upon production of a certificate of judgement, pursuant to section 30.(1). Judgements against the Crown in the Supreme Court of Canada are likewise payable out of the Consolidated Revenue Fund, pursuant to section 98 of the *Supreme Court Act* (http://laws-lois.justice.gc.ca/eng/acts/S-26). Money paid on behalf of departments from the Consolidated Revenue Fund will eventually be accounted for either by transferring funds from a departmental appropriation or by seeking supplementary funding.
- Crown witness, travel, and legal fees and other expenses incurred by, or on behalf of, the department when preparing, prosecuting or defending a court case, out?of? court settlements and liability and *ex gratia* payments are charged to the appropriation of the relevant department.
- Costs awarded against the Crown by a judgment are paid as directed by the court. Court awards are charged to the appropriation of the relevant department.
- It is important to recognize the distinction between a judgment in a proceeding brought before a court and a decision of a judge acting in a non-judicial capacity. Just as a judge is often appointed as a Commissioners of Inquiries or an arbitrator in labour disputes, a judge may likewise be appointed as an assessors or arbitrator under various acts. A decision by a judge under, for example, section 57(3) of the *Health of Animals Act* (http://laws-lois.justice.gc.ca/eng/acts/H-3.3) or section 41(3) of the *Plant Protection Act* (http://laws-lois.justice.gc.ca/eng/acts/P-14.8) is not a court award and is not covered by the statutory authorities for court judgements.

8. Claims by the Crown

8.1 Crown's position

In compliance with the Directive, managers are responsible for making every reasonable effort to obtain value for money when resolving claims by the Crown. It is recommended that managers take into account administrative expediency and cost-effectiveness when resolving such claims.

8.2 Legal opinion

In compliance with the Directive, managers are responsible for referring all claims involving legal proceedings to Legal Services and obtaining a legal opinion when material sums are at stake or when there is a lack of or conflicting evidence or uncertainty as to the applicable legal principles.

8.3 Recovery from servants

A situation may arise wherein the Crown has a claim against a servant for which the servant is not indemnified under the *Policy on the Indemnification of and Legal Assistance for Crown Servants* (/pol/doc-eng.aspx?id=12338). Under the Directive, when this happens and before recovery of the claim amount either by deduction from or set?off against any money that may be due or payable by the Crown to the servant, managers are responsible for the following:

- Notifying the servant of the proposed retention and of his or her right to make representation within 30 days; and
- Considering the servant's representation, if any, before making a final decision.

8.4 Revenues

As required under the Directive, managers are responsible for collecting or enforcing payment on a claim made by the Crown in compliance with the *Directive on Receivables Management* (/pol/doc-eng.aspx?id=17063) and the *Directive on Receipt, Deposit and Recording of Money* (/pol/doc-eng.aspx?id=15785). The money collected, including any insurance proceeds, is deposited to the credit of the Receiver General and not credited back to an appropriation unless:

- The recovery is a claim for loss or damage to a Crown asset, which according to section 39 of the *Financial Administration Act* (http://laws-lois.justice.gc.ca/eng/acts/F-11/), may be credited to the appropriation against which

the related expenditure was charged provided the expenditure and recovery occur in the same fiscal year; or

- There is revenue spending authority.

8.5 Release

As established under the Directive, managers with delegated authority to resolve claims may sign a release as a condition of payment being made to resolve a claim by the Crown.

Appendix A - Release

Know all persons by these present that (*name and address of claimant*) does hereby remise, release and forever discharge Her Majesty the Queen in right of Canada and (*name of any officer or servant of the Crown involved*), from all manners of action, claims or demands, of whatever kind or nature that (*name of claimant*) ever had, now has or can, shall or may hereafter have by reason of damage to or personal injury, or both, (*here set out subject matter of the damage*) as a result of or in any way arising out of (*here set out incident and the date, time and place of occurrence*).

It is understood and agreed that this Release shall only be effective when payment will have been made on behalf of Her Majesty to (*name of claimant*) of the sum of $_____.

It is also understood that Her Majesty the Queen in right of Canada does not admit any liability to (*name of claimant*) by acceptance of this Release or by payment of the said sum of $_____.

Signed, Sealed and Delivered in the Presence of

Witness:

IN WITNESS WHEREOF, I have hereunto set my hand and seal this _____ day of _____, 20____.

Print Name _____

Signature _____

Phone number (_ _ _) _ _ _ - _ _ _ _

For the (*department or agency name*):

IN WITNESS WHEREOF, I have hereunto set my hand and seal this _____ day of _____, 20____.

Print Name _____

Signature _____

Phone number (_ _ _) _ _ _ - _ _ _ _

Witness:

For the Claimant or person duly authorized for the Claimant:

IN WITNESS WHEREOF, I have hereunto set my hand and seal this _____ day of _____, 20____.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this _____ day of _____, 20____.

Print Name _____

Print Name _____

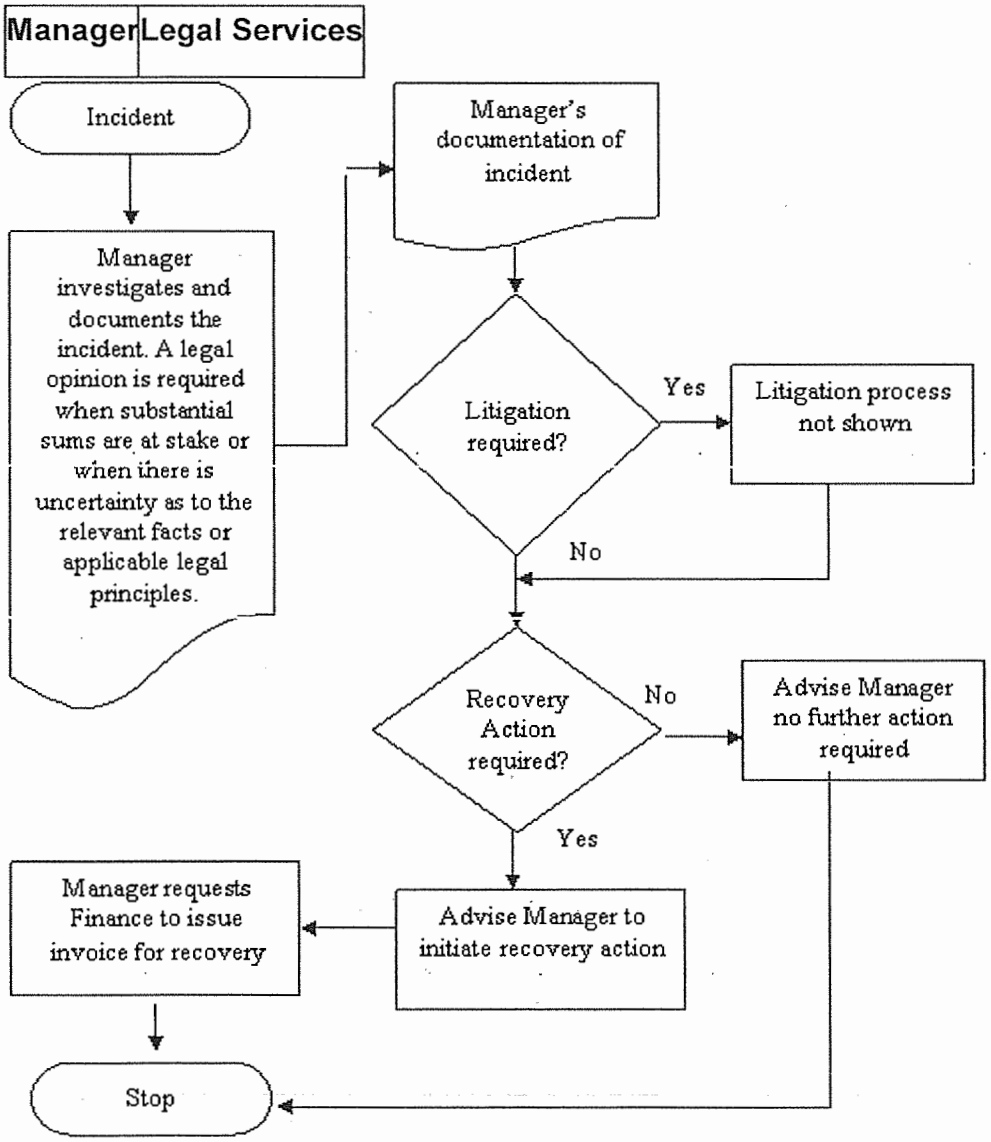
Signature _____

Signature _____

Phone number (_ _ _) _ _ _ - _ _ _ _

Phone number (_ _ _) _ _ _ - _ _ _ _

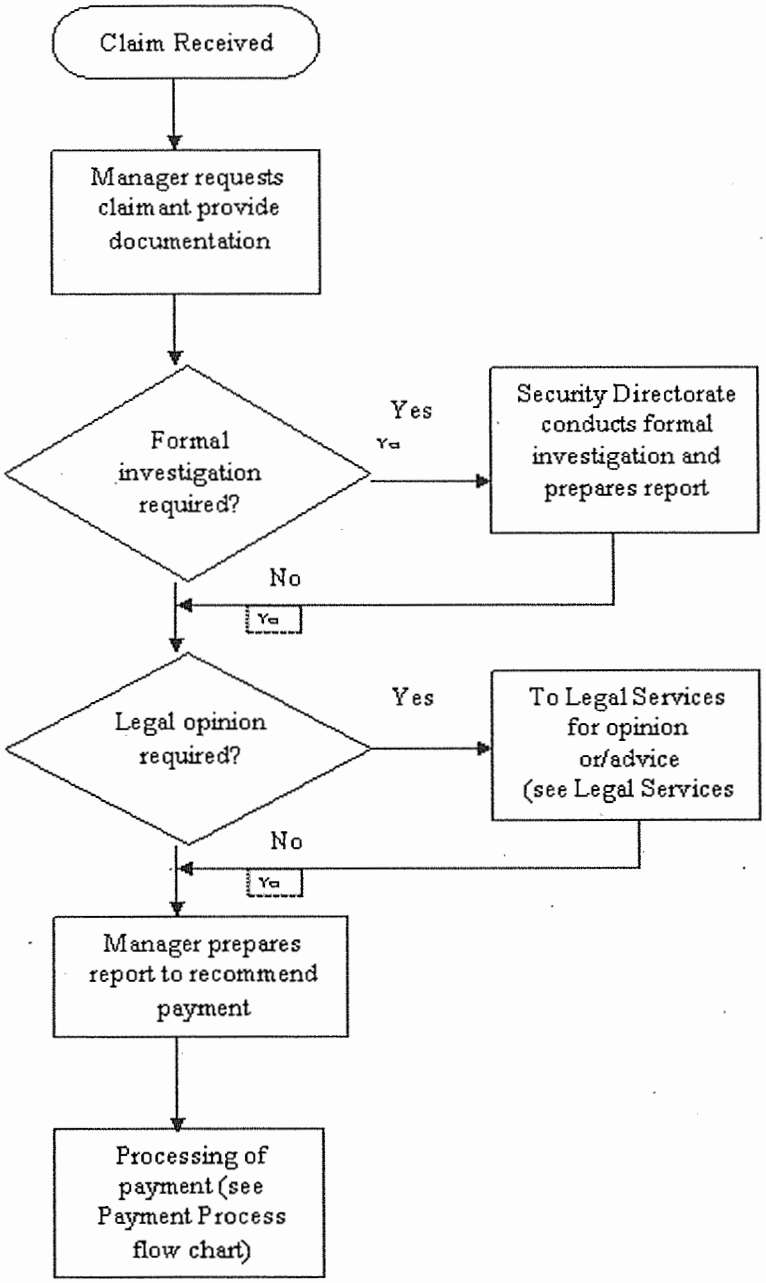
Appendix B - Claims By the Crown



Text version: Claims By the Crown (/pol/doc-eng.aspx?id=17068&section=longdesc&ld=1)

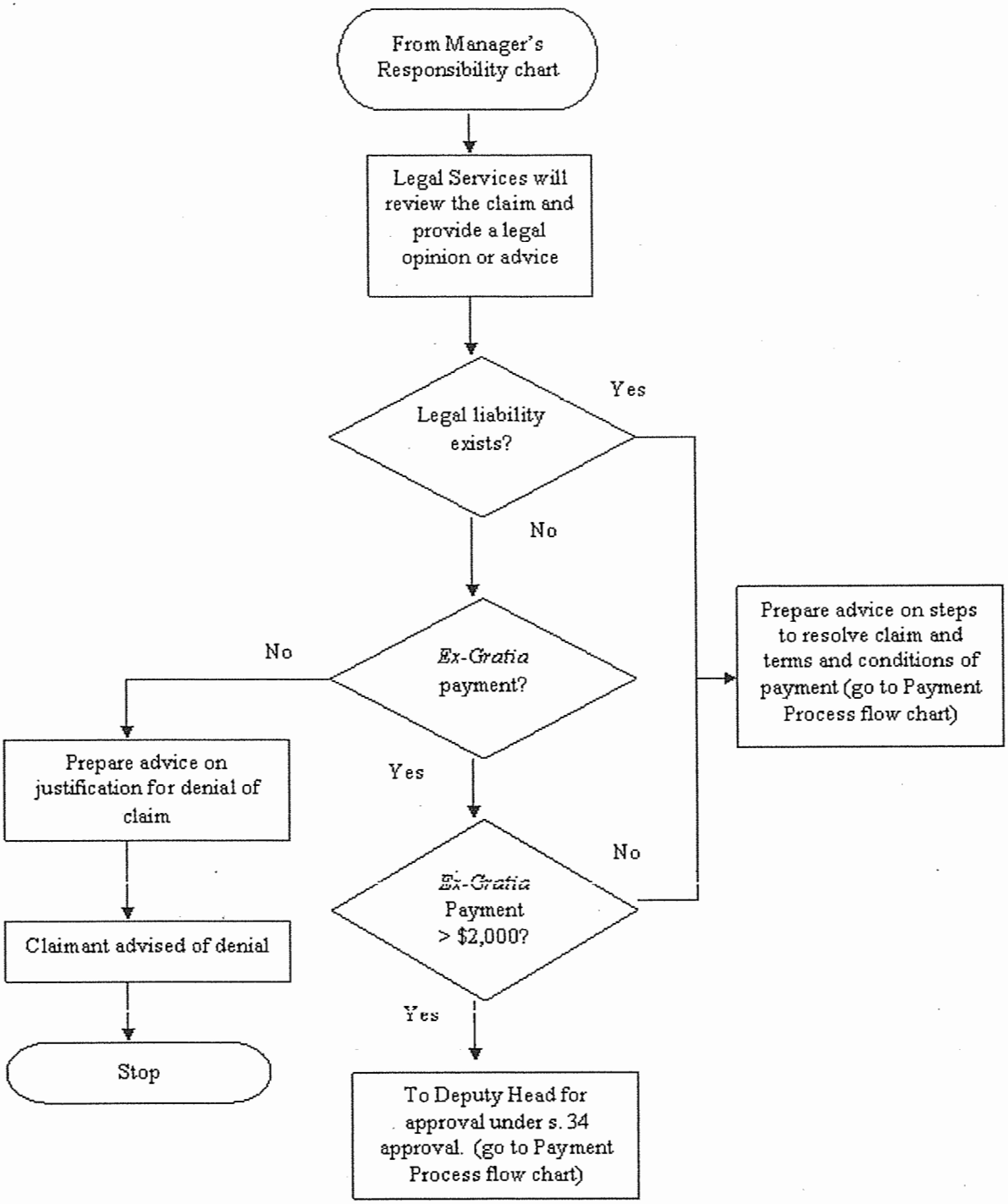
Appendix C - Claims Against the Crown

Manager's Responsibilities



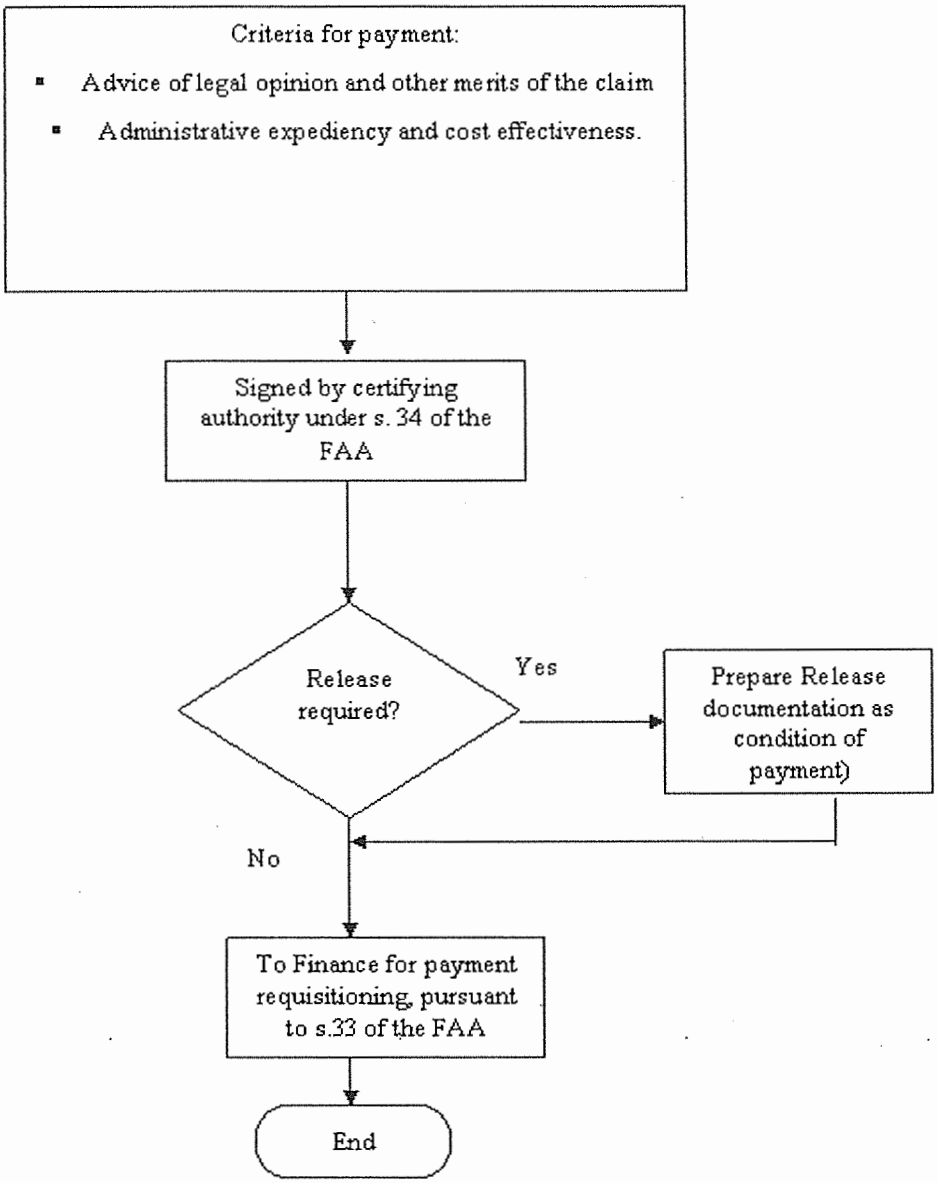
Text version: Manager's Responsibilities (/pol/doc-eng.aspx?id=17068&section=longdesc&ld=2)

Legal Services



Text version: Legal Services (/pol/doc-eng.aspx?id=17068&section=longdesc&ld=3)

Payment Process



Text version: Payment Process (/pol/doc-eng.aspx?id=17068&section=longdesc&Id=4)

Date Modified:

2009-10-01

National Defence Act	Loi sur la défense nationale
R.S.C., 1985, c. N-5	**L.R.C. (1985), ch. N-5**
An Act respecting national defence	Loi concernant la défense nationale
Short Title	**Titre abrégé**
Short title	**Titre abrégé**
1 This Act may be cited as the *National Defence Act*.	**1** *Loi sur la défense nationale*.
R.S., c. N-4, s. 1.	S.R., ch. N-4, art. 1.
Remuneration	**Rémunération**
165.22 (1) The rates and conditions of issue of pay of military judges shall be prescribed by the Treasury Board in regulations.	**165.22 (1)** Les taux et conditions de versement de la solde des juges militaires sont fixés par règlement du Conseil du Trésor.
Review of remuneration	**Révision de la rémunération**
(2) The remuneration of military judges shall be reviewed regularly by a Compensation Committee established under regulations made by the Governor in Council.	**(2)** La rémunération des juges militaires est révisée régulièrement par un comité établi à cette fin par règlement du gouverneur en conseil.
1998, c. 35, s. 42.	1998, ch. 35, art. 42.

CHAPTER 204

FINANCIAL BENEFITS AND PAY OF MILITARY JUDGES

(Refer carefully to article 1.02 (Definitions) when reading every regulation in this chapter.)

(204.01 TO 204.02: REPEALED BY T.B. 829184 OF 28 AUGUST 2001 EFFECTIVE 1 SEPTEMBER 2001)

204.03 – APPLICATION

This chapter applies to military judges who are appointed under section 165.21 of the *National Defence Act*.

(T) (T.B. 829184 of 28 August 2001 effective 1 September 2001)

(204.04 TO 204.06 INCLUSIVE: NOT ALLOCATED)

(204.07 TO 204.09: REPEALED BY T.B. 829184 OF 28 AUGUST 2001 EFFECTIVE 1 SEPTEMBER 2001)

Section 1 - Administration

204.10 – COMMENCEMENT OF PAY

(1) The entitlement of a military judge to pay under this chapter commences on the effective date of their appointment as a military judge.

(2) Subject to the QR&O, if the rate of pay of a military judge is altered du to a change in the qualifying conditions, payment at the new rate shall commence on the day notified as the effective date of the change. (*see article 204.16 – Authority to Adjust Pay Accounts*)

(T) (T.B. 829184 of 28 August 2001 effective 1 September 2001)

204.11 – CESSATION OF PAY

Subject to the QR&O, the entitlement to pay as a military judge ceases at the end of the day on which the judge ceases to hold office.

(T) (T.B. 829184 of 28 August 2001 effective 1 September 2001)

CHAPITRE 204

LES PRESTATIONS FINANCIÈRES ET LA SOLDE A L'ÉGARD DES JUGES MILITAIRES

(Avoir soin de se reporter à l'article 1.02 (Définitions) à propos de chaque règlement contenu dans le présent chapitre.)

(204.01 À 204.02 : ABROGÉS PAR C.T. 829184 DU 28 AOÛT 2001 EN VIGUEUR LE 1er SEPTEMBRE 2001)

204.03 - APPLICATION

Le présent chapitre s'applique aux juges militaires qui sont nommés aux termes de l'article 165.21 de la *Loi sur la défense nationale*.

(T) (C.T. 829184 du 28 août 2001 en vigueur le 1er septembre 2001)

(204.04 À 204.06 INCLUS : NON-ATTRIBUÉS)

(204.07 À 204.09 : ABROGÉS PAR C.T. 829184 DU 28 AOÛT 2001 EN VIGUEUR LE 1er SEPTEMBRE 2001)

Section 1 - Administration

204.10 – DÉBUT DE LA SOLDE

(1) Le droit à la solde en conformité avec le présent chapitre date, du jour de la nomination du juge militaire à sa charge.

(2) Sous réserve des ORFC, lorsque le taux de solde versée à un juge militaire est modifié en raison d'un changement survenu dans les conditions d'admissibilité, le paiement selon le nouveau taux doit commencer à la date d'entrée en vigueur établie à l'égard du changement. (*voir l'article 204.16 – Autorisation de rectifier le compte de solde*)

(T) (C.T. 829184 du 28 août 2001 en vigueur le 1er septembre 2001)

204.11 – CESSATION DE LA SOLDE

Sous réserve des ORFC, le droit à la solde à titre de juge militaire cesse d'exister à la fin du jour où le juge cesse d'occuper sa charge.

(T) (C.T. 829184 du 28 août 2001 en vigueur le 1er septembre 2001)

(*a*) subject to paragraph (5), elect within the time and in the manner determined by the Chief of the Defence Staff to receive rehabilitation leave under article 16.19 (*Rehabilitation Leave*); or

(b) commenced rehabilitation leave on or before 31 March 1972, unless they are recalled from that leave to serve on full-time duty in the Regular Force.

(5) An election made by an officer or non-commissioned member under paragraph (4) is deemed to be revoked if they are recalled from rehabilitation leave to serve on full-time duty in the Regular Force.

(6) When an officer or non-commissioned member dies while serving in the Regular Force, severance pay shall, unless at the time of death they are on rehabilitation leave, be paid to their service estate in the amount calculated under paragraph (2).

(7) Any period of service in respect of which a retirement gratuity has been paid under CBI 204.54 (*Reserve Force Retirement Gratuity*) shall not be included as continuous service for the purpose of the calculation of severance pay under paragraph (2).

(T) (T.B. 829184 of 28 August 2001 effective 1 September 2001)

Section 2 – Military Judges Compensation Committee

204.23 – ESTABLISHMENT OF MILITARY JUDGES COMPENSATION COMMITTEE

(1) The Military Judges Compensation Committee is hereby established to inquire into the adequacy of the remuneration of military judges.

(2) The Committee consists of three part-time members appointed by the Governor in Council as follows:

(*a*) one person nominated by the military judges;

(*b*) one person nominated by the Minister; and

(*c*) one person, who shall act as chairperson, nominated by the members who are nominated under subparagraphs (*a*) and (*b*).

a) sous réserve de l'alinéa (5), le militaire opte, dans la période et selon la manière prévues par le chef d'état-major de la défense, pour un congé de réadaptation aux termes de l'article 16.19 (*Congé de réadaptation*);

b) le militaire a commencé son congé de réadaptation le 31 mars 1972 ou avant cette date, sauf s'il est rappelé de ce congé pour servir à temps plein dans la force régulière.

(5) Le choix fait par un officier ou militaire du rang aux termes de l'alinéa (4) est considéré comme annulé si le militaire est rappelé de son congé de réadaptation pour servir à plein temps dans la force régulière.

(6) L'indemnité de départ versée à la succession militaire d'un officier ou militaire du rang décédé en service dans la force régulière doit être le montant calculé aux termes de l'alinéa (2), sauf si ce décès survient au cours du congé de réadaptation

(7) N'est pas incluse comme service continu aux fins du calcul de l'indemnité de départ aux termes de l'alinéa (2), la période de service à l'égard de laquelle une allocation de retraite a été payée conformément à la DRAS 204.54 (*Allocation de retraite – force de réserve*).

(T) (C.T. 829184 du 28 août 2001 en vigueur le 1er septembre 2001)

Section 2 – Comité d'examen de la rémunération des juges militaires

204.23 – ÉTABLISSEMENT DU COMITÉ D'EXAMEN DE LA RÉMUNÉRATION DES JUGES MILITAIRES

(1) Est établi le Comité d'examen de la rémunération des juges militaires chargé d'examiner la question de savoir si la rémunération des juges militaires est satisfaisante.

(2) Le comité se compose de trois membres à temps partiel nommés par le gouverneur en conseil en se fondant sur les propositions suivantes :

a) un membre proposé par les juges militaires;

b) un membre proposé par le ministre;

c) un membre proposé à titre de président, par les membres nommés conformément aux sous-alinéas *a*) et *b*) et disposé à agir en cette qualité.

(3) Each member holds office during good behaviour for a term of four years, and may be removed for cause at any time by the Governor in Council.

(4) In the event of the absence or incapacity of a member, the Governor in Council may appoint as a substitute temporary member a person nominated in accordance with paragraph (2) to hold office during the absence or incapacity.

(5) If the office of a member becomes vacant during the term of the member, the Governor in Council shall appoint a person nominated in accordance with paragraph (2) to hold office for the remainder of the term.

(6) A member is eligible to be re-appointed for one further term if re-nominated in accordance with paragraph (2).

(7) A quorum of the Committee consists of all three members.

(8) The members of the Committee and persons carrying out duties under paragraph (3) of article 204.25 (*Other Inquiries*) shall be paid:

(*a*) the remuneration fixed by the Governor in Council; and

(*b*) travel and living expenses incurred by them in the course of their duties while absent from their ordinary place of residence, in accordance with the *Travel Directive* issued by the Treasury Board, as amended from time to time.

(G) (P.C. 2000-1419 of 13 September 2000)

204.24 – QUADRENNIAL INQUIRY

(1) The Military Judges Compensation Committee shall commence an inquiry on September 1, 1999, and on every September 1 of every fourth year after 1999, and shall submit a report containing its recommendations to the Minister within nine months after the date of commencement. **(13 September 2000)**

(2) The Committee may, with the consent of the Minister and the military judges, postpone the date of commencement of a quadrennial inquiry.

(3) In conducting its inquiry, the Committee shall consider:

(3) Les membres sont nommés à titre inamovible pour un mandat de quatre ans, sous réserve de révocation motivée que prononce le gouverneur en conseil.

(4) En cas d'absence ou d'empêchement d'un membre, le gouverneur en conseil peut lui nommer un remplaçant suivant la procédure prévue à l'alinéa (2).

(5) Le gouverneur en conseil comble tout poste vacant suivant la procédure prévue à l'alinéa (2). Le mandat du nouveau membre prend fin à la date prévue pour la fin du mandat de l'ancien.

(6) Le mandat du membre est renouvelable une fois si sa nomination est proposée en suivant la procédure prévue à l'alinéa (2).

(7) Le quorum est de trois membres.

(8) Les membres et les personnes qui exercent leurs fonctions au titre de l'alinéa (3) de l'article 204.25 (*Autres examens*) ont droit :

a) à la rémunération fixée par le gouverneur en conseil;

b) aux frais de déplacement et de séjour entraînés par l'accomplissement de leurs fonctions hors du lieu de leur résidence habituelle, conformément à la *Directive sur les voyages d'affaires* publiée par le Conseil du Trésor, avec ses modifications successives.

(G) (C.P. 2000-1419 du 13 septembre 2000)

204.24 – EXAMEN QUADRIENNAL

(1) Le Comité d'examen de la rémunération des juges militaires commence ses travaux le 1er septembre 1999 et remet un rapport faisant état de ses recommandations au ministre dans les neuf mois qui suivent. Il refait le même exercice tous les quatre ans par la suite, la date du début des travaux demeurant le 1er septembre. **(13 septembre 2000)**

(2) Le comité peut, avec le consentement du ministre et des juges militaires, reporter le début de ses travaux.

(3) Le comité fait son examen en tenant compte des facteurs suivants :

(*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 military judges in ensuring judicial independence;

(*c*) the need to attract outstanding officers as military judges; and

(*d*) any other objective criteria that the Committee considers relevant.

(G) (P.C. 2000-1419 of 13 September 2000)

204.25 – OTHER INQUIRIES

(1) The Minister may at any time refer to the Military Judges Compensation Committee for its inquiry a matter concerning the remuneration of military judges.

(2) The Committee shall submit to the Minister a report containing its recommendations within a period fixed by the Minister after consultation with the Committee.

(3) Where the term of a member ends, other than in the case of removal for cause, the member may carry out and complete duties of the members in respect of a matter that was referred to the Committee under paragraph (1) while he or she was a member.

(G) (P.C. 1999-1305 of 8 July 1999 effective 1 September 1999)

204.26 – EXTENSIONS

The Governor in Council may, on the request of the Military Judges Compensation Committee, extend the time for submission of a report under article 204.24 (*Quadrennial Inquiry*) or 204.25 (*Other Inquiries*).

(G) (P.C. 1999-1305 of 8 July 1999 effective 1 September 1999)

204.27 – DUTIES OF MINISTER

(1) Within 30 days after receiving a report under article 204.24 (*Quadrennial Inquiry*) or 204.25 (*Other Inquiries*), the Minister shall make the report available to the public in any manner the Minister considers appropriate to facilitate public access to the report, and shall advise the public that the report is available.

a) l'état de l'économie au Canada, y compris le coût de la vie ainsi que la situation économique et financière globale du gouvernement fédéral;

b) le rôle de la sécurité financière des juges militaires dans la préservation de l'indépendance judiciaire;

c) le besoin de recruter les meilleurs officiers pour la magistrature militaire;

d) tout autre facteur objectif qu'il considère pertinent.

(G) (C.P. 2000-1419 du 13 septembre 2000)

204.25 – AUTRES EXAMENS

(1) Le ministre peut en tout temps demander au Comité d'examen de la rémunération des juges militaires d'examiner la question de la rémunération des juges militaires ou un aspect de celle-ci.

(2) Le comité lui remet, dans le délai fixé par le ministre après l'avoir consulté, un rapport faisant état de ses recommandations.

(3) Le membre dont le mandat se termine, pour tout motif autre que la révocation motivée, peut continuer d'exercer ses fonctions à l'égard de toute question dont l'examen, demandé au titre de l'alinéa (1), a commencé avant la fin de son mandat.

(G) (C.P. 1999-1305 du 8 juillet 1999 en vigueur le 1er septembre 1999)

204.26 – PROLONGATION

Le gouverneur en conseil peut permettre au Comité d'examen de la rémunération des juges militaires, à la demande de ce dernier, de remettre le rapport visé aux articles 204.24 (*Examen quadriennal*) ou 204.25 (*Autres examens*) à une date ultérieure.

(G) (C.P. 1999-1305 du 8 juillet 1999 en vigueur le 1er septembre 1999)

204.27 – FONCTIONS DU MINISTRE

(1) Dans les 30 jours suivant la réception d'un rapport visé aux articles 204.24 (*Enquête quadriennal*) ou 204.25 (*Autres examens*), le ministre en donne avis public et en favorise l'accès par le public de la manière qu'il estime indiquée.

(2) The Minister shall respond to a report within six months after receiving it.

(G) (P.C. 1999-1305 of 8 July 1999 effective 1 September 1999)

(204.28 AND 204.29 INCLUSIVE: NOT ALLOCATED)

(SECTION 3: REPEALED BY T.B. 829184 OF 28 AUGUST 2001 EFFECTIVE 1 SEPTEMBER 2001)

(204.30: REPEALED BY T.B. 829184 OF 28 AUGUST 2001 EFFECTIVE 1 SEPTEMBER 2001)

(204.31 TO 204.39 INCLUSIVE: NOT ALLOCATED)

(SECTION 4: REPEALED BY T.B. 829184 OF 28 AUGUST 2001 EFFECTIVE 1 SEPTEMBER 2001)

(204.40: REPEALED BY T.B. 829184 OF 28 AUGUST 2001 EFFECTIVE 1 SEPTEMBER 2001)

(204.41 TO 204.49 INCLUSIVE: NOT ALLOCATED)

(SECTION 5: REPEALED BY T.B. 829184 OF 28 AUGUST 2001 EFFECTIVE 1 SEPTEMBER 2001)

(204.50 TO 204.53: REPEALED BY T.B. 829184 OF 28 AUGUST 2001 EFFECTIVE 1 SEPTEMBER 2001)

(SECTION 6 : REPEALED BY T.B. 829184 OF 28 AUGUST 2001 EFFECTIVE 1 SEPTEMBER 2001)

(204.54: REPEALED BY T.B. 829184 OF 28 AUGUST 2001 EFFECTIVE 1 SEPTEMBER 2001)

(SECTION 7 : REPEALED BY T.B. 829184 OF 28 AUGUST 2001 EFFECTIVE 1 SEPTEMBER 2001)

(204.55: REPEALED BY T.B. 829184 OF 28 AUGUST 2001 EFFECTIVE 1 SEPTEMBER 2001)

(204.56 TO 204.99 INCLUSIVE: NOT ALLOCATED)

(2) Le ministre donne suite au rapport au plus tard six mois après l'avoir reçu.

(G) (C.P. 1999-1305 du 8 juillet 1999 en vigueur le 1er septembre 1999)

(204.28 ET 204.29 INCLUS : NON ATTRIBUÉS)

(SECTION 3 : ABROGÉ PAR C.T. 829184 DU 28 AOÛT 2001 EN VIGUEUR LE 1er SEPTEMBRE 2001)

(204.30 : ABROGÉ PAR C.T. 829184 DU 28 AOÛT 2001 EN VIGUEUR LE 1er SEPTEMBRE 2001)

(204.31 À 204.39 INCLUS : NON ATTRIBUÉS)

(SECTION 4 : ABROGÉ PAR C.T. 829184 DU 28 AOÛT 2001 EN VIGUEUR LE 1 er SEPTEMBRE 2001)

(204.40 : ABROGÉ PAR C.T. 829184 DU 28 AOÛT 2001 EN VIGUEUR LE 1er SEPTEMBRE 2001)

(204.41 À 204.49 INCLUS : NON – ATTRIBUÉS)

(SECTION 5 : ABROGÉ PAR C.T. 829184 DU 28 AOÛT 2001 EN VIGUEUR LE 1 er SEPTEMBRE 2001)

(204.50 TO 204.53 : ABROGÉ PAR C.T. 829184 DU 28 AOÛT 2001 EN VIGUEUR LE 1 er SEPTEMBRE 2001)

(SECTION 6 : ABROGÉ PAR C.T. 829184 DU 28 AOÛT 2001 EN VIGUEUR LE 1 er SEPTEMBRE 2001)

(204.54 : ABROGÉ PAR C.T. 829184 DU 28 AOÛT 2001 EN VIGUEUR LE 1 er SEPTEMBRE 2001)

(SECTION 7 : ABROGÉ PAR C.T. 829184 DU 28 AOÛT 2001 VIGUEUR LE 1er SEPTEMBRE 2001)

(204.55 : ABROGÉ PAR C.T. 829184 DU 28 AOÛT 2001 EN VIGUEUR LE 1 er SEPTEMBRE 2001)

(204.56 À 204.99 INCLUS : NON - ATTRIBUÉS)

National Defence Act

R.S.C., 1985, c. N-5

An Act respecting national defence

Short title

1 This Act may be cited as the *National Defence Act*.
R.S., c. N-4, s. 1.

Military Judges Compensation Committee

Composition of Committee

165.33 (1) There is established a Military Judges Compensation Committee consisting of three part-time members to be appointed by the Governor in Council as follows:

- **(a)** one person nominated by the military judges;
- **(b)** one person nominated by the Minister; and
- **(c)** one person, who shall act as chairperson, nominated by the members who are nominated under paragraphs (a) and (b).

Tenure and removal

(2) Each member holds office during good behaviour for a term of four years, and may be removed for cause at any time by the Governor in Council.

Reappointment

(3) A member is eligible to be reappointed for one further term.

Absence or incapacity

(4) In the event of the absence or incapacity of a member, the Governor in

Loi sur la défense nationale

L.R.C. (1985), ch. N-5

Loi concernant la défense nationale

Titre abrégé

1 *Loi sur la défense nationale*.
S.R., ch. N-4, art. 1.

Comité d'examen de la rémunération des juges militaires

Constitution du comité

165.33 (1) Est constitué le comité d'examen de la rémunération des juges militaires, composé de trois membres à temps partiel nommés par le gouverneur en conseil sur le fondement des propositions suivantes :

- **a)** un membre proposé par les juges militaires;
- **b)** un membre proposé par le ministre;
- **c)** un membre proposé à titre de président par les membres nommés conformément aux alinéas a) et b).

Durée du mandat et révocation

(2) Les membres sont nommés à titre inamovible pour un mandat de quatre ans, sous réserve de révocation motivée du gouverneur en conseil.

Mandat renouvelable

(3) Leur mandat est renouvelable une fois.

Remplacement

(4) En cas d'absence ou d'empêchement d'un membre, le gouverneur en conseil

Council may appoint, as a substitute temporary member, a person nominated in accordance with subsection (1).	peut lui nommer un remplaçant suivant la procédure prévue au paragraphe (1).
Vacancy **(5)** If the office of a member becomes vacant during the member's term, the Governor in Council shall appoint a person nominated in accordance with subsection (1) to hold office for the remainder of the term.	**Vacance à combler** **(5)** Le gouverneur en conseil comble toute vacance suivant la procédure prévue au paragraphe (1). Le mandat du nouveau membre prend fin à la date prévue pour la fin du mandat de l'ancien.
Quorum **(6)** All three members of the compensation committee together constitute a quorum.	**Quorum** **(6)** Le quorum est de trois membres.
Remuneration **(7)** The members of the compensation committee shall be paid the remuneration fixed by the Governor in Council and, subject to any applicable Treasury Board directives, the reasonable travel and living expenses incurred by them in the course of their duties while absent from their ordinary place of residence.	**Rémunération et frais** **(7)** Les membres ont droit à la rémunération fixée par le gouverneur en conseil et sont indemnisés, en conformité avec les instructions du Conseil du Trésor, des frais de déplacement et de séjour entraînés par l'accomplissement de leurs fonctions hors de leur lieu habituel de résidence.
2013, c. 24, s. 45.	2013, ch. 24, art. 45.
Mandate **165.34 (1)** The Military Judges Compensation Committee shall inquire into the adequacy of the remuneration of military judges.	**Fonctions** **165.34 (1)** Le comité d'examen de la rémunération des juges militaires est chargé d'examiner la question de savoir si la rémunération des juges militaires est satisfaisante.
Factors to be considered **(2)** In conducting its inquiry, the compensation committee shall consider	**Facteurs à prendre en considération** **(2)** Le comité fait son examen en tenant compte des facteurs suivants :
o **(a)** the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;	o **a)** l'état de l'économie au Canada, y compris le coût de la vie, ainsi que la situation économique et financière globale de l'administration fédérale;
	o **b)** le rôle de la sécurité financière des juges militaires dans la préservation de l'indépendance judiciaire;

o **(b)** the role of financial security of the judiciary in ensuring judicial independence; o **(c)** the need to attract outstanding candidates to the judiciary; and o **(d)** any other objective criteria that the committee considers relevant. **Quadrennial inquiry** **(3)** The compensation committee shall commence an inquiry on September 1, 2015, and on September 1 of every fourth year after 2015, and shall submit a report containing its recommendations to the Minister within nine months after the day on which the inquiry commenced. **Postponement** **(4)** The compensation committee may, with the consent of the Minister and the military judges, postpone the commencement of a quadrennial inquiry. 2013, c. 24, s. 45. **Other inquiries** **165.35 (1)** The Minister may at any time refer to the Military Judges Compensation Committee for its inquiry the matter, or any aspect of the matter, mentioned in subsection 165.34(1). **Report** **(2)** The compensation committee shall submit to the Minister a report containing its recommendations within a period fixed by the Minister after consultation with the compensation committee. **Continuance of duties** **(3)** A person who ceases to hold office as a member for any reason other than their removal may carry out and complete their	o **c)** le besoin de recruter les meilleurs officiers pour la magistrature militaire; o **d)** tout autre facteur objectif qu'il considère comme important. **Examen quadriennal** **(3)** Il commence ses travaux le 1er septembre 2015 et remet un rapport faisant état de ses recommandations au ministre dans les neuf mois qui suivent. Il refait le même exercice, dans le même délai, à partir du 1er septembre tous les quatre ans par la suite. **Report** **(4)** Il peut, avec le consentement du ministre et des juges militaires, reporter le début de ses travaux. 2013, ch. 24, art. 45. **Autres examens** **165.35 (1)** Le ministre peut en tout temps demander au comité d'examen de la rémunération des juges militaires d'examiner la question visée au paragraphe 165.34(1) ou un aspect de celle-ci. **Rapport** **(2)** Le comité remet au ministre, dans le délai que ce dernier fixe après l'avoir consulté, un rapport faisant état de ses recommandations. **Examen non interrompu** **(3)** Le membre dont le mandat se termine pour tout motif autre que la révocation motivée peut continuer d'exercer ses fonctions à l'égard de toute question dont l'examen a été demandé, au titre du paragraphe (1), avant la fin de son

duties in respect of a matter that was referred to the compensation committee under subsection (1) before the person ceased to hold office. While completing those duties, the person is deemed to be a member of the compensation committee. 2013, c. 24, s. 45. **Extension** **165.36** The Governor in Council may, on the request of the Military Judges Compensation Committee, extend the time for the submission of a report. 2013, c. 24, s. 45. **Minister's duties** **165.37 (1)** Within 30 days after receiving a report, the Minister shall notify the public and facilitate public access to the report in any manner that the Minister considers appropriate. **Response** **(2)** The Minister shall respond to a report within six months after receiving it. 2013, c. 24, s. 45.	mandat; il est alors réputé être membre du comité. 2013, ch. 24, art. 45. **Prolongation** **165.36** Le gouverneur en conseil peut, à la demande du comité d'examen de la rémunération des juges militaires, permettre à celui-ci de remettre tout rapport à une date ultérieure. 2013, ch. 24, art. 45. **Fonctions du ministre** **165.37 (1)** Le ministre est tenu, dans les trente jours suivant la réception de tout rapport, d'en donner avis public et d'en faciliter l'accès par le public de la manière qu'il estime indiquée. **Suivi** **(2)** Il donne suite au rapport au plus tard six mois après l'avoir reçu. 2013, ch. 24, art. 45.

PC Number: 2007-1015

Date: 2007-06-21

Whereas, pursuant to paragraph 127.1(1)(*c*) of the *Public Service Employment Act*, the Governor in Council may appoint a special advisor to a minister;

Whereas the adequacy of the salary and the benefits of prothonotaries of the Federal Court have not been comprehensively considered to date;

And whereas the Governor in Council deems it necessary that there be a special advisor to the Minister of Justice to undertake an external review of, and advise on, the adequacy of the salary and the benefits of prothonotaries of the Federal Court;

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Prime Minister, hereby sets out in the annexed schedule the terms and conditions governing the appointment of a special advisor to the Minister of Justice, to be known as the Special Advisor on Federal Court Prothonotaries Compensation, who may be appointed by the Governor in Council under paragraph 127.1(1)(*c*) of the *Public Service Employment Act*.

JUS-609982

SCHEDULE

INTERPRETATION

1. The following definitions apply in this schedule.

"Minister" means the Minister of Justice. (*minister*)

"prothonotary" means a prothonotary of the Federal Court appointed by the Governor in Council pursuant to subsection 12(1) of the *Federal Courts Act*. (*protonotaire*)

"Special Advisor" means the Special Advisor on Federal Court Prothonotaries Compensation. (*conseiller spécial*)

APPOINTMENT

2. (1) The Special Advisor to the Minister, to be known as the Special Advisor on Federal Court Prothonotaries Compensation, shall be appointed by the Governor in Council, on the recommendation of the Minister, for a term beginning no later than September 1, 2007 and ending

May 31, 2008, and may only be removed for cause by the Governor in Council.

(2) The Special Advisor recommended by the Minister for appointment shall be a person jointly nominated by the prothonotaries and the Minister.

(3) The Governor in Council may extend the term of the Special Advisor for one or more further terms, each not exceeding six months.

(4) In the event of incapacity, the Governor in Council, on the recommendation of the Minister, may appoint a substitute Special Advisor.

(5) The substitute Special Advisor recommended by the Minister shall be a person jointly nominated by the prothonotaries and the Minister.

STAFF

3. The Special Advisor shall make use of the staff, services and facilities of the Office of the Commissioner for Federal Judicial Affairs or the Courts Administration Service, as determined by the Minister, for the performance of the duties and functions of the Special Advisor.

MANDATE

4. (1) The Special Advisor shall inquire into the adequacy of the salary and the benefits of prothonotaries, whether current or past.

(2) In conducting the inquiry, the Special Advisor shall consider

(*a*) the nature of the duties of a prothonotary;

(*b*) the salary and the benefits of appropriate comparator groups;

(*c*) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;

(*d*) the role of financial security in ensuring the independence of prothonotaries;

(*e*) the need to attract outstanding candidates to the office of Federal Court prothonotary; and

(*f*) any other objective criteria that the Special Advisor considers relevant.

PERIOD OF INQUIRY AND REPORT

5. (1) The Special Advisor shall commence the inquiry under subsection 4(1) no later than September 1, 2007, and shall submit a report containing his or her recommendations to the Minister

no later than May 31, 2008.

(2) The Special Advisor may, with the consent of the Minister and the prothonotaries, postpone the date of commencement of the inquiry.

(3) The Minister may, on the request of the Special Advisor, extend the time for submission of the report.

(4) The Minister shall respond to the report of the Special Advisor no later than six months after receipt of the report.

(5) If the Minister deems that clarification is necessary to respond to the report, the Minister may request the Special Advisor to clarify any matter in the report.

6. If a substitute Special Advisor is appointed, the Governor in Council may extend the deadline for submission of the report by the substitute Special Advisor and the deadline for response to the report by the Minister.

Attendu que, en vertu de l'alinéa 127.1(1)*c*) de la *Loi sur l'emploi dans la fonction publique*, le gouverneur en conseil peut nommer un conseiller spécial d'un ministre;

Attendu que, jusqu'à présent, le traitement et les avantages des protonotaires de la Cour fédérale n'ont jamais été examinés en profondeur afin de vérifier s'ils sont satisfaisants;

Attendu que la gouverneure en conseil juge nécessaire que le ministre de la Justice soit assisté d'un conseiller spécial chargé d'entreprendre un examen externe du traitement et des avantages des protonotaires de la Cour fédérale afin de vérifier s'ils sont satisfaisants, et de conseiller le ministre à cet égard,

À ces causes, sur recommandation du premier ministre, Son Excellence la Gouverneure générale en conseil établit à l'annexe ci-jointe les modalités d'emploi du conseiller spécial du ministre de la Justice, lequel doit porter le titre de conseiller spécial sur la rémunération des protonotaires de

la Cour fédérale, que le gouverneur en conseil peut nommer en vertu de l'alinéa 127.1(1)*c*) de la *Loi sur l'emploi dans la fonction publique.*

ANNEXE

DÉFINITIONS

1. Les définitions qui suivent s'appliquent à la présente annexe.

« conseiller spécial » Le conseiller spécial sur la rémunération des protonotaires de la Cour fédérale. (*Special Advisor*)

« ministre » Le ministre de la Justice. *(Minister)*

« protonotaire » Protonotaire de la Cour fédérale nommé par le gouverneur en conseil en vertu du paragraphe 12(1) de la *Loi sur les Cours fédérales*. (*prothonotary*)

NOMINATION

2. (1) Le gouverneur en conseil, sur recommandation du ministre, nomme un conseiller spécial de ce ministre, qui doit porter le titre de conseiller spécial sur la rémunération des protonotaires de

la Cour fédérale, pour un mandat commençant au plus tard le 1er septembre 2007 et se terminant le 31 mai 2008, sauf révocation motivée de la part du gouverneur en conseil.

(2) Le conseiller spécial recommandé par le ministre est une personne choisie conjointement par les protonotaires et le ministre.

(3) Le gouverneur en conseil peut renouveler le mandat du conseiller spécial pour des périodes maximales de six mois chacune.

(4) En cas d'incapacité du conseiller spécial, le gouverneur en conseil, sur recommandation du ministre, peut nommer un conseiller spécial suppléant.

(5) Le conseiller spécial suppléant recommandé par le ministre est une personne choisie conjointement par les protonotaires et le ministre.

JUS-609982

PERSONNEL

3. Le conseiller spécial utilise le personnel, les services et les installations du Bureau du commissaire à la magistrature fédérale ou du Service administratif des tribunaux judiciaires, selon ce que décide le ministre, pour l'exécution de ses attributions en tant que conseiller spécial.

MANDAT

4. (1) Le conseiller spécial a pour mandat d'examiner si le traitement et les avantages des protonotaires, actuels ou passés, sont satisfaisants.

(2) En procédant à cet examen, le conseiller spécial tient compte des éléments suivants :

a) la nature des fonctions exercées par le protonotaire;

b) le traitement et les avantages de groupes de comparaison appropriés;

c) l'état de l'économie au Canada, notamment le coût de la vie, ainsi que la situation économique et financière globale de l'administration fédérale;

d) le rôle de la sécurité financière dans la préservation de l'indépendance des protonotaires;

e) le besoin de recruter les meilleurs candidats pour occuper la charge de protonotaire de la Cour fédérale;

f) tout autre facteur objectif que le conseiller spécial estime important.

PÉRIODE D'EXAMEN ET DE RAPPORT

5. (1) Le conseiller spécial commence l'examen prévu au paragraphe 4(1) au plus tard le 1er septembre 2007 et présente son rapport et ses recommandations au ministre au plus tard le 31 mai 2008.

(2) Le conseiller spécial peut, avec le consentement du ministre et des protonotaires, retarder la date du début de l'examen.

(3) Le ministre peut, à la demande du conseiller spécial, proroger le délai de présentation du rapport.

(4) Le ministre donne suite au rapport au plus tard six mois après l'avoir reçu.

(5) Le ministre peut demander au conseiller spécial de clarifier toute question abordée dans le rapport s'il estime qu'il ne peut donner suite à celui-ci sans une telle clarification.

6. En cas de nomination d'un conseiller spécial suppléant, le gouverneur en conseil peut proroger le délai de présentation du rapport par le conseiller spécial suppléant et le délai accordé au ministre pour y donner suite.

PC Number: 2012-0991

Date: 2012-07-20

Whereas, pursuant to paragraph 127.1(1)(*c*) of the *Public Service Employment Act*, the Governor in Council may appoint a special adviser to a minister;

And whereas the Governor in Council considers it necessary that there be a special adviser to the Minister of Justice to undertake an independent review of, and advise on, the adequacy of the salary and the benefits of prothonotaries of the Federal Court;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Prime Minister, sets out in the annexed schedule the terms and conditions governing the appointment of a special adviser to the Minister of Justice, to be known as the Special Adviser on Federal Court Prothonotaries Compensation, who may be appointed by the Governor in Council pursuant to paragraph 127.1(1)(*c*) of the *Public Service Employment Act*.

Attendu que, en vertu de l'alinéa 127.1(1)*c*) de la *Loi sur l'emploi dans la fonction publique*, le gouverneur en conseil peut nommer un conseiller spécial d'un ministre;

Attendu que le gouverneur en conseil juge nécessaire que le ministre de la Justice soit assisté d'un conseiller spécial chargé d'entreprendre un examen indépendant du traitement et des avantages des protonotaires de la Cour fédérale afin de vérifier s'ils sont satisfaisants, et de conseiller le ministre à cet égard,

À ces causes, sur recommandation du premier ministre, Son Excellence le Gouverneur général en conseil établit à l'annexe ci-jointe les modalités de nomination du conseiller spécial du ministre de la Justice, lequel doit porter le titre de conseiller spécial sur la rémunération des protonotaires de la Cour fédérale, que le gouverneur en conseil peut nommer en vertu de l'alinéa 127.1(1)*c*) de la *Loi sur l'emploi dans la fonction publique*.