JUDICIAL COMPENSATION AND BENEFITS COMMISSION

SUBMISSIONS

of the

CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

regarding

DIVISION OF ANNUITIES UPON CONJUGAL BREAKDOWN

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I. INTRODUCTION

1. In his letter dated April 7, 2004, the Chairman of the Commission asked for the parties' submissions on the division of annuities upon conjugal breakdown in the event that no agreement has been reached between them on this issue.

2. The Association and Council unconditionally support the objective of providing a mechanism for the division of judicial annuities upon conjugal breakdown. They have conveyed this support to the Government and have advised the Commission accordingly. As reflected in the present submissions, the difference that persists between the Government and the judiciary lies only in determining the proper means to attain this shared objective.

II. BACKGROUND

3. The judiciary and the Government agree on the following points:

- The objective is not to create substantive rights to the division of the annuity upon conjugal breakdown;
- Substantive rights will continue to be determined by provincial law and private agreements;
- The primary goal of this measure is to create privity between a judge's spouse and the federal Government so that the spouse may deal directly with the Government in order to receive his/her share of the annuity as determined by a superior-court order or private agreement;
- While provincial law and private agreements are the source of the relevant substantive rights (bullet 2 above), the federal Government does want to establish the maximum amount that the Government is willing to recognize as being transferable to a spouse – in this case a 50% limitation;

- Whatever formula is adopted, the Government has insisted that it should, to the extent possible, maintain cost-neutrality;

- It is now common ground between the parties that judicial independence requires that the amendment implementing the division mechanism for judicial annuities be made to the *Judges Act* and not the *Pension Benefits Division Act*.

4. As evidenced by the parties' respective reports attached to their original submissions of December 15, 2003, there is disagreement on the exact formula to be used to determine the share of the annuity a spouse should receive. When considering the share a spouse is to receive it is important to remember that the percentage is distinct from the calculation of the value of the annuity to which that percentage will be applied. The two formulae for the determination of the share initially considered by each of the parties may be summarized as follows.

5. The Government, in the Hay Group Report (the "**Government's Report**"), proposed a division of annuities based on the Modified Rule of 80 to be applied at the time of breakdown. For example, if a judge is appointed at age 50 and suffers a conjugal breakdown at age 60, a formula of 10/15 would be applied to the annuity since the judge had served 10 years on the Bench, but the total required to satisfy the Modified Rule of 80 is 15. Up to 50% of the value of the annuity could be transferred to the spouse upon breakdown. The manner in which the value of the annuity is to be determined is discussed below, in paragraph 17 and following.

6. The judiciary's position, as expressed in the Eckler Partners Report (the "**Judiciary's Report**"), was that division should not be effected until actual retirement, since applying the Modified Rule of 80 without knowing when the judge will actually retire could leave the judge with an unfairly reduced share of annuity. The proper proportion, as submitted by the judiciary's consultant, ought to be the number of years of marriage during the judicial career over the total number of years on the Bench (*ie.* until the actual date of retirement). Hence, the judiciary proposed that the division of the annuity be deferred until the judge retires, and then the amount to be transferred be

calculated by multiplying the annuity by the number of years of marriage while on the Bench, divided by the total number of years on the Bench. In this way, the amount to be transferred would equitably mirror the proportion represented by the years of marriage over the course of the judicial career.

7. This represented the parties' original positions. The Government's approach will be labelled the **Modified Rule of 80 Approach**, while the judiciary's approach will be labelled the **Retirement Age Rule**.

8. The differences between the two approaches can be observed in the following table:

			Proportion of Net Annuity to be Received by the Retiring Judge based on Retirement at				
			Age + 5			Age + 10	
Age	Service		Modified Rule of 80	Retirement Age Rule		Modified Rule of 80	Retirement Age Rule
55	10		68%	67%		74%	75%
55	15		64%	63%		66%	70%
60	10		68%	67%		69%	75%
60	15		59%	63%		61%	70%
60	20		52%	60%		54%	67%
65	10		68%	67%		69%	75%
65	15		52%	63%		54%	70%

9. These figures illustrate the fact that the ultimate share of the annuity payable to a judge may be reduced by more than what may be considered appropriate if the judge

remains on the Bench beyond the earlier years when he or she would qualify for a full annuity.

10. The figures in the column for the Retirement Age Rule are based on prorating the number of years of marriage while on the Bench over the total number of years of service to retirement, and presume that the annuity is earned over the full period on the Bench. The part to be allocated to the former spouse is based on the service on the Bench to the date of the marriage breakdown and 50% of this share is allocated to the spouse. If the example of a conjugal breakdown affecting a judge aged 65 with 15 years of service is taken and the presumption that retirement occurs 5 years after the breakdown is applied, the total service is 20 years, so it is said that $15/20^{th}$ of the annuity has been earned during the marriage. Half of the $15/20^{th}$ is 37.5% so that the portion remaining for the judge is 62.5%. Similarly, in the example where the 65 year old judge had a marriage breakdown at 15 years of service, then worked a further 10 years, the annuity allocated to the marriage is $15/25^{th}$ or 60% of the total, half of which is 30%, leaving a balance of 70% for the judge.

11. As mentioned above, the portion of annuity remaining after allowing for the marriage breakdown is significantly smaller under the Modified Rule of 80 Approach in certain circumstances and in those cases produces an inequitable result. In other situations the differences are not significant.

12. It must be noted that the Government's proposal to have the division occur upon breakdown is more costly to it, and, to that extent, is not cost-neutral. The Government is paying a lump-sum amount to the spouse "up front", without knowing when the judge will actually retire and how long the judge will collect the annuity payments.

13. The Government's position, the judiciary was advised, stems from a commitment to the principles of clean break and portability, from which the Government is unwilling to depart, notwithstanding the greater cost to it and the potential unfairness to the judge. The Government takes the position that the timing of the division should not be contingent on an event that is solely within the judge's discretion.

14. The Judiciary's Report expressed a concern that where a breakdown occurs prior to eligibility for early retirement, there would be unfairness to the spouse if he or she were to receive a share of the contributions only, as suggested by the Government's proposal, since the judge may be on the brink of eligibility for early retirement and therefore be eligible for a partial annuity. In response to this concern, the Government has informed the judiciary that where breakdown occurs just prior to eligibility for early retirement, the Government will allow for a deferral of the division, so as to avoid unfairness to the spouse. By deferring division in such a case, the spouse would be entitled to receive a share of the annuity as opposed to merely the contributions paid.

15. In light of the entrenched position of the Government based on its commitment to clean break and portability, the judiciary proposed a variation to its Retirement Age Rule. Under this approach, the Modified Rule of 80 would be applied to determine the spouse's share at time of breakdown, but the Retirement Age Rule would be applied to determine the share of the annuity to be received by the judge at the time of retirement.

16. The Government replied to this proposal by saying that it was not cost-neutral. In addition, it was said that, under this proposal, the share of the annuity ultimately payable to the judge would be within the judge's own discretion since the date of retirement is determined solely by the judge.

17. In the course of the parties' consideration of this issue, the judiciary learned from the Government that, under the Government's proposal, while the proportion to be applied is based on the Modified Rule of 80, the value of the annuity to which the proportion is to be applied would not be calculated based on the Modified Rule of 80. Rather, the value would be calculated based on the expected retirement age of the judge in question, relying on historical data of judges' retirement patterns. In discussions with the Government, the number that was used by its representatives was age 72. Consequently, under the Government's proposal, the determination of the proportion of the annuity is based on an "accrual" period ending at the earliest age at which the judge qualifies for a full annuity, *ie.* 15 years, while the determination of the value to which that proportion is applied in order to calculate the amount to be paid to the spouse uses

the expected retirement age, on the basis of actuarial data reflecting judges' past retirement patterns, *ie*. age 72.

18. In addition to the example shown in the table above, another situation that can be unfair for the judge under the Government's proposal is where there is a second conjugal breakdown. In the simple example above, for a 65-year old judge with 15 years on the Bench at the time of breakdown, the Modified Rule of 80 Approach would treat the annuity as "fully accrued" and the assignment of 50% to the former spouse would leave the judge with 50% of the full entitlement.

19. If this judge then remarries, remains on the Bench until the assumed retirement age of 72, but suffers a second marriage breakdown shortly before retirement, the application of the Modified Rule of 80 Approach would suggest that no portion of the annuity was earned during the second marriage and thus that no portion should be allocated to the second former spouse.

20. However, it may be that in certain provinces, the law would require an allocation to the second former spouse. Accordingly, this second spouse could be deemed entitled to 50% of 7/22 of the annuity where 7 years is the period of the second marriage and 22 years is the total period on the Bench. If the first breakdown had assigned 50% of 100% of the annuity to the first spouse then the total assigned would be 66% of the annuity thus leaving 34% for the judge. The 66% figure is the sum of 50% and 50% of 7/22. The 50% assigned to the first spouse could be dealt with through the annuity program while, because of the 50% limit on amounts to be assigned to spouses within the program, the 16% allocated to the second spouse would be settled with other assets.

21. If the Retirement Age Rule were applied instead, the first spouse would receive 50% of 15/22 (*i.e.* 15 years of marriage and an estimated 22-year judicial career) while the second spouse would receive 50% of 7/22 so that a total of 50% is assigned to former spouses with 50% remaining for the judge. Clearly, the Retirement Age Rule is not only fairer to the judge, it is also more advantageous for the second spouse for whose benefit privity would be created between him or her and the Government.

22. Another situation in respect of which the Government's proposal would be defective is where a judge marries after reaching the age to satisfy the Modified Rule of 80, the age at which the Government says the annuity has "accrued". If a breakdown were to occur, and assuming that provincial law would give a benefit to the spouse, the division mechanism would fail as it would not take account of the "accrual" after the date of the Modified Rule of 80.

III. JUDICIARY'S POSITION

23. The Association and Council, relying on the advice of their expert consultant, submit that the Retirement Age Rule is the fairest method to divide the annuity in the event of a conjugal breakdown. It is also cost-neutral.

24. However, the Association and Council acknowledge and respect the Government's commitment to clean break and portability upon conjugal breakdown, and have been willing to modify their position to accommodate these goals.

25. The Government's present proposal uses actuarial data reflecting historical retirement patterns to determine the value of the annuity, yet it uses the Modified Rule of 80 to calculate the proportion to be applied.

26. It is submitted that this is an inconsistency. There is no reason to use actuarial data for the determination of the value of the annuity, but use the earliest age of eligibility for retirement with a full annuity to calculate the proportion to be applied to that annuity.

27. The only issue that falls to be determined by the Commission is the basis to be used when calculating the proportion to be applied to the annuity in order to determine the spouse's share.

28. The justification offered by the Government in using the earliest age of eligibility to calculate the proportion to be applied is that there is no more "accrual" after eligibility to retire under the Modified Rule of 80. However, this proffered justification is misconceived since the concept of accrual is alien to the judicial annuity regime.

There is no accrual under this regime. This notion was unjustifiably imported in the discussion through the Government's Report[1] and it has been allowed to become an obstacle to a consistent approach to the calculation of the proportion to be applied to the annuity.

29. "Accrual" was proposed in the Government's Report as a way to force fit the judicial annuity into the mould of the *Pension Benefits Division Act*. Yet the parties are now agreed that the amendments are to be made in the *Judges Act*, to preserve, in the interests of judicial independence, the uniqueness of the judicial annuity regime.

30. The Government's expert argues that an implicit notion of accrual derives from the early-retirement provision in s. 43.1 of the *Judges Act*. The early-retirement provision was added to the *Judges Act* as part of the Government's response in 2001 to the Drouin Report. It cannnot be argued that this provision "implicitly defines [...] a benefit accrual formula" as the Government's Report suggests[2] since the annuity as originally conceived has never had an accrual period. Stated otherwise, the insertion of a new option like early retirement cannot somehow retroactively alter the fundamental nature of the regime which, as expressed in the Government's Report itself, is the conferral of a benefit "expressed as a single objective—66 2/3% of salary at retirement".[3] In effect, the Government is reverse-engineering by reference to a narrow sub-set of the annuity provisions of the *Judges Act*, which post-dates the establishment of the larger regime, in order to re-characterize the regime itself.

31. The Association and Council submit that both the value of the annuity at breakdown and the proportion to be applied to it should be determined by the actuarial

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[1] See D. Crane (Hay Group), *Report to Department of Justice on Division of Judicial Annuity following Conjugal Breakdown* at 3, 13-15, attached as Tab 13 to vol. II of the Government's Appendices dated December 15, 2003. It is interesting to note that the definition of "accrued pension" given at page 6 does not actually conform to the conception of accrual being proposed for the judicial annuity.

[2] *Ibid.* at 3.

[3] *Ibid.* at 13.

data of past judicial retirement patterns, and urge the Commission to make a recommendation accordingly.

32. The Commission is also urged to recommend that the Association and Council be consulted as to the amendment to be proposed to implement the Commission's recommendation on this subject. Both parties acknowledge the value of these consultations.

The whole respectfully submitted.

Montréal, April 15, 2004.

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