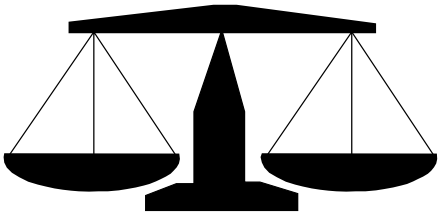
JUDICIAL COMPENSATION AND BENEFITS COMMISSION

REPORT

May 31, 2000



SUBMITTED TO THE
MINISTER OF JUSTICE OF CANADA

PREFACE

This is the first report of the Judicial Compensation and Benefits Commission established by 1998 amendments to the *Judges Act* to inquire into the adequacy of salaries and benefits of the federally-appointed judiciary. This new quadrennial process in part results from the Supreme Court of Canada's 1997 decision in *Reference Re Remuneration of Judges* calling for independent compensation commissions. The creation of this Commission also reflects recognition of the need to improve upon the previous process to determine judicial salary and benefits, which several triennial commissions had concluded was substantially inadequate. We undertook our responsibilities knowing that all parties were looking to this new process to produce results.

Our report is forward-looking. Past circumstances informed our deliberations; however, they were not determinative of our recommendations. The conclusions and recommendations in this report are the result of the Commissioners considering many relevant issues, weighing sometimes competing interests and making those choices that we believe are appropriate today and for the remainder of our mandate.

We believe that our recommendations, if fully implemented on a timely basis, will assist in ensuring the continued independence of the Judiciary and the ability to attract outstanding candidates for appointment to the Bench.

Acknowledgements

The Commission wishes to thank Guy Goulard, Commissioner for Federal Judicial Affairs, and the members of his organization, in particular, Marie Burgher, Jacqueline Desjardins, Wayne Osborne, Dave Poulin and Richard Saunders, for their support throughout the last nine months as we conducted our inquiry. As the Commission is now established on a permanent basis, the Office of the Commissioner for Federal Judicial Affairs has facilitated the establishment of offices and assisted in administrative matters since its inception. We would also like to thank the Information Technology staff at the Office of the Commissioner for Federal Judicial Affairs for their technical assistance in maintaining our computer links. Our thanks also to Daniel Poulin and others of LexUM in Montreal for the development and maintenance of our web site.

We also express our appreciation to the Office of the Chief Actuary, in particular Lou Cornelis, and to Raymond Gaudet and André Sauvé, of Morneau Sobeco, for their valuable assistance in actuarial, compensation and costing matters. The Commission also benefited from the constitutional expertise of Professor Patrick Monahan, of Osgoode Hall Law School, who was of great assistance in assessing the implications of the *Charter of Rights and Freedoms* on some of the issues raised during deliberations.

The Commission is most fortunate to have had as its Executive Director, Deborah Lapierre who was seconded to the Commission by Natural Resources Canada. Her previous experience with other boards and inquiries, together with her dedicated commitment to the organization and coordination of the Commission's research and proceedings made it possible to deliver this report within the legislated time limit. Ms Lapierre was ably assisted by Paula Carty, a Masters Degree graduate from Carleton University whose research, word processing and editing skills were relied upon in compiling our report. We are grateful to them both.

Richard Drouin, O.C., Q.C., Chair

Eleanore Cronk, Commissioner

Fred Gorbet, Commissioner

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CHAPTER 1

INTRODUCTION

1.1 The Commission

The Judicial Compensation and Benefits Commission (the "Commission") consists of three members: one nominated by federally-appointed judges (the "Judiciary") and another by the federal Minister of Justice, and a Chairperson chosen by the first two nominees. In September 1999, the Minister of Justice announced the appointments by the Governor in Council of Richard Drouin, O.C., Q.C., as Chair of the Commission, and Eleanore Cronk and Fred Gorbet as Commissioners, for terms ending on August 31, 2003. The next quadrennial inquiry will not commence until September 2003. Accordingly, the planning horizon of this report is four years, ending August 31, 2003. The process contemplates that the Commissioners, once appointed, will function independently of the parties that nominated them. We have conducted ourselves accordingly.

1.2 Background and Context

The legal authority of the Parliament of Canada to set the compensation of the Judiciary flows from Canada's Constitution. Section 100 of the *Constitution Act, 1867* specifically provides that the salaries, allowances and pensions of the judges "*of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the time being paid by Salary*", are to be fixed and provided by the Parliament of Canada. This section of the *Constitution Act, 1867* has remained unchanged through various phases of constitutional reform. The process to facilitate the fixing of such compensation is now provided for in the *Judges Act*, R.S. 1985, c. J-1, as amended, (the "*Judges Act*").

Before 1981, judges' salaries and benefits were reviewed by advisory committees, a process which was generally unsatisfactory to the Judiciary. Judges felt that the process merely amounted to petitioning the government to fulfill its constitutional obligations.

In 1982, section 26 was introduced to the *Judges Act*, establishing the "Triennial Commission". The intention was to create a body which would be independent of the Judiciary and Parliament, and which would present the Minister of Justice with objective and fair recommendations. The goal was to depoliticize the process, thus maintaining judicial independence.

There were five Triennial Commissions[1]. Despite extensive inquiries and research by each of them, many of their recommendations on judicial salaries and benefits, between 1987 and 1993, generally were unimplemented or ignored. The Government of Canada (the "Government") froze judges' salaries and suspended indexation in the mid-1990s. The last adjustment to judges' salaries was made in November 1998 pursuant to recommendations made by the Triennial Commission chaired by David Scott, Q.C. (the "Scott Commission")[2].

In its 1996 report, the Scott Commission described the problem with the triennial commission process by stating:

> *In spite of the thorough recommendation by successive Commissions, Parliament has failed, in a proactive sense, to fix judicial salaries and benefits for many years.*
>
> *Furthermore, successive reports have failed to generate any meaningful response from Government. The whole subject of judicial salaries and benefits has, in spite of best intentions, been politicized.*[3]

The Scott Commission's report and recommendations were tabled with the Minister of Justice in September 1996 and were then referred to the Standing Committee on Justice and Legal Affairs.

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[1] Lang (1983), Guthrie (1987), Courtois (1990), Crawford (1993) and Scott (1996). Dates refer to the year of the Report.
[2] In November 1998, the *Judges Act* was amended to increase judicial salaries by 4.1% effective April 1, 1997 and an additional 4.1% effective April 1, 1998.
[3] Scott (1996), at 8

While the Committee was considering that report, the Supreme Court of Canada ruled in *Reference Re Remuneration of Judges* (the "*PEI Reference Case")*.[4]

The PEI Reference Case

The *PEI Reference Case* involved litigation concerning judicial independence and the remuneration of provincial court judges in a series of cases in Prince Edward Island, Alberta and Manitoba. The common issue in these cases was the validity of provincial legislation purporting to reduce the compensation of provincial court judges as part of wider restraint measures involving a large number of other persons whose compensation was paid from public funds. Although the case arose in the context of provincial court judges, it is clear that the Court's statements pertain equally to federally-appointed judges and, hence, to the Judiciary whose compensation is the subject-matter of this report.

In its decision, the Supreme Court of Canada outlined a number of basic principles concerning the obligations of governments in establishing judicial compensation. Chief Justice Lamer concluded for the majority of the Court that provinces are under a fundamental constitutional obligation to establish judicial compensation commissions and, further, in the absence of prior recourse to such commissions, any change to or freeze in the remuneration of provincial court judges is unlawful.

The Foundational Principle of Judicial Independence

The analysis of Chief Justice Lamer began with an extensive discussion of the basis for judicial independence. He concluded that judicial independence, at root, is an unwritten constitutional principle, which traces its origins to the *Act of Settlement of 1701*. It is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. Thus, the express provisions of the *Constitution Act, 1867* are not an exhaustive code for the protection of judicial independence in Canada. Rather, the specific provisions of the *Constitution Acts*, 1867 to 1982,

[4] *Reference Re Remuneration of Judges* (1997), 150 D.L.R. (4th) 577 and [1998] 1 S.C.R. 3.

merely "*elaborate that principle in the institutional apparatus which they create or contemplate*" (at 617, para. 83).

The *PEI Reference Case* confirms that there are three core characteristics of judicial independence: security of tenure, financial security and administrative independence. "Financial security" has both an individual and an institutional or collective dimension (at 631-633, paras. 115 to 122). Collective or institutional financial security has three components, all of which flow from the requirement that, to the extent possible, the relationship between judges and the executive branch of government be depoliticized (at 637, para. 131).

The necessity to depoliticize the relationship between judges and the executive branch of government requires, at least, that:

i) no changes to or freezes in judicial remuneration be effected without prior recourse to an independent, effective and objective process for determining judicial remuneration. Thus, *"what judicial independence requires is an independent body, along the lines of the bodies that exist in many provinces and at the federal level to set or recommend the levels of judicial remuneration"* (at 637, para. 133);

ii) under no circumstances should the judiciary, either collectively through representative organizations or individually, engage in negotiations concerning remuneration with the executive or representatives of the legislature. To do so would be to act fundamentally at odds with judicial independence (at 638, para. 134); and

iii) judicial salaries cannot be reduced, in any circumstances, below a minimum level. According to the Court, *"…any reduction to judicial remuneration, including de facto reductions through the erosion of judicial salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge"* (at 638, para. 135).

Only in extraordinary and dire circumstances may governments avoid the requirement of prior recourse to a compensation commission before changing or freezing judges' remuneration. But for these rare and exceptional circumstances, as a matter of law, governments must adhere to the three components of the collective or institutional dimension of financial security identified above. Financial security, in turn, constitutes one of the three basic elements of judicial independence.

The Requirement for a Special Process

The *PEI Reference Case* did not dictate the exact shape and powers of the independent review body mandated by the Court's judgment. It did establish, however, certain of the required content of the norms of "independence, effectiveness and objectivity". Generally, such content includes at least the following:

i) members of compensation commissions must have some kind of security of tenure, which may vary in length;

ii) the appointments to compensation commissions must not be entirely controlled by any one branch of government;

iii) a commission's recommendations concerning judges' compensation must be made "*by reference to objective criteria, not political expediencies*";

iv) it is preferable that the enabling legislation or regulations creating compensation commissions stipulate a non-exhaustive list of relevant factors to guide the commission's deliberations;

v) the process of compensation commissions must be employed before implementation of any changes or freezes to judicial compensation;

vi) to guard against the possibilities that government inaction might lead to a reduction in judges' real salaries because of inflation, compensation commissions must convene at least every three to five years to ensure the adequacy of judges' salaries and benefits over time;

vii) the reports of compensation commissions must have a "*meaningful effect on the determination of judicial salaries*". Thus, while the report of a compensation commission need not be binding, at a minimum the responsible legislative or executive authority must formally respond to the report within a specified time; and

viii) finally, the executive or the legislature, as applicable, must be prepared to justify any decision rejecting one or more of the recommendations in a compensation commission's report, if necessary, in a court of law.

As envisaged by the *PEI Reference Case*, all provinces, as well as Yukon Territory, have established commissions to conduct reviews of the compensation and benefits of provincial and territorial court judges.

In 1998, Parliament enacted extensive amendments to the *Judges Act*. Certain of these amendments were intended specifically to respond to the requirement to assure an "independent, effective and objective" process for the determination of judicial compensation. The mandate of this Commission flows from the new process for review of judges' compensation established by the *Judges Act*, as amended.

1.3 Mandate

Section 26 of the *Judges Act* establishes the Commission. The Commission is permanent, with established offices and an independent structure. Its mandate is clearly set out in subsections 26(1) and (2) of the *Judges Act*:

> *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.*
>
> *26(2) The Commission shall commence an inquiry on September 1, 1999 and on September 1 of every fourth year after 1999, and shall submit a report containing its recommendations to the Minister of Justice of Canada within nine months after the date of commencement.*

Also included in the Commission's mandate under the *Act* is a new referral clause whereby the Minister of Justice can request other reports from the Commission:

> *26(4) In addition to its quadrennial inquiry, the Minister of Justice may at any time refer to the Commission for its inquiry a matter mentioned in subsection (1). The Commission shall submit to that Minister a report containing its recommendations within a period fixed by the Minister after consultation with the Commission.*

Subsections 26(6) and 26(7) of the *Act* outline the responsibilities of the Minister of Justice upon receiving a report from the Commission:

> *26(6) The Minister of Justice shall table a copy of the report in each House of Parliament on any of the first ten days on which that House is sitting after the Minister receives the report.*
>
> *26(7) The Minister of Justice shall respond to a report of the Commission within six months after receiving it.*

1.4 Operating Principles

In our deliberations, we were guided by our mandate as set out in section 26 of the *Judges Act*, described above. In particular, the *Act* requires that we determine whether judicial salaries and benefits are adequate and that we must consider, in arriving at this determination, the four factors set out in subsection 26(1.1).

In conducting our inquiry, we addressed each of these factors in a number of ways. We considered information presented to us in submissions from interested parties and in responses by those parties to our questions of clarification. Our staff undertook research on our behalf. We sought and received expert advice on some important issues. We also spent considerable time discussing among ourselves the issues, the evidence, how it could be interpreted, and our conclusions and recommendations.

It is important in the public interest and for the benefit of all interested persons, including the Judiciary and Government, that our report clearly outline the basis and rationale for our recommendations. For this reason, the specific context for our individual recommendations is discussed in more detail in subsequent chapters of this report. We believe it will also help the reader understand our overall report if we set out some of our basic conclusions and operating

principles to provide insight into how we approached the various issues we were asked to consider, in light of the statutory factors.

Our work was shaped and guided by the Supreme Court of Canada's articulation, in the *PEI Reference Case,* of the constitutional importance of the concept of judicial independence. From the outset we attempted to be alert and responsive to the requirements outlined by the Court for an "independent, effective and objective" special process for determining judicial compensation.

We strongly affirm the importance of an independent judiciary, and we recognize the role that financial security plays as a fundamental component of independence as set out in the second enumerated factor under subsection 26(1.1). We note, in this regard, that the *PEI Reference Case* does not provide explicit guidance as to the appropriate level of remuneration necessary to ensure judicial independence, other than to indicate that:

i) the basic minimum must be at a level that will not lead to perceptions that judges are susceptible to political pressure through economic manipulation (at 658, para. 193); and

ii) the salary level *"shall be adequate, commensurate with the status, dignity and responsibility of their office"* (at 659, para. 194).

We cite these references to illustrate an important point. There is, in our view, no single, objectively demonstrable answer to the question of what is adequate compensation for the Judiciary in light of the factors enumerated in subsection 26(1.1). This is not to say that the issues cannot be approached with objectivity. We believe that they can and we believe that we have done so. But, at the end of the day, judgments are required that necessitate compromise among sometimes competing objectives or interests.

For example, we were required explicitly by the first factor set out in subsection 26(1.1) to consider the economic situation and the financial position of the Government. We received material from the Government indicating that the economy is robust and the financial position is healthy. We concluded from this that there is no fiscal constraint that should impact on the ability of Parliament to ensure that judicial compensation is adequate. But the lack of fiscal constraint, while important and welcome, should not be viewed as an invitation to be profligate

with taxpayers' money. It is a condition that allowed us to recommend without constraint what we felt to be appropriate, but it did not help us determine what that recommendation should be.

Similarly, in interpreting the third factor identified in subsection 26(1.1), relating to recruitment of outstanding candidates to the Judiciary, it is important to note that there is no objective definition of "outstanding". An example of the need to compromise can be illustrated by considering this factor against the background of regional differences across Canada. Generally, all members of the Judiciary are paid the same salary, regardless of where they live and work. But it is a reality that attracting outstanding candidates in major metropolitan areas will require higher compensation than attracting outstanding candidates in rural areas of Canada. The Commission, therefore, considered whether judges should be differentially compensated, on a provincial or regional basis, as had been considered by various Triennial Commissions[5]. For reasons later outlined in this report, we concluded that we should not recommend regional variations in salaries. Nonetheless, we recognized that unless the Government compensates judges in all regions of the country according to the "highest paying" or most lucrative legal services market, which we do not believe to be realistic or responsible, uniform salaries will have a differential impact, in different regions of the country, on the ability to attract outstanding candidates to the Judiciary. After weighing what evidence was available and taking these realities into account, we had to make compromises that, in our view, best serve the broad public interest.

We sought, in accordance with the fourth factor enumerated in subsection 26(1.1), to inform ourselves with regard to a number of objective criteria that we believed relevant to our deliberations. These included, with regard to salaries, comparators that we considered in coming to conclusions about adequacy, particularly in light of the second and third enumerated factors. While we considered a number of comparators, we believe that the unique position of the Judiciary in Canada strongly militates against a formulaic approach to the determination of an

[5] The Lang Commission (1983) considered recommending regional variations in judicial salaries and rejected the concept, "*so as to avoid the creation of different classes within the judiciary*" (at 7). The Lang Commission, however, did recommend that "*the next triennial commission address the issue of regional and cost of living variations for judicial salaries and allowances*" (at 15). The successor Commission, Guthrie (1987), concluded that "*Having considered the matter, we are not disposed to recommend any changes*" (at 10).

adequate salary. With regard to annuities and other benefits, we also sought the advice of experts on practices that are generally followed within the private and public sectors. Once again, we stress that while such information was helpful and informative, it was not determinative.

Finally, we conclude this section by noting that not only are the role and responsibilities of the Judiciary unique in our society, they constantly evolve according to the dynamics and needs of Canadian society. In response to the *Charter of Rights and Freedoms* (the "*Charter*"), and the growing complexity of our social and economic relationships, the Judiciary is playing an increasingly public role in key decisions that affect us all. Moreover, the characteristics of the Judiciary have changed and continue to shift: judges are being appointed at a younger age, and more females are being appointed to the Bench. The caseload of judges has grown, as more cases move to the higher courts for determination. Many of these cases are high profile and controversial. They capture the public interest and become the focus of media attention. Judicial decisions often generate considerable political debate. The reality of these trends must be recognized when considering the salary and benefits that are adequate to secure judicial independence and attract outstanding candidates to the Bench.

1.5 Operating Process

The Commission sought to establish an open and accessible process for all those interested in participating in our inquiry, or in keeping abreast of the Commission's proceedings. A web site was created and any documents that were accessible electronically were posted on the site (see http://www.quadcom.gc.ca). Links were made to other relevant sites and documents. An e-mail address was incorporated to allow for communication directly with the Commission and with the Commission's Executive Director in our Ottawa office.

In November 1999, a notice announcing the Commission's inquiry and process was published in major newspapers across the country. This notice invited anyone who was interested to make written submissions to the Commission and indicated that an oral hearing would be held. A copy of the notice is attached at Appendix 1. In addition, the Chair wrote letters to provincial and

territorial Ministers of Justice and Attorneys General and to law societies informing them of the Commission's inquiry and inviting submissions or comments on issues covered by our mandate.

The Commission received submissions from 20 parties. Submissions from the Canadian Judges Conference and the Canadian Judicial Council (the "Conference and Council"), representing the Judiciary, and from the Government covered a broad range of compensation and benefits matters. Submissions from other parties addressed a more limited range of specific issues. A list of those persons who provided written submissions is set out at Appendix 2.

The Commission held a public hearing on February 14, 2000 in the Government of Canada Conference Centre on Rideau Street in Ottawa. The hearing was continued on March 20, 2000 in the same location. A copy of the notices of hearing and a list of participants can be found at Appendix 3. Copies of the transcripts of these hearings are available for perusal at the Office of the Commission. Access can be arranged through the Executive Director.

CHAPTER 2

JUDICIAL SALARIES

The determination of compensation for judges is grounded in the constitutional imperative that the independence of the judiciary be fostered and maintained. This necessarily means that the evaluation of judicial salaries, and benefits, must begin with recognition of the special role in Canada occupied by judges and the unique responsibilities they bear. As described in the submission of the Government, the role and responsibilities of judges are "*sui generis*", that is, in a category or class of their own.[1] For our purposes, their role and responsibilities require that they be paid a salary and be provided with benefits that are adequate to ensure them a reasonable standard of living, both prior to and after retirement, in relation to their position and duties in our society, in order that they might continue to function impartially and fearlessly in the advancement of the administration of justice.

We detail in this Chapter those considerations underlying our approach to evaluation of the adequacy of current judicial salaries, our assessment of the issues raised before us and those other matters which we regarded as relevant and useful.

2.1 The Legal Framework

The constitutionally-mandated requirement of judicial independence has resulted in special provisions under our law relating to judges. Some of these provisions deny to judges, basic rights and opportunities available generally to most other Canadians. Other provisions establish special entitlements for judges. Some of the indicators of the unique responsibilities and role of judges are embodied in the Constitution itself, and in our constitutional jurisprudence. Others

[1] Submission of the Government dated December 20, 1999, at para. 31.

flow from general statutory provision as, for example, under the *Judges Act*. In combination, they define the legal parameters within which compensation policy for judges is to be determined.

Constitutional Principles

The primary constitutional indicator of the importance of judicial independence is found in section 100 of the *Constitution Act, 1867*. By this provision, Canadian judges are the only persons in Canadian society whose compensation, by constitutional requirement, is to be set by Parliament. As discussed in section 1.2 of Chapter 1, constitutional jurisprudence, established most recently by the *PEI Reference Case*, requires that this be done following a process of review by independent compensation commissions.

Constitutional principles also protect judicial salaries from falling below an acceptable minimum level. As stated by Chief Justice Lamer:

> *…Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation, as is witnessed in many countries.*[2]

In *The Queen v. Beauregard*,[3] Chief Justice Dixon quoted with approval the following provision of the Universal Declaration of the Independence of Justice (1983), which affirmed that the salaries of judges:

> *…[must be adequate] commensurate with the status, dignity and responsibility of their office, and be regularly adjusted to account fully for price increases.*[4]

However, as noted by the Department of Justice in its submissions to the Crawford Commission in 1993:

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[2] *Supra*, Chapter 1, fn. 4, at para. 135, and Submission of the Government dated December 20, 1999, at para. 24.
[3] [1986] 2 S.C.R. 56.
[4] *Ibid*., at para. 33.

> *There is no certain way of determining what amount of salary is necessary to provide the degree of financial security required for judicial independence. The amount of salary has always been, and will always be, a judgment call, and the unique responsibility for making that judgment call is placed, by our constitution, on Parliament. …*[5]

Also relevant is the constitutional prohibition against judges negotiating any part of their compensation arrangements, including salaries, with the executive or representatives of the legislature. This prohibition on negotiation is exceptional. No similar restraint applies to any other class of persons in Canada. Except for the process of compensation commissions, it requires that judges refrain from negotiating or lobbying for improvements in their compensation arrangements. Under our traditions and laws, judges do not publicly advocate on such matters. As noted by Chief Justice Lamer in the *PEI Reference Case:*

> *I recognize that the constitutional prohibition against salary negotiations places the judiciary at an inherent disadvantage compared to other persons paid from the public purse, because they cannot lobby the executive and the legislature with respect to their level of remuneration. The point is put very well by Douglas A. Schmeiser and W. Howard McConnell in The Independence of Provincial Court Judges: A Public Trust (Toronto: Canadian Association of Provincial Judges, 1996), at p. 13:*
>
> > *Because of the constitutional convention that judges should not speak out on political matters, judges are at a disadvantage vis-à-vis other groups when making a case to governments for increments in salaries.*
>
> *I have no doubt that this is the case, although to some extent, the inability of judges to engage in negotiations is offset [by the constitutional guarantees requiring an independent compensation commission process]. In particular, the mandatory involvement of an independent commission serves as a substitute for negotiations, because it provides a forum in which members of the judiciary can raise concerns about the level of their remuneration that might have otherwise been advanced at the bargaining table…*[6]

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[5] *1975 Equivalence – An Explanation*, Department of Justice, October 1992, at 7, contained at Appendix 3 to the February 14, 2000 Submission of the Conference and Council.

[6] *Supra*, fn. 2, at para. 189.

While the *PEI Reference Case* makes it clear that this prohibition on negotiation does not preclude expressions of concern or representations by Chief Justices and Chief Judges, and organizations that represent judges, to governments regarding the adequacy of judicial remuneration, nonetheless, the prohibition means that judges do not enjoy a basic right of other Canadians – the right to openly assert the need, and engage in negotiations, for improvements in compensation.

In part to offset the prohibition on negotiation, and the politicization that would otherwise result with respect to judicial compensation, the Judiciary enjoys the benefit of mandatory annual indexation of their salaries, as a matter of law. This entitlement, established by section 25 of the *Judges Act*, is also unique. Since 1981, automatic indexation according to the Industrial Aggregate Index (then known as the Industrial Composite Index) effective each April 1st, has been provided for by statute.[7]

Statutory Provisions

The special position of judges in our society is also reflected in a number of statutory provisions. For example, under our laws:

i) judges are precluded from engaging in any other occupation or business other than their judicial duties;[8] and

ii) entry to the class of persons comprising the Judiciary is confined to lawyers of at least ten years standing at the bar of any province in Canada. This constitutes an entry level eligibility requirement particular to judges.[9]

[7] The Industrial Aggregate Index (the "IAI") is a measure of wages. It is intended to, and in many years does, encompass more than changes in the cost of living as reflected in the consumer price index (the "CPI"). Over the period 1992-1998, the cumulative increase in the IAI was 14.51%, compared to a cumulative increase in the CPI of 10.2%. The IAI, however, does not always exceed the CPI in every year. For example, the increase in the IAI used to index judges' salaries as of April 1, 2000 was only 0.67%, compared to an increase of 1.7% in the CPI over the same period. This was the lowest level for the IAI experienced since 1981.

[8] Section 55 of the *Judges Act* (Canada).

[9] Section 3 of the *Judges Act* (Canada). This provision, of course, is designed to ensure that candidates for appointment to the Bench have achieved the requisite level of experience, judgment and skill, as well as seniority and profile within the legal profession, as to warrant consideration of their candidacy for appointment. In essence, it represents a statutory form of competency threshold.

Other Considerations

All of the constitutional and statutory factors described above contribute to the overall legal framework within which any analysis of the adequacy of judicial salaries must be undertaken. We were mindful of these factors, and this framework, in approaching our task.

Other considerations are also relevant, however, to the assessment of judicial salaries. Foremost among these, arguably, is the fact that the nature of the job required and expected of Canadian judges has undergone significant change over the years. There are increasing, and ever-shifting, demands placed upon the Judiciary. As a result of the introduction of the *Charter*, the growth in litigation in Canada, the complexity of the matters which actually proceed before the courts, and intensified public scrutiny of judicial decisions, the process and requirements of "judging" have become more onerous at both the trial and appellate levels. There is no reason to conclude that this will change during the planning period relevant to our report.

We also recognized the constraints facing judges should they become dissatisfied with working conditions or compensation arrangements. In practical terms, should the morale of members of the Judiciary deteriorate because of such matters following appointment to the Bench, there is no ready forum or remedy, short of resignation by individual judges or litigation, by which the Judiciary may seek to achieve a negotiated resolution of complaints or dissatisfaction. Once again, under our constitutional system, the Judiciary does not speak publicly on such issues. They are limited to seeking redress once every four years, in the process of a compensation commission review. This constitutes a further limitation on the options of judges, in contrast to those available to other Canadians.

Moreover, many concepts and mechanisms that are basic and useful in the setting of compensation policy in the private and public sectors traditionally have not applied, and in some cases cannot apply, to the Judiciary. While this emanates from sound public policy and, in some instances, in consequence of constitutional requirements, it does mean that the potential for utilizing flexible or creative approaches to compensation policy for the Judiciary is constrained. For example:

i) in the private corporate sector, it is common to set compensation policy, including salary levels, for senior managers and executives taking into account and integrating where appropriate some combination of bonus plan arrangements, profit-sharing, gain-sharing, merit awards, long-term cash incentives, stock purchase plans and stock options. Some of these mechanisms can and do apply to lawyers engaged in the practice of law with law firms or corporations. They have no application, however, to the Judiciary;

ii) similarly, resort cannot easily be had to compensation techniques sometimes utilized in the public service. While performance pay, bonus arrangements, "at-risk" or variable pay and recruitment or signing bonuses all potentially play a role in the determination of compensation for senior managers or Order-In-Council appointees within the Government, such concepts are not easily imported into the design of a judicial compensation scheme. In any event, the application of some of these mechanisms to the Judiciary, in our view, would not be in the public interest; and

iii) concepts of promotion and merit pay have no application in the judicial context.

These factors make the evaluation of judicial salaries complex, and the prospects for innovation remote. The Commission believes it is important, therefore, to recognize that both practical constraints and legal requirements define the boundaries for setting judicial compensation policies.

We have also taken into account three other material considerations.

First, as subsequently discussed in this report, the annuity arrangements in place at present for the Judiciary are unique in Canada in many respects. This is so for many important policy and constitutional reasons. As observed by several Triennial Commissions, the value of a judicial annuity constitutes a significant portion of the total compensation available to judges. In our view, the assessment of the adequacy of judicial salaries cannot be undertaken prudently, or fairly, without examination of the total compensation of judges, including pension benefits. Consideration of the value of the annuity benefit available to judges upon retirement is an important, although not determinative, factor in setting salary levels.

Second, in several submissions received by the Commission, it was emphasized for varying purposes that the demographics of the Judiciary have changed significantly such that they have

come to include, over time, the appointment of a greater number of young and female judges. The achievement of greater diversity in the demographic profile of the Bench, a laudable policy objective identified and supported by the Government, Bench and bar over the years, also carries with it compensation consequences. One of these consequences is increased life expectancies of some appointees in comparison to others, as well as greater anticipated tenure of younger appointees on the Bench until eligibility for retirement is achieved, in contrast to the anticipated tenure of colleagues appointed at comparatively older ages. These factors have implications both for the evaluation of judicial salaries and to issues concerning the current pension arrangements for the Judiciary.

Finally, in contrast to both the private and public sectors, retention factors traditionally have not played a material part in the setting of judicial salaries. Historically, few judges resigned their positions prior to eligibility for retirement, save for health or personal reasons. In these times, it would be unwise to assume that retention is not a relevant factor in judicial compensation.

2.2 The Positions of the Parties

At present, puisne judges (excluding puisne judges of the Supreme Court of Canada) are paid a salary of $179,200 per annum, inclusive of indexation as of April 1, 2000, in accordance with section 25 of the *Judges Act*. Also effective April 1, 2000, Chief Justices and Associate Chief Justices of the Superior, Federal and Tax Courts receive a base salary of $196,500, and Justices of the Supreme Court of Canada receive a base salary of $213,300. The April 2000 adjusted salary for the Chief Justice of Canada is $230,200.

On the issue of the current adequacy of these judicial salaries, the principal parties were starkly divided.

The Conference and Council urged that judicial salaries be increased to at least $225,000 per year effective April 1, 2000 and, further, that provision be made to supplement that base salary with further staged increments, in addition to the mandatory annual statutory indexing, for the duration of the work of this Commission as currently constituted and as may be necessary to

reflect any parallel movement in the remuneration of senior Deputy Ministers within the Government.

The request for a $225,000 salary level was premised in part on the proposition that such an increase was warranted to establish a necessary and reasonable relationship between judicial remuneration and that of senior lawyers at the bar from whose ranks judges are traditionally appointed. In addition, it was argued that recent increases in the salaries of senior Deputy Ministers in the Government supported such a salary level. The Conference and Council also pointed out that review of judicial compensation is now undertaken at four-year intervals rather than three year intervals as was the case prior to 1998. Thus, judicial salaries will not be reviewed again until at least the fall of 2003. In contrast, the compensation of senior Deputy Ministers and others within Government will next be reviewed in 2001. Moreover, based on past history, some delay may be anticipated in implementing those salary recommendations of this Commission that are accepted by Parliament. For all of these reasons, the Judiciary argued that it was now time for a "*real and substantive increase*" in the salaries of the Judiciary.

In contrast, the Government submitted that the current level of judicial salaries, coupled with automatic annual adjustments mandated by the statutory indexation provision, reflects an adequate and acceptable level of judicial remuneration. In the alternative, if the Commission concluded that an increase in judicial salaries was necessary based on compensation trends in the federal public service, the maximum increase that could be justified would be 5.7% as of April 1, 2000, inclusive of statutory indexing effective the same date.[10]

The Government submitted that the effect of section 25 of the *Judges Act* has been *"not merely to protect judicial salaries against inflation, but to deliver an increase in salary in real terms"*.[11] In addition, it was submitted that the level of existing judicial salaries fully reflects the recommendations of the Scott Commission (1996), which expressed concern about the erosion of judicial salaries resulting from the freeze on the salaries of judges and other publicly - remunerated officials during the five-year period commencing December 1992 and ending

[10] Submission of the Government dated December 20, 1999, at paras. 25 and 40.
[11] *Ibid.*, at para. 18.

March 31, 1997 pursuant to the *Public Sector Compensation Restraint Act* (Canada).[12] As a result of that statute, annual statutory indexing of judicial salaries was suspended for a five-year period and no other alterations in the level of judicial salaries were made.

The Scott Commission recommended that commencing April 1, 1997, the Government introduce an "*appropriately phased upward adjustment in judicial salaries such as to ensure that the erosion of the salary base caused by the elimination of statutory indexing is effectively corrected*".[13] This recommendation was implemented over two years, with the result that judicial salaries were increased by 4.1% on April 1, 1997 and by an additional 4.1% on April 1, 1998. The Government asserted that these increases were in addition to the restoration of annual indexing adjustments and that they had the effect of restoring judicial salaries to the levels that would have been attained if indexing had not been suspended during the five years of the freeze.[14]

2.3 The Suggested Comparators

The Conference and Council suggested to the Commission that the adequacy of current judicial salaries should be examined with reference to various comparators, namely:

i) the salaries at present of the most senior level of deputy ministers within the Government ("DM-3s");

ii) the incomes of the top one-third of lawyers in the private practice of law in Canada, to the extent measurable by available income tax data; and

iii) the salaries available to judges, including senior judges, in other jurisdictions including England, Australia and New Zealand.

As later discussed, the Government expressed concerns regarding the applicability, and reliability, of such comparators.

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[12] *Ibid.*, at para. 11.
[13] Scott (1996), at 16.
[14] *Supra*, fn. 10, at para. 12.

Because of the special legal and other considerations that establish the framework within which judicial salaries are to be assessed and determined, no suggested comparator to the Judiciary is truly apt. Nonetheless, each suggested comparator informs the overall assessment of the adequacy of judicial salaries. In this context, some comparators are more useful than others.

We concluded that all of the suggested comparators should be included in our considerations but, as earlier noted, a strictly formulaic approach to the determination of an adequate salary level for judges was not desirable or appropriate. Our conclusion in this regard was reinforced by our review of the reports of various Triennial Commissions, each of which considered one or all of the comparators suggested to us by the Conference and Council, and each of which placed greater or lesser weight on them depending upon their view of prevailing circumstances at the time of their respective inquiries. Thus, while one comparator might be apposite during the planning horizon of one compensation commission, another suggested comparator might be more relevant during the inquiry of another, depending upon all of the considerations then relevant. In our view, at this time, no one comparator can or should dominate.

Various Triennial Commissions discussed in their reports the concept of "relationships" between judicial salaries and the salaries of DM-3s or the compensation of senior members of the bar. In some instances, recommendations concerning judicial salaries were based on a suggested "gap" between the salary level of judges and the salary of one or more comparator groups. Thus, all of the Lang (1983), Guthrie (1987), Courtois (1990) and Crawford (1993) Commissions specifically considered the historic relationship between judicial salaries and the salaries of DM-3s, and the status of that relationship at the time of their respective inquiries. Similarly, those Commissions and the Scott Commission (1996) considered the incomes of legal practitioners to be a relevant and useful comparator and the relationship between judicial salaries and the incomes of private practitioners an important factor in formulating recommendations on judicial salaries. In the case of the Scott Commission (1996), as discussed further below, this comparator was regarded as the most significant one for the purposes of that Commission's salary recommendations.

In our view, the criteria now enumerated in subsection 26(1.1) of the *Judges Act* expressly permit consideration of such relationships. The criterion identified in subsection 26(1.1)(c), for example, is directed expressly to the issue of recruitment of suitable candidates for the Bench. Traditionally, most judges in Canada are appointed from the ranks of private legal practitioners. Accordingly, those factors constituting incentives or disincentives to the seeking of judicial office by private legal practitioners are relevant to recruitment of judicial candidates. Compensation differentials are clearly one of the factors influencing the decision by practitioners to seek appointment to the Bench. Similarly, none of the parties before this Commission took issue with the proposition that the compensation of DM-3s could be considered by this Commission, if thought by us to be relevant, under subsection 26(1.1)(d).

Part of our principal mandate under the *Judges Act* is to inquire into the adequacy of the salaries of the Judiciary. "Adequacy" is a relational term. In seeking to determine its meaning in the context of judicial salaries, several questions arise: Adequate for what purpose? Adequate in relation to who, or what? Adequate over what time frame? Against the background of the constitutional principles articulated in the *PEI Reference Case*, we have concluded that the operative meaning of "adequacy", to guide our work, requires us to determine what constitutes a fair and sufficient salary level for the Judiciary taking into account the criteria set out under subsection 26(1.1). What is required in this context is a proper judicial salary level, not a perfect one.

The DM-3 Comparator

The number of DM-3s fluctuates by reason of resignations and promotions.[15] There were 10 Deputy Ministers within Government at the DM-3 level as of late November 1999. As of April 1, 2000 there were 13 incumbent DM-3s.

[15] Responses to Requests Provided by the Government of Canada to the Judicial Compensation and Benefits Commission dated April 19, 2000, at para. 5.

As a result of a report in 1998 by the Strong Committee[16] on Senior Level Retention and Compensation, significant enhancements to the salary levels of DM-3s, among others, were recommended and ultimately accepted by the Government. In summary, the Strong Committee recommended a base salary increase for DM-3s of 19.4% effective April 1, 1998, plus variable at-risk pay. As implemented to date, effective April 1, 1999, the mid-point base salary level for DM-3s was set at $188,250, within an overall salary range of $173,000 to $203,500. Table 2.1 below, reproduced from materials provided to the Commission by the Government,[17] illustrates the increases in the mid-point of the base salary of DM-3s since 1992.

Table 2.1
Mid-Point and Base Salary Ranges: DM-3s

Date	Mid-Point Salary	Base Salary Range
April 1, 1992	$150,750	$136,000 - $165,500
June 1, 1992	$155,300	$140,100 - $170,500 (3% legislated increase effective June 1, 1992)
April 1, 1993	$155,300	$140,100 - $170,500
April 1, 1994	$155,300	$140,100 - $170,500
April 1, 1995	$155,300	$140,100 - $170,500
April 1, 1996	$155,300	$l40,100 - $170,500
April 1, 1997	$155,300	$140,100 - $170,500
April 1, 1998	$188,250	$173,000 - $203,500 (19% increase as a result of Advisory Committee recommendations)
April 1, 1999	$188,250	$173,000 - $203,500

[16] First Report of the Advisory Committee on Senior Level Retention and Compensation, dated January 1998 (the "Strong Committee").
[17] Letter from the Department of Justice, Canada, dated December 9, 1999.

In addition to their base salary level, DM-3s have been entitled since July 1, 1996 to some form of performance, variable or at-risk pay. The Strong Committee recommended a new scheme of variable, at-risk compensation for DM-3s, to replace the previously existing performance pay scheme and to be paid on the basis of performance measured against agreed targets and the achievement of business plans. This variable pay component was regarded by the Strong Committee as an integral part of the total compensation for DM-3s. It is a pensionable component of compensation for these public servants in that it forms part of the compensation against which annual pension accrual entitlements are calculated. Fourteen persons received at-risk pay as DM-3s as of April 1, 1999.

The Strong Committee recommended that at-risk or variable pay for DM-3s up to a maximum of 10% of salary be introduced by April 1, 1999, and that a maximum of 20% of salary be introduced by April 1, 2001 (for performance in fiscal year 2000-2001). Table 2.2 below, illustrates the range of at-risk awards that were made as of April 1, 1999.[18]

Table 2.2
Distribution of 'at-risk' pay for DM-3s (14 eligible)
As of April 1, 1999

Percentage of 'at-risk' pay	Number of DM-3s
Between 0% and 5%	2 (average $4,400)
Between 5.5% and 7%	4 (average $13,200)
Between 7.5% and 10%	8 (average $17,735)

Overall average 'at-risk' pay: $15,800
Overall average 'at-risk' pay as % of average salary: 8.19%

[18] Submission of the Government dated March 31, 2000, at Tab 48.

As appears from Table 2.2, the average at-risk pay effective April 1, 1999 ranged from $4,400 (2 DM-3s) to $17,735 (8 DM-3s). The overall average at-risk pay, as of the same date, was $15,800 or 8.19% of average salary.

The Government argued that the DM-3 comparator was a weak one for the purposes of assessing the adequacy of current judicial salaries and, in any event, that it should not be determinative of our recommendations concerning judges' salaries. It was suggested that the overall increase in the compensation of DM-3s, as recommended by the Strong Committee and accepted by the Government, came about because DM-3s did not have the advantage of automatic annual indexing of their salaries, in contrast to the benefit afforded judges under section 25 of the *Judges Act*. Accordingly, if the DM-3 comparator was to be used by the Commission, it was the Government's position that regard should be had only to the mid-point of the base salary level of DM-3s, namely, to the sum of $188,250, without any regard to at-risk awards. This would result in a 5.7% salary increase for puisne judges[19], inclusive of annual statutory indexing as of April 1, 2000.

Several observations should be made:

i) the Commission does not accept the Government's submission that no regard should be had to the at-risk component of the DM-3 compensation package in comparing judicial salaries with those of DM-3s. Similarly, the Commission does not agree with the implied submission of the Conference and Council, that the proper comparison point is the maximum at-risk award. It is not clear what proportion of at-risk pay is relevant in making the compensation comparison between judges and DM-3s but, in our view, it is not zero, and it is not 100%. We concluded that neither of these approaches is appropriate;

ii) while the relevant proportion, for comparison purposes, of DM-3 at-risk pay cannot be precisely ascertained, one can consider the average of actual at-risk awards, as a percentage of the maximum. Based on the most current information available (that is, the at-risk awards made as of April 1, 1999), this average was 82%. If the 82% average payout effective as of April 1, 1999 is added to the mid-point of the DM-3 base salary range ($188,250), it results in total compensation of $203,686 ($188,250 plus $15,436);

[19] That is, an increase of $10,250 from a 1999 base of $178,000.

iii) based on the information provided to the Commission, it is not possible to ascertain the number of DM-3s who were at the high end of the total salary range as of April 1, 1999. In the interests of maintaining the privacy of the affected individuals, the Commission is unaware of what any individual DM-3 earns, either as base salary or for at-risk pay as of April 1, 1999. What is clear from the available information, however, is that the overall total range for DM-3 compensation as of April 1, 1999 was $173,000 (the lowest end of the base salary range without any at-risk award) to a maximum of $223,850 (the highest end of the base salary range, plus the maximum at-risk award of $20,350);

iv) at the time of finalizing our report, the at-risk awards for DM-3s effective as of April 1, 2000 had not yet been determined. The Strong Committee recommended variable pay for DM-3s up to a maximum potential of 10% of salary for fiscal years 1998-99 and 1999-2000, to reach 20% for fiscal year 2000-2001. The Government informed us that, "*consistent with the recommendations, the maximum available in respect of 1998-99 was 10% and is likely to be 10% for 1999-2000*".[20]

Assuming, therefore, a 10% maximum for at-risk awards in 1999-2000, the total range for DM-3 compensation as of April 1, 2000 would be identical to the range as of April 1, 1999, that is, $173,000 to $223,850; should the at-risk awards again average 82% of maximum, applying the average at-risk award to the mid-point of the base salary range would result in an overall compensation level of $203,686 as of April 1, 2000;

v) should the Government accept the Strong Committee recommendation to increase at-risk awards as of April 1, 2001 (for performance in fiscal year 2000-2001) to a maximum of 20% of salary, the total range for DM-3 compensation as of that date will be increased to $173,000 (the lowest end of the base salary range without any at-risk award) to $244,200 (the highest end of the base salary range, plus the maximum at-risk award of $40,700). If actual at-risk awards are again in the range of 82% of maximum, application of this average to the mid-point of the base salary range would result in an overall compensation level of $219,123 as of April 1, 2001 ($188,250 plus 82% of 20% of salary);

vi) if one were to assume that all DM-3s will receive the maximum 20% at-risk award as of April 1, 2001, the mid-point of the compensation range would be adjusted by 20% to yield a total salary of $225,900 ($188,250 plus $37,650). The request of the Conference and Council before this Commission for a salary level of $225,000 emanates from this calculation; and

[20] Submission of the Government dated January 21, 2000, at para. 16.

vii) the Strong Committee is scheduled to again review compensation for senior executives within the Government, including DM-3s, in 2001. The Commission has taken into consideration the timing of that scheduled compensation review in comparison to the timing of the next required review of judicial compensation and benefits, in the fall of 2003.

Before the Triennial Commissions, much was said about the concept of "1975 equivalence", referring to the historic relationship of rough equivalence between the salaries of judges and those of senior deputy ministers in the federal public service. This concept of the relational aspects of judicial salaries to those of DM-3s, was a significant issue for each Triennial Commission, including the Scott Commission. Both the Guthrie and Scott Commissions (1986 and 1996, respectively) observed that as a result of amendments to the *Judges Act* in 1975, the salary level of Superior Court puisne judges was *"brought to within 2% of the mid-point of the salary range"* of DM-3s. They suggested, however, that thereafter the relationship again deteriorated. By 1989 the level of judges' salaries was said to be $8,200 below 1975 equivalence.[21]

In submissions in 1993 by the Department of Justice to the Crawford Commission, the Department, argued that:

> *Despite the historically lower salaries of judges as compared with senior deputy ministers, the government has indicated to the judges that a rough equivalence between judicial salaries and the midpoint of the DM-3 salary scale would be considered appropriate. Support for this sort of rough parity between judges and top-level public servants is found in comparative figures from other common-law countries that are most like Canada. …*
>
> *1975 was a long time ago, and much has changed in the meantime, not the least of which has been our economy. There seems to be little point in trying to tie judicial salaries to some arbitrary level set so long ago and in very different circumstances. Therefore, the government thinks it would be better to do away with both the concept and the terminology of 1975 equivalence, and instead deal with judicial salary levels on the basis that there should be a rough equivalence to the DM-3 midpoint.*[22]

[21] Lang (1983), at 6; Guthrie (1987), at 8; Courtois (1990), at 10 and see *Supra*, fn. 5, at 3.
[22] *Ibid.*, fn. 5 at 6.

This concept of rough equivalence expressly recognizes that while DM-3s and judges do not perform the same work, there is a basis for approximate remuneration parity.[23]

In this context, the Commission noted the suggestion by the Scott Commission (1996) that there were two contributing factors to erosion in judicial salaries, the first only of which was attributable to the withdrawal of statutory indexing and the second of which was occasioned by the suggested failure of governments to introduce 1975 equivalency.[24] We agree with the suggestion made by the Department of Justice in 1992 that the concept of 1975 equivalence may be less useful today than it once was to earlier compensation commissions. We were concerned, nonetheless, to track the historical relationship between the mid-point salary levels of DM-3s and judges. Table 2.3 below, reproduced from information provided by the Government, tracks the historical salary data of Superior Court Judges and DM-3s at mid-point of salary range, from 1980 to 2000.[25]

Based on Table 2.3, it appears that by 1989 the salaries of Superior Court Judges were $10,850 below the mid-point salary level of DM-3s. A disparity between the salary levels of such judges and DM-3s persisted until 1991 (in reducing amounts). In 1992 the situation was reversed and the judicial salary level became slightly more per annum than the base mid-point salary level of DM-3s. This remained the case for the next four years, while wage restraint measures were in effect. In 1997, as a result of partial implementation in that year of the salary recommendations of the Scott Commission (1996), the judicial salary level became $10,200 higher than the mid-point base salary level of DM-3s. By 1998, when salary levels for DM-3s were adjusted as a result of the Strong Committee recommendations, the base salary level for DM-3s was increased to a mid-point amount of $188,250, the level at which it remains today. After implementation in 1998 of the remaining aspects of the Scott Commission's salary recommendations for judges, a salary gap or differential was again created between the salary level of judges and that of DM-3s, in amounts ranging from $12,450 (1998) to $9,050 (2000).

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[23] *Ibid.*, at 5.
[24] Scott (1996), at 15 to 16.
[25] *Supra*, fn.15, at Appendix 57.

Table 2.3
Historical Salary Data – 1980 to Present

Year	Superior Court Judges	DM-3 – Mid-Point
1980	$70,000	$77,300
1981 (Apr)	$74,900	$86,750
1981 (Nov)	$74,900	$91,750
1982	$80,100	$97,250
1983	$84,900	$102,105
1984	$89,100	$105,675
1985	$105,000	$110,950
1986	$115,000	$110,950
1987	$121,300	$126,500
1988	$127,700	$134,550
1989	$133,800	$144,650
1990	$140,400	$150,750
1991	$147,800	$150,750
1992	$155,800	$155,300
1993	$155,800	$155,300
1994	$155,800	$155,300
1995	$155,800	$155,300
1996	$155,800	$155,300
1997	$165,500	$155,300
1998	$175,800	$188,250
1999	$178,100	$188,250
2000	$179,200	$188,250

Note: The salaries in Table 2.3 are as of April 1 of the year in question. The only exception is for 1981; the first entry is for April 1; the second is for November 1, the date on which executive classifications and salaries were restructured.

To the extent then, that rough equivalency between judicial salaries and the remuneration of DM-3s was the desired outcome, the basic salary levels of these groups have been "out-of-sync" for the last four years. When it is recognized that variable, at-risk pay for DM-3s became substantial in 1998 as a result of the adoption of the recommendations of the Strong Committee, the pay gap between the two groups becomes more pronounced.

We have considered this matter in detail and have examined the various approaches taken by Triennial Commissions, the Judiciary and Government depending upon the timing and circumstances applicable to previous judicial compensation reviews. While we agree that the

DM-3 comparator should not be determinative of our recommendations concerning judicial salaries, in our view, it is an appropriate and useful comparator at this time. More particularly, we have concluded that the important aspect of the DM-3 comparator, for the purposes of our inquiry, is the maintenance of a relationship between judges' salaries and the remuneration of those senior federal public servants whose skills, experience and levels of responsibilities most closely parallel those of the Judiciary. We agree with the substance of the observation by both the Courtois and Scott Commissions (1990 and 1996) that the relationship between the remuneration of DM-3s and judges should be maintained, not as a precise measure of "value" but as a reflection of "*what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges*".[26]

This approach is consistent, in our view, with the conclusions reached by successive Triennial Commissions that judicial salaries are not to be addressed *"as though judges were subject to the conditions of service of federal government employees"*[27] because they are *"a distinct group with compensation requirements that set them apart from the public service"*.[28] This proposition is not simply a matter of policy perspective. It has long been recognized in the relevant jurisprudence. As articulated by the House of Lords in 1933:

> *It is we think beyond question that the Judges are not in the position occupied by civil servants. They are appointed to hold particular offices of dignity and exceptional importance. They occupy a vital place in the constitution of this country. They stand equally between the Crown and the Executive, and between the Executive and the subject. They have to discharge the gravest and most responsible duties. It has for two centuries been considered essential that their security and independence should be maintained inviolate.*[29]

More recently, the Supreme Court of Canada in the *PEI Reference Case* unequivocally confirmed that judges are not to be regarded as civil servants for the purposes of compensation policy. As stated by Chief Justice Lamer:

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[26] Scott (1996), at 13; Courtois (1990), at 10.
[27] Lang (1983), at 3.
[28] Guthrie (1987), at 7.
[29] *Ibid.*, at 7.

> *…the fact remains that judges, although they must ultimately be paid from public monies, are not civil servants. Civil servants are part of the executive; judges, by definition, are independent of the executive. The three core characteristics of judicial independence – security of tenure, financial security, and administrative independence – are a reflection of that fundamental distinction, because they provide a range of protections to members of the judiciary to which civil servants are not constitutionally entitled.*[30]

In this context, it is clear that the salaries of judges are not to be set automatically based on the remuneration of public servants. To do so would be to treat judges, indirectly, as part of the executive branch of government. That does not mean, however, that the salaries of judges must be set without any regard to remuneration levels within the senior ranks of the Government, or that they should be permitted to lag materially behind the remuneration available to senior individuals within the Government. To allow this to occur, would be to legitimize a financial gap between the overall remuneration of judges and the remuneration of those within the Government who, historically, have been regarded as possessing the same characteristics of skill, integrity, talent and leadership required of judges.

We have concluded, therefore, as did successive compensation commissions before us, that the remuneration of DM-3s at the time of our inquiry and for the term of our mandate is relevant to our assessment of the adequacy of judicial salaries and, further, that rough equivalency between the overall remuneration of DM-3s and the salary level of judges is both proper and desirable in the public interest.

Incomes of Private Practitioners

The appropriateness and utility of examining the relationship between judicial salaries and the incomes of lawyers in private practice, as earlier noted, was affirmed by various Triennial Commissions. Just as the concept of a relationship between remuneration levels of DM-3s and judges has been found worthy of support, so too has the concept of a relationship between the incomes of above-average lawyers and salaries of judges.

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[30] *Supra*, fn. 2, at 640, para. 143.

The Lang Commission (1983) supported maintenance of a proportionate relationship between the salaries of Superior Court Judges and the professional incomes of senior members of the bar because it is the latter class of persons who, in the public interest, should be attracted to the Bench. It was the conclusion of that Commission that such a proportionate relationship should be maintained *"… while at the same time recognizing that the satisfaction to be derived from public service is both an incentive to judicial office and an incalculable part of judicial compensation"*.[31]

Thirteen years later, the Scott Commission was more strongly of this view. It concluded that the relationship between judicial salaries and the incomes of lawyers in private practice was a "far more significant aspect" of judicial compensation than was the relationship between DM-3s and judges' compensation.[32] The Scott Commission felt that the entitlement of judges to automatic statutory indexing of their salaries was reflective of much more than a statutory device designed merely to prevent erosion of salaries from inflation. Rather, it suggested, the provisions of section 25 of the *Judges Act,* are:

> *… more specifically, a statutory mechanism for ensuring that there will be, to the extent possible, a constant relationship, in terms of degree, between judges' salaries and the incomes of those members of the Bar most suited in experience and ability for appointment to the Bench. The importance of the maintenance of this constant cannot be overstated. It represents, in effect, a social contract between the state and the judiciary. By its statutory terms, the judges, who by acceptance of judicial office close the door, on a permanent basis, to any real prospect of a return to their previous lives at the Bar, can at least be certain that their commitment in accepting a judicial appointment will not result over the years in a less favourable financial situation as between judicial service and practice at the Bar than that which prevailed at the moment of their appointment.*[33]

The Conference and Council strongly urged the Commission, when assessing judicial salaries, to have regard to the available data concerning incomes of lawyers in private practice including those, in particular, within the top third of income earners based on reported income tax data.

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[31] Lang (1983), at 3.
[32] Scott (1996), at 14.
[33] *Ibid*., at 14 to 15.

The Government argued that various difficulties arise when such a comparison is undertaken. These difficulties concern both the availability of income data and issues relating to the appropriate comparator segment of the legal profession. In raising these concerns, however, the Government did not argue that any comparison with the incomes of members of the legal profession was inappropriate or irrelevant.[34]

Other groups also supported consideration by us of the incomes of private practitioners. The Canadian Bar Association ("CBA"), through its Standing Committee on Pensions for Judges' Spouses and Salaries, provided the Commission with both written and oral submissions on the matter of judicial salaries. The CBA expressed concerns that:

> *…judicial salaries are falling farther and farther behind those of senior practitioners, who form the pool from which judges are selected. Except for indexation to reflect inflation, federally appointed judges have not received a salary increase for over a decade. Indexation does not take into account that salaries for senior practitioners, as determined by the market, probably increased more than the cost of living.*
>
> *As a result, the CBA recommends that judges receive a salary increase over and above indexation. To determine the appropriate level of salary, reference should be made to salaries of senior practitioners as well as senior employees in the public service.*[35]

The CBA did not make any submission as to a specific salary level considered by its members to be appropriate or adequate.

While the information available to the Commission did not support, for reasons earlier outlined in this Chapter, the suggestion that the Judiciary has not received "*a salary increase for over a decade*", the available data did indicate that the incomes of senior practitioners in the legal profession are in some instances higher, sometimes materially higher, than the salary level of judges. However, as appears from the discussion below, much depends on regional location and urban versus non-urban factors.

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[34] Submission of the Government dated December 20, 1999, at paras. 27 and 28.
[35] Submission of the Canadian Bar Association dated January 14, 2000, at 4 to 5.

The Commission also had regard to a submission received from John Honsberger, Q.C., an experienced practitioner from Toronto. Mr. Honsberger urged that:

> *The salaries of judges should be increased by at least the increased cost of living and any additional amount as may be necessary to catch up to an appropriate salary level so that judges may maintain a standard of living comparable to what most members of the profession enjoy but with some reduction to represent the value of the pension a judge will receive on retirement.*[36]

It is the view of this Commission that the need to consider the relationship between the incomes of private practitioners and judicial salaries arises in consequence of the mandatory statutory requirement that we consider, as a criterion relevant to the assessment of the adequacy of judicial salaries, "*the need to attract outstanding candidates to the judiciary*". This statutory criterion expressly engages recruitment issues that, in turn, give rise to consideration of those factors that encourage or discourage applications for appointment from outstanding candidates. Income differentials are clearly such a factor.

a) The Importance of Recruitment Issues

The *PEI Reference Case* confirmed that the objective is to recruit to the Bench lawyers of great ability and first class reputation.[37] This principle was subsequently confirmed by statute upon introduction of subsection 26(1.1)(c) of the *Judges Act*, which identifies the type of candidates to be attracted as those who, by ability and experience, may be regarded as "outstanding". This is significant because many lawyers in Canada apply for appointment, but few are chosen. Between 1990 and 1999, for example, 4,209 applications for appointment to the Judiciary were received.[38] This statistic is of limited use, however, because the number of overall applications across Canada does not reflect the number of applications from outstanding candidates. Expressed differently, it is not difficult to encourage 1,000 applications. It is much more difficult to ensure that 1,000 applications from the best applicants are received.

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[36] Letter from John Honsberger, Q.C., dated January 11, 2000, at 2.
[37] *Supra,* fn. 2, at para. 55.
[38] Data provided by the Commissioner for Federal Judicial Affairs to the Commission.

Therefore, the Commission specifically considered the category of applicants comprising those who, following assessment by the involved advisory committees, were ranked as "recommended" or "highly recommended" for consideration for judicial office. This analysis revealed that in the same 10-year period (1990 to 1999), 40% (1,682) of the total number of overall candidates were recommended or highly recommended for consideration for appointment. Based on information provided by the Government, we estimate that approximately 25% were ranked as "highly recommended" for appointment[39]. Overall, 556 candidates were appointed to the Bench.[40]. Even if only the 25% of candidates who were "highly recommended" are considered to be "outstanding", it cannot be said that serious recruitment problems currently exist. Indeed, no party to our inquiry provided evidence of, or suggested, a current recruitment problem.

It is also important to consider the distribution of judicial appointments, in geographic terms, of the 556 persons appointed to the Bench. Information provided to the Commission revealed that in the years 1990 to 1999, of the 556 appointees in Canada, 36.5% were from Ontario, 20.5% were from Quebec, 11.5% were from British Columbia, and 10.4% were from Alberta.[41]

At present, there are 1,014 members of the Judiciary, including 192 judges who have elected to serve as supernumerary judges. As pointed out by Counsel for the Government, no segment of the legal profession has a monopoly on outstanding candidates.[42] Rather, they are drawn from the private bar, provincial and territorial Benches, the academic community and government service. Nonetheless, while it is inappropriate to regard the private bar as the only relevant source of candidates for appointment to the Bench, the data indicate that the overwhelming majority of candidates continues to be drawn from private practice. In the years 1990 to 1999:

i) 73% of appointed judges were drawn from private practice;

ii) 11% of appointed judges were elevated to the Judiciary from a provincial or territorial Bench; and

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[39] Submission of the Government dated March 14, 2000, at Appendix 35.
[40] Data provided by the Commissioner for Federal Judicial Affairs to the Commission.
[41] *Ibid.*
[42] Submission of the Government dated December 20, 1999, at para. 28.

iii) 16% of appointed judges were drawn from government (9%), from the academic community (4%) and from other legal fields (3%).[43]

If those judges elevated from the provincial or territorial Bench are excluded from the assessment, approximately 82% of those appointed to the Bench in this 10-year period were appointed from the private bar. Thus, it clearly represents the primary source of potential candidates for appointment to the Bench. This underscores the importance and relevance of a comparison between the incomes of lawyers in the private bar and judicial salaries.

b) Available Data Concerning Incomes in the Private Bar

A direct comparison between judicial salaries and the incomes of lawyers is difficult given:

i) the unavailability of current reliable income data relating to legal practitioners including, in particular, those in the private bar;

ii) the unavailability of income data of practitioners at the time of their appointment to the Bench;

iii) the difficulty in isolating appropriate comparison points. As queried by Counsel for the Government, are the average or median earnings of lawyers to be considered, or those of only higher income earners, or of the profession as a whole?[44]

iv) that available income data does not distinguish between areas of practice. Thus, to the extent relevant, it is not possible on the information available to us to distinguish the reported incomes of litigation versus non-litigation lawyers at the bar.

Because the comparison is difficult, however, it does not follow that it is irrelevant or impossible.

We had available to us a report prepared by Sack Goldblatt Mitchell on behalf of the Conference and Council concerning the "*Incomes of Canadian Lawyers Based on Revenue Canada Income Tax Data*", dated January 31, 2000 and based on 1997 income tax data (the most current

[43] *Ibid*., at Appendix 10.
[44] *Ibid.*, at para. 27.

available income tax data); a letter dated February 10, 2000 from Hay Management Consultants Limited commenting on the Sack Goldblatt Mitchell report; and detailed submissions by the Conference and Council, and the Government, on the issue. In addition, as described below, the Commission consulted its own experts, Morneau Sobeco, on standard compensation principles and the data provided by the parties. In combination, this formed a sufficient data base to assist us in understanding the current relationship between judicial salaries and the incomes of lawyers in private practice.

The available data make clear that the incomes of private practitioners vary materially by the age and experience of the practitioner, the province or territory in which the lawyer practises, and the geographic location of the practice within each province (that is, whether the lawyer practises in an urban or non-urban setting). The Sack Goldblatt Mitchell report indicates that the average income of the top third by income of those lawyers aged 44 to 56 years who earn more than $50,000 per year, is $342,280.[45] Not unexpectedly, the figures are higher in large metropolitan centres such as Toronto, Calgary and Vancouver. The comparable figure for the top third of lawyers practising in the seven largest census metropolitan areas, as defined by Statistics Canada (the "Largest Metropolitan Areas"), according to the Sack Goldblatt Mitchell report, was $393,881[46], in 1997. The Largest Metropolitan Areas examined were: Toronto, Montreal, Vancouver, Ottawa-Hull, Edmonton, Calgary and Quebec City. The Largest Metropolitan Areas account for 52% of the appointments to the Judiciary made since 1989.[47]

The following is noteworthy concerning this information:

i) the overall data applied to 31,270 self-employed lawyers of all ages in Canada. The data was refined to focus on self-employed lawyers between the ages of 44 to 56 years. We were informed that this age grouping was selected by the Conference and Council because since 1989 approximately 69% of persons appointed to the Judiciary have been in this age grouping;[48]

[45] Report by Sack Goldblatt Mitchell dated January 31, 2000 and entitled "*Incomes of Canadian Lawyers Based on Revenue Canada Income Tax Data*", at 1.
[46] Morneau Sobeco calculate this number to be $399,720.
[47] *Supra,* fn. 45.
[48] The data available to the Commission from the Commissioner for Federal Judicial Affairs indicates that in the last 10 years, the overall average age of appointees to the Bench was 50.

ii) an income exclusion, set at $50,000, was used by the Conference and Council and their experts to exclude potential distortions in the data that might be occasioned by inclusion of lawyers practising law on a part-time basis. They suggested that this was a conservative approach because lawyers practising full-time, among other matters, likely earn far more than $50,000, even if they utilize low billing rates.

Issue was taken in several respects with the appropriateness of a $50,000 income exclusion based on the assumption of part-time employment. It was pointed out to the Commission, for example, that the effect of such an income exclusion was to reduce the number of lawyers covered in the data by almost 48% and, if examined strictly in the 44 to 56 years age grouping, by approximately 39%.

In the Commission's view there may be many explanations, in addition to part-time employment, for income of less than $50,000 by members of the private bar. These include life-style decisions to moderate work commitments, new practices that are not yet fully established, and less successful or profitable practices. In this connection, it is important to recall that lawyers are not eligible for appointment to the Bench for ten years following their call to the bar. It can be expected that income levels for new lawyers, generally, will be lower than for more experienced lawyers and that, absent income-limiting choices by practitioners, income will increase with seniority, experience and increased profile at the bar; and

iii) as a result of application of an income exclusion of $50,000, and the decision to focus on self-employed lawyers between the ages of 44 to 56 years, the number of lawyers to whom the income data applied was reduced from 31,270 to 7,830 (the "Comparator Population");

The Conference and Council suggested, in connection with this income data, that the comparable group of practitioners for the purposes of comparison to judges was the group of lawyers comprising the top third income earners within the Comparator Population, and that the average income of this group was the appropriate comparison point. While this approach recognizes that the majority of judges (as noted, approximately 69%) appointed since 1989 were between the ages of 44 to 56 at the time of their appointment, it also has the effect of targeting an income range with a mid-point at approximately the 83rd percentile within the Comparator Population. In addition, the average income in that range ($342,280) is above the 87th percentile for lawyers in the Comparator Population.

Hay Management Consultants Limited, on behalf of the Government, expressed reservations about targeting an income range with a mid-point at the 83rd percentile, among other matters, indicating that in the private sector "*an aggressive tie in to comparable market data for executives would be the 75th percentile*".[49] The experts engaged by the Commission agreed with this observation.

In light of these issues, the Commission sought additional data regarding the net professional income of lawyers in 1997, broken down in multiples of 5 percentiles, between the 50th and 95th percentiles in the Comparator Population. The purpose was to examine the comparable income figures for practitioners within the group of lawyers thought to be the group at the bar most likely to represent the primary source of outstanding candidates for the Judiciary, while at the same time targeting an income range at the 75th percentile of the Comparator Population. The detailed calculations in this regard are attached at Appendix 4 to this report. They revealed the following incomes for lawyers at the 75th percentile:

Alberta	$283,000
British Columbia	$236,000
Manitoba	$176,000
New Brunswick	$177,000
Newfoundland	$222,000
Nova Scotia	$191,000
Ontario	$260,000
Prince Edward Island	$179,000
Quebec	$209,000
Saskatchewan	$163,000
CANADA	$230,000

In 1997, the year to which this income data pertains, the salary of a federally-appointed puisne judge of the trial and appellate superior courts was $172,000. The comparative data suggested

[49] Letter from Hay Management Consultants Limited to D. Sgayias of the Department of Justice, dated February 10, 2000, at 5.

that a significant gap existed in 1997 between the salary of such judges and the reported incomes of private practitioners at the 75th percentile in the Comparator Population. The gap is higher, lower or eliminated depending upon the geographic location of the practitioner within Canada. The gap is more pronounced in urban areas from which the largest number of appointees to the Bench are drawn. In those centres, the range of incomes for young lawyers is often significantly higher than the salary level of judges. The impact of urbanization on the potential for income in the private bar is clearly demonstrated by the 1997 professional income data available to the Commission. It revealed incomes, at the 75th percentile, of lawyers in the Comparator Population practising in the Largest Metropolitan Areas, as follows:

Toronto	$343,000
Montreal	$248,000
Vancouver	$266,000
Ottawa-Hull	$198,000
Edmonton	$163,000
Calgary	$375,000
Quebec City	$204,000

As appears from these figures, the gap can vary among urban areas even within the same province (as, for example, between Edmonton and Calgary, Alberta). Overall, there is a significant disparity between incomes within the Largest Metropolitan Areas and other areas. The data available to the Commission indicate that the incomes of practitioners in the Comparator Population at the 75th percentile is $284,000 in the Largest Metropolitan Areas. Outside these areas, the figure drops to $158,000. When it is recalled that the current, and historical, approach in Canada to judicial salaries for puisne judges has been the adoption of a flat national salary level, the potential implications of urbanization become more serious.

The Significance of the Judicial Annuity to the Assessment of Salary Levels

For the reasons earlier described in this Report, we also had regard to the value of the judicial annuity in assessing the adequacy of current judicial salaries. We recognized, in both economic and human terms, that the value of future pension entitlements does not assist in the payment of bills due in the present. The pension value, however, is a significant factor to be taken into account in comparing the income position of judges and lawyers in private practice. This is so because lawyers in private practice form the group from whose ranks the majority of judicial candidates are selected. Further, such lawyers generally do not have the benefit of pension arrangements or pension schemes and are obliged to save for their retirement through Registered Retirement Savings Plans ("RRSPs") and from after tax savings on an on-going basis. For some, therefore, it may safely be assumed that the judicial annuity is an important engine driving recruitment. Moreover, the availability of the judicial annuity frees judges from any form of savings plan for retirement, aggressive or otherwise, which lawyers in private practice ignore at their peril.

Therefore, we asked our experts to examine the benefit of the pension with regard to lawyers in private practice, by addressing the following question: what additional salary would a judge require, to purchase the annuity that the judge in fact would receive under current pension arrangements? Expressed differently, were a lawyer in private practice to attempt to save from income an amount sufficient to yield an equivalent pension benefit per annum upon retirement as the current annuity benefit available to judges upon retirement, what amount would the lawyer be required to save per annum?

There is no single answer to these questions, because the calculation depends upon assumptions about the age of retirement of the judge, the gender of the judge, and the economic value of the ability to elect supernumerary status. Our experts made assumptions about these variables that

we believe to be reasonable. Their assumptions and calculations are set out in detail at Appendices 5 and 6 to this report.[50]

Hay Management Consultants Limited, on behalf of the Government, suggested that a 50-year old individual commencing to fund a retirement income of $120,000 per year and planning to retire at age 65, expecting to live to the age of 80, would need to invest approximately $57,500 in after tax income per year (assuming a 5% real rate of return on investment), to generate such a retirement income. Assuming maximum annual RRSP contributions, this would require over $90,000 per year in pre-tax income.

The Commission's experts suggested that the pre-tax estimate of $90,000, in fact, was somewhat conservative. As a general proposition, they estimated that a judge, appointed at age 50 and retiring at age 65, would require a salary approximately 70% higher in order to fund the annuity available to him or her under the current annuity arrangements. A judge retiring at age 70, in contrast, would require a salary approximately 55% higher to fund the annuity to which the judge would be entitled under the current annuity arrangements. In terms of 1997 dollars, an additional salary of $95,000 to $120,000 pre-tax income would be required to fund the judicial annuity if a judge were required to do so, or if a lawyer in private practice sought to fund a similar annuity benefit.

The calculations in Appendix 6 reveal that the base salary of judges in 1997 dollars ($172,000) was slightly in excess of the average income of two-thirds (62%) of the lawyers in the Comparator Population. When the total compensation of judges in 1997 was taken into account, including an attributed value for the judicial annuity, it exceeded the average income of approximately 79% of lawyers in the Comparator Population, regardless of whether retirement for judges was assumed to be at age 65 or age 70.

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[50] Appendix 5 sets out the assumptions used to calculate the values of the annuity. Appendix 6 provides calculations that illustrate the total 1997 earnings of the Judiciary, including an attributed value for the judicial annuity, in comparison to the net reported income of self-employed lawyers in Canada based on 1997 income tax data in each of the 10 provinces in Canada (except Prince Edward Island) and in each of the Largest Metropolitan Areas, as well as on a national basis. To ensure comparability insofar as possible with the methodology reflected in the Sacks Goldblatt Mitchell report, the comparisons in Appendix 6 were restricted to lawyers in the Comparator Population.

As shown in Table 2.4 below, if the comparison is made at the 75th percentile of the Comparator Population, the base salary of judges in 1997 was less than the average income of lawyers at the 75th percentile in all provinces in Canada except Saskatchewan. However, when the total compensation of judges in 1997 is taken into account, including an attributed value for the judicial annuity, it exceeded the average income of private practitioners at the 75th percentile on a Canada-wide basis in all areas, except in Toronto and Calgary[51].

Table 2.4
Estimated Percentage Gaps between the Compensation of Judges and the Incomes of Private Practitioners at the 75th percentile in the Comparator Population, 1997 data

Geographic Area	Income of Private Practitioners at the 75th percentile in the Comparator Population	Percentage Gap Between the Compensation of Judges and Incomes of Lawyers (positive indicates that judges compensation exceeds lawyers income), based upon		
		Judges Salary ($172,000)	Judges Salary adjusted for benefit of judicial annuity, estimated at:	
	$		$267,000	$292,000
CANADA	230,000	-25.2	16.1	27.0
Alberta	283,000	-39.2	- 5.7	3.2
British Columbia	236,000	-27.1	13.1	23.7
Manitoba	176,000	- 2.2	51.7	65.9
New Brunswick	177,000	- 2.8	50.8	65.0
Newfoundland	222,000	-22.5	20.2	31.5
Nova Scotia	191,000	- 9.9	39.8	52.9
Ontario	260,000	-33.8	2.7	12.3
Prince Edward Island	179,000	- 3.9	49.2	63.1
Quebec	209,000	-17.7	27.8	39.7
Saskatchewan	163,000	5.5	63.8	79.1
LARGEST METROPOLITAN AREAS	$			
Toronto	343,000	- 49.8	-22.2	-14.9
Montreal	248,000	-30.6	8.7	17.7
Vancouver	266,000	-35.3	0.4	9.8
Ottawa-Hull	198,000	-13.1	34.8	47.4
Edmonton	163,000	5.5	63.8	79.1
Calgary	375,000	-54.1	-28.8	-22.1
Quebec City	204,000	-15.7	30.9	43.1

[51] As indicated in Table 2.4, at the level of $267,000 for total judicial compensation, judges' compensation is also less than the overall average income of practitioners in the Province of Alberta.

When this data is reviewed in the context of urban versus non-urban settings, it becomes clear that profound disparities exist between the total compensation of judges (including an attributed value for the judicial annuity) and the incomes of lawyers in the Comparator Population, depending upon geographic location. What is critical to this analysis is the impact of regionalization and urbanization within various regions.

It is apparent, therefore, that use of a uniform national salary scale for the Judiciary fails to take into account pronounced regional disparities in the income of those practitioners considered, at least by the Judiciary, to form the group of lawyers most likely to generate outstanding candidates for judicial appointment.

The Commission therefore considered whether some compensation arrangement should be recommended which specifically took into account and responded to the financial disparities created by regionalization and urbanization. One of the most obvious ways to address this issue would be to recommend a salary differential between members of the Judiciary serving in urban, versus non-urban settings. Other creative ways may also be available to compensate judges serving in urban centres without introducing a base salary differential.

In considering this matter, we noted the observation of the Lang Commission (1983) which concluded that the implications of regionalization should be considered by successor commissions.[52] We were conscious, however, of the fact that no party to our inquiry recommended the creation of a salary differential between members of the Judiciary based on the geographic location of residence of the judge. Indeed, both the Government, and the Conference and Council indicated during the Commission's public hearings that they did not support such a differential[53]. We were also concerned that creation of such a differential, or the adoption of other differentiating income mechanisms, could have the practical effect of creating many different classes of judges at the same level within the Judiciary, in fact or in perception. In our view, this would not be in the public interest or in the interests of the administration of justice cherished in this country.

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[52] Lang (1983), at 7.
[53] Transcript of the February 14, 2000 Public Hearing, Vol. II, at 232 to 237.

While it may be that introduction of some differentiating income mechanism will be warranted in the future, so as to take into account directly the negative financial impact of regionalization and, in particular, urbanization, for the reasons indicated, we have decided not to recommend such an approach at this time. While we are mindful of the income disparities created by regionalization, demonstrated by the Sack Goldblatt Mitchell report and the additional income data provided to the Commission and presented at Appendix 6, we do not think it responsible to suggest that the salary level of the Judiciary should be set so as to match the income of the highest income earning lawyers in the largest urban centres in Canada. What is required, in our view, is the striking of an appropriate balance in order to ensure that the judicial salary level is sufficient to continue to attract outstanding candidates to the Bench, including outstanding candidates from the most lucrative of legal services markets in Canada, and that current and future judges serving in urban areas receive a fair and sufficient salary.

We therefore concluded that the assessment of the adequacy of judicial salaries in relation to the incomes of private practitioners must take into account the following:

i) the total compensation of judges includes a significant pension annuity that has substantial value when a comparison of judicial compensation to the income of private practitioners is undertaken;

ii) continued use of a uniform national salary scale for puisne judges will have an adverse differential impact in different regions of the country and, therefore, potentially on the ability to attract outstanding candidates to the Judiciary in some areas of the country; and

iii) while judicial salaries should not be set according to the most lucrative legal services market, they must be set at a level which will not have a chilling effect on recruitment by serving as a disincentive to outstanding candidates in the Largest Metropolitan Areas, including those urban centres in which lawyers in private practice realize the highest incomes. They must also be set at a level that does not result in unfairness to those current and future judges residing in larger urban areas.

Pension Benefits of DM-3s

As noted, we believe that the value of the judicial annuity is a significant and relevant factor to be considered in assessing the adequacy of judicial compensation in comparison to the incomes of lawyers in private practice. It is clear to us that this comparison is both necessary and useful because the incomes of lawyers in private practice affect recruitment among the class of persons from whom most judges are drawn.

It is less clear that it is appropriate to have regard to the comparative positions of DM-3s and judges in relation to annuity benefits. We recognize that there will be differing views on this issue. We thought it important to at least be aware of the facts concerning the value of the pension benefit available to DM-3s.

We therefore requested the experts engaged by the Commission to determine the additional salary that would be required, as a percentage of pay, to accumulate in after-tax savings funds necessary to provide a retirement income equivalent to the difference between the judicial annuity and the DM-3 pension (and special retiring allowance, where applicable). The additional value of a judicial annuity, compared with a DM-3 pension, increases with the age of appointment of the judge and the DM-3. Later ages of appointment, and shorter terms of service, provide substantial pension benefits to judges compared to pension benefits available to DM-3s. For example, if a judge appointed at age 50 were required to purchase the pension benefits to which he or she is entitled under the current pension regime, over and above those currently available to a DM-3 appointed at the same age, the judge would require a salary approximately 25% higher than that paid to the DM-3 (assuming a salary of $200,000 in the year 2000). If one assumes that the judge was appointed at age 40, however, and retires at age 65 after 25 years service, only about 2% additional salary would be required for the judge to purchase the additional pension benefits received, over and above those currently available to a DM-3 who serves for a similar period. On the same assumptions, if the judge retires at 70 years of age, no additional salary would be required. Particulars of the calculations carried out by the Commission's experts in this regard, and the assumptions underlying them, are set out at Appendix 5 to this report.

Judges' Salaries in Other Jurisdictions

The Commission was also requested by the Conference and Council to take into account the current salary levels applicable to judges in other jurisdictions. We were informed that effective April 1, 1999, the salary of an English High Court Judge is approximately $309,500 (Cdn) and that Circuit Judges in England now receive the equivalent of approximately $232,000 (Cdn). Moreover, District Judges in England, who have a more limited jurisdiction than do members of the Canadian Judiciary, currently receive a salary of approximately $186,000 (Cdn). The Commission was also provided with some data concerning judicial salary levels in Australia, New Zealand and at the Federal Circuit Court level in the United States.

In every instance made known to us, the salary level of judges in other jurisdictions exceeds the current salary, sometimes significantly, of the Canadian Judiciary. Care must be taken, however, not to assess these figures out of context. The utility and reliability of comparisons between judicial salaries in other jurisdictions and those in this country are questionable on the basis of the information now available to us. This is so, in our view, because of variations between economic and social conditions in Canada and the other identified jurisdictions, fluctuating exchange rates, significantly different income tax structures, differing costs of living and the absence of information concerning the retirement benefits of judges in the other identified jurisdictions. Without further, and more detailed, information regarding the process for setting judicial salaries in other jurisdictions, the nature and extent of the responsibilities of the judges in those jurisdictions suggested to be comparable to Canada, and the overall total compensation scheme applicable to judges in the other identified jurisdictions, we are unable to place significant reliance on data concerning judges' salaries in other jurisdictions.

2.4 Recommendations Concerning Salaries for Puisne Judges

We have attempted in our recommendations to be fair both to the Judiciary and taxpayers. We believe that our recommendations for judicial salaries are in the public interest and strike the appropriate balance.

Recommendation 1

The Commission recommends that 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.

2.5 Salary Differentials for Trial and Appellate Judges

The appellate judges of six Courts of Appeal in Canada (Alberta, Saskatchewan, Manitoba, Ontario, Quebec and New Brunswick) urged the Commission to recommend a salary differential between appellate and trial court judges. They requested a recommendation that the salaries for federally-appointed appellate court judges be fixed at that amount which is the mid-point between the salaries of puisne judges of the trial court and the salaries of puisne judges of the Supreme Court of Canada. They also requested that we recommend that the salaries of the Chief Justices of the appellate courts continue to be set at an amount that represents the same approximate percentage by which the salaries of those Chief Justices now exceed the salaries of judges of their respective courts, that is, approximately 10%.

The Commission received both a written submission on behalf of the appellate judges and an oral presentation by Mr. Justice J. Michel Robert of the Quebec Court of Appeal supporting salary differential recommendations. The Commission also received a written submission from Mr. Justice Ronald L. Berger of the Court of Appeal for Alberta, submitted in his individual capacity as a puisne judge of that Court, opposing any such salary differential. The Conference and Council took no position on the request for a salary differential between appellate and trial court judges.

In the written submissions delivered on behalf of the various appellate courts and in the oral presentation of Mr. Justice Robert, a number of significant factors were outlined in support of the proposal for differential salaries between trial and appellate court judges. Any summary of those factors in this report would not do justice to the full reasoning identified by the requesting appellate courts. Briefly, however, the main arguments advanced in support of differential salaries were as follows:

i) when regard is had to the hierarchical organization of the Canadian judicial system, it is clear that salary differentials already exist for all levels of courts, save that no increased salary is paid to judges in the appellate courts. For example, salary differentials now exist between judges on the Supreme Court of Canada and other courts; between judges on the trial courts in each province and provincial court judges and masters in each province and territory; and between justices of the peace and commissioners, or their equivalents, and judges at various levels in all provinces and territories. Thus, it might be said that salary differentials are currently the norm in Canada, with one prominent exception, namely, the absence of a differential between the salaries of trial and appellate court judges;

ii) other common law countries, including the United Kingdom, Australia, New Zealand, and the United States provide for salary differentials between their trial and appellate courts;

iii) the responsibilities and obligations imposed on appellate courts in Canada are extensive. The appellate courts in the provinces and territories, in practical terms, are courts of last resort for the overwhelming majority of cases. This is reflected in the fact that more than 98% of the cases in some provinces never reach the Supreme Court of Canada. These facts underscore the importance of the jurisprudential development role of the appellate courts in the provinces and the territories. In this context, it may be argued that a salary differential between trial and appellate courts is as justified as the current salary differential between appellate courts and the Supreme Court of Canada;

iv) the costs of implementing a salary differential for trial and appellate judges would not be excessive having regard to the relatively limited number of appellate judges (138); and

v) finally, the absence of a salary differential in Canada between trial and appellate court judges may be characterized as an historical anachronism arising from an era in history pre-dating the creation of separate courts of appeal. The reality of the current court structure in Canada, it was argued,

> necessitates bringing compensation policy for trial and appellate court judges in this country into line with those of other common law countries and, as well, with the contemporary reality of our court system.

The Commissioners regarded many of these arguments as compelling. We were concerned, however, with the opposition to such a salary differential advanced both by the Government and by Mr. Justice Berger of the Court of Appeal for Alberta. We also noted that some appellate courts did not join in the request for a salary differential. Mr. Justice Berger made it clear in his written submission that his remarks to the Commission were made on his own behalf only. He argued that:

i) the absence of hierarchical distinctions among federally-appointed judges strengthens collegiality and fosters mutual respect. This traditional legal culture, he suggested, promotes constructive and useful interaction among members of both levels of court. In his view, the adoption of a salary differential between trial and appellate court judges would give rise to a "*very real risk of destroying the goodwill, collegiality and interaction that we have worked so hard to achieve*"; (at 2)

ii) some trial judges sit from time to time with courts of appeal. A pay differential among judges performing the same judicial function, Mr. Justice Berger suggested, would be both undesirable and potentially vulnerable to constitutional challenge. The alternative solution, of paying those trial judges who sit with appellate courts a special *per diem* or *ad hoc* pay amount, would have the effect of creating two classes of judges performing the same functions; and

iii) members of appellate courts sit as a group thereby sharing collective responsibility for the outcome of cases argued before them and diffusing the workload and responsibilities within the group. This contrasts to the daily tasks of individual trial judges who bear their decision-making responsibilities alone.

The Government argued that the Commission should not recommend a salary differential for trial and appellate judges absent evidence that the work of appellate judges is more onerous or of greater value than that of trial judges. This, it was submitted, would require an objective and principled assessment of the responsibilities of both appellate and trial judges. Moreover, the Government suggested that recommendations for such a salary differential should not be made without consultation with affected provinces. The Government maintained that a salary

differential could have implications for the structure of the system of courts within the provinces, giving rise to constitutional issues under the *Constitution Act, 1867*. This is so, it was suggested, because legislative responsibility for the structure of the system of courts within Canada rests with the provinces.

We recognized the merits of the arguments made by various parties on this issue. The proposal for a salary differential between trial and appellate court judges is of significant importance and far-reaching implication having regard to the traditions of the Canadian judicial system and the historical construct of our court system. We concluded that any decision on the matter necessitates an in-depth review and evaluation of more extensive information than is currently available to us. Such additional information, we suggest, might usefully include data concerning the current workloads and responsibilities of trial and appellate courts across the country, the history of salary differentials in other comparable jurisdictions, and consideration of potential constitutional issues identified by various of the parties. We would be prepared to consider this matter in further detail, should it be made the subject of a referral to us pursuant to the *Judges Act* (Canada) within the term of our mandate.

2.6 Salary Levels for Other Judges

For many years a relatively constant differential has been maintained between the salaries of puisne judges and Chief Justices/Associate Chief Justices. No party before the Commission suggested that this differential should be altered. Chief Justice Lamer, on behalf of the Canadian Judicial Council, requested that the Commission recommend continuation of approximately a 10% differential between the salaries of puisne judges and the salaries of their Chief Justices and Associate Chief Justices. The Commission sees no reason to alter this well-established relationship.

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, 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.

CHAPTER 3

OTHER ALLOWANCES

Under section 27 of the *Judges Act* provision is made for various annual allowances to judges. These allowances are referred to as "Incidental Allowances", "Northern Allowances" and "Representational Allowances".

Incidental Allowances cover such things as the cost of repair and replacement of court attire, the purchase of law books and periodicals, memberships in legal and judicial organizations, the purchase of computers and other assorted expenses associated with the position. The purchase of art, furniture and rugs, hospitality costs, and expenses relating to spouses and to office personnel are not covered.

Northern Allowances are paid to judges working in the northern communities. They are intended to provide compensation for the higher cost of living in those locations.

Representational Allowances cover travel and other expenses actually incurred by a judge or the spouse of a judge in discharging the special extra-judicial obligations and responsibilities that are required of their position. Representational Allowances, like Incidental Allowances, cover only those expenses not covered elsewhere under the *Act.*

3.1 Incidental Allowances

Subsection 27(1) of the *Judges Act* provides that the Judiciary are entitled to be reimbursed up to $2,500 each year for "*reasonable incidental expenditures that the fit and proper execution of the office of judge may require, to the extent that the judge has actually incurred the expenditures*

and is not entitled to be reimbursed therefor under any other provision of [the Judges Act]". They have been set at the same level since 1989.

Several parties in their submissions to the Commission indicated that the level of Incidental Allowances was no longer adequate and requested that it be adjusted to reflect the true cost of expenditures. The Conference and Council cited, as examples, the increased cost of law books and the growing need for computers and information on CD-ROM. Increases to levels between $3,200 and $5,000 were suggested. It was also initially requested that Incidental Allowances should be indexed, a request that was opposed by the Government. The issue became moot, however, because at the public hearing on February 14, 2000 the Conference and Council withdrew the request for indexing of Incidental Allowances.

The Commission agrees that Incidental Allowances should be adjusted upward to better reflect the cost of goods in today's marketplace.

Recommendation 3

> **The Commission recommends that Incidental Allowances be adjusted to a level of $5,000 per year effective as of April 1, 2000.**

3.2 Northern Allowances

Under subsection 27(2) of the *Judges Act*, judges in the northern territories are entitled, in addition to Incidental Allowances, to a yearly allowance of $6,000 as compensation for the higher cost of living in the northern communities.

Seven judges currently receive Northern Allowances. The amount of the Northern Allowances was last adjusted in 1989.

The Conference and Council, in their submissions, requested an increase to between $16,000 and $20,000 citing the allowances paid to public servants under the Treasury Board's Isolated Posts Directive (the "IPD") as a comparator. The IPD provides for an environmental allowance

and adjustments for cost of living and fuel and utility differentials at site specific locations in the territories and in the provinces.

The Government submitted that the IPD was not a good comparator, and argued that the environmental allowance provided for under the IPD is used for recruitment and retention purposes and should not apply to judges. The Government did note that the cost of living is higher in the territories, particularly in Nunavut, and that the Northern Allowances should be reviewed. It asked for the Commission's advice on the scope, structure and amount of these Northern Allowances.

Northern Allowances under the IPD vary between locations. Judges qualifying for Northern Allowances reside in Whitehorse, Yellowknife and Iqaluit. Using the IPD, allowances of $5,123, $9,161 and $15,356, including the environmental allowance, respectively, would apply. If the environmental allowance component is excluded, as urged by the Government, and only the cost of living adjustment is considered, the Northern Allowances would be $3,088, $5,338 and $10,108, respectively.

In our view there are sound reasons to maintain the traditional approach of having a uniform level of Northern Allowances. We looked at the numbers provided for under the IPD, in particular those for Iqaluit, which range from $10,108 to $15,356. We decided that $12,000 was an appropriate Northern Allowance for all three locations.

Recommendation 4

> **The Commission recommends that Northern Allowances be adjusted to a level of $12,000 per year effective as of April 1, 2000.**

3.3 Representational Allowances

Under subsection 27(6) of the *Judges Act*, the Chief Justice of Canada, puisne judges of the Supreme Court of Canada, Chief Justices of the Federal Court and the Chief Justices of each of

the provinces, other specified Chief Justices and Judges, and the Chief Judge and Senior Judges of the northern territories are entitled to be paid Representational Allowances.

The maximum yearly amounts currently allowed for Representational Allowances are listed below.

Chief Justice of Canada	$10,000
Chief Justices of the Federal Court of Canada and the Chief Justice of each province	$ 7,000
Supreme Court of Canada Puisne Judges, Trial Chief Justices, Other Designated Chief Justices and Senior Judges	$ 5,000

The amount of these Representational Allowances has not been changed since 1985. The Supreme Court of Canada and the Canadian Judicial Council (the "Council") made submissions to the Commission requesting increases in the maximum yearly limits. The Courtois Commission (1990) recommended that the levels be increased to $15,000, $10,000 and $8,000, respectively. Bill C-50, which was introduced in December 1991, contained the increases recommended by the Courtois Commission. However, Bill C-50 died on the Order Paper. Two years later, the Crawford Commission (1993) concluded that the recommendations of the Courtois Commission were still adequate and endorsed the same levels. No Bill was introduced to implement these recommendations.

Both the Supreme Court of Canada and Council suggested that, after 15 years, the maximum level for these Representational Allowances is no longer adequate and that an increase is necessary to cover the increasing demands on judges to participate in activities both inside and outside of Canada. Both of these parties requested that the Representational Allowances be indexed annually and suggested that they be increased to $22,500 for the Chief Justice of Canada, $15,000 for Chief Justices of the Federal Court and provinces, and $12,000 for other eligible judges. Submissions were based on increasing either the current levels, or the levels

recommended by the Courtois Commission, according to various indexation measures.

The Government's submission noted that automatic indexation of allowances, generally, was not necessary, stating that "*while judicial independence may require indexing protection to prevent erosion of judicial salaries by inflation, the same cannot be said for allowances*"[1]. The Government maintained that this was particularly true for Representational Allowances and that a review of them on a quadrennial basis was sufficient.

We agree that the maximum level for Representational Allowances should be increased to reflect the increase in the cost of living over the past 15 years. We also agree with the Government that the Commission should review the amount of the Representational Allowances every four years.

We indexed the Courtois Commission's recommendations, as if implemented in 1990, to 1999 using both the IAI index and the CPI index to determine the range in which those recommendations would be today. We believe that the resulting levels are a valid basis for establishing current Representational Allowances.

Recommendation 5

The Commission recommends that, 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**

[1] Submission of the Government of Canada dated January 21, 2000, at 9, para. 39.

CHAPTER 4

JUDICIAL ANNUITIES

As we noted earlier in this report, the pension arrangements to which members of the Judiciary are entitled are an integral part of their total compensation and a critically important element in attracting outstanding candidates to serve as judges. They are also extraordinary, if not unique, in the sense that no other pension arrangements in Canadian society are structured in the way that judicial annuities are structured.

In this Chapter, we make substantial recommendations that will change the nature of the judicial annuity arrangements. It is important to understand the context in which we are putting these recommendations forward. Therefore, we begin with a brief historical review of how the judges' annuity scheme has evolved to its present state, and a summary of the current regime, noting the major points that differentiate it from other, more broadly representative, retirement income schemes.

4.1 Evolution of Annuity Arrangements[1]

Members of the Judiciary are entitled to a pension by virtue of Section 100 of the *Constitution Act, 1867*. They are the only group in society that is constitutionally entitled to such a benefit.

From the time of Confederation until 1919, federally appointed judges were entitled to retire voluntarily after 15 years of service with an annuity equal to 2/3 of their salary ("a 2/3 annuity"). There were no mandatory retirement provisions and judges could choose to work, at full salary, for as long as they lived. From 1903-1919, provision existed for judges to retire voluntarily at

[1] This section draws largely on the historical review contained in the Submission of the Conference and Council dated December 20, 1999, at 3-7 to 3-14.

full salary upon reaching age 75 with 20 years of service, or age 70 with 25 years of service, or any age with 30 years of service.[2] Judges made no contributions toward the cost of these retirement income arrangements.

In 1919, Parliament converted the right to retire voluntarily after 15 years of service with a 2/3 annuity to a benefit, available only when the Governor-in-Council decided that a given retirement would be "in the public interest". Parliament also eliminated the right to retire on full salary for future appointees. As a result, judges had no automatic retirement income rights, although they continued to have the right to lifetime tenure with full salary. These arrangements continued until 1927.

Over the period from 1927 to 1960, a number of changes were made that, in concert, removed the right of lifetime tenure by introducing mandatory retirement concepts. Mandatory retirement at age 75 for justices of the Supreme Court and the Exchequer Court was introduced in 1927 and compulsory retirement was accompanied by an annuity of 2/3 of salary. In 1960, a constitutional amendment imposed mandatory retirement provisions for all Superior Court judges at age 75 and related amendments to the *Judges Act* provided a 2/3 annuity for all judges on retirement. From 1960 forward, a judge was required to retire on a 2/3 annuity at 75 years of age, and was entitled to retire voluntarily with a 2/3 annuity if he or she had attained the age of 70 and had served at least 15 years on the Bench. The annuities were still non-contributory.

The next change came when Parliament introduced the concept of supernumerary judges. Supernumerary judges are judges that have reached eligibility for retirement, but elect to continue to work on a half-time basis for full salary. In 1971, judges could elect supernumerary status at age 70 with 10 years of service. In 1973, election of supernumerary status was extended to judges of 65 years of age with a minimum of 15 years of service. Judges eligible for retirement could elect supernumerary status for up to 10 years. The introduction of supernumerary judges helped deal with a serious backlog of cases at the time by opening up

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[2] Friedland, Martin L., *A Place Apart: Judicial Independence and Accountability in Canada,* Canadian Judicial Council, Ottawa: 1995, p. 67.

additional positions for the appointment of new judges, while retaining the expertise of highly experienced judges on a part-time basis.

In 1975, judges' annuities were made contributory. Judges appointed before February 17, 1975 were required to contribute 1.5% of salary annually, which at the time was said to be on account of improvements to survivors' benefits that were then introduced. Judges appointed after February 17, 1975 were required to contribute 7% of salary, which included 1% for the indexation of retirement income to inflation. This decision of Parliament was very controversial, both because it broke the tradition of non-contributory pensions and because, by grandfathering certain judges, it created a situation where judges who were doing exactly the same work were compensated differentially (after contributions) depending upon the date of their appointment. The decision was the subject of consideration by the Dorfman Commission (1978) and by a special Advisory Committee set up to consider judicial annuities that was chaired by Jean deGrandpre and reported in 1981. The decision was also appealed to and upheld by the Supreme Court of Canada.[3]

Two further changes affected judicial annuities during the 1990s.

In 1992, Parliament revised the framework that governed tax assistance available for retirement savings. In essence, the changes set a maximum value of tax assistance for individuals regardless of whether they were accumulating retirement income through registered pension plans or RRSPs. As a result of these changes, judges -- who had previously been able to contribute to individual RRSPs to augment their judicial annuities -- were no longer able to do so. This decision was appealed unsuccessfully to the Federal Court of Appeal. Our understanding is that leave to appeal to the Supreme Court is currently being sought.[4]

In 1998, in response to recommendations by the Crawford (1993) and Scott (1996) Commissions, Parliament amended the *Judges Act* to allow for voluntary retirement with an annuity equal to 2/3 of salary under what is known as a "modified Rule of 80". That is, with a

[3] *The Queen v. Beauregard,* [1986] 2 S.C.R. 56
[4] *Trussler v. R.,* [1999] 3 C.T.C. 580.

minimum of 15 years of service, a judge can now retire with a 2/3 annuity when age plus years of service total 80.

4.2 Current Situation

The main characteristics of the current annuity scheme for judges are the following:

i) the maximum annuity that can be received is a 2/3 annuity calculated at the date of actual retirement;

ii) the plan is contributory. Virtually all judges now contribute 7% per annum, 1 percentage point of which is on account of post-retirement indexation. Contributions are fully deductible under the *Income Tax Act* and judges are entitled to RRSP contributions of only $1,000 per year while they are contributing to their annuity scheme. Judges make contributions until they actually retire and begin drawing an annuity, even though they may become eligible to retire at an earlier date;

iii) a judge is eligible to retire, with a 2/3 annuity, in the following circumstances:

   a) after serving 15 years in office, with a combined age and years of service that total 80;

   b) after serving at least 15 years, where in the opinion of the Governor-in-Council, the resignation of the judge is conducive to the better administration of justice or is in the national interest;

   c) where a judge has become afflicted with a permanent disability that prevents the performance of judicial duties;

   d) where a judge reaches the mandatory retirement age with at least 10 years of service; or

   e) where a judge of the Supreme Court of Canada attains the age of 65 and has served at least 10 years on that Court;

iv) a judge who is 65 years of age and has at least 15 years service may elect to become a supernumerary judge for up to 10 years, until the age of compulsory retirement. A supernumerary judge continues to work at full salary, but at a reduced workload (generally 50% of a full workload). A supernumerary judge, even though eligible for retirement, continues to make contributions of 7% per year to the annuity scheme;

v) a judge who is eligible to retire with a 2/3 annuity, but is younger than 65, may choose to continue working full time until age 65 at which point the judge becomes eligible for supernumerary status; and

vi) a judge must retire at age 75. If service at age 75 is less than 15 years but greater than 10 years, the judge will receive a 2/3 annuity. If service at age 75 is less than 10 years he or she will receive 1/10 of a 2/3 annuity for each year of service.

At the time that the judges' annuity scheme was introduced, employer-sponsored pension plans were relatively rare. Over the past decades they have grown in importance and legislative frameworks have been developed federally and provincially to ensure that they meet certain basic minimum criteria. When the judges' plan was made contributory in 1975, and when judges were denied the right to contribute to RRSPs in 1992, their overall annuity scheme began to take on some of the characteristics of employer-sponsored plans. Major differences, however, remain.

Most employer-sponsored plans are structured in a way that allows an individual to accrue a certain percentage of salary every year, with a pension benefit based upon the rate of accrual, times the number of years of eligibility, times an average of the last several years of salary (usually three years or five years). These plans typically have a maximum allowable pension of about 70% of average final salary. The judges' plan differs in several important respects:

i) basing the annuity on final salary, rather than on an average of salaries, is more generous than most employer-sponsored plans, but using a maximum of 2/3 rather than 70% tends to compensate for this;[5]

ii) the 2/3 maximum annuity is "earned" entirely at the time the judge becomes eligible for an annuity. There is no vesting and there are no accrual rights. This means that individuals appointed at different ages will have *implicit* accrual rates that vary from one individual to another. For example, a judge appointed at age 40 could retire with a full annuity at age 60, accruing that annuity over a twenty-year working span, while a judge appointed at age 50, five years after the appointment of the 40 year old, could retire at the same time as the 40 year old, aged 65, with exactly the same annuity accrued over a fifteen-year working span. This situation is characterized by the

[5] With reasonable growth in salaries, 2/3 of final salary becomes similar to 70% of the average of several past years. For example, using the average of past five years (the benchmark for the public service plan) and assuming the same salary five years before retirement and a growth rate of 3% per year for the last five years of employment, then 2/3 of the final salary would equate to 70.7% of the five-year average.

Conference and Council as "*leading to unequal treatment among judges (a characteristic which raises Charter implications)*";[6]

iii) because there is no vesting or accrual, there is no right to early retirement with a pro-rated pension. If a judge retires prior to attaining eligibility for a full annuity according to the modified Rule of 80, there is no provision for the payment of a pro-rated or partial annuity, other than for a judge aged 75 with less than 10 years of service. In all other cases, judges are entitled only to a return of contributions with interest, regardless of how long they have served; and

iv) finally, the overall structure of the judges' plan makes it more generous financially than most employer-sponsored contributory pension plans. Insofar as we are aware, only "top-hat", or supplementary executive retirement plans in the private sector, which are generally non-contributory, are sometimes more generous. As a point of comparison, for example, judges' contributions amount to between 19% and 25% of the present value of their annuities, depending upon actuarial assumptions.[7]

4.3 Major Issues

The Conference and Council, in their submissions to the Commission, devoted considerable attention to the inequities that they suggested arise as a result of the operation of the modified Rule of 80. In particular, they pointed out that younger appointees are compelled to work more years and pay longer before being entitled to retire with exactly the same benefits as colleagues who may have been judges for a considerably shorter time. They submitted that this requirement raises serious equality issues, in particular since a majority of recent younger appointees are women. The Commission has taken this concern very seriously. We have sought and obtained expert advice on whether the modified Rule of 80 might be successfully challenged under section 15 of the *Charter*. We outline that advice, and our own conclusions, below.

The Conference and Council sought a number of recommendations from the Commission that, in their view, were essential to both redress inequities in the annuity scheme and to repair inadequacies in the current retirement package. In particular, they urged that the annuity scheme be amended such that:

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[6] Submission of the Conference and Council dated December 20, 1999, at 3-2.
[7] Submission of the Government dated April 14, 2000, at Appendix 52.

i) the modified Rule of 80 be amended to delete the requirement for 15 years of service, making it an "unencumbered Rule of 80";

ii) eligibility for retirement on a full annuity of 2/3 salary to occur at the earlier of attaining 15 years of service (with the annuity payable at age 60) or when the judge would be eligible under the unencumbered Rule of 80;

iii) contributions to the annuity scheme cease after 15 years of service;

iv) the right to contribute to an RRSP be reinstated after 15 years of service;

v) the right to elect supernumerary status for up to 10 years be available after 15 years of service, provided the judge is at least 55 years of age at that time;

vi) judges have the right to elect early retirement at any age after 10 years of service, with a prorated annuity payable at age 60 (based on salary that would have obtained at age 60 and with no actuarial reduction) or payable immediately with an actuarial reduction of 3% per year;

vii) there be more generous pro-ration rules for judges who retire with less than a full pension after the age of 65;

viii) the current provision of the *Judges Act* that limits survivors to receipt of only one judicial pension be eliminated;

ix) survivors' benefit provisions be amended to bring the law into conformity with existing law and jurisprudence concerning common law and same sex relationships;

x) survivors' benefits be increased at Government expense and additional options be provided for election by judges at their expense;

xi) single judges be entitled to benefits equivalent to those that are received by judges with survivors;

xii) all pensions be adjusted annually so that they would be based on the higher of the original pension indexed for inflation, or the current judicial salary being paid; and

xiii) judges have the right to increase their annuity beyond 2/3 of final salary at a rate of an additional 2.2% of salary for every year (or partial year) of full-time work beyond 15 years and/or an additional 1.1% for every year (or partial year of supernumerary work.

The Government, in its initial submission, expressed the view that *"changes that would alter fundamental features of that scheme [i.e., the current annuity scheme], should only be*

undertaken following a comprehensive review of the structure and function of the scheme in the face of changing demographics and new demands".[8] The Government informed the Commission in that submission that:

> *The Minister of Justice intends to refer to the issue of the adequacy of the current judicial annuity scheme to the Judicial Compensation and Benefits Commission for consideration sometime following June 1, 2000. The Government invites the Commission's views about the appropriate timing of such a review, as well as any preliminary views as to the scope, design and conduct of the review.*[9]

The Government acknowledged that issues related to the provision of survivors benefits to survivors who were in a common-law or same-sex relationship with judges should be addressed outside the scope of this broader review, as should the requirement for judges to continue to make contributions to their annuity arrangements after they had completed the necessary service to be eligible for a full annuity.

In its reply submission of January 21, 2000, the Government presented cost estimates of the amendments proposed in the initial submission of the Conference and Council. The estimated costs of all the amendments to the annuity scheme on an accrued liability basis for the 1,014 members of the Judiciary who would be affected, ranged between $499 million and $594 million. The actual cost increase in fiscal year 2000-2001 ranged from $28.3 million to $35.3 million. These costs reflect changes proposed to the annuity scheme based on continuation of 1999 salary levels. They would be higher with an increase in salary.[10]

At the public hearing held by the Commission on February 14, 2000, Counsel for the Conference and Council informed the Commission that they accepted the costing numbers of the Chief Actuary that had been submitted to the Commission.[11] Counsel also indicated at this time that the last three requests enumerated in the above list, as well as the request with respect to enhanced pro-ration on early retirement for judges who had served beyond 65 years of age, were

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[8] Submission of the Government dated December 20, 1999, at 17, para. 66.
[9] *Ibid.*, at 17, para. 68.
[10] For example, these estimates calculated that increasing the salary level to $225,000 on April 1, 2000, as requested by the Conference and Council, would increase accrued liabilities by $130-170 million, and actual costs by $10.2-13.9 million. See Reply Submission of the Government, January 21, 2000, Appendix 29, at 3.
[11] Transcript of the February 14, 2000 Public Hearing, Volume II, at 273.

no longer being advanced by the Conference and Council as amendments that should be considered in this inquiry. What this meant, in terms of the cost of potential amendments to the annuity scheme, was a reduction in the cost estimates provided by the Government of between $430 and $510 million in accrued liabilities and between $17.5 and $21.9 million in annual costs.

In light of this revised position, and having considered the submissions of the principal parties on the matter, the Commissioners informed both the Conference and Council, and the Government, at the conclusion of the hearing on February 14, 2000, that:

> *…the Commission feels that following this Hearing and having taken into consideration the reasons for which there was a decision by [the Government] to favour a referral on the comprehensive review of the pension plan or the annuity scheme and taking into consideration what we heard about some of the items that have been deleted from the list of proposals or submissions made by the Judiciary, we would like to ask [Counsel for the Government] if you could go back to your clients and discuss this further with them in order that we do everything possible to meet our requirements of dealing with the whole issue in view of Article 26 (1) …. When we look at the …issues that are left on the table the Commission feels that they could deal with these issues within the mandate of 26 (1).*[12]

At the public hearing on March 20, 2000, Counsel for the Government expanded the list of items that the Government felt could be dealt with in this report. However, it continued to be the Government's position that certain proposals -- particularly those relating to early retirement and, by implication, the "appropriate length of a judicial career" -- should be the subject of a comprehensive review, to be conducted after the presentation of this report.

There was clear agreement among all principal parties, however, that the Commission has jurisdiction to deal with all the proposals that have been raised in this inquiry. As Counsel for the Government commented on March 20:

> *…the Government accepts that the Commission has the jurisdiction to deal with all the issues of salary and pensions as a matter of jurisdiction. The Government has not made a referral and will not make a referral before seeing the Commission's report…*

[12] *Ibid.*, at 301 to 302.

> *And the Government's argument is in the framework of what the Commission should do, not what it can do, but what the Commission should do in that respect.*[13]

4.4 Our Approach to the Issues

The Commission carefully considered the positions advanced by the Conference and Council and by the Government. We had long and detailed consultations with experts whom we engaged. We believe that we are in position to deal fairly and responsibly with the issues that have been raised before us within the statutorily mandated time frame of our inquiry. Therefore, we recommend in the balance of this Chapter a number of changes to the annuity scheme for judges that in our view respond constructively and responsibly to the changing characteristics and needs of the Judiciary in a rapidly evolving society. Although our recommendations carry with them some increased costs, they are not aimed at further enriching the pension plan but, rather, are directed at providing additional flexibility and choice, which we believe are important to continue to attract the outstanding judicial candidates that the country requires.

Before discussing the specific recommendations, it is important to comment on the notion of what is an "appropriate judicial life span". The Government asserted that this issue is critical to the design of the annuity scheme, and is one where there should be deeper study than the Commission is in a position to conduct in the context of the current review. The Conference and Council submitted that the appropriate judicial life span is 15 years, although no studies supporting this position were provided. Rather, the proposition was founded upon the historical role that 15 years has played in the annuity scheme, particularly in the period between 1867 and 1919.[14]

The Commission recognizes the importance of this issue. On the basis of the information before us, we are unable to conclude that any change is required in the modified Rule of 80 that currently determines when judges become eligible for a full annuity. We believe it is nevertheless possible and appropriate to make recommendations for substantive, practical

[13] Transcript of the March 20, 2000 Public Hearing, at 97.
[14] *Ibid.*, at 35 to 36 and 80 to 81.

changes that will provide greater fairness and flexibility to judges' annuities. We believe that we can move a considerable distance toward the increased flexibility that characterizes most modern pension plans while maintaining the essential distinguishing characteristic of the judges' annuity: that is, the entitlement to a pension equal to 2/3 of final salary upon eligibility for retirement.

The balance of this Chapter outlines our reasoning and our recommendations.

4.5 Eligibility for Full Pension

The Conference and Council have proposed two modifications to the current rules. First, they propose that a judge be eligible for full pension after 15 years of service, although the pension would not be payable until the judge reaches age 60. This change, compared with the current regime, would benefit judges who are appointed at ages younger than 50. Second, they propose that the requirement that a judge serve at least 15 years, the requirement now attached to the current modified Rule of 80, be removed. This change would benefit judges who are appointed at ages older than 50. Table 4.1 compares the eligibility age for full pension, and the working years necessary to earn it, for judges appointed at different ages, under the current regime and that proposed by the Conference and Council.

We note that the Government took no substantive position on these proposals of the Conference and Council, since it argued that the requirements for eligibility for full pension should be subject to a subsequent, more detailed review.

Although the judges' annuity plan does not have an annual accrual rate, it is possible to calculate an implicit accrual rate. With 15 years of service required to earn an annuity equal to 2/3 of final salary, the implicit accrual rate is 4.4% of salary per year. An accrual rate that exceeds 4% is very unusual among pension plans in either the public or private sectors.[15] The proposal of the Conference and Council for an unencumbered Rule of 80 would further benefit judges who are appointed in their 50s and 60s, making it possible to accrue a full annuity with as few as 6

[15] For example, accrual rates for members of the House of Commons are 4% per annum. Some senior Deputy Ministers are entitled to accrue retirement income at a rate of 4% per annum for a maximum of ten years.

working years. We are not convinced that it is necessary or desirable to move to an unencumbered Rule of 80.

Table 4.1
Age of Eligibility For Full Pension
And Working Years Required To Earn It

Age at Appointment	Current Regime		Proposal by Conference and Council	
	Age at eligibility	Working years required	Age at eligibility	Working years required
38	59	21	53	15
40	60	20	55	15
42	61	19	57	15
44	62	18	59	15
46	63	17	61	15
48	64	16	63	15
50	65	15	65	15
52	67	15	66	14
54	69	15	67	13
56	71	15	68	12
58	73	15	69	11
60	75	15	70	10
62	75	13	71	9
64	75	11	72	8
66	75	9*	73	7
68	75	7**	74	6

*The retiring judge would receive 90% of a full annuity.
**The retiring judge would receive 70% of a full annuity.

As we indicated earlier, the Conference and Council, in arguing for a right to full annuity eligibility at 15 years, argued that the current system disadvantages younger judges appointed in their late 30s or 40s, many of whom are female. As can be seen from Table 4.1, a judge appointed at age 40 must work (and contribute) five years longer than a judge appointed at age 50 in order to receive an identical annuity. This is not a feature of most pension plans, where the amount of the annuity is related to years of service. The Commissioners engaged Professor Patrick Monahan, of Osgoode Hall Law School at York University, to examine whether this situation raised concerns under the *Charter*. Professor Monahan, in an opinion that is attached at

Appendix 7, concluded that there are three significant reasons why an equality rights challenge brought on this basis would be unlikely to succeed.

First, an incomplete picture is obtained if one looks only at the contributions and does not consider the benefit received for those contributions. It is true that a younger appointee contributes for a longer time, but it is also true that a younger appointee will retire at a younger age than an older appointee and can therefore be expected to receive the annuity for a longer period. Indeed, as set out in Professor Monahan's opinion, calculations provided by the Office of the Chief Actuary show that:

> *…the annuity available to an appointee at age 40 will have a present value of approximately $5 million in the year 2020, which is significantly higher than the present value of the annuity available to the 50 year old appointee ($3.64 million in the year 2015) or the 60 year old appointee ($2.64 million in the year 2015). Even discounting for inflation between the years 2015 and 2020, the present value of the 40 year old's annuity is approximately 19 per cent higher than that of the 50 year old appointee, and 63 per cent higher than that of the 60 year old appointee. Female appointees are assumed to live longer than male appointees and thus the present value of their individual annuities (considered without regard to the value of a survivor's annuity) is uniformly higher for all age groups. However the life expectancies of survivors of male appointees are assumed to be longer, which has the effect of increasing in relative terms the present value of the total annuity attributable to male judges to a level which is broadly comparable to the value of the total annuity attributable to female judges.* (at 2)

On this point, Professor Monahan concludes that *"since younger appointees are entitled to receive an annuity with a present value that is far greater than older appointees, they cannot be said to be subject to unequal treatment."* (at 3)

The second reason why Professor Monahan concludes that a challenge would be unlikely to succeed is that the age of judicial appointment is within the significant control of the appointee.

> *…if a potential candidate came to the view that the judicial annuity scheme is discriminatory towards younger appointees, he or she could avoid this discrimination by waiting to apply until a later date. On this basis, even if it were to be found that there was some form of inequality inherent in the judicial annuity scheme, it is arguable that the inequality*

> *can be avoided by the conscious choice of candidates and thus cannot give rise to a successful equality rights claim.* (at 3)

Third, Professor Monahan concludes that even if the scheme were found to impose some sort of unequal treatment, it *"nevertheless confers a significant economic benefit on judicial appointees of all ages. Therefore it is very unlikely that the judicial annuity scheme could be held to be discriminatory, within the definition elaborated by the Supreme Court of Canada"*. (at 3)

Professor Monahan's conclusions with regard to the *Charter* suggest to us that it is not legally necessary to change the current eligibility for retirement as reflected in the modified Rule of 80. The question remains, however, whether it is desirable to do so even though it may not be legally required.

We have considered carefully the proposal to allow eligibility for a full pension after 15 years. On the one hand, we recognize the role that 15 years of service has played historically. We also recognize that providing a full entitlement to 2/3 of salary after 15 years of service would be extraordinarily generous in comparison to other broadly based pension plans. On balance, we conclude that we do not have an adequate basis at this time to accept the proposal of the Conference and Council that judges be entitled to a full pension after 15 years of service.

There is an additional factor that we believe important in this connection. Although younger appointees do receive a greater annuity (in present value terms) than older appointees, they must serve a longer time to "earn" this pension. Because there are no early retirement provisions in the annuity scheme, they are effectively locked in to what can be a very long period of service to receive any benefit other than a return of their own contributions with interest. Shortening the eligibility requirement to 15 years is one way of addressing this concern. But another way is to provide more flexibility in the form of early retirement options. We recommend such options below. We believe that this additional flexibility will be helpful in encouraging younger candidates to apply, as well as providing additional retirement planning opportunities for those now serving as judges.

4.6 Cessation of Contributions

The Conference and Council proposed that contributions to the annuity scheme cease after 15 years of service, whether or not a judge is then eligible to retire. The Government submitted that contributions should be reduced from 7% to 1% of salary at the time that a judge becomes eligible for a full annuity.

The Commission also received submissions on this point from Mr. Justice Douglas Lambert, of the Court of Appeal for British Columbia and Court of Appeal for Yukon, who took the position that requiring contributions after a judge has effectively earned the right to retire with a full annuity is not only unfair, but is unlawful and unconstitutional.[16]

This issue was also considered by the Scott Commission (1996), which noted that *"the sum of the annual pension contributions of 7% made by judges to retirement are modest relative to the final costs borne by the Crown".*[17] On this basis, it agreed with the earlier conclusions of the Crawford Commission (1993), which supported the continuation of judges' contributions towards the cost of their pensions until those who are entitled to retire do so. The Scott Commission commented that any *"perception of inequitable treatment is surely tempered by the benefits afforded the annuitant under the present arrangement."*[18]

After hearing and considering the submissions of Justice Lambert and those of the Conference and Council and of the Government, we concluded that contributions toward the judges' annuity should not continue past the point where the judge is eligible to receive that annuity. Even though there is no concept of annual accrual, it would nevertheless be the case that additional contributions were being required in circumstances where no additional benefit was forthcoming. We have noted that this is not the case in employer-sponsored pension plans. We do recognize that the 7% contribution is made up of two components -- 6% on account of the pension and 1% as a contribution to the indexation of the pension in retirement. The pension plan for the federal public service requires that the 1% contribution continue even after the maximum pension has

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[16] Submission of Mr. Justice Lambert to the Commission dated December 6, 1999 and the Transcript of the March 20, 2000 Public Hearing, at 47 to 66.
[17] Scott (1996), at 22.
[18] *Ibid*.

been earned, so long as the individual continues in employment. We believe that this is also a reasonable situation for the Judiciary.

Recommendation 6

> **The Commission recommends that, 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.**

4.7 Contributions to RRSPs

The Conference and Council requested the right to fully contribute to RRSPs after 15 years of service. There is no explicit link in the submission of the Conference and Council to the eligibility for retirement after 15 years and the cessation of contributions after 15 years, but there is a certain logic in linking the two proposals. Counsel for the Government pointed out that, for public service pensions, the RRSP limit is restored once contributions cease.[19]

The Commission sees no reason, either in policy or precedent, why contribution room to RRSPs should not be restored when judges cease making contributions to their annuity. We understand that this will not happen automatically, but will require amendment to Regulation 8309(2) of the *Income Tax Act.*

Recommendation 7

> **The Commission recommends that, 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 they cease making contributions to the judicial annuity scheme, on the same basis as public servants are now allowed to do.**

[19] Transcript of the March 20, 2000 Public Hearing, at 15.

4.8 Supernumerary Status

The ability for judges to elect supernumerary status, under certain conditions, was introduced in 1971. The election to supernumerary status allows a judge who would otherwise be eligible for retirement, and an annuity equal to 2/3 of salary, to continue to work on a half-time basis for full salary. When the measure was introduced in 1971 the then Minister of Justice, testifying before the Standing Committee on Justice and Legal Affairs, explained the proposal in the following terms:

> *The advantages of the proposition before you, Mr. Chairman, are that the judges will be induced to vacate their ordinary judicial office, will be able, thereby, to create a vacancy for younger appointments, and yet the supernumerary judges will be available at all times; it will provide a larger proportion of younger judges and yet at the same time retain a pool of capable experienced judges at the disposal of the chief justice.*[20]

As a result of the 1971 changes, judges were afforded the opportunity to elect supernumerary status at age 70, with a minimum of 10 years on the Bench. Judges could serve in a supernumerary capacity for five years, until mandatory retirement at age 75.

In 1973, amendments were passed that permitted judges to elect supernumerary status at age 65, rather than 70, for a maximum period of 10 years, so long as the judge had served at least 15 years. This change linked the ability of judges to elect supernumerary status with the conditions at which they became eligible for a full annuity of 2/3 of salary. In 1998, conditions for eligibility for a full annuity were revised to incorporate the modified Rule of 80, which provided additional flexibility to younger judges in terms of their retirement options. But no corresponding changes were made to eligibility for supernumerary status. As a result, judges who are now eligible for a full annuity at ages younger than 65 years cannot opt for supernumerary status without continuing to serve for a further period as a full-time judge.

The submissions of the Conference and Council suggest that supernumerary status is not only cost neutral to the Government, but that it is a net benefit since a supernumerary judge effectively works half-time for 1/3 of his or her salary (that is, the difference between full salary

[20] Submission of the Government dated April 19, 2000, at 3 and at Appendix 53.

and what the judge would be entitled to as an annuity if he or she retired). The Crawford Commission (1993) accepted this analysis but went on to state that:

> *We would encourage chief justices to continue to carefully monitor the implementation of the supernumerary programme in their respective courts. We would invite the Canadian Judicial Council to consider documenting court management of the supernumerary programme so that it might confirm for future Triennial Commissions whether the basic assumptions surrounding supernumerary service, such as the 50% workload factor, remain valid in the years ahead as the number of supernumerary judges increases.*[21]

To the best of our knowledge, such follow-up activities have not been undertaken. We reiterate the encouragement given by the Crawford Commission (1993) to the Council to actively collect relevant information in this area with a view to making it available for future quadrennial reviews.

We have considered the reasons why supernumerary status was introduced and our conclusions are that it was a useful response to both the backlog in judicial cases and the desire to renew the judiciary and make it more reflective of demographics in a changing Canadian society. We believe that both of these objectives suggest that there be no substantive change at this time in the basic concept of supernumerary status. We do find, however, that there is no logical basis for the gap between eligibility for a full annuity and the ability to elect supernumerary status that has opened up since the introduction of the modified Rule of 80. Therefore, we conclude that this gap should be closed.

Recommendation 8

> **The Commission recommends that, 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.**

[21] Crawford (1993), at 25.

4.9 Early Retirement

At the present time judges are not allowed any early retirement benefits. A judge appointed at 40 years of age must serve 20 years to qualify for a full annuity. If he or she serves any time less than 20 years, the only compensation is return of the judges' contributions with interest. As we have seen, judges' contributions account for only a small portion of the value of the annuity and judges have been denied RRSP room for all of the time during which they are making contributions to the annuity program. This lack of any early retirement consideration strikes us as inflexible and unfair.

We believe that many of the alleged inequities in the annuity scheme would become substantially less difficult if judges could elect to retire with some pension benefits after a reasonable period of service. For example, a judge appointed at 40, who must now work 20 years to attain the same pension that an older judge can attain by working 15 years, might feel differently about the additional five years if he or she could also retire after 15 years, with some pension benefits, and pursue other professional or personal interests. Similarly, a judge who is appointed in his or her late 50s, and now must work until the early 70s to attain any judicial pension, could be less interested in an unencumbered Rule of 80 if it were possible to retire earlier with some pension benefits. We therefore believe that an early retirement option is of critical importance.

We also believe that an early retirement option is strongly suggested by the changing nature of the judiciary -- that is, by the demographic and gender characteristics of new appointees, and the increasingly complex and difficult nature of the judicial workload. In the modern world, pension arrangements ought not to act as "golden handcuffs" but should facilitate rational career planning on a fair and reasonable basis.

The Conference and Council have proposed that judges have the right to take early retirement at any age after 10 years of service, on a pro-rated annuity. Consistent with the view that the annuity should be fully earned after 15 years, the Conference and Council suggest that the pro-rated annuity should be payable at age 60 and should be calculated as 2/3 of the salary that pertains at that time, times a fraction that would be equal to the actual number of years of service divided by 15. It further submits that a judge should be able to take the annuity immediately

upon retirement, in which case it would be calculated as 2/3 of the final salary times the same fraction, reduced by 3% per year for every year in advance of age 60.

The Government made no submission on the issue of early retirement, arguing that this was one of the issues which turned upon the broader questions it wished to have explored in its suggested review of the entire annuity scheme. The submission of the Conference and Council suggested that one reason for proposing an early retirement scheme was to address the issue of burnout.[22] In oral submissions before the Commission, Counsel for the Government argued that there is inadequate information about the extent to which burnout is a problem, and even if it is a serious problem, there are other methods that can be introduced to deal with it short of early retirement provisions.[23]

As indicated above, the Commission does not rest its conclusions with regard to early retirement on the existence of burnout. In our view, the case for early retirement with some pension benefit is one of planning flexibility and fairness. It appears to us that the key issue is not whether to provide a benefit, but how it should be structured.

We regret that the Government did not put forward any views in this regard. We feel nonetheless that we have developed a model that is reasonable in the circumstances. There are a number of parameters that must be decided upon to develop an early retirement regime. These include:

i) the threshold at which a judge would be entitled to elect early retirement;

ii) the manner in which the pension should be calculated and pro-rated, and the date at which an unreduced pension could begin to flow to the retired judge; and

iii) the actuarial penalty that should be imposed if the judge chooses to take an immediate pension at the time of early retirement.

[22] Submission of the Conference and Council dated December 20, 1999, at 3-26.
[23] Transcript of the March 20, 2000 Public Hearing, at 33 to 35.

The Threshold for Early Retirement

We believe that those who would seek appointments to the Bench should do so with a view to serving a reasonable length of time and devoting a considerable portion of their career to this endeavour. We also note that it is the norm among most pension plans in both the private and public sectors, to set age 55 as a threshold for early retirement eligibility. We have concluded that this is an appropriate standard to apply at this time to the judges' pension plan.

Recommendation 9

> **The Commission recommends that, 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.**

Calculation of the Pension

A judge who is eligible for a pro-rated pension would have the pension calculated as 2/3 of salary at the time the election for early retirement is made, multiplied by a fraction calculated as the number of years of service divided by the number of years of service necessary for that judge to become eligible for a full pension. The denominator will vary by age of appointment, as shown in Table 4.1. For example:

i) a judge appointed at age 38 and choosing early retirement at age 55 would receive 17/21 of his or her pension;

ii) a judge appointed at age 44 and choosing early retirement at age 55 would receive 11/18 of his or her pension; and

iii) a judge appointed at age 56 and retiring 10 years later at age 66 would receive 10/15 of his or her pension.

In each of these cases the pension would not be payable before age 60 but would be indexed by the Consumer Price Index in each of the years for which it was deferred.

Recommendation 10

The Commission recommends that, 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.

Recommendation 11

The Commission recommends that, 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.

Actuarial Penalty for Immediate Payment

Virtually all early retirement provisions allow the annuitant a choice between deferring the pro-rated pension until some later date, with no actuarial reduction, or taking an immediate pension that is reduced by an amount that, in principle, should be cost-neutral with respect to taking the pension earlier or later.

The Conference and Council asked for a reduction of 3% per year for each year in advance of age 60 that the annuitant receives the pro-rated pension. The information we have received from our experts suggests that early retirement penalties typically vary from 3% to 6% per year. A 6% penalty was the traditional, widely used penalty in the 1960s and 1970s but has often been reduced over the years. A 5% penalty is widely used now and is the rate that is applied in the federal public service pension plan, including senior Deputy Ministers. The 3% penalty rate is the minimum penalty rate that Canadian income tax rules permit in combination with generous formulas for the entitlement to an unreduced pension. It is widely used with executive pension plans when an important objective is to maximize the tax advantage provided under the *Income Tax Act.*

The cost of various penalties to the plan sponsor will depend upon the specific characteristics of each plan. In general, a 5% penalty will always cause some additional, but not necessarily significant, cost. A 3% penalty tends to cause significant cost increases because of the larger pension being paid and the greater inducement to early retirement that derives from a lower penalty. The cost will be proportional to the usage of the option, and the lower the penalty, the greater the expected use of the option will be.

Recommendation 12

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

Summary of Early Retirement Recommendations

Table 4.2 shows the increased retirement flexibility that these proposals provide to judges who are appointed at different ages. Under the current regime, a judge who retires before the earliest age of retirement (column 2) is entitled to only a return of his or her own contributions plus interest. Under the proposed recommendations, a judge appointed at 40, choosing to retire at 55 would have an annuity of 50% of salary if deferred to age 60 or 37.5% of salary if the annuity is taken at retirement.

Table 4.2
Early Retirement Options Under Recommended System

Age at appointment	Earliest age of retirement with full (2/3) annuity (identical for current and proposed systems)	Early retirement options under recommended system		
		Earliest age of retirement with pro-rated annuity	Pro-rated annuity as % of salary at time of early retirement, if deferred to age 60	Pro-rated annuity as % of salary at time of early retirement, if taken at retirement.
40	60	55	50%	37.5%
44	62	55	40.8%	30.6%
50	65	60	44.4%	44.4%
56	71	66	44.4%	44.4%
60	75	70	44.4%	44.4%
65	75	75	66.7%	66.7%

4.10 Survivor Benefits

The Conference and Council raised four concerns with regard to the structure and level of survivors' benefits. They proposed that:

i) legislation be amended to bring the *Judges Act* into conformity with existing law and jurisprudence regarding the rights of survivors of common-law or same-sex relationships;

ii) the annuity payable to a survivor should be increased from 33.3% to 40% of salary if the judge dies while in office, and from 50% to 60% of the judge's annuity if the judge dies while in receipt of an annuity;

iii) a judge, at the time of retirement, should have the right to elect a higher survivor benefit for the lifetime of the survivor, with the initial pension being actuarially reduced to make such an election cost-neutral to the government; and

iv) subsection 44(3) of the *Judges Act*, which limits to one the number of survivors' pensions that can be paid under the *Act*, should be repealed.

Bill C-23, which was introduced by the Government on February 11, 2000, responds to the first proposal of the Conference and Council with respect to common-law and same-sex relationships. The views of the Commission were sought with respect to this legislation. In a letter to the

Minister of Justice dated March 27, 2000 (at Appendix 8), the Commission endorsed the proposals to amend the *Judges Act* contained in Bill C-23.

With respect to the second proposal, the Conference and Council indicated that this was recommended by both the Guthrie Commission (1987) and the Courtois Commission (1990).[24] Both of those Commissions recommended that the benefit increase apply only to future deaths and not to existing survivors. Neither the Guthrie nor Courtois Commissions appear to have addressed the issue of who would pay for this benefit enhancement, suggesting by implication that it would be at Government expense. The Scott Commission (1996) also addressed the survivor benefit issue, noting that estimates that it received suggested that the cost of the reform would be *"in the neighbourhood of $2 million over five years escalating accordingly thereafter"*.[25] The Scott Commission chose to recommend no change in benefits because it felt that a salary increase was a higher priority.

The existing survivors' benefits in the judges' plan are identical to those available to federal public servants. Pension benefit standards legislation, which governs minimum acceptable standards for private sector pension plans, requires survivors' benefits of at least 60% of pension. In most plans that offer this benefit, the annuitant's pension is actuarially reduced to fund the higher level of benefit that is paid to survivors, with no net cost to the plan. This Commission supports increasing survivors' benefits but the question of who pays for this enhancement deserves consideration and comment.

The Government's estimated costing in accrued liabilities under the annuity scheme for the increase in survivors' benefits ranged from $39.7 to $49.6 million, depending upon which actuarial assumptions were employed in the calculation. The actual increase in annual costs was estimated at between $2.8 and $3.7 million per year.

The Commission also received information from Statistics Canada about the treatment of survivors' benefits in public and private pension plans. This information covers 6,901 registered pension plans with 4.45 million members. Of the total, 24.2% of all members belong to plans

[24] Guthrie (1987), at 19 and Courtois (1990), at 29.
[25] Scott (1996), at 24.

that provide only a survivors' benefit of 50% of the pension. An additional 53.5% of all members belong to plans that provide survivors' benefits equal to 60% of the annuity, but require a reduction of the initial benefit. Only 8.3% of all members have survivors' benefits of 60% with no reduction of the initial benefit.[26]

We reiterate an important principle that we articulated at the beginning of this Chapter, namely, our overall concern in addressing the structure of the annuity scheme, which is relatively generous, is not to enrich the program further but to provide greater planning flexibility and choice to current and future judges.

Recommendation 13

> **The Commission recommends that, 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.**

The Conference and Council also requested the ability to elect survivors' benefits in excess of 60% on a cost neutral basis. In principle, we see no problem with this request as it appears to be a simple extension of the previous request. In practice, however, we have been cautioned that it is not strictly possible to make such elections on a cost-neutral basis because of the age at which judges retire. Indeed, Mr. Cornelis of the Office of the Chief Actuary has commented that *"true cost neutrality cannot be achieved"* and that the election is tantamount to giving a retired judge *"the right to buy insurance at a standard cost but without a medical examination"*.[27] We conclude that some additional flexibility should be provided, but we believe that the extent of such flexibility should be limited to contain costs.

[26]Statistics Canada, *Pension Plans in Canada*. Catalogue no. 74-401-SPB, January 1 1997, Table 18. The information was contained in the Submission of the Government dated March 31, 2000 at Appendix 43.
[27] Submission of the Government dated January 21, 2000, at Appendix 29, at 8.

Recommendation 14

The Commission recommends that, 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.

Finally, the Conference and Council requested that the limitation in the *Judges Act*, which prevents a survivor of more than one judge from collecting more than one survivor's benefit, be removed. The Commission sees no justifiable basis for continuance of this provision.

Recommendation 15

The Commission recommends that subsection 44(3) of the *Judges Act* be repealed.

4.11 Addressing the Impact of the Salary Freeze

As previously referred to in this report, the Government imposed a freeze on judges' salaries, by suspending automatic indexation from December of 1992 until March of 1997. This was implemented as part of a broader series of restraint measures contained in the *Public Sector Compensation Restraint Act* (Canada). The Scott Commission (1996) recommended that the Government introduce an appropriately phased upward adjustment in judicial salaries, beginning April 1, 1997, so as to ensure that the erosion of the salary base caused by the elimination of statutory indexing was effectively corrected.

During the period of the freeze, 131 judges retired. The Conference and Council submitted that the pensions of these retired judges (or, where applicable, their survivors) should be increased to reflect the "catch-up" in salary that was recommended by the Scott Commission. The Commission also received a submission from the Honourable Wallis Kempo who urged that judges who were actively working during the freeze period and then retired effective 1996 and onward, have been either forgotten or ignored. Madame Justice Kempo stated that these judges

have been denied not only compensation for the freeze years but, as well, reduced annuities as a consequence.[28]

While the Government did implement the Scott Commission recommendations with regard to salary, it did not implement them retroactively. Indeed, the position of the Government is that the economic objectives that a wage freeze is intended to secure are at risk if those subject to the freeze have expectations that the impact of the wage freeze on incomes will be redressed subsequently. Counsel for the Government submitted that:

> *…it has not been demonstrated that the freeze was unfair and needs to be redressed. The Scott Commission did not recommend a salary increase because the freeze was somehow unfair but because post-freeze salaries needed to be at a certain level.*[29]

Counsel for the Government also noted that the pensions of public servants who retired during the freeze were similarly affected, with no offsetting measures.

The Commission recognizes that the freeze has had an adverse impact on some individual judges and their survivors. However, judges were not singled out as targets of wage restraint and the adverse impacts of the wage freeze were experienced by other Canadians as well. As a matter of principle, we do not accept that the adverse impact of the freeze should be redressed and we are not prepared to recommend the adjustment of pensions for those annuitants who retired during the freeze, or their survivors.

4.12 Special Retirement Provisions for Supreme Court Justices

Justices of the Supreme Court are permitted by law to participate in the deliberative process and judgment-writing on cases that they heard, for a period of up to six months after retirement. The Registrar of the Court, in a submission to the Commission, noted that:

> *It is in the best interests of the litigants and of the Court to have the complete Bench which heard an appeal make the decision. In particular,*

[28] Letter from the Honourable Wallis Kempo dated December 20, 1999.
[29] Transcript of the March 20, 2000 Public Hearing, at 30.

> *this avoids potential gridlock situations the Court could face with an even number of judges which could result in costly rehearings.*[30]

The Registrar submitted that for this six-month period after retirement, Supreme Court Justices, with the certification of the Chief Justice, should be eligible for supernumerary status, and receive full salary, and an appropriately pro-rated portion of Incidental and Representational Allowances. We do not see the need to formally grant supernumerary status to Supreme Court Justices in this situation, but we do believe that they should receive full salary and pro-rated allowances for the period of time they are called upon to complete this work.

Recommendation 16

> **The Commission recommends that, 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.**

4.13 Cost of Pension Proposals

We requested the Commission's experts to review our recommendations, together with the cost estimates of the requests of the Conference and Council that were prepared by the Office of the Chief Actuary and submitted to the Commission. We asked them, in light of this information, to provide their best estimates of the cost of the recommendations made in this Chapter. The detailed assumptions and results are provided at Appendix 9.

Overall, our recommendations concerning judicial annuities will decrease accrued liabilities by up to $800,000 and will increase the annual cost of judicial pensions by $2.23 to $2.49 million. Virtually all of the annual cost increase, which has no impact on the accrued liabilities, is attributable to cessation of contributions at the time of eligibility for a full pension.

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[30] Submission of the Registrar of the Supreme Court of Canada dated December 16, 1999, at 5 to 6.

CHAPTER 5

OTHER BENEFITS

The Commission also received proposals for certain changes to current insurance and related benefits available to the Judiciary. These concerned:

i) basic and supplementary life insurance benefits;

ii) health benefits;

iii) survivor benefits following death on duty; and

iv) dental benefits.

5.1 Basic and Supplementary Life Insurance Benefits

At present, the Judiciary participates in insurance benefits available under the Public Service Management Insurance Plan (the "PSMIP"). Full-time Order-In-Council appointees and other senior public service executives (including Deputy Ministers) enjoy different benefits under an executive group life insurance plan (the "Executive Plan") available under the framework of the PSMIP. The Commission was informed that the Judiciary, for some time, has sought the benefits available under the Executive Plan. This was supported by the Scott Commission, which recommended that "*the government paid life insurance coverage for judges be brought more closely into line with that provided to Deputy Ministers*".[1]

The basic life insurance benefits now available to the Judiciary provide a judge with coverage of one or two times salary, at the option and expense of the judge. Variable premiums apply, based on the age and gender of the participant in the plan.

[1] Scott (1996), at 28

In contrast, under the Executive Plan, basic insurance coverage of two times salary at no cost to the participants is provided. Similar benefits are available, without cost to the participants, to Members of Parliament and Senators under another plan. These separate plans have a single premium rate for life insurance based on the claims experience of the group as a whole. Under this structure, the actual premiums paid on behalf of an individual by the Government vary by salary level and are treated as a taxable benefit to the individual plan participant.

In submissions to this Commission, the Government recognized and supported the need to improve the life insurance available to the Judiciary, and indicated that it was prepared to fund the level of benefits equivalent to that available in the Executive Plan, so long as two concerns could be met. First, there should be no "cross-subsidization" within the PSMIP. For example, if the Judiciary were included in one of the existing plans under the PSIMP this would lead to higher premiums for each participant, thereby triggering increased taxable benefits. In effect, this would result in non-judicial plan participants subsidizing the participation of the Judiciary and, at the same time, receiving lower net insurance benefits. Second, the structure of the plan for the Judiciary should be such that the degree of cross-subsidization that would take place within the plan (between younger and older judges) would not result in a breach of section 15 of the *Charter*.

In this context, the Conference and Council suggested that a separate plan could be created for the Judiciary under the general rubric of the PSMIP, in order to avoid any cross-subsidization between members of the Judiciary and members of the Executive Plan.

Both the Conference and the Council, and the Government agreed that such a plan would provide to the judges benefits with respect to basic life insurance coverage, supplementary life insurance coverage, and post-retirement benefits that are, in all material respects, the same as those available to members of the Executive Plan

The understanding of the Commission with regard to post-retirement benefits under the Executive Plan is that coverage would be available, at no cost to the insured, equivalent to 100% of final salary during the first year of retirement; 75% of salary during the second year; 50% of salary in the third year; and 25% thereafter for life.

Our understanding with regard to available supplementary benefits is that members of the Executive Plan, at their option and cost, and with suitable evidence of insurability, can purchase supplementary insurance up to 100% of annual salary.

Despite the willingness of both the Conference and Council, and the Government, to move in this direction, the proposed structure of the plan creates two separate issues, each related to the proposal of the Conference and Council that participation in the plan be compulsory for persons appointed to the Bench after introduction of the plan. The issues are:

i) whether compulsory participation could result in a successful challenge under section 15 of the *Charter*; and

ii) whether compulsory participation can be accommodated within the umbrella of the PSMIP.

The Conference and Council are strongly of the view that the economic sustainability of the plan, given the demographic profile of the Judiciary, depends upon compulsory participation in the plan of all judges following introduction of the plan. This is so because, over a certain age range for younger judges, the tax payable on the taxable benefit resulting from participation in the plan will likely exceed the actual cost at which insurance could be purchased in the market. If such judges opt out of the plan, this would raise premiums, raise taxable benefits, increase the range over which "opting-out" becomes attractive, and potentially threaten the viability of the plan. Compulsory participation, on the other hand, clearly results in cross-subsidization of older participants by younger participants.

In hearings before the Commission, the Conference and Council suggested that, upon creation of a separate plan, a one-time "opt-out" opportunity would be provided by which those persons who were judges at the time of introduction of the separate plan could elect whether to participate in the plan. Thereafter, following introduction of the plan, new judicial appointees would be required to participate in the plan or forego Government-paid basic life insurance benefits. Counsel for the Government expressed concern that limiting the ability to opt-out of the plan to those judges who are serving at the time the plan is introduced, and denying such ability to

judges who might be appointed subsequent to the introduction of the plan, could lead to a challenge under the *Charter*.[2]

In an effort to better understand the structure of the group insurance plans, and the concerns of the Conference and Council, and Government, we asked our expert advisors to convene a meeting of experts to explore some of the issues in more depth. We also requested the views of Professor Patrick Monahan, of Osgoode Hall Law School at York University, concerning the question of whether restricting an opt-out provision to those judges serving at the time of introduction of the plan could lead to a successful challenge under section 15 of the *Charter*.

Subsequent to the meeting of experts, and in response to a request to the Conference and Council for clarification of some points in their proposal, we were informed by letter that the opt-out proposal being requested by the Judiciary was an ability for a sitting judge, on a one-time basis at the inception of the plan, to exercise an option to either:

i) opt out of the Government-paid basic life benefit; or

ii) elect a lower basic life benefit of 100% of salary, rather than 200% [3].

With respect to the potential *Charter* concerns, the Commission was informed by Professor Monahan that his preliminary examination of the issues suggested that an equality challenge to the plan proposed by the Conference and Council would not likely be successful.[4]

The second concern raised by the Government is that the current structure of the PSMIP does not provide for compulsory participation. In a letter to the Commission dated May 16, 2000, Counsel for the Government informed the Commissioners that:

> *The terms sought by the Conference and Council are incompatible with the PSMIP. Participation in the PSMIP is always optional: executives and parliamentarians have the choice of not participating. …. Compulsory*

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[2] Transcript of the February 14, 2000 Public Hearing, at 258 to 259.
[3] Letter to Commission from Leigh D. Crestohl, dated April 28, 2000, at 1 to 2.
[4] Memorandum from Patrick J. Monahan to Mr. Richard Drouin, dated April 28, 2000 and reproduced at Appendix 10 to this report. Professor Monahan's memorandum suggests that more detailed analysis of the situation would be appropriate in order to provide a more definitive opinion. The view of the Commission was that such further analysis was not necessary.

> *participation…would be inconsistent with the principles that groups may participate in the PSMIP only on the basis that they abide by the overall plan design as established for the public service population.*[5]

In response to this letter the Commissioners sought and obtained confirmation from the parties that there was no disagreement between them about the benefits being sought; rather, the issues of concern related solely to the structure of the plan. An option was explored of legislating a stand-alone plan for the Judiciary outside the PSMIP, but such a stand-alone plan was subsequently rejected by the Conference and Council on the grounds that it would be economically prohibitive. In a letter to the Commission dated May 19, 2000, Counsel for the Conference and Council categorically rejected a solution outside the PSMIP. They strongly reiterated their rationale for requiring compulsory participation, but indicated that:

> *…should the Commission be of the opinion that the Judges cannot or should not be accommodated within the PSMIP, unless membership in the plan is voluntary, the Judges would rather forego insistence on compulsory membership in the plan than to find themselves thrust outside of the PSMIP.*[6]

The Commission is satisfied that a separate plan within the PSMIP for the Judiciary is essential to obtain the economies necessary to make the group life insurance plan reasonable. We are further satisfied that there is a sound rationale for the structure of the plan proposed by the Conference and Council. On the basis of the advice received from Professor Monahan, we do not believe that this structure is likely to lead to a successful challenge under section 15 of the *Charter*. That leaves the issue of whether the framework of the PSMIP can be altered, as necessary, to accommodate the proposed structure of the judges' plan. We have heard suggestions that legislation might be required to do so, but we have not heard any evidence that the framework cannot be so modified.

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[5] Letter to Commission from David Sgayias, dated May 16, 2000.
[6] Letter to Commission from L. Yves Fortier and Leigh D. Crestohl, dated May 19, 2000.

Recommendation 17

The Commission recommends that 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.

Recommendation 18

The Commission recommends that 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.

5.2 Health Benefits

Under the applicable current plan, the Judiciary is provided with Government-paid health insurance coverage, which provides 80% reimbursement of all eligible medical expenses subject to an annual deductible of $25.00 for an individual and $40.00 for a family. In connection with hospital benefits, judges currently have the option of upgrading hospital coverage from $60.00 per day to $150.00 per day, at their own expense. The Conference and Council proposed that the current hospital benefit of $60.00 per day be upgraded to $150.00 per day, at the cost of the Government, to accord with hospital benefits that the Judiciary understands are currently available to Deputy Ministers and OIC Executives.

The Commission was informed that effective April 1, 2000 the Government had entered into an agreement with relevant public service unions establishing a trust to manage the Public Service Health Care Plan. As part of this agreement, the Government undertook that no changes would be made to the plan prior to April 1, 2000 and that changes thereafter would be in the discretion of the trustees of the plan. Accordingly, while the Government was not opposed in principle to the request by the Conference and Council for Government-paid hospital coverage at the rate of $150.00 per day, it cautioned that introduction of such an improved benefit ultimately was within the discretion of the trustees and not the control of the Government.

In these circumstances the Commission concludes that the Government should assume the cost of this additional benefit, and should take all available steps to urge the trustees to make the changes to the plan necessary to effect this result.

Recommendation 19

> **The Commission recommends that 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.**

The Commission also received a submission from Madam Justice Alice Desjardins of the Federal Court of Appeal. Madam Justice Desjardins urged that single judges be allowed to register a close family member under the Public Service Health Care Plan, even if that family member was neither in a conjugal relationship with the judge nor a dependent. While sympathetic to the general principle raised by Madam Justice Desjardins, the Commission felt that a change of this nature would have such far-ranging implications for so many social programs that we were not able to recommend it.

5.3 Survivor Benefits Following Death On Duty

The Commission learned during the course of its inquiry that, at the present time, limited survivor benefits are available to the survivors of judges who die of unnatural causes during the course of the discharge by them of their public duties. This is to be contrasted with arrangements that apply for the surviving families of those senior public servants who regrettably suffer accidental or violent death as a result or during the course of the discharge by them of their public duties.

The Conference and Council requested that survivor benefits be made available to the families of judges who die by reason of, or in the performance of, their judicial duties, at the same level and under the same conditions as such benefits are made available to the survivors of Deputy

Ministers and other senior members of Government who die in like circumstances. The Government, in turn, informed the Commission that survivor benefits of this type are available for public servants but may not be available for Order-In-Council appointees. Apart from providing this clarification, the Government took no position on this request by the Conference and Council.

The Commission recognizes that in contemporary society members of the Judiciary, by virtue of the nature of their duties and the public aspect of their responsibilities, regrettably are exposed to increasing risk of personal, including fatal, injury. The frightening possibility of grave disabling or fatal injury occasioned by virtue of their status as judges is a possibility that can no longer responsibly be considered as entirely hypothetical. The Commission, therefore, strongly supports the proposition that the survivors of members of the Judiciary who die by reason of violence or through accident as a result or during 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.

Recommendation 20

> **The Commission recommends that, 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.**

5.4 Dental Benefits

The Conference and Council requested that the Commission consider and recommend improvements to the dental plan benefits available to judges so as to provide benefits comparable to those provided under private sector dental plans. Further, the Commission was requested to recommend that coverage under the current dental plan available to judges be extended to retired judges. The dental coverage available to the Judiciary is identical to that currently provided to OIC Executives. The Government indicated that the dental plan is currently in the process of

being amended to provide coverage for retirees on an optional basis. The Government anticipated that retired judges would be eligible to participate in the dental plan, once so amended.

Although the Conference and Council provided some summary information to the Commission to compare the level of benefits under the public sector plan to those under certain private sector plans, the information, in our view, was not adequate to allow us to reach a determination with regard to the overall comparability of the public sector plan with the wide range of practices in the private sector. The Conference and Council were not specific in recommending particular changes to the current dental insurance arrangements. The Commissioners are aware that dental benefits under private sector plans are subject to considerable variation depending on the plan, the number of participants, the nature and extent of related benefits and the total compensation arrangements for plan participants. Accordingly, without specific details as to the nature of the improvements sought and identification of the type of private sector dental plan considered relevant by the Judiciary, we are not in a position to make any recommendation on this issue at this time.

With respect to the issue of inclusion of retired judges in the available dental plan, the Commission understands that the Government does not object to such inclusion so long as the necessary amendments are made to the current dental plan so as to permit the participation of such retirees, on the same terms and conditions as other retirees.

Recommendation 21

> **The Commission recommends that 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.**

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.*

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[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:

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[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

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[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.

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[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.

CHAPTER 7

REFLECTIONS ON PROCESS

Because this inquiry is the first to be conducted in response to the decision of the Supreme Court of Canada in the *PEI Reference Case,* we have spent considerable time in our own deliberations focusing on issues of process. There are no "hard and fast rules" for how the inquiry we have conducted should be undertaken. Successor Commissioners will develop their own procedures and any procedures we have adopted, while possibly helpful, are not binding as precedents. We believe, nonetheless, that it may assist successor Commissioners if we record the way in which we dealt with many of the process and procedural issues we considered. This Chapter does that, and also puts forward some suggestions as to how the process might be improved in future.

7.1 Relations with the Parties

Although the mandate and authority of this Commission is found in section 26 of the *Judges Act,* the Commission is also rooted in the constitutional framework that assures the independence of the Judiciary and the determination of the remuneration of the Judiciary by Parliament, and in the interpretation of that framework enunciated by Chief Justice Lamer in the *PEI Reference Case.* Among the consequences that flow from this is the recognition that the Government must respond promptly to the recommendations of the Commission, and that the Government must be prepared to justify, if necessary in a court of law, any decision not to implement the Commission's recommendations:

> *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 period of time. …*

> *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. … An unjustified decision could potentially lead to a finding of unconstitutionality.*[1]

This obligation on the Government to respond and justify its decision has altered the relationship of the Government to this Commission compared to its relationship with past Triennial Commissions. For example, we understand that this is the first Commission on judges' salaries and benefits where the Government has chosen to be represented throughout by counsel. This has tended to make the process and the work of the Commission somewhat more formal compared to the way in which we understand the previous Triennial Commissions to have functioned.

In considering our process, we reached the following conclusions:

i) the Commissioners should have no direct contact with either the Judiciary or the Government on any matter before the Commission, other than through counsel to the parties. When we made requests to either the Government or the Judiciary, we ensured that the other party was made aware of the request, and, in cases where third parties had expressed a particular interest in the issue that concerned us, we endeavoured to ensure that they were also made aware of such requests;

ii) since the *Judges Act* mandates us to submit our report to the Minister of Justice, it places the Commission in the position where, by statute, we are required to submit our report to a representative of one of the parties in proceedings before us. We concluded that fairness required that we make our report available to all parties at the same time, to the extent that logistics would allow;

iii) our Commission decided that we should be as open and informal as possible. Our web site provided an opportunity to ensure that all parties, and other interested persons, could follow the submissions and arguments made to the Commission, and could contact us easily by e-mail if they wished to make comments. We provided three opportunities for written submissions: an original submission, a reply submission and a final submission. This process seems to have worked well; and

iv) we endeavored to make our public hearings as informal as possible. Counsel representing parties submitted that formal rules of evidence did not apply

[1] *Supra*, Chapter 1, fn. 4, at paras. 179 to 180.

> and we agreed. We structured our hearings in a way that would maximize information exchange, rather than the reiteration of formal positions that had already been made in written submissions. We also allowed questions of clarification of any party by all parties in attendance at the public hearing. Again, we believe that this process served the Commission and the parties well.

7.2 Organizational and Administrative Issues

In the early days of this Commission we received valuable administrative and logistical support from the Commissioner for Federal Judicial Affairs and his staff. We established our own offices that are associated with those of the Commissioner in order to achieve economies, but function independently. We suggest that the Commission, as a permanent entity separate from the Government and the Judiciary, should maintain its own offices and its own files. These should be physically separate from and independent of the Office of the Commissioner for Federal Judicial Affairs, although we believe that it is helpful and efficient to maintain close administrative ties with that office.

With regard to composition and staffing, we urge the Judiciary and the Government to nominate their representatives on the Commission in future in a time frame that will allow the Commission to be constituted and fully ready to function as of the September 1 date at which the quadrennial inquiry must be commenced. Nine months in which to conduct an inquiry of this scope and importance is not a long time.

In considering the timing of nominations, note must be taken of the manner in which the Commission is constituted. Each of the Judiciary and the Government nominates a Commissioner and the two nominees are charged with identifying and recruiting a Chair. In the case of this Commission, the nominees did not seek and were not provided with any assistance from the parties with regard to potential chairs of the Commission. We believe that the timelines around the appointments of the nominees were such that we were indeed fortunate to be able to commence our work, as required, in early September 1999. It took many additional weeks to recruit staff and put in place the necessary logistical and support measures that allowed us to function effectively. We believe that it is desirable for the next

Commissioners, whose inquiry will commence on September 1, 2003, to be appointed well in advance of that date, so that staffing and logistical arrangements can be made and a fully functioning Commission can have nine full months to complete the mandate that is set out for it in the *Judges Act*.

7.3 The Role of Experts and Research

We benefited greatly from the advice that we obtained from experts who examined difficult compensation, constitutional and other legal issues for us. We suggest that future Commissioners may wish to consider engaging such experts early in their inquiry.

One area where we felt the process might be improved concerned the matter of research. Our initial view was that the Commission might play a helpful role in working with the Judiciary and Government to identify an agreed research agenda, and that we might then contract such research on behalf of the parties and the Commission. In the event, this idea became a casualty of our not being fully staffed and ready to commence an in-depth review of the issues as of September 1. We simply had too many other administrative and logistical issues to deal with first. We continue to believe that it is a concept that makes good sense and one worthy of pursuit by future Commissioners. There are several benefits: increased understanding of the issues considered relevant by each party; economic use of research resources; and, hopefully, an accepted data base that would be common to the Commission, the Judiciary and Government.

As we indicated in Chapter 2, our deliberations on salary levels were informed by considerable information provided to us by both the Conference and Council, and Government. However, we did not have full or current information on the incomes of lawyers in private practice, the group that is likely to continue to yield most of the outstanding candidates for appointment to the Bench. Information from tax returns, provided to us by the Conference and Council, was a helpful proxy. We believe, however, that the Commission should develop, as best it can, a relevant income measure for lawyers in private practice that would allow it to track over time, in

a consistent way, the relationship between judges' compensation and a compensation measure for the private bar.

We believe that the Commission should be resourced to conduct a survey of private practioner incomes on a regular basis.

CHAPTER 8

RECOMMENDATIONS

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 they

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)