CANADIAN JUDGES CONFERENCE/

CANADIAN JUDICIAL COUNCIL

REPLY SUBMISSIONS

For presentation to the

1999 JUDICIAL COMPENSATION AND BENEFITS COMMISSION

January 21, 2000

TABLE OF CONTENTS

I – INTRODUCTION

The following submissions are in reply to those filed on behalf of the Government of Canada dated December 20, 1999. The Canadian Judges Conference ("Conference") and Canadian Judicial Council ("Council") reply to the four issues raised in the Government's submissions, namely (i) salaries, (ii) northern allowance, (iii) life insurance and (iv) annuities. In addition, we will comment briefly on the Government's qualification of this Commission's mandate and conclude with a request for costs.

II – COMMISSION'S MANDATE

This Commission's mandate is succinctly stated in section 26(1) of the *Judges Act*. On the face of the statutory language employed, the inquiry is intended to be a general one regarding the adequacy of salaries and benefits. While the legislator has clearly directed that the factors enumerated in subsection 26(1.1) must be taken into account, Parliament has not sought to otherwise restrict the ambit of the Commission's inquiry.[1]

The list of factors in subsection 26(1.1) is but a recitation of factors which have from time to time been considered by previous triennial commissions, as well as by similar commissions in other jurisdictions. It does not necessarily follow that this Commission's mandate is identical to previous triennial commissions. Indeed, the work of each previous commission was influenced by terms of reference drafted by the Government. For example, the terms of reference of the Scott Commission specifically directed the

---

[1] It is interesting to observe that Bill C-37, as initially introduced, did not contain s. 26(1.1).

commission to take into account "the compensation freeze reflected in the *Public Sector Compensation Restraint Act*".[2] There are no terms of reference for this Commission beyond the *Judges Act* itself and, indeed, an attempt by Government to direct the course of the Commission's inquiry by terms of reference would violate the essential independence of the Commission. Thus, it is submitted that, although the mandate is generally to inquire into the salaries and benefits of judges, each commission may in practice be called upon to consider different issues in a variety of factual contexts. Given the nature of the proceedings, it is not unreasonable to expect that the issues raised by the parties will play an important role in defining the parameters of the inquiry.

III – SALARIES

In their submissions dated December 20, 1999, the Conference and Council have argued that, while the consequences of difficult financial circumstances and fiscal restraint have invariably been meted out on the judges, their treatment has rarely been better in favourable economic circumstances. The Government's submissions to this Commission regarding salary typify this historical paradigm.

The Government merely accepts as a premise that, since the increases recommended by the Scott Commission were accepted, the current level of remuneration is "adequate" in the absence of any subsequent change in circumstance. The Government further maintains that, as long as the current salary level is "adequate", the Government is free to dispose of its huge

---

[2] See *Report and Recommendations of the 1995 Commission on Judges' salaries and benefits* (hereinafter "Scott Report"), Appendix A, at 32.

budgetary surplus according to its own priorities, which priorities seemingly do not include improving the salaries and benefits of the judiciary.

As will be explained further below, it is a mistake to view the Scott Commission as having recommended a salary increase. Moreover, the Government's premise as to the adequacy of current judicial salaries is quite simply erroneous when one considers: the lack of any real salary increase in the past 12 years; the situation of members of the traditional comparator groups; and the ultimate statutory objective of attracting outstanding candidates.

The Government has also suggested that the DM-3 group is no longer an appropriate comparator to assess the adequacy of judicial salaries. The Government, however, fails to propose a more meaningful comparator to replace the traditional correlation between judicial salaries and the mid-point of the DM-3 salary range.

A. The Scott Commission

The Government's submissions leave the reader with the erroneous impression that the implementation of the Scott Commission recommendations on salary amounted to a salary increase for the judges. This is manifestly not the case, as has been explained more fully in the lengthy submissions filed by the Conference and Council.[3]

The thrust of the Scott Commission recommendations in respect of salary was to allow for judicial salaries to "catch up" following the salary freeze which was unilaterally and unconstitutionally imposed on the judges in 1992. Indeed, the Scott Commission clearly noted that it had chosen to

---

[3] See in particular page 1-14.

> "focus on the most significant factor, the withdrawal of indexing. It is this government initiative which has been, and if not checked will continue to be, the most significant contributor to distancing judicial salaries from those of the practising Bar."[4]

The actual wording of the Scott Commission recommendations remove any doubt as to the purpose of the recommended increase:

> "It is 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." [5]
>
> [emphasis added]

The Scott Commission's preoccupation with the withdrawal of indexing is no surprise given the commission's terms of reference, commented upon above, which clearly mentioned the compensation freeze as a factor to be considered.

The Chairman of the Scott Commission, David Scott, Q.C., testified before the House of Commons Standing Committee on Justice and Human Rights. His testimony makes it clear that the salary increase recommended by his Commission was a function of the salary freeze between 1992 and 1996.

> "**Mr. Derek Lee:** I see no other source for the 8%, so I'm concluding that the source of the 8% is the missed indexing.
>
> **Mr. David Scott:** Correct.
>
> **Mr. Derek Lee:** Then I want to call the 8% "catch-up". It's catch-up for the judges.

---

4 Scott Report, at 16.

5 Ibid.

> **Mr. David Scott:** Right. I guess, Mr. Lee, all I would say is that any salary increase after a freeze is catch-up. We had a formula that has a catch-up character to it, but if you have a freeze and then people get a pay increase, there's an element of catch-up in it, because, as the Supreme Court of Canada said in the P.E.I. case, **a freeze is a salary reduction.**" [6]
>
> [emphasis added]

It also bears repeating that the implementation of the Scott Commission's recommendations took virtually two years to achieve and, moreover, the catch up was introduced by staged increases. Moreover, while it is true that judicial salaries were "caught up" to the level they would now be at but for the freeze, it must be remembered that the freeze itself meant a salary reduction of more than $37,000 for each judge holding office from 1992 to 1997. The increases implemented following the Scott Commission were prospective only. The current Minister of Justice was very clear about this:

> "Keep in mind that judges were frozen, as everybody else was, in 1992. That freeze was not lifted until April 1, 1997, and there is no retroactivity here. We are talking about prospective salary increases, **unlike some of the provinces that chose to retroactively compensate judges for freezes that were imposed. We are not doing that, and I make no apologies for that either.**" [7] (emphasis added)

It is therefore quite simply incorrect to assume, as the Government does, that the Government's implementation of the Scott Commission recommendations made judicial salaries fully "adequate". Such a suggestion overlooks the rather extensive history of ignored triennial commission recommendations which preceded the Scott Commission's study, and the growing disparity between the salaries of judges on the one hand and many practitioners and senior public servants on the other. The fact remains that the Federal judiciary

---

6 House of Commons, *Minutes and proceedings of the Standing Committee on Justice and Human Rights*, May 13, 1998, at 10.

7 Ibid, at 16.

has not had a real salary increase in 12 years. If the Government's submissions are to be accepted, it will be at least another 4 years before the adequacy of judicial remuneration is again reviewed. This is simply unacceptable.

B. The DM-3 comparator

The Government's submissions are ambiguous as to the appropriateness of comparing judicial salaries with the DM-3 public servant group. Although admitting that "*the Government has on occasion made reference to the DM-3 mid-point as a rough benchmark*", it is also stated by the Government that "*deputy ministers are a poor comparator*".

Admittedly, the comparison of judges with the most senior level of public servant is not a perfect one. As the Government rightly notes, judges are not public servants, a constitutional truism of long standing which was recently reiterated by the Supreme Court in *Provincial Court Judges Reference*. Chief Justice Lamer's observation should not however be taken as precluding comparisons with the treatment of public servants in fashioning an appropriate overall benefits package for the judges.

While the *Judges Act* does not specifically direct the Commission to consider the remuneration and benefits of the DM-3s, nothing suggests that such a comparison is not an appropriate objective factor for the Commission's consideration. Indeed, the Scott Commission, by its terms of reference, was specifically directed to take into account comparative factors, "*including the relative compensation of* (…) *persons paid out of public funds* (…)."[8]

[8] Scott Report, Appendix A, at 32.

In fact, it has been customary for previous triennial commissions to reference the mid-point salary range of the DM-3 in considering the adequacy of judicial remuneration.

> "We believe that an appropriate benchmark by which to gauge judicial salaries is rough equivalence with the mid-point of the salary range of the most senior level of federal public servant, the Deputy Minister 3, commonly referred to as DM-3. As the two immediately previous Triennial Commission have also indicated, the DM-3 range and mid-point reflect what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges." [9]

Moreover, Canada is not unique in taking the salary and benefits of senior public servants into account in fixing the appropriate level of judicial salaries. The United States Quadrennial Commission, the Senior Salaries Review Board in the United Kingdom, the Higher Salaries Commission in New Zealand and various salary review bodies in Australia have all at some point had resort to such a comparison.[10]

It should also be noted that successive Ministers of Justice have accepted the validity of the comparison.

> "I know judicial salaries are high by the standards of the average Canadian but they are not exceptional when measured against the professional incomes lawyers can expect to enjoy at the Bar **and they are not even exceptional when measured against senior public sector salaries**." [11] [emphasis added]

---

[9] *Report and Recommendations of the 1992 Commission on judges salaries and benefits*, (Crawford Commission), at 11, reproduced at tab 12 of the Government's appendices.

[10] The Quebec *Courts of Justice Act*, R.S.Q., c. T-16, s. 246.12(8) also expressly directs the Commission to consider "*the level and prevailing trend of the remuneration received by the judges concerned, as compared to that received by other persons receiving remuneration out of public funds.*"

[11] Hon. John Crosbie, *House of Commons Debates* (October 11, 1985) at 7601 **[Tab 2]**

Certainly, comparisons with the remuneration of lawyers in private practice is in many respects a more suitable comparator. Although not every judge appointed to the federal bench comes from private practice, the Government's own statistics indicate that, in this last decade, nearly three quarters of them have come from private practice.[12] The Commission is therefore invited to refer to the submissions of the Conference and Council in this regard. [13]

In conclusion, the Government cannot have it both ways. It cannot reject the DM-3 mid-point as an acceptable comparator while at the same time disputing that there should be a relationship between judicial salaries and the upper third of the private Bar. It is telling that the Government has not itself proposed a more meaningful comparator. The Conference and Council invite the Commission to consider each of the comparator groups identified in their submissions, including the DM-3s.

C. Government Budgetary Priorities

The Government makes great moment in its submissions of the numerous policy demands being made on the enormous financial surplus now available to the Government. Copies of the speech from the throne and the Prime Minister's address in response thereto have been produced by the Government to highlight the political environment and government policies which may have a bearing on how the Government intends to ultimately dispose of this multi-billion dollar surplus.

---

[12] Sources of Judicial Appointments 1990-1999, Submissions of the Government of Canada, Appendix 10.

[13] Submissions of the Conference and Council dated December 20, 1999, at 2-14 and 2-15.

The Judges, in their submissions, have referred to the very favourable economic position of the Government of Canada. It would, however, be wrong to characterize these submissions, as the Government apparently does, as an attempt by the Judges to take advantage of and share in the Government's large surplus merely because there is a surplus to be spent. The point simply is that the current financial position of the Government renders it impossible for the Government to maintain, as it has so often done in the past, that the necessary financial resources are not available to give full effect to whatever recommendations this Commission may make.

For example, the increases implemented by Parliament in 1985 were well below the recommendations of the Lang Commission. In rejecting the Lang Commission's salary recommendations, the then Minister of Justice, the Hon. John Crosbie, expressly invoked fiscal restraint to justify the Government's actions.

> "We also have a mandate for fiscal restraint and to protect the nation's economic interests. As a result of that mandate, we are not going to accept fully, at this time, the Lang Commission's recommendations. We have sought to arrive at salary levels which will adequately compensate the judiciary, while recognizing the fact that we are in a position of fiscal restraint and are attempting to achieve economic recovery." [14]

Similarly, Bill C-88 which was intended to give effect to the recommendations of the Guthrie Commission (1986), provided for a phased increase while at the same time suspending indexation for 1987 and 1988. The then Minister of Justice, the Hon. Ray Hnatyshyn, explained to the House of

---

[14] *House of Commons Debates* (October 11, 1985) at 7601 **[Tab 2]**

Commons that the phasing in of the proposed adjustment had to be understood "*in the context of the Government's fiscal framework*." [15]

In addition, as explained in greater detail in the submissions of the Conference and Council, the salary freeze implemented throughout the federal public sector between 1992 and 1996 was imposed unilaterally on the judiciary. In light of the *Provincial Court Judges Reference* case, the freeze, as applied to the judiciary, was in all likelihood unconstitutional and could have been challenged by the Judges before the Courts. The Judges chose not do so. As Chief Justice Lamer observed in the *Provincial Court Judges Reference* case:

> "Nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times."

Now that those difficult economic times have passed, the Government would have the Judges continue to shoulder a burden whereas other persons paid from public funds, such as deputy ministers have, comparatively speaking, been treated quite generously. This is unfair.

The Judges agree that the allocation of public spending is inherently political. It is for this very reason that the Government cannot, before this Commission, hold up its promised platform of public spending and ask the Commission to endorse the Government's priorities which, coincidentally, do not include a salary increase for the Judges.

It is submitted that debates about public policy priorities can have no place before a commission of this kind. It would be highly improper, perhaps even unconstitutional, for the judiciary to be seen to engage in a political debate as to the relative merits of the policy priorities of the government of the day.

---

[15] *House of Commons Debates* (November 5, 1987) at 10789 **[Tab 3]**

The depoliticisation of decisions concerning judicial remuneration is the purpose behind the creation of an independent, objective and effective commission. The Government's approach of characterizing the submission of the Conference and Council for an increase in judicial salaries as one amongst many "*competing claims*" against the budget surplus invites the very sort of political debate which Parliament intended to exclude.

Moreover, it is reasonable to expect that increases in judicial remuneration will rarely figure in the Government's list of priorities. The judiciary quite simply is not a political constituency which is reasonably taken into account by elected politicians. The political program and policy options of the government of the day cannot therefore be a factor which is relevant to the Commission's analysis, although the Commission may well wish to recommend that judicial remuneration and benefits should be a priority. It would be wrong, however, for the Government to seek to influence the Commission's recommendations by suggesting how the Government might prioritize the Commission's findings in its overall policy program. Rather, it is the responsibility of the Government, once the Commission's recommendations are known, to publicly react to the Commission's report and, should it choose not to accept one or more of the recommendations in that report, it must be prepared to justify that decision in a court of law[16].

Conclusion

The current salaries are not "adequate" in the sense of s. 26(1) of the *Judges Act*. In any event, the Government acknowledges in its submissions that the current level of judicial remuneration lags behind that of the traditional comparator group, namely the mid-point salary level of DM-3s.[17] To that

---

16 *Provincial Court Judges Reference*, paras. 179-80 at 108-109.

17 Submissions of the Government of Canada, paragraphs 35 and 40.

extent, the Government's suggestion that the *status quo* is fully adequate is untenable.

We take note of the Government's *in extremis* position that judicial salaries might be brought into line with the DM-3 mid-point. It follows that the bonus and the availability of performance pay should be taken into account in establishing that mid-point. Other important comparators, such as judicial salaries in other jurisdictions and the top third of the private Bar, fully support the submissions of the Conference and Council to the effect that current judicial remuneration is inadequate to meet the legislative imperative of continuing to secure the recruitment of outstanding judicial candidates and maintaining the financial security of the judiciary.

IV – NORTHERN ALLOWANCE

The Government concedes that the current northern allowance is inadequate.

The Conference and Council do not, however, believe that it is necessary to embark upon a fundamental review of the structure of the northern allowance. It is submitted that a significant increase in quantum to reflect the current realities of life in the northern territories would provide a satisfactory solution. The Conference and Council rely upon their submissions in this regard.[18]

[18] See pages 4-2 to 4-4.

V – LIFE INSURANCE

The submissions filed by the Government of Canada offer the possibility of resolving this issue which has been left outstanding following the recommendations of the Scott Commission. The Scott Commission recommended as follows:

> "It is recommended that: the government paid life insurance coverage for judges be brought more closely into line with that provided to Deputy Ministers." [19]

Although the Government was not initially inclined to act on this recommendation, it now appears willing to support and fund life insurance coverage for judges in terms similar to what has been suggested by the Conference and Council in their submissions dated December 20, 1999. The Government's support of such an initiative, however, is conditional upon the improvements being implemented fairly and at a reasonable cost.

In particular, the Government identifies two sources of concern. Firstly, the demographic profile of the judiciary differs from current members of the Government Executive Plan such that greater tax consequences would result for those members of the public service. It has also been suggested that demographics within the judicial population itself, particularly as between male and female judges, may lead to objections that the younger judges are subsidizing the insurance benefits of the older judges.

The Conference and Council believe that these concerns can be satisfactorily addressed. Equity issues stemming from the current demographic profile of the judiciary, as compared to current members of the Executive Plan,

---

[19] Scott Report, at 28.

could be addressed by providing a separate pool within the existing government Executive Plan, such as is currently the case for Members of Parliament and Senators, with all of the rights and benefits offered under that plan. This would include the provision of some continuing insurance benefit after retirement up until death, and would completely avoid cross-subsidization between judges and members of the executive and legislative branches of government.

We propose that equity issues within the judicial population itself be addressed by providing a one-time opportunity for any judge to opt out of such a plan upon its introduction. The Conference has received a legal opinion that tax legislation does not bar such a provision in a group insurance plan and the actuary retained by the Conference and Council advises that such a provision is common in the industry. The judiciary's acceptance of such a pool arrangement would be conditional upon the inclusion of such an opt-out provision. The provision of some continuing life insurance until death under the plan will act as an inducement for younger judges to remain in the plan, thus minimizing its effective costs for all members.

In conclusion, as the Government is prepared to assume the costs of the improvements sought, the opportunity now exists to resolve this issue to the mutual satisfaction of both the Government and the Judges.

As for the other benefits and improvements sought in Section V of the submissions of the Conference and Council, the Government has yet to comment in substance. While we are of the view that many of those matters are uncontentious, the Judges reserve their right to reply should the Government take a position on those issues.

VI – JUDICIAL ANNUITIES

Members of the Conference and Council were surprised to learn that the Minister of Justice intends to refer the current judicial annuity scheme to this Commission for an extensive review at some point following June 1, 2000. The judiciary strongly opposes the suggestion that there be such a reference. The Judges first became aware of the Minister's intention as a result of paragraph 68 of the Government's submissions. There had been no prior consultation with the Conference or Council notwithstanding the numerous opportunities which presented themselves over the past year in the context of an ongoing dialogue between the parties.

In a meeting between senior officials of the Department of Justice and members of the Executive of the Conference and the Council held January 7, 1999, the Judges were advised that the Government had no intention of changing the fundamental underpinnings of the judiciary's annuity program unless the judiciary so desired. The Government was immediately advised that the judiciary had no wish to see the basic structure of the plan disturbed. At a further meeting with senior Department of Justice representatives on June 25, 1999 also attended by representatives of the Treasury Board, the matter was again discussed. It was confirmed at that meeting that the Government had no intention of seeking fundamental changes before this Commission.

On that basis, the judiciary commenced its study of the annuity plan to determine what additions or "add-ons" could be introduced into the current plan to make it more contemporary and equitable. The propositions contained in the submissions of the Conference and Council dated December 20, 1999 are the result of that study.

The Government's stated intention to defer annuity matters and to seek a comprehensive review of the plan after June 1, 2000, without prior consultation with the judiciary, squarely contravenes the wishes of the latter. It is apparently predicated upon a perceived "general dissatisfaction" on the part of the Judges concerning the structure of the plan. No such "general dissatisfaction" in fact exists. Although the *Judges Act* does empower the Minister to make references to the Commission, it is nevertheless hoped that the Government would not call into question something as fundamental as the judicial annuities against the wishes of the judiciary. For the Government to embark on such a course of action, in a situation where such a re-examination is unnecessary, would be both unfortunate and would involve needless expense.

In the circumstances, the Conference and Council ask the Government to abandon its intention of making a separate reference to the Commission concerning judicial annuities after June 1, 2000. Should the Government not renounce its intention in this regard, it is nevertheless submitted that the Commission is now in a position to fully consider all the submissions made by the Conference and Council concerning add-ons to the judicial annuity.

In the event that the Commission declines, at this time, to consider the entirety of the submissions made by the Conference and Council, we do agree with the Government that certain add-ons can and must be conveniently dealt with by this Commission at this juncture. There are, moreover, certain additional items which the Conference and Council have raised in their submissions which the Government might agree could be similarly dealt with. These items are explained more fully below.

Contributions

The Government concedes that an immediate amendment should be introduced regarding contributions. It agrees, specifically, that judicial

contributions be reduced to 1% once a judge is eligible to retire. The judiciary maintains that contributions should cease once a judge has served 15 years whether or not he or she is then eligible to retire.

The judiciary's position expands upon that of the Government and, in the process, imports several advantages which the Government's position fails to address. Firstly, it addresses the major inequality in the current plan, which allows some members to retire on full annuity after contributing for a minimum 15 years of service, yet requires others to contribute for considerably longer periods of time, depending upon their age at the time they were appointed to the bench. The leveling of the contribution period to 15 years for all judges results in more equitable treatment for all judges.

Further, the actuarially calculated cost of such an initiative is minimal. Indeed, this is the least costly of any of the additions to the annuity plan recommended by the judiciary in its submissions. As the Conference and Council have argued in their submissions, judicial annuity contributions are primarily of symbolic importance to the Government and are in no manner connected to funding the annuity plan. Thus the introduction of this amendment would not affect, in any way, the Government's ability to meet annuity payment obligations to retired judges. It is also interesting that while the Government argues that the judicial annuity scheme should not be confused with a common employer-sponsored pension plan, the contribution requirement paradoxically stems from such a confusion.

Nevertheless, the only question in dispute between the Government and the Judges on this issue is the point at which contributions should cease. It is submitted that a 15 year contribution period would be the simplest system to administer and the most consistent with the history of the judicial annuity from its earliest inception.

Survivor Benefits

The Government further concedes that the issue of the entitlement of common law and same sex partners to a survivor annuity should now be considered by the Commission. We agree.

While the Commission is considering the survivor annuity, it would, in our submission, be an appropriate time to give effect to unfinished and pressing business remaining from previous Commissions, notably the Crawford Commission. In particular, the moment is opportune to recommend that an increase in all survivor benefits from 1/3 of salary to 40% of salary be implemented without further delay. Although a Bill was introduced to give effect to this recommendation following the report of the Crawford Commission, Parliament was dissolved before it could be passed. Given this history, implementation of this recommendation should not be contentious.

Also, this improvement in the survivor benefit is needed to bring the benefit contained in the *Judges Act* in line with the benefit available to Canadians generally under analogous legislation which requires the provision of a minimum 40% of salary to survivors. Survivors of judges are excluded from a benefit which is mandatory for others.

Early Retirement

Moreover, should the Commission elect either to defer to the Government's request or to prioritize treatment of the improvements sought bearing upon early retirement, it should nevertheless recommend that the Government immediately implement an option which would allow judges to elect to retire early on a *pro rata* actuarially reduced basis after a minimum of 10 years of service. This provision would be virtually cost-free to the Government as each retiree's annuity would be actuarially reduced to reflect his

or her age at time of retirement. Such an option should be available to members of the judiciary and there is no compelling reason why such a proposal could not be given effect to immediately. Indeed, any delay in the introduction of this measure would effectively deny the right of early retirement to those who currently need it most, namely those few judges victim of judicial burn-out or others who, for personal reasons which fall short of permanent complete medical disability, wish to leave the Bench before retirement age.

Issues Related to the Suspension of Indexing

Finally, the Council and the Conference feel it imperative that this Commission make recommendations aimed at correcting the inequity which has occurred regarding the calculation of the pensions of judges who retired during the period of the freeze, between 1992 and 1997.

III – COSTS

In the Summary of Issues filed by the Conference and Council with the Commission on November 15, 1999, the Judges raised a preliminary issue regarding funding.[20] It was hoped that this issue could be resolved consensually and for that reason, submissions with respect to costs were not made in the submissions dated December 20, 1999.

The Conference and Council have since been formally advised that the Government does not concede any obligation to assume the costs of the Judges' participation in these proceedings. While the Government has authorized an *ex gratia* payment to be made, the sum involved is far below what is felt by the

[20] Summary of Issues, pages 4 and 5.

Conference and Council to be necessary in order to secure the meaningful participation of the judiciary before this Commission. As the parties disagree both as to the existence of the obligation to reimburse the Judges' costs as well as quantum, the matter is being submitted to this Commission for an appropriate decision as to costs. In so doing, the Conference and Council ask the Commission to consider the following:

(1) The judiciary, like the legislative and executive branches of Government, are an essential participant in the Commission process;

(2) Judicial independence ultimately inures to the benefit of the public and the commission process is constitutionally required in order to preserve judicial independence;

(3) In participating in the commission process, the judiciary performs a public and constitutional role;

(4) Unlike the Judges, the Government can call upon in-house lawyers, economists, actuaries and a host of support services all at public expense;

(5) In order to participate in a meaningful way, the judiciary also requires legal and actuarial advisors, the fees and disbursements of which will otherwise have to be borne by the judges personally;

(6) The Conference and Council have relied heavily on actuarial expertise in order to develop submissions in the highly complex area of annuity reform.

If the Government's view is accepted, the ability of the judiciary to make any meaningful contribution to the process will always perilously depend upon the Government's good will in authorizing *ex gratia* payments. It cannot seriously be disputed that the Government has at its disposal financial resources far in excess of the Conference which would otherwise be required to pay counsel and experts, including all disbursements, from its own funds which, ultimately, are levied from the individual members themselves. Such a result, in our submission, would not ensure a Commission process that is either independent or effective.

The Conference and Council submit that their expenses in participating in the proceedings of this Commission should be reimbursed to them in a manner analogous to a solicitor and client award in a court proceeding. As a simple matter of fairness, there is no sound reason why the Government's participation in the Commission process should be fully assumed from public funds but not the Judges'.

A number of court proceedings in recent years have addressed the question of representational funding for judges in discharging public duties. For example, Mr. Justice Roberts in *Newfoundland Association of Provincial Court Judges* v. *Newfoundland* (1998), 160 D.L.R. (4th) 337 (Nfld.S.C.) **[Tab 4]** clearly addressed this very question and concluded as follows:

> "The government must constitutionally provide funding to the Judges for adequate representation before a tribunal and/or the courts, the amounts of such funding to be subject to review by either a Taxing Master or Judge of the Supreme Court of Newfoundland." (at 372)

Earlier in the decision, one finds a cogent explanation for this conclusion:

> "[69] 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. 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 Cas*e, 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 whose services are paid for out of the public purse while those who represent the judicial branch are not? I think not.** (…)
>
> [71] For the system to work as envisaged, **equity dictates that both parties to the process be funded**, not just one."
>
> (at 371, emphasis added)

An earlier decision of the Supreme Court of the Northwest Territories is also instructive. In that case, the government referred constitutional questions regarding judicial independence to the court. The Chief Judge intervened in the Reference and sought full reimbursement of his costs, which claim was contested by the Minister of Justice. Vertes J. concluded as follows:

> "The Minister has quite appropriately sought the opinion of this court before, perhaps, embarking on a course of action that could later be challenged. The Minister knew that the Chief Judge had concerns about the position taken by the Minister. The Chief Judge intervened in this reference so as to advance alternative arguments to those advanced by the Minister. The issues on this reference touch directly the fundamentally important considerations of the independence and impartiality of the Territorial Court. **As submitted by his counsel, the Chief Judge had an**

> **obligation to intervene in the interests of the judiciary and in the public interest for the orderly administration of justice.** No one else did so.
>
> **In my opinion the Chief Judge did a public service by his intervention. For these reasons I have concluded that the government should pay in full the reasonable solicitor-and-client costs of the Chief Judge.** Those costs should include allowance for the fact that the Chief Judge's counsel is from out of the jurisdiction. In my view it was completely reasonable for the Chief Judge to retain counsel who does not appear regularly in the Territorial Court." [21]
>
> (emphasis added)

By way of analogy, it is interesting to note that judges who are required to appear before disciplinary commissions have traditionally been reimbursed their representational costs by the Government. In *Ruffo* v. *Quebec (Minister of Justice),* [1998] R.J.Q. 254 (C.S.) [**Tab 6]**, the Quebec Superior Court concluded that such reimbursement is guaranteed by the Constitution (at 260).

Some direction on this issue has already been issued by the Supreme Court of Canada. In response to a Motion for Directions made by the Alberta Provincial Judges Association following the *Provincial Court Judges Reference*, the Court stated that "*whatever may be the approach to the payment of costs, it should be fair, equitable and reasonable*."[22] Clearly, the Government's offer of a limited *ex gratia* payment, contrasted with its own extensive resources including in-house actuarial and financial experts, is neither fair, equitable nor reasonable. The Conference and Council invite the Commission to resolve the matter in such a way as to insure that the Judges are treated fairly.

January 21, 2000

---

[21] *Reference Re Territorial Court Act (NWT), S. 6(2)* (1997), 152 D.L.R. (4th) 132 at 177 to 178 (NWT. S.C.) **[Tab 5]**.

[22] *R.* v. *Campbell et al.*, (December 24, 1998) 24831 (S.C.C.) (unreported) **[Tab 7]**.