SUBMISSION OF THE GOVERNMENT OF CANADA

TO

THE JUDICIAL COMPENSATION AND BENEFITS COMMISSION

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Department of Justice
Ottawa, Ontario
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INTRODUCTION

1. The Government of Canada is committed to the continuing independence and effectiveness of the Canadian judiciary. Judicial salaries and benefits must be adequate to ensure that the judiciary may continue to carry out its role independently and effectively.

2. The Government of Canada is also committed to fiscal responsibility. Faced with competing demands, the Government must make the best use of financial resources, for the benefit of all Canadians.

3. The Government's principal submission to this Commission is that the current regime of salaries and benefits secures an independent and effective judiciary. At most, only limited adjustments, involving modest expenditures, are required in order to maintain the adequacy of judicial salaries and benefits.

4. This brief sets out the matters which the Government proposes that the Commission consider in its inquiry into the adequacy of judicial salaries and benefits. Issues and arguments that might be raised by other interested persons will be addressed in due course in line with the procedure that the Commission has established.

II. COMMISSION MANDATE

5. In accordance with s. 26 of the *Judges Act*, the Commission's task is to inquire into the adequacy of judicial salaries and benefits and report its recommendations. In doing so, the Commission is discharging essentially the same mandate as the previous commissions.

6. The element of the Commission's mandate which is new is the prescription by s. 26(1.1)

of factors to be taken into account in inquiring into the adequacy of judicial salaries and benefits. That subsection directs the Commission to consider:

> the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
> the role of financial security of the judiciary in ensuring judicial independence;
> the need to attract outstanding candidates to the judiciary; and
> any other objective criteria that the Commission considers relevant.

7. The Government will address these criteria in the submissions which follow, particularly those dealing with judicial salaries. It is the Government's position that the statutory criteria provide the analytical framework within which the adequacy of judicial salaries and benefits, and the proposals for their alteration, are to be assessed.

8. The statutory work of the Commission will be carried out against the backdrop of the decision of the Supreme Court of Canada in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("the *PEI Judges case*"). The constitutional principles identified in that case may assist in the interpretation and application of the statutory criteria.

III. SALARIES

9. The initial question for the Commission is whether the existing judicial salaries are adequate. If they are not, the question of an appropriate increase arises.

10. At the outset, two points should be noted. The first is that the existing judicial salaries are not static. In accordance with s. 25 of the *Judges Act* salaries are adjusted annually to reflect increases in the Industrial Aggregate Index ("IAI"). Judicial salaries will be automatically increased effective April 1, 2000 and effective April 1 of each following year.

11. The second point to note is that the existing judicial salaries fully reflect the recommendations of the 1995 Commission on Judges' Salaries and Benefits ("the Scott Commission"). The Scott Commission expressed concern about the erosion of judicial salaries resulting from the freeze on the salaries of judges and most other publicly-remunerated officials

during 1992 to 1996, and recommended:

> …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.

See Appendix 1: *Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits*, at page 16.

12. That recommendation was implemented by way of Bill C-37, enacted as S.C. 1998, c. 30. Judicial salaries were increased by 4.1% on April 1, 1997 and again by 4.1% on April 1, 1998: see ss. 25(5) and (6) of the *Judges Act*, as amended. These increases were in addition to the restoration of the annual indexing adjustments. Their effect was to fully restore judicial salaries to the levels they would had attained if indexing had not been suspended during the freeze.

13. The result is a current annual salary for a puisne judge of $178,100. As noted above, that salary will be automatically adjusted effective April 1, 2000.

14. One question that may be asked is whether circumstances have changed since the Scott Commission such that the salary established by Bill C-37 can no longer be considered adequate. That question should be answered with reference to the criteria prescribed by s. 26(1.1) of the *Judges Act*. Each of those criteria is considered in turn below.

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

15. The Government's current assessment of the state of the Canadian economy is to be found in *The Economic and Fiscal Update: Translating better finances into better lives*, presented by the Minister of Finance to the House of Commons Finance Committee on November 2, 1999. The General Director of the Economic and Fiscal Policy Branch of the Department of Finance explains:

> Prevailing conditions in the Canadian economy can be reasonably characterized in very positive terms. The economy is growing at

> robust rates, and is expected to continue to do so by both private-sector forecasters and by the major international financial institutions …

and goes on to point out that other economic indicators are similarly positive. See Appendix 4: Letter from David Moloney dated December 7, 1999, at pages 1-2.

16. *The Economic and Fiscal Update* indicates that inflation has been low and stable: see Appendix 5, at page 39. Inflation as measured by the Consumer Price Index is projected to remain moderate: see Appendix 5, page 75.

17. Judicial salaries are protected from erosion by inflation by the annual adjustments tied to the IAI. The General Director explains:

> …this measure of wages [the IAI] has tended to increase at or slightly above the rate of CPI inflation over the past decade. Taking the experience of the past two decades into account … it is clear that indexation to this measure of wages should protect purchasing power over a number of years even when major recessions are encountered.

See Appendix 4, at page 2 and the table attached thereto.

18. Focusing on the past seven years - the period of the freeze and subsequent restoration of indexing - Table 2 of Appendix 6 shows that the IAI of 14.5% has outpaced the CPI of 10.2%, on a compounded basis. The effect has been not merely to protect judicial salaries against inflation, but to deliver an increase in salary in real terms.

19. Given the protection against inflation afforded by the adjustments based on the IAI, the cost of living does not provide a basis for questioning the adequacy of judicial salaries.

20. The Commission is also directed to consider the overall economic and current financial position of the Government. *The Economic and Fiscal Update* projects a "fiscal surplus for planning" of $2.0 billion for 1999-00 and $5.5 billion for 2000-01, and further increases thereafter. See Appendix 5, at page 80.

21. The public debate as to the use of the surplus has already begun. The General Director explains:

> … the update identifies a "Fiscal Surplus for Planning". It is this latter amount that is available, based on current information, to fund any and all new government priorities and unplanned liabilities established in future years. This would include new expenditure and tax reduction priorities identified in the recent Speech from the Throne, as well as any faster-than-planned growth in the cost of existing programs. Thus adjustments to judicial compensation in excess of the rate of inflation would represent one among a great many competing claims against this substantial, but still finite, planning surplus.

See Appendix 4, page 3.

22. As Chief Justice Lamer recognized in the *PEI Judges case*, the allocation of public resources is an inherently political matter: see para. 142-145 and 176. There are difficult policy choices to be made as to new spending, reduction of the national debt, and tax relief. The Government's approach was laid out in general terms in the recent *Speech from the Throne*:

> Canadians expect their national government to focus on areas where it can and must make a difference. And they want this done in the Canadian way - working together, balancing individual and government action, and listening to citizens. Canadians expect their Government to be fiscally prudent, to reduce the debt burden, to cut taxes, and to pursue the policies necessary for a strong society. The emerging global marketplace offers an enormous opportunity to create more Canadian jobs, more Canadian growth and more Canadian influence in the world. It provides expanding opportunities to secure a higher quality of life for all Canadians. To seize these opportunities, we must build on our strengths.
>
> Achieving a higher quality of life requires a comprehensive strategy to accelerate the transition to the knowledge-based economy, promote our interests and project our values in the world. Together, we will strive for excellence. This demands that we collaborate with our partners to:
>
> develop our children and youth, our leaders for the 21st century;
> build a dynamic economy;

> strengthen health and quality care for Canadians;
> ensure the quality of our environment;
> build stronger communities;
> strengthen the relationship with Canada's Aboriginal peoples; and
> advance Canada's place in the world.

Appendix 7, pages 3-4. See also Appendix 8: *Prime Minister's Response to the Speech from the Throne.*

23. These priorities demonstrate the breadth of demands on the planning surplus. That is not to suggest that an increase in judicial salaries cannot be a legitimate demand on the surplus. Indeed, that could be the case where an increase is essential to ensure that judicial salaries are adequate. Short of that, however, increases in judicial salaries have no priority call on public resources.

(b) the role of financial security of the judiciary in ensuring judicial independence

24. In the *PEI Judges case*, at para. 131-135, Chief Justice Lamer identifies three components of financial security. Two of those components relate to process: the requirement of an independent, objective and effective commission and the avoidance of negotiations between the judiciary and the executive. The third component is substantive: judicial salaries may not fall below a minimum level. The Chief Justice explains, at para. 193:

> I have no doubt that the Constitution protects judicial salaries from falling below an acceptable minimum level. The reason it does is for financial security to protect the judiciary from political interference through economic manipulation, and to thereby ensure public confidence in the administration of justice. If salaries are too low, there is always the danger, however speculative, that members of the judiciary could be tempted to adjudicate cases in a particular way in order to secure a higher salary from the executive or the legislature or to receive benefits from one of the litigants. …

25. The Government submits that the current salary of $178,100, coupled with automatic annual adjustments, is far beyond the minimum acceptable level of judicial remuneration. There is no risk of judges paid such a salary being "perceived to be susceptible to political pressure through economic manipulation", to use the words of the Chief Justice at para. 135.

(c) the need to attract outstanding candidates to the judiciary

26. While this criterion is obvious, it is difficult to apply. The difficulty lies in isolating salary level as a decisive factor in the attraction of outstanding candidates. Salary is just one of a myriad of considerations that may enter into an individual's decision to apply for judicial office. Other considerations may include: the opportunity to make a contribution to the public life of the nation, a desire to change career direction while continuing to work within the law, the security of tenure and remuneration afforded a judge, the generous retirement provisions, and the recognition, status, and quality of life associated with judicial office. None of these considerations, including salary level, can be said to predominate.

27. A further difficulty lies in identifying the point at which the salary level may become a disincentive to outstanding candidates. Obviously, that will vary from individual to individual, depending upon their personal circumstances and aspirations. Given that difficulty, there may be a certain attraction in measuring the level of judicial salaries against earnings by members of the legal profession. Such a comparison is fraught with its own difficulties involving the availability of earnings data concerning the legal profession and its comparability to the total compensation package of judges (salary and benefits, including retirement provisions). Questions then arise as to how to make the comparison: to the average earnings in the legal profession as a whole, to the average earnings of members of the private bar, to the average earnings of higher-earners, to the median earnings of any of these populations?

28. The Government has not proposed that the Commission attempt to compare judicial salaries to earnings in the legal profession. If any such comparison is undertaken, the Government submits that the comparison must proceed from the principle that no segment of the legal profession has a monopoly on outstanding candidates. As shown in Appendix 10, appointments are made not only from the private bar, but from the provincial and territorial benches, the academic community, and government service. Appointments come from across the provinces, from small communities and larger urban centres. It is the stated policy objective of the Government to achieve a federally-appointed bench that is more reflective of Canadian society as a whole. That entails appointments from a broad range of backgrounds and experience. It also entails avoiding questionable assumptions of connections between earnings and excellence.

29. The ultimate question is whether outstanding candidates are being attracted to the judiciary. The Government submits that appointments have been and continue to be of the highest quality. A large pool of potential candidates apply for judicial appointments. As shown in Appendix 11, from January 1, 1989 through November 30, 1999, 5006 applications were received and 589 appointments were made, a ratio of 8.5 candidates for every appointment. The advisory committees have recommended 1887 candidates, a ratio of more than 3 candidates for every appointment. That number understates the qualified candidates because it does not include candidates from the provincial or territorial benches, who are not reviewed by the advisory committees and from among whom 7 candidates were appointed to the federal bench.

(d) any other objective criteria that the Commission considers relevant

30. The Commission may consider additional criteria as long as they are both relevant to the adequacy of judicial salaries and objective.

31. Establishing salary levels for judges, whose role and responsibilities are *sui generis*, has always presented a challenge. Faced with this task, past commissions have looked to the salary level of senior deputy ministers in the federal Public Service. The Crawford Commission explained:

> … the DM-3 range and mid-point reflect what the market place expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges.

See Appendix 12: *Report and Recommendations of the 1992 Commission on Judges' Salaries and Benefits*, at page 11.

32. In the past, the Government has on occasion made reference to the DM-3 mid-point as a rough benchmark, for lack of a more satisfactory reference point. However, comparison of judicial salaries to those paid senior deputy ministers must be approached with caution. The *PEI Judges case*, at para. 143, makes it quite clear that judges are not public servants, particularly when it comes to remuneration. In adding s. 26(1.1) of the *Judges Act*, Parliament did not direct the Commission to consider such a comparison. Comparative factors, including the relative

compensation of persons paid out of public funds, had formed part of the terms of reference of the Scott Commission: see Appendix 1, at page 32.

33. Furthermore, deputy ministers are a poor comparator. Unlike judges, they do not have tenure, they are appointed at pleasure. Unlike judges, their salaries are not indexed. A significant portion of deputy ministers' earnings depends upon an annual evaluation of their performance and is at risk. Unlike judges, deputy ministers are a very small cadre, with only 10 individuals who have risen to the DM-3 level.

34. If the DM-3 is used as a rough benchmark, the comparison should continue to be made to the mid-point of the salary range. Pay dependent upon annual assessed performance, either by way of annual performance award or movement through the range, should not enter into the comparison. Performance pay is a concept foreign to judicial salaries, since it would be at odds with the principle of judicial independence.

35. The current mid-point of the DM-3 salary range is $188,250: see Appendix 13. The mid-point is $10,150 or 5.7% ahead of the current judicial salary of $178,100. Of course, that salary will be increased effective April 1, 2000 in accordance with the automatic adjustment under the *Judges Act*. The DM-3 salary range is not expected to be reviewed until 2001; see Appendix 14: *First Report of the Advisory Committee on Senior Level Retention and Compensation* (1998), at page 27. Therefore, the gap between judicial salaries and the DM-3 mid-point will be bridged in part by the automatic increase accorded judges on April 1, 2000.

36. Given the difficulties attaching to direct comparison of salaries paid judges and senior deputy ministers it may be appropriate to consider the range of increases which the Government has afforded to public servants. Those increases are some indicator of the financial capacity and priorities of the Government. The focus is on the rate of increase, rather than the gross amounts of salary.

37. The bar graph in Appendix 15 shows the percentage increases awarded to various categories of public servants and compares those increases to that afforded judges. Since the end of the wage freeze, increases have ranged from 5.1% for the Executive Group to 19.4% for DM-3's. During the same period, judicial salaries have increased by 14.5%, a rate exceeded only by DM-2's and DM-3's. However, as explained above, the automatic increase effective April 1,

2000 will narrow the gap between judicial salaries and those of DM-3's. Therefore, the 19.4% increase accorded DM-3 should be compared to the combination of the existing 14.5% increase in judicial salaries plus the further increase in accordance with the IAI.

38. The cost of a salary increase should be considered. There is a difficulty in estimating the cost: the automatic IAI adjustment will not be known until April 1, 2000. Therefore, the estimate of the cost of a particular percentage increase at that date necessarily includes the cost of the automatic increase. On that basis, the cost of the 5.7% increase mentioned above would be $12,243,600 in the year 2000-01 and $48,974,400 for the four-year period through 2003-04.

39. In contrast, the Canadian Judges Conference and Canadian Judicial Council have indicated their intention to seek a judicial salary of at least $225,000 effective April 1, 2000, with further stage increments beyond the IAI. That increase is at least 26.3%. The salary cost of such an increase, quite apart from any improvements in benefits, would be $56,556,840 in 2000-01 and $226,227,360 through 2003-04, even without further staged increments beyond the IAI.

40. After considering all the factors under s. 26(1.1) of the *Judges Act*, it would appear that current salaries, coupled with the automatic annual adjustments, are adequate. Should the Commission consider it appropriate to have regard to 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.

IV. NORTHERN ALLOWANCE

41. The *Judges Act* was amended in 1967 to provide a non-accountable annual allowance of $2,000 to judges appointed to the Supreme Courts of the Northwest Territories and Yukon Territory, expressly "as compensation for the higher cost of living". The allowance was increased to $3,000 in 1975, $4,000 in 1981, and to its current level of $6,000 in 1989. The Act was amended in 1999 to extend the allowance to judges of the Nunavut Court of Justice.

42. In addition to the northern allowance under the *Judges Act*, federally-appointed judges in the Territories are currently reimbursed for one vacation trip per family member per year, as well as for expenses for travel for medical, bereavement and compassionate reasons. These specific additional benefits are similar to those extended to federal public servants under the *Isolated*

Posts Directive, described below.

43. The subject of northern allowances was last dealt with by the Crawford Commission in its 1993 report. That Commission rejected a proposal by northern judges to vary the northern allowance by tying it to increases in judicial salaries. The Commission observed:

> The Commission is not persuaded that there is a sufficient basis to increase the northern allowance by any amount. The existing $6,000 allowance is already unique in that the *Judges Act* does not recognize other regional cost disparities that exist across Canada.

See Appendix 12: *Report and Recommendation of the 1992 Commission on Judges' Salaries and Benefits* (1993), at page 28.

44. The adequacy of the northern allowance has arisen again in the context of the recent establishment of the Nunavut Court of Justice, given of the particularly high cost of living in the new Territory. That disparity in the cost of living is identified in the *Isolated Posts Directive* applicable to federal public servants.

45. The *Isolated Posts Directive* comprises components intended to compensate public servants for the higher cost of living in the Territories and to address issues of recruitment and retention. Unlike the northern allowance for judges, the allowances under the Directive are location specific, calculated upon a number of factors that vary from place to place. The Directive also applies to locations outside the Territories. See Appendix 17 for relevant excerpts from the Directive and Appendix 18 for examples of allowances at various locations.

46. Special considerations apply to the design of the northern allowance for judges. For reasons of independence, benefits provided to the judiciary cannot be subject to the discretion of the executive, but rather must be established by law. In addition, on the authority of the *PEI Judges case*, any changes to judicial benefits require prior consideration by the Commission.

47. Tying northern allowances for judges to the Directive would raise the following difficulties:

(a) the Directive is part of a collective agreement and is amended from time to time to

reflect the negotiated solutions to issues arising in the Public Service;

(b) the application of the Directive would result in different treatment for judges in different locations; a departure from past practice and policy;

(c) in some locations, for example Whitehorse, application of the Directive would actually reduce the amount to which judges would be currently entitled under the *Judges Act*; and

(d) the Directive is designed to facilitate the recruitment and retention of employees to isolated locations, an objective beyond that of the current northern allowance for judges.

Nevertheless, the Directive may give some indication of the sort of compensation that might be afforded in respect of the higher cost of living at various locations within the Territories.

48. The Government submits that the northern allowances should be reviewed and welcomes the Commission's advice as to their scope, structure and amount.

V. LIFE INSURANCE

49. The Government supports the improvement of life insurance provided to judges, as long as it can be done fairly and at a reasonable cost.

50. Currently, judges participate in the portion of the Public Service Management Insurance Plan (PSMIP) that covers non-executive public servants. This provides a judge with coverage of one or two times salary, at the option and expense of the judge. Premiums under this sub-plan vary based on the age and sex of the member. The cost of coverage is therefore proportionate to the mortality risk of the individual, with the cost for younger, female judges being much lower than that for older, male judges.

51. Under the umbrella of the PSMIP, there is a separate Executive Plan. That plan provides deputy ministers and other executives in the Public Service with insurance coverage at two times salary at no cost to the participants. A similar separate plan provides coverage to Members of Parliament and Senators. For tax reasons, these separate plans have a single premium for life

insurance based on the claims experience (mortality rate, salary) of the group as a whole. The premium paid by the Government in respect of individual plan members varies only in relation to salary level. The premiums are a taxable benefit to the plan member.

52. Maintaining separate Executive and MP plans ensures that neither group subsidizes the other and that the costs for each group can be identified and considered in establishing their total compensation. Separate plans also permit the employer to modify coverage to suit the particular needs of the population in question.

53. At present, the judiciary is composed predominantly of older males. As a group, it represents therefore a higher insurance risk than deputy ministers and public service executives. In addition, judicial salaries are significantly higher than those of the average public service manager. The cost of life insurance for the judiciary is higher as a result of these factors.

54. The Government submits that it would be unfair to include the judiciary within the Executive Plan. Adding the judges would raise the premiums paid for each member of the Plan. The public service executives participating in the Plan would suffer an increased taxable benefit representing the greater premium being paid by the employer. In effect, other plan members would be subsidizing judges and receiving lower net compensation. See Appendix 19 for an illustration of the greater tax liability that public service executives would face.

55. The Government questions whether, as a matter of principle, judges and public servants should be within the same plan, particularly where there would be cross-subsidization. It has an appearance that might best be avoided.

56. An alternative would be to establish a separate "stand-alone" judicial life insurance plan within the PSMIP. This would be similar to the approach taken for Members of Parliament and Senators. The cost of providing active judges with life insurance coverage of two times salary under such a plan would range from $2,577,600 to $2,724,523, depending upon the salary assumption: see Appendix 19 for the calculation. There would be an additional, and growing, cost to provide post-retirement life insurance to judges. The Government is prepared to assume those costs.

57. However, given the current demographic profile of the judiciary, such a plan would be

open to criticism of discrimination because the younger female judges would be subsidizing the older male judges. The taxable benefit to younger female judges could leave them worse off than if they were to purchase insurance coverage from their own funds. See Appendix 19 for an illustration of comparative benefit to older male judges and younger female judges.

58. There may be other options for the design of a plan at an equivalent cost which would provide improved coverage to judges in a equitable fashion. For example, consideration might be given to providing an allowance to judges to purchase life insurance. Also possible might be the combination of a less generous group plan, with an allowance to purchase additional insurance, as the individual judge considered necessary.

59. There may be other possible plan designs. The Government submits that an acceptable design should avoid cross-subsidization by public servants, be fair to the judicial population and not involve a cost beyond that the Government would bear if judges were included in a sub-plan of the PSMIP providing coverage equivalent to that afforded deputy ministers and public service executives.

VI. ANNUITIES

(a) General Approach

60. Upon retirement, judges are entitled to an annuity of two-thirds of salary. Judges may retire after 15 years of service, once the combination of age and years of service totals 80.

61. Until retirement, judges contribute 7% of salary towards the annuity scheme. These contributions meet approximately 20% of the estimated long term cost of the scheme, with the balance paid from public funds.

62. The judicial annuity scheme should not be confused with the common employer-sponsored pension plans. Pension plans are designed to provide for the accrual of pension credits over an entire career, possibly 35 or more years. Judicial annuities are designed to provide judges with income protection at the end of their careers. While the amount of pension benefits depends upon the length of service, judicial annuities are available at two-thirds salary after as little as 15 years service. Pension plans operate within the framework of the *Income Tax Act*,

which both encourages contributions and limits benefits. Judicial annuities deliver benefits far in excess of those permitted under the pension plan provisions of the *Income Tax Act*.

63. Given its peculiar nature, review of the adequacy of the judicial annuity scheme is particularly complex. Proposals to graft elements of pension plans onto the judicial annuities and or to make other piecemeal adjustments should be rigorously scrutinized.

64. The task of reviewing the adequacy of the judicial annuity scheme is further complicated by changes in the demographic profile of the judicial community. More women are being appointed. Judges are being appointed at an earlier age. Appointments are less likely to mark the end of a long legal career. A judicial annuity scheme that does not take account of these changes may attract challenges under the *Canadian Charter of Rights and Freedoms*.

65. Members of the judiciary have increasingly expressed dissatisfaction with the current annuity scheme. The Government will respond in due course to any specific proposals that may be advanced in the written submissions of other parties. However, the general dissatisfaction must be addressed.

66. Subject to two exceptions discussed below, the Government submits that further *ad hoc* changes to the judicial annuity scheme, particularly changes that would alter fundamental features of that 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.

67. It would be unrealistic to expect this Commission to undertake and complete a comprehensive policy review of the judicial annuity scheme by June 1, 2000, the Commission's reporting date. Time is required to design and carry out this complex and important study. The Government submits that the study should be undertaken separately from the current Quandrennial review.

68. 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.

(b) Survivor Annuity

69. One matter which the Government submits should be addressed by this Commission is the survivor annuity.

70. Section 44 of the *Judges Act* provides an annuity to the surviving spouse of a judge. The provision applies only to married spouses and not to extend to unmarried partners of the same or opposite sex.

71. The Government recognizes that the limitation to married spouses is likely vulnerable to challenge under the Charter, in light of recent Supreme Court of Canada decisions.

72. In Bill C-37 the Government proposed amendments to the *Judges Act* to extend the survivor annuity to:

> a person of the opposite sex who has cohabited with a judge in a conjugal relationship for at least one year immediately before the judge's death.

See Appendix 2, Bill C-37, clause 1.

73. As a result of concerns raised before the Standing Committee of the Senate on Legal and Constitutional Affairs, the proposed amendments concerning the survivor annuity were dropped from Bill C-37. The Government undertook to seek this Commission's guidance. See Appendix 20, *House of Commons Debates*, November 6, 1998, para. 1005. (As to the Committee's consideration of Bill C-37, see the *Proceedings of the Standing Committee* for September 23 and 30, and October 6, 7, 21 and 22, 1998.)

74. In any event, the *PEI Judges case* has now established that consideration and recommendation by the Commission is required prior to any legislative change to the judicial annuity scheme.

75. A model which is consistent with other federal legislation, and upon which the

Commission's views are sought, would include the following definitions:

> "common law partner" in relation to a judge, means a person who is cohabiting with the judge in a conjugal relationship and who has so cohabited for a period of at least one year.
>
> "survivor" means a person
>
> (a) who was married to the judge immediately before his or her death; or
>
> (b) who establishes that they were cohabiting in a conjugal relationship with the judge for a period of at least one year immediately before his or her death.

76. It should be noted that there was some discussion before the Senate Committee about whether the one year cohabitation period was equitable and appropriate. The Government continues to support this policy choice as consistent with public sector pension schemes. See Appendix 21 for similar legislative provisions.

77. The inclusion of common law partners as defined above introduces the possibility that a judge would be survived by both a married, separated spouse and a common law partner. Three approaches to competing claims are:

(a) the entire annuity would go to the married spouse;
(b) the entire annuity would go to the common law partner with whom the judge was living at the time of death; or
(c) the annuity would be apportioned on some equitable basis.

78. Apportionment is a fair solution and the one adopted in the legislation governing public sector pension plans: see Appendix 21 for the provisions in public sector pension plan legislation.

79. In Bill C-37 the Government proposed a formula for apportionment of the survivor annuity. Before the Senate Committee there was disagreement and debate as to the best approach to apportionment. The Senate Committee recommended, and the Government agreed, that the

issue of apportionment should be referred to this Commission at the first opportunity.

80. It should be noted that the Senate Committee also heard arguments suggesting that Parliament lacks the constitutional authority to legislate with respect to survivors' annuities. The Government rejects the argument. Parliament has the full authority to legislate with respect to judicial annuities, including matters ancillary to the creation and administration of those annuities.

81. The Government continues to view the Bill C-37 model as equitable and appropriate for the judiciary. The apportionment proposal upon which the Commission's views are sought is as follows:

(a) where there are two survivors, each would receive a prorated share of the annuity based on a formula set out in the Act;
(b) the apportionment formula would be that used in Bill C-37, by which the pro-rated share is based on the number of years each of the survivors cohabited with the judge; and
(c) flexibility would be provided by allowing either the married spouse or the common law partner to waive their claim, in which case the other would be entitled to the full annuity.

(c) Contributions

82. As noted above, federally-appointed judges contribute 7% of salary towards their annuity scheme until such time as they retire. Of the 7%, 6% is a contribution towards the cost of providing the basic annuity and the remaining 1% is a contribution towards the cost of indexing annuities to the cost of living.

83. The requirement that judges contribute towards the cost of the annuity scheme has been controversial. It led to litigation: *The Queen v. Beauregard*, [1986] 2 S.C.R. 56, which upheld the constitutional validity of the measure. It has been a contentious matter before the triennial commissions, producing conflicting recommendations that contributions be eliminated or

maintained.

84. The Government submits that the contribution issue goes to the basic nature and structure of the annuity scheme and would be better considered as part of the comprehensive review proposed above.

85. There is one modest adjustment that could be considered within the current review. That is reduction of contributions upon a judge reaching the eligibility for retirement. Currently, a judge eligible for retirement, but remaining in office, continues to pay the full 7% contribution. The Commission could recommend that a judge in that situation should no longer contribute the 6% towards the basic annuity, but only the 1% towards future indexing.

86. The reduction of contributions from 7% to 1% would reflect the provisions of public service pension plans. As explained above, such pension plans are far from a perfect analogy. However, contributions are an element imported from pension plans in the first place. An adjustment to achieve consistency would appear to be appropriate.

87. As contributions are based on salary, the cost of reducing contributions from 7% to 1% would depend on salary levels. At the current salary level the cost would be $2,631,300; with a salary increase of 5.7% effective April 1, 2000, the cost would be $2,781,284 in the first year, increasing annually with the automatic annual adjustments to salary levels.

VII. CONCLUSION

88. The Government respectfully requests that the Commission consider the matters set out above and make recommendations consistent with these submissions.

89. The Government seeks to support the Commission in its work and will make every effort to provide any additional information or advice which the Commission considers would be of assistance.