

RESPONSES TO REQUESTS

PROVIDED BY THE GOVERNMENT OF CANADA

TO

**THE JUDICIAL COMPENSATION AND BENEFITS
COMMISSION**

March 31, 2000

**Department of Justice
Ottawa, Ontario
K1A 0H8**

Responses to Requests for Information

Appendices:

- 42 Letter from the Deputy Minister of Justice to the Commission dated March 31, 2000.
- 43 Excerpt from *Pension Plans in Canada*, respecting joint and survivor benefits.
- 44 Proportion of Judges Electing Supernumerary Status 1990-99
- 45 Average Age of Retired Judges since January 1, 1987
- 46 Letter from Canada Customs and Revenue Agency respecting Roll-over of Return of Judge's Contributions.
- 47 Ex Gratia Payments for Representational Costs
- 48 At Risk Pay for DM-3s 1998-99
- 49 Summary of Benefits for DM-3s
- 50 *Report of the Advisory Group on Executive Compensation* (June 1988)
- 51 Letter from the Office of the Chief Actuary respecting a calculation of annuities commencing during 1997-98.

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1. **Pre-Commission Discussions**
(Transcript of March 20, 2000, pages 102, 131-132)

The Deputy Minister of Justice has written to the Commission to set out the two discussions held with representatives of the judiciary during 1999 in anticipation of the commission process. A copy of his letter is included as Appendix 42.

2. **The 15-Year Requirement**
(Transcript of March 20, 2000, pages 122-124)

Neither the Department of Justice nor the Treasury Board Secretariat has done or commissioned any studies or research as to the purpose, operation or effect of the requirement that judges serve for 15 years in order to qualify for annuities under the *Judges Act*. Neither the Department nor the Secretariat is aware of any study or research done by or for anyone else as to those questions.

The purpose, operation and effect of the 15-year requirement are matters that will necessarily be the subject of study and research during a comprehensive review of the judicial annuity scheme.

3. **Scope of Commission's Functions**
(Transcript of March 20, 2000, pages 41-44)

The Commission is not limited to scrutinizing and reporting on proposals advanced by the Government, the Conference and Council, or other participants before the Commission.

Under both subsections 26(1) and 26(4), the Commission has the jurisdiction to inquire into matters within the broad subject area of judicial compensation and benefits. While the Government's proposals for changes to judicial compensation and benefits require the Commission's review, the Commission is not limited expressly or impliedly to reviewing only proposals.

The breadth of function of the Commission extends to referrals under s. 26(4). That subsection provides expressly that the Minister may refer "a matter" mentioned in subsection (1), namely the adequacy of judicial salaries and benefits. There is no restriction to proposals for legislative change.

Reference of complex policy matters for the Commission's consideration was expressly contemplated when the current process was established. In her appearance on September 23, 1998, before the Senate Committee considering Bill C-37 the Minister of Justice offered the following observations:

The exception to the general nine-month period of activity is when the minister decides to submit a matter to the commission for its inquiry, as permitted by these proposals. This provision would allow for changes to judicial compensation to be made where necessary between the fixed four-year time frames. This is necessary in light of the new constitutional requirement, established by the Supreme Court of Canada, that future changes to judicial compensation cannot be implemented without prior consideration by a judicial compensation commission. *This power might also occasionally be used to have more detailed and informed consideration of particularly complex policy issues.*
[emphasis added]

Parliament intended a broader role for the Commission than merely passing on government proposals. The Commission can provide the forum to tackle complex policy questions that involve interrelated and possibly competing policy objectives. The commission process is the means by which the judiciary and the public may collaborate

in the development of public policy. Denying this role to the Commission would mean that proposals for change could only be developed by the Government independently and in isolation from other interested parties. That could prove ineffective and wasteful of resources.

4. **Increased Survivor Annuities**

(Transcript of March 20, 2000, pages 19, 93 and 98; page 23 and Request from Morneau Sobeco)

The conclusion of the Scott Commission respecting the proposal to increase survivor annuities is found at page 24 of its Report:

... We consider that while these increases may be warranted, the reestablishment of an appropriate salary base for the judiciary is of greater importance. If priorities are being set, we would locate the reestablishment of this salary base of the highest level of importance *and, accordingly, for the present, would recommend that there be no change in spousal benefits.*
[emphasis added]

Appendix 43 is an excerpt from *Pension Plans in Canada: Statistical Highlights and Key Tables, January 1, 1997*, published by Statistics Canada. It shows that:

- (a) 58% of members participate in plans that make a reduction in the member's benefit when a joint and survivor pension is payable - the vast majority of those plans pay only the minimum 60% of the reduced benefit;
- (b) 24% of members participate in plans that make no reduction in the member's benefit, but provide a joint and survivor or spouse's benefit of only 50%; and
- (c) only 8% of plan members participate in plans that provide a 60% benefit based on an unreduced pension.

5. **Vesting of Retirement Benefits**
(Transcript of March 20, 2000, pages 36-39)

Federal public service pension plans provide for vesting of benefits following two years of service and for payment of a pro-rated or reduced pension to persons who retire or resign after vesting.

The *Pension Benefits Standards Act, 1985*, which governs other pension plans with federal legislative jurisdiction, is to similar effect.

The pension plans for the following groups depart from the usual two-year period:

Canadian Forces	10 years
RCMP - Uniformed Members	10 years
- Civilian employees	5 years
Members of Parliament and Senators	6 years
Lieutenant Governors	5 years
Diplomatic Service (non-career public servants)	5 years

The absence of vesting is one of the unique characteristics of judicial annuities scheme.

6. **Supernumerary Status versus Retirement**
(Transcript of March 20, 2000, pages 83-85 and Request from Morneau Sobeco)

As shown in Appendix 44, during the period 1990-1999, 92.4% of judges chose to elect supernumerary status while only 7.6% retired (or died) without having served as a supernumerary judge.

As shown in Appendix 45, the average age of retirement of judges since 1987 has been 72.2 years.

7. **Pension Contributions**

(Transcript of March 20, 2000, pages 45-46 and Requests from Morneau Sobeco)

Subsection 50(3) of the *Judges Act* dates from the introduction of contributions in 1975. The purpose of the subsection is to permit the deductibility of contributions for income tax purposes.

Subsection 50(3) was re-enacted by s. 240 of the *Miscellaneous Statute Law Amendment Act, 1999*, S.C. 1999, c. 31. The purpose was merely to change "registered pension fund or plan" to "registered pension plan", in accordance with the current terminology of the *Income Tax Act*.

On a related matter, the Canada Customs and Revenue Agency advises that contributions returned to a judge on resignation before eligibility for retirement may be rolled into an RRSP: see Appendix 46.

8. **Ex Gratia Payment**

(Transcript of March 20, 2000, pages 120-121)

In response to questions as to the \$80,000 quantum of the *ex gratia* payment, it was explained that the submissions to, deliberations of, and decision by the Treasury Board are Cabinet confidences which cannot be disclosed, even under compulsion: section 39 of the *Canada Evidence Act*.

It may be instructive to consider the approach to *ex gratia* payments for representational costs in other contexts. Appendix 47 contains copies of the announcement by the Solicitor General concerning the funding of complainants' counsel in the APEC hearings and of the order in council approving intervenor funding for the Krever Inquiry. The criteria include the application of the Department of Justice tariff for legal agents. That tariff is also applied when counsel are retained to represent judges who are the subject of

inquiries under the *Judges Act* or who are sued in respect of acts done in their judicial capacity.

If the Department of Justice tariff were applied to the current *ex gratia* payment, assuming an hourly rate of \$200 for senior counsel and \$100 for junior counsel, both on a maximum 10 hour day, the \$80,000 payment would support 20 days time for each of a senior and a junior counsel, with \$20,000 for other expenses. This represents a reasonable contribution towards the costs of the Conference and Council.

9. **Performance Awards for 1998-99**
(Transcript of March 20, 2000, pages 134-135).

As shown in Appendix 48, performance awards for DM-3s for 1998-99 (payable April 1, 1999) were 8.2% on average.

10. **DM-3 Pensions**
(Commission's Request of March 21, 2000)

Appendix 49 describes the pension entitlements of DM-3s.

It should be noted that appointment at the DM-3 level does not qualify the incumbent for the special retirement allowance. That benefit is available only to deputy ministers who head a government department.

The special retirement allowance was introduced following the recommendation of the Advisory Group on Executive Compensation (often referred to as the Burns Committee). The rationale for the benefit is explained under recommendation 10 at page 9 of the Report: see Appendix 50.

11. **Actuarial Assumptions and Calculations**
(Commission's Request of March 21, 2000)

The Office of the Chief Actuary is preparing the actuarial calculations as requested by the Commission's letter dated March 21, 2000. The calculations should be available by April 7, 2000.

12. **Annuities Commencing During 1997-98**
(Request from Executive Director)

Appendix 51 is a letter dated March 27, 2000 from the Office of the Chief Actuary estimating the cost if annuities granted between April 1, 1997 and March 31, 1998 were calculated on the basis of the judicial salaries as increased on April 1, 1998.