**Judicial Compensation and Benefits Commission**

CANADA

**Commission d'examen de la rémunération des juges**

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May 31, 2004

The Honourable Irwin Cotler
Minister of Justice and Attorney General of Canada
Department of Justice
East Memorial Building
284 Wellington Street
Ottawa, Ontario K1A 0H8

Dear Minister:

Pursuant to the provisions of Section 26(2) of the *Judges Act*, I am pleased to submit the report of the second Judicial Compensation and Benefits Commission.

Yours truly,

Roderick A. McLennan, Q.C.
Chair

Encl.

# ACKNOWLEDGEMENTS

In the work we undertook, we were ably assisted by the following:

- Ms. Deborah LaPierre, the Executive Director of the Drouin Commission, who on completing her duties had the foresight to prepare a record of the activities carried out and the methodology used by her and her staff in the work of the first Quadrennial Commission and made herself available to guide us from the outset of this Commission.

- Mr. David Gourdeau, the Commissioner of the Federal Judicial Affairs, and his assistant, Ms. Marie Burgher, and their staff who helped us get organized and recruit an Executive Director for our work and who subsequently provided continuous administrative services, support and counsel.

- Ms. Jeanne Ruest, who joined us as our Executive Director and who has diligently and faithfully organized the information flow and communications with persons making submissions and with other government departments from which we needed information. Her experience with government, organizational skills and pleasant personality were of invaluable assistance to the work of the Commission.

- Ms. Elizabeth Morin, our Research Assistant, who provided us with the necessary research and technical expertise to gather and organize the information we required and greatly assisted us in putting this report together.

- Mr. André Sauvé, an associate with the actuarial firm of Morneau Sobeco, whose past experience and insights into compensation matters generally and judicial compensation matters specifically, were invaluable to us.

- Ms. Chantal Lefebvre from the LexUM Centre at the University of Montreal who efficiently organized and updated our website.

- Mr. Phil Epstein, Q.C., who helped us to understand the complexities of the issues surrounding conjugal breakdown.

We are indebted to all these individuals for their unstinting commitment to the work of the Commission.

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# CHAPTER 1

# INTRODUCTION

This is the report of the second Quadrennial Judicial Compensation and Benefits Commission, which was established pursuant to the provisions of the *Judges Act* by amendments to that statute contained in Bill C-37 in 1999. The first such report, hereafter identified as the "Drouin Commission", outlined carefully and fully the history of earlier Commission activity, which had been designed to maintain proper compensation levels for federally-appointed judges (hereafter referred to as "puisne judges") over the years. It is, accordingly, unnecessary for us to reiterate that history here.

The recommendations presented in compensation reports that preceded the Drouin Commission were generally not acted upon by the federal government. The consequences of successive governments' failure to act, as well as the attempted reduction in the compensation paid to provincial court judges by some provinces, culminated in a decision by the Supreme Court of Canada known as the *PEI Reference Case*.[1] In that decision, Chief Justice Antonio Lamer concluded, for the majority of the court, that there was a constitutional obligation on government to establish a judicial compensation commission. He stated that the object of a commission ought to be to present "an objective and fair set of recommendations dictated by the public interest", and went on to say that "financial security is a means to the end of judicial independence, and is therefore of benefit to the public".[2]

The relevant consequence of the Supreme Court of Canada judgment in the *PEI Reference Case* was the amendment to the *Judges Act* (Bill C-37), which provided for

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1 *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3 (*PEI Reference Case*).

2 *PEI Reference Case*, at paragraphs 173 and 193.

the creation of this Commission, set out its powers and duties, and defined the framework within which we are obliged to act.

The significant portions of the *Judges Act* provide as follows:

> ***Commission***
>
> s. 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.
>
> ***Quadrennial Inquiry***
>
> *(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.
>
> ***Response to Report***
>
> *(7)* The Minister of Justice shall respond to a report of the Commission within six months after receiving it. R.S. 1985, c. J-1, s. 26; 1996, c. 2, s. 1; 1998, c. 30, s. 5; 2001, c. 7, s. 17 (F).

The Act also provides for the membership of the Commission.[3] Pursuant to those provisions, the judiciary nominated Earl A. Cherniak, Q.C. as Commissioner of the 2003 Quadrennial Commission and the Minister of Justice of Canada nominated Gretta Chambers, C.C., O.Q. Those nominees together selected Roderick A. McLennan, Q.C. as the Chair of the Commission. All nominations were confirmed by Order in Council (see Appendix 1).

## 1.1 Overall Considerations

The members of the Commission owe no allegiance to those who appointed them and the Commission has acted completely independently throughout the process. In all our deliberations, we have been able to arrive at our recommendations amicably and unanimously.

We did not consider ourselves in any sense an arbitration panel deciding and resolving differences between the two principal protagonists – the federal government and the judiciary – rather, we approached our duties on the basis that we were to be guided by our perception of the public interest. For example, as will be seen, there is one feature of the proposed compensation package that we do not recommend, notwithstanding the fact that the federal government and the judiciary are in accord on that issue.

The legal principles and constitutional imperatives underlying a judge's compensation was described in detail in the Drouin Report[4] and have not changed in the intervening four years. They are set out in that report and can be conveniently summarized as follows:

- The *sui generis* nature of the role and responsibilities of judges in Canada requires that they be provided with salary and benefits, before and after

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3 *Judges Act* (Canada), s. 26.1 (1).

4 Drouin (2000), at pages 13–16.

retirement, to ensure a reasonable standard of living, in order that they may function fearlessly and impartially in the advancement of the administration of justice and that they be independent of both government and all litigants appearing before them.

- There is a constitutional prohibition against judges negotiating any part of their compensation arrangement with the executive or representatives of the legislature, a prohibition that applies to no other class of persons in Canada, within or outside of the public service.[5]

- Federally appointed judges are the only persons in Canadian society whose compensation is set by Parliament, pursuant to s. 100 of *The Constitution Act, 1867*.[6] (Recent legislation, however, has tied the compensation of others to that which is authorized by the federal government for puisne judges.[7])

- There is, as a result, a constitutional guarantee of an independent commission process, which 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 otherwise have been advanced at the bargaining table."[8]

- Judges' salaries are subject to mandatory indexing according to the Industrial Aggregate Index (IAI), pursuant to s. 25 of the *Judges Act*.[9]

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5 *PEI Reference Case*, at paragraph 134.

6 Sections 54.1, 60–62, and subsection 4(1) of Bill C-28 amended portions of the *Parliament of Canada Act* in June 2001, tying the salaries of the Prime Minister, Ministers, Senators, specific members of the House of Commons (such as the Speaker, chairs of committees, Parliamentary Secretary and Leader of the Opposition) to the salary of the Chief Justice of Canada. As well, the salaries of other individuals, such as the Auditor General, the Information Commissioner, the Privacy Commissioner, the Official Languages Commissioner and the Chief Electoral Officer, are tied to judicial salaries.

7 See Appendix 2 for details.

8 *PEI Reference Case*, at paragraph 189.

9 *Judges Act* (Canada), s. 9

- Judges are precluded from engaging in any form of occupation or business other than their judicial duties, and must be lawyers of at least 10 years' standing at the bar.[10]

A variety of additional considerations are relevant to the setting of judicial compensation. They include the ever-shifting demands on the judiciary, the increasing complexity of litigation, the growth in importance of *Charter* litigation and the intensified scrutiny of judicial decisions.[11] If anything, those factors are even more relevant in 2004, given the involvement of the courts in such diverse and controversial matters as same-sex marriage, First Nation land claims and constitutional challenges to legislation. One vivid example serves to signify the issue – the child pornography decision in *R. v. Sharp,* where the trial judge was widely (but totally improperly) vilified in some quarters for concluding that the relevant sections of the *Criminal Code* violated the provisions of the *Canadian Charter of Rights and Freedoms*.[12]

The considerations that go into the setting of judicial compensation and benefits are unique, in that so much of the usual process of determining compensation does not apply. Judges cannot speak out and bargain in the usual way. Compensation incentives usual in the private sector, such as bonuses, profit sharing, stock options, at-risk pay, recruitment and performance bonuses, together with the prospect of promotion, do not apply in the judicial context, although many of these financial incentives are increasingly common in the public sector.

On the other side of the ledger, judges have an annuity that, as will be seen, has a substantial value and is unique in many respects. Its existence is essential to the concept of judicial independence, ensuring, as it does, a reasonable and commensurate standard of living in retirement after judicial service is done. Judges also have the opportunity of achieving supernumerary status for a maximum of 10 years, during which

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10 *Judges Act* (Canada), s. 55.
11 Drouin (2000), at page 17.
12 *R. v. Sharp* [2001], 1 S.C.R. 45.

time a judge continues to receive full pay and benefits for a partial workload. Retention factors play little part in the consideration of appropriate compensation for judges; historically few judges resign their position before they were eligible to retire, save for health or unusual personal reasons.

## 1.2 Process

As stated, we were the beneficiaries of the Drouin Commission report, which comprehensively identified a number of significant issues and an appropriate method of dealing with them. However, to obtain an appreciation of what other precedents might guide and inform us, we gathered for our review all of the previous triennial commission reports (five such commissions preceded the Drouin report) as well as the reports of the provincial commissions that were created in each province to address the compensation payable to provincial court judges following the *PEI Reference Case*. In addition, we reviewed the decisions issued by a number of courts when some provinces failed to implement certain recommendations made by provincial commissions.[13]

We published our mandate in newspapers across the country and solicited submissions from the public as well as the more acutely interested parties. A copy of that advertisement and a list of the newspapers in which it was published are attached in Appendix 4.

We also solicited by letter, submissions from either the Attorneys General or Ministers of Justice of each province, from the bar associations or law societies of each province, and the Canadian Bar Association. Notwithstanding these steps, it is fair to say that only very modest public interest was shown in the work of the Commission. We updated the Commission's website, www.quadcom.gc.ca, where we published all of the submissions and communications received by the Commission. Those who made submissions to the Commission are identified in Appendix 5.

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[13] Related case law listed in Appendix 3.

We retained our own compensation consultants/actuaries from the firm of Morneau Sobeco to advise the Commission on matters that arose as a result of the information submitted to us and/or obtained at the public hearings we conducted, and to opine on such other matters as the Commission referred to them.

We met with counsel for the federal government (hereafter, the "Government") and for the judiciary early in the process to determine what they respectively saw as the major issues so that we could prepare to assess the eventual submissions they and others might make. Their candour and advice was of benefit to us. The judiciary made submissions to us through the Association of Canadian Superior Court Judges and the Canadian Judicial Council (hereafter referred to as the "Association and Council"). The Association and Council, we were advised, represent over 90% of the federal judiciary.

We found when our Commission was first created that it had no staff or infrastructure. The Office of the Commissioner for Federal Judicial Affairs assisted us in getting organized and in recruiting an Executive Director. Our Executive Director, Jeanne Ruest, in turn, recruited a Research Assistant, Elizabeth Morin, and organized our website. (We will speak further to this situation in our recommendations for the future.) We believe, notwithstanding our late start, that the Commission has been able to effectively assemble the information we required to make our recommendations.

We have had the benefit of reviewing a series of reports initially entitled: *The Advisory Commission on Senior Level Retention and Compensation;* the first such report (the Strong Report) was issued in January 1998 and the latest report in the series was issued in May 2003. These reports were commissioned by the Treasury Board of Canada and represent the views and conclusions of a sophisticated and experienced group of business people and academics. The last three such reports were chaired by Professor Carol Stephenson, Dean of the Ivey School of Business, University of Western Ontario.

These reports were of assistance to us because they addressed, *inter alia,* the need for the federal government to attract and retain executive level personnel with the requisite skills for the efficient operation of the nation's civil service. They do not refer to the compensation paid to judges, but because of the importance of the comparator of the most senior civil servants to judges, the rationale for establishing those salaries was seen by us to be important, and is addressed later in this report.

The Commission held hearings in Ottawa on February 3 and 4, 2004, and the presenters are listed in Appendix 6. We granted a hearing to all those who expressed an interest in making an oral presentation. Those hearings were beneficial and resulted in frank and useful discussions and presentations by all those participating. In particular, the presentation by the Government led by Paul Vickery, along with Judith Bellis and Linda Wall, and the presentation for the Association and Council, which was led by Yves Fortier, Q.C. and Pierre Bienvenu, were very helpful to the Commission. Certain matters were identified at those hearings that needed to be further addressed, and, as a result, at the end of March further written submissions were made. In April, we received submissions from the principal parties on the subject of the consequences of conjugal breakdown on the judges' annuity.

We have adverted to the precedential value of the previous commissions. It is proper that we state that we did not consider ourselves to be "bound" by any previous decisions, including those of the Drouin Commission. We were, and are, of the view that it would be counter-productive to fix judicial salaries as having a pre-determined relationship to other salaries, whether those of senior civil servants or senior legal practitioners. Those considerations represent dynamics at work in our society and they change constantly. We believe the proper approach was to consider these and other factors in light of the most current information and to make recommendations accordingly. Were it otherwise, there would be no need to address this subject every four years, as contemplated by the *Judges Act*.

## 1.3 Our Jurisdiction

As stated, s. 26 of the *Judges Act* frames our role. We have interpreted this legislation as dictating that our recommendations be prospective in nature for the next four years. Our mandate is to consider the issues and make recommendations that will have the future desired effect on the financial security of judges and the availability of excellent candidates for appointment to judicial office. As will become apparent from this report and our comments below, we concluded that we are not some form of judicial ombudsman cloaked with authority to correct perceived past wrongs or anomalies, nor to re-arrange the historical structure of our courts, which have served the country so well.

Section 26 calls on us to make recommendations as to what compensation would be "adequate" to fulfill the goals established by the legislation. We interpret that mandate as meaning compensation that is appropriate or sufficient. If it is appropriate or sufficient to achieve the desired goals, it will be adequate, whereas if it were not appropriate compensation, in hindsight it might be determined not to have been adequate.

We are obliged by s. 26 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.

We interpret this direction as obliging us to consider whether the state of economic affairs in Canada would or should inhibit or restrain us from making the recommendations we otherwise would consider appropriate. An economy providing large surpluses, lower taxes, etc. should not influence a commission to make recommendations that would be overly generous or spendthrift. The consideration to be applied is whether economic conditions dictate restraint from expenditures out of the public purse.

While this consideration may well impose difficulties for future commissions, we conclude that the current economic condition in Canada does not restrain this Commission from arriving at the compensation recommendations we believe are appropriate.

To wit:

- The 2004 budget handed down in March by the federal government clearly signals that the economy in Canada is very healthy indeed. It identifies low projected inflation rates and a growing economy.

- The recent report of the Conference Board of Canada similarly rates Canada's economy as healthy and growing and forecasts significant surpluses in the next two years and growing surpluses over the longer term.[14]

- A recent report from the Royal Bank of Canada states:

> "The Canadian economy bounced back in the fourth quarter of 2003 from the year's shocks with the strongest growth rate in six quarters. Growth comes in at 3.8% and was 1.7% for the year as a whole. We expect the economy to nearly double last year's performance of a target of 3.2% this year and 3.6% next year." [15]

- The recent federal budget referred to above highlights Canada's enviable economic condition relative to other G-7 countries as follows:

  - Canada was the only G-7 country to record a surplus in 2002 and 2003.

  - According to the Organization for Economic Co-operation and Development (OECD), Canada is projected to be the only G-7 country to record a surplus in both 2004 and 2005.

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[14] The Conference Board of Canada, *Canadian Outlook, Executive Summary*, Winter 2004.

[15] Econoscope, March 2004.

- Canada has made the largest improvement in its budgetary situation among the G-7 countries since 1992, including the sharpest decline in the debt burden.

- Canada's total government sector debt burden declined to an estimated 35% of Gross Domestic Product (GDP) in 2003 and, according to the OECD, it is expected to be the lowest in the G-7 in 2004.

- The Canadian federal government posted a surplus of $7 billion, or 0.6% of GDP, in 2002–03, while the U.S. federal balance fell further into deficit in 2002–03 to U.S. $375 billion, or 3.5% of its GDP.

- For 2003-04, a surplus of $1.9 billion is estimated for Canada, while a deficit of U.S. $521 billion is projected for the United States.

- As a result of continued surpluses at the federal level in Canada and the recent deterioration in U.S. federal finances, the federal market debt-to-GDP ratio in Canada is expected to fall below the U.S. figure in 2003–04 for the first time since 1977–78.

In light of all this information, we conclude there is no economic basis for us to restrain our recommendations from what we otherwise believe is appropriate.

We have been apprised of the surprising number of people who, by virtue of amendments to legislation passed since the report of the Drouin Commission, have had their compensation tied to that which is accorded by Parliament to the federal judiciary. The persons so affected and the legislation creating this effect is summarized in Appendix 7. The wisdom of directly linking those compensation arrangements to the compensation paid to puisne judges is not for us to comment on. We have concluded that our terms of reference in s. 26 of the *Judges Act* neither require nor permit our consideration of any extraneous implications that will flow from our recommendations pursuant to the legislation referred to in Appendix 2; and accordingly, we have concluded that we are obliged to ignore any ramifications for the compensation of others which will ensue as a result of that legislation. In other words, it is our duty to make recommendations with respect to the appropriate compensation for judges as contemplated in s. 26 of the *Judges Act*, and that is what we have done.

## 1.4 Conclusions

Our conclusions have been arrived at from a consideration of the information we received from the submissions made to us and from the efforts made and research conducted by our own staff and consultants. Our recommendations are consistent with our description of the approach we took in the interpretation of s. 26 and the philosophy that guided our approach and informed our conclusions.

Reports of the Strong Committee and its successors, mentioned above, have the advantage of being able to consider an active marketplace in arriving at recommendations as to the proposed appropriate level of compensation for the most senior of the government's executives. This Commission does not have that ability, inasmuch as judges' compensation is arrived at in a monopsony or a situation where there is no marketplace for puisne judges; all judges are paid from the public purse and appointed by the federal government. The only direct comparison would be to judges similarly remunerated by governments in other jurisdictions. We received no information to make the appropriate comparison with respect to working conditions, cost of living, judicial tradition, annuities, security of tenure, and all the other factors that might permit us to consider the role and compensation of judges in other jurisdictions, which could assist us to make meaningful comparisons. We comment further on this situation in our recommendations.

Accordingly, our role is to consider, as we have, those available comparators that are best able to provide us with an informed opinion and to reach a judgment on what compensation would be appropriate for federally appointed judges for the next four years.

The government appoints judges from pools of candidates who have applied for such an appointment. Our purpose is to recommend a level of compensation that ensures that those pools from which appointments are made are composed of persons who are highly qualified for judicial office, whereby the country ensures that its judiciary – the

third arm of our democracy – is secure in its position and can confidently, efficiently, and with the wisdom and experience of excellent judges, fulfill its important role in the maintenance of that democracy. In a prosperous and progressive country like Canada, subject as it is to the rule of law, nothing less should be tolerated.

Our recommendations are for a level of compensation that will not deter the best and the brightest from seeking judicial office and that should ensure that the level of compensation provided to puisne judges is not so great that the office will be sought after for its monetary rewards alone. Rather, it should appeal to those highly qualified persons of maturity and judgment who seek to provide a valuable public service to their country. In other words, we are of the view that "too much" would not be in the public interest just as "too little" is obviously not in the public interest.

The importance and prestige of the judiciary must continue to be gauged by the manner in which judges carry out their important duties rather than the compensation they are accorded by this or any other commission. This concept has been foremost in the posture that has been adopted by our puisne judges in the past and, as a result, we are privileged to live in a society where our judiciary is nearly universally regarded as a group of dispassionate officers of the law who manifestly serve no other interests. We must ensure that that continues to be so.

There are two parts to the quest of securing a judiciary of high quality and this Commission can influence only one part. We expect that our recommendations, if implemented, will result in a salary level that will attract the best and the brightest to make themselves available for judicial appointment, or at least not discourage them from doing so. The goal will be attained when the second part of the quest is properly fulfilled, which is the selection, from the pool of candidates available, of the most qualified of those prepared to accept judicial office. That will continue to be the challenge of the government.

# CHAPTER 2

# JUDICIAL SALARIES

This chapter deals with the considerations underlying our approach to the evaluation of the appropriate level of judicial salaries for the ensuing four-year period, the position of the principal parties, the comparators put forward and our view of their relevance and importance, our assessment of the issues raised before us, and those other matters that we considered relevant and useful.

## 2.1 Financial Security and the Need to Attract Outstanding Candidates

While financial security and the need to attract outstanding candidates are interrelated, they have different purposes. Judicial salaries and benefits must be set at a level such that those most qualified for judicial office, those who can be characterized as outstanding candidates, will be not be deterred from seeking judicial office. That level of salary and benefits must also be such that those who hold judicial office can never be tempted, or be seen to be tempted, to compromise their independence and integrity by reward or hope of reward, either during or after their judicial tenure. This latter consideration is why the judicial annuity is such an important part of the judicial compensation package. But its value, on an annual basis, must also be considered as part of the financial package for those contemplating judicial appointment, given that the large majority of those applying, especially those in private practice, are unlikely to have any such benefit available to them.

We have to take into account that there is no universally applicable definition or measure of “outstanding”, as it applies to candidates for judicial office, given the geographical and pre-appointment occupational diversity of applicants. Certainly, pre-appointment income levels can be no firm guide to quality, for a number of reasons. A large income is no sure indication, although financial success can be an indicator of

ability. Incomes of self-employed lawyers, including the most successful, vary substantially across the country. Incomes of lawyers in larger firms may be thought to be generally higher than those in smaller firms, but our common experience tells us that this is far from universally the case, since many small firm lawyers, depending upon the kind of law they practice, may earn large sums of money, while many who work in large firms, again depending on the type of law they practice, do not.

Outstanding candidates for the judiciary can be found in all types of legal practice, such as academe, government service, including the provincial or territorial courts, as counsel in corporations, as well as in private practice. In private practice, incomes vary significantly, not only by geography, but by area of practice, given that many outstanding potential candidates work in what are generally considered the less well paid segments of the profession, such as family law, criminal law, or legal aid clinics. Even in some of those areas, there are exceptions. For lawyers in private practice, many of the most successful and high-income potential candidates will have made a significant capital contribution to their firm, which would be returned to them upon appointment.

We have to take into account all of these factors, and the reality that while for some, judicial appointment involves a significant reduction from the income that they enjoyed in practice, for others the current level of salary and benefits may result in an enhanced economic package.

Tables 1 through 5 show the statistics on age at date of appointment, area of practice, and geographical distribution of federal appointees from 1997 to 2004.

Table 1
**Age at Date of Appointment**
January 1, 1997 to March 30, 2004

| Age Groups | # of Appointees | % of Appointees |
|---|---|---|
| 40 to 43 | 14 | 3.8% |
| 44 to 56 | 310 | 84.2% |
| 57 to 66 | 44 | 11.0% |
| Total | 368* | 100% |

**Source**: Office of the Commissioner for Federal Judicial Affairs – Judicial Appointments Secretariat.

Table 2
**Appointees' Predominant Occupation**
January 1, 1997, to March 30, 2004

| Sector | # of Appointees |
|---|---|
| Private Practice | 268 |
| Government (including federal, provincial and municipal as well as administrative tribunals and regulatory bodies, law societies and law reform bodies) | 86 |
| Academe (i.e., universities or colleges) | 8 |
| Legal Aid Clinic | 2 |
| Corporate Legal Department | 4 |
| Total | 368 |

**Source**: Office of the Commissioner for Federal Judicial Affairs – Judicial Appointments Secretariat.

Table 3
**Size of Firm for Private Sector Appointees**
January 1, 1997 to March 30, 2004

| Size of Firm | # of Appointees |
|---|---|
| More than 60 Lawyers | 19 |
| 41 – 60 Lawyers | 54 |
| 25 – 40 Lawyers | 40 |
| 6 – 24 Lawyers | 78 |
| 2 – 5 Lawyers | 49 |
| Sole Practice | 27 |
| Unknown | 1 |
| Total | 268 |

**Source**: Office of the Commissioner for Federal Judicial Affairs – Judicial Appointments Secretariat.

* As of May 1, 2004, there are currently 1,008 puisne judges.

Table 4
**Area of Practice at Date of Appointment**
January 1, 1997 to March 30, 2004

| Area of Practice | From Private Practice | From Government |
|---|---|---|
| Administrative Law | 35 | 6 |
| Bankruptcy & Insolvency Law | 3 | 0 |
| Civil Litigation – Plaintiff | 45 | 4 |
| Civil Litigation – Defendant | 4 | 10 |
| Construction Law | 2 | 0 |
| Corporate/Commercial Law | 24 | 18 |
| Criminal/Quasi-criminal Law | 44 | 16 |
| Employment/Labour Law | 10 | 5 |
| Environmental Law | 1 | 0 |
| Family/Matrimonial | 55 | 12 |
| Immigration Law | 0 | 1 |
| Public Law | 1 | 0 |
| Real Estate Law | 8 | 3 |
| Tax Law | 14 | 6 |
| Wills, Estates & Trusts Law | 4 | 0 |
| Workplace Safety & Insurance Law | 12 | 2 |
| Other[1] | 6 | 3 |
| Total[2] | 268 | 86 |

**Source**: Office of the Commissioner for Federal Judicial Affairs – Judicial Appointments Secretariat.

1 Includes Natural Resources Law, International Law, Native Law, Telecommunications Law and Class Actions.
2 Does not include appointees from academe, legal aid clinics or corporate lawyers.

Table 5
**Regional Breakdown of Practice at Date of Appointment**
January 1, 1997 to March 30, 2004

| Province/Territory | # of Appointees | Metropolitan Area | # of Appointees |
|---|---|---|---|
| Newfoundland and Labrador | 15 | Calgary | 11 |
| Prince Edward Island | 5 | Edmonton | 15 |
| Nova Scotia | 25 | Halifax | 12 |
| New Brunswick | 15 | Hamilton | 6 |
| Quebec | 73 | Kitchener | 2 |
| Ontario | 129 | London | 4 |
| Manitoba | 17 | Montréal | 45 |
| Saskatchewan | 17 | Oshawa | 4 |
| Alberta | 32 | Ottawa–Gatineau | 25 |
| British Columbia | 36 | Québec | 10 |
| Northwest Territories | 1 | Regina | 6 |
| Yukon | 2 | Saint John | 5 |
| Nunavut | 1 | Saskatoon | 6 |
| | | Sherbrooke | 1 |
| | | St.Catharines-Niagara | 4 |
| | | St. John's | 6 |
| | | Sudbury | 8 |
| | | Toronto | 42 |
| | | Trois-Rivières | 3 |
| | | Vancouver | 26 |
| | | Victoria | 2 |
| | | Windsor | 4 |
| | | Winnipeg | 17 |
| | | Other | 104 |
| Total: | 368 | | 368 |

**Source** : Office of the Commissioner for Federal Judicial Affairs – Judicial Appointments Secretariat.

Table 5 shows that geographical diversity of appointees was, of course, very wide. The number of judges appointed from the major centres, where incomes might be considered to be highest, included 12 from Halifax, 45 from Montreal, 42 from Toronto, 17 from Winnipeg, 11 from Calgary, 15 from Edmonton, and 26 from Vancouver. We note as well that, while many judicial appointees do not come from the large cities, those who work in large urban centres are subject to a higher cost of living than those who do not. Judicial compensation and benefits, with only minor exceptions, is the same throughout Canada, though the reality is that the judicial dollar goes further in some areas of the country than it does, say, in Toronto or Vancouver.

We must also be mindful that, as shown in Table 6, the number of applicants who are recommended or highly recommended by the provincial and territorial Judicial Appointment Committees and the Federal Judicial Appointments Secretariat that inform the Minister of Justice, relative to the number of judicial vacancies, demonstrates that current levels of salary and benefits do attract qualified candidates.[16] This consideration must be tempered by the fact that, while many potential candidates may be qualified or even highly qualified, what is important for the well-being of our judicial system and democracy, and what is mandated for us, is to ensure that salary and benefit levels are adequate to attract, or at least, not discourage, *outstanding* candidates, in other words, the best and the brightest, which must be only a subset of even those who may be highly recommended.[17]

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[16] Between 1988 and March 30, 2004, the Federal Judicial Appointments Secretariat received 6,964 applications for judgeship; after assessment by various provincial/territorial judicial appointments committees, 2,084 candidates were recommended and 585 were highly recommended for a total of 2,669 recommendations. Of these, 793 were actually appointed to the bench (11.39% of total applications or 29.71% of recommended applicants). *Figures from the Federal Judicial Appointments Secretariat, March 30, 2004.*

[17] *PEI* Reference Case, at paragraph 173.

Table 6

## Judicial Appointments Process

From 1988 to March 30, 2004

| Province | Applications Received | Candidates Proposed (not assessed) | Recommended | Highly Recommended | Total Recommended and Highly Recommended | Provincial Judges | Unable to Recommend | Candidates Appointed |
|---|---|---|---|---|---|---|---|---|
| Newfoundland and Labrador | 158 | 7 | 41 | 38 | 79 | 17 | 48 | 21 |
| Prince Edward Island | 66 | 2 | 23 | 14 | 37 | 0 | 23 | 9 |
| Nova Scotia | 386 | 7 | 117 | 29 | 146 | 23 | 186 | 43 |
| New Brunswick | 262 | 10 | 82 | 52 | 134 | 11 | 100 | 25 |
| Quebec | 1,651 | 43 | 488 | 64 | 552 | 44 | 947 | 168 |
| Ontario | 2,491 | 77 | 807 | 236 | 1,043 | 77 | 1,179 | 266 |
| Manitoba | 306 | 14 | 86 | 44 | 130 | 16 | 137 | 37 |
| Saskatchewan | 267 | 2 | 97 | 27 | 124 | 10 | 120 | 38 |
| Alberta | 597 | 16 | 170 | 56 | 226 | 20 | 302 | 77 |
| British Columbia | 677 | 12 | 161 | 17 | 178 | 31 | 428 | 101 |
| Northwest Territories | 24 | 0 | 4 | 3 | 7 | 0 | 6 | 2 |
| Yukon | 30 | 0 | 3 | 3 | 6 | 3 | 16 | 3 |
| Nunavut | 49 | 9 | 5 | 2 | 7 | 3 | 28 | 3 |
| Total | 6,964 | 199 | 2,084 | 585 | 2,669 | 255 | 3,520 | 793 |

**Source**: Office of Federal Judicial Affairs – Judicial Appointments Secretariat.

## 2.2 Positions of the Principal Parties

The current salary levels of puisne judges (2003–04), including the $2,000 annual increase recommended by the Drouin Commission and the statutory increases for inflation, is $216,600, up from the $198,000 level recommended in May 2000 by the Drouin Commission and accepted by the federal government. The chief justices and associate chief justices of the Superior, Federal and Tax Courts receive a salary of $237,400, judges of the Supreme Court of Canada, a salary of $257,800, and the Chief Justice of Canada $278,400. The increases set out above for puisne judges between the years 2000 and 2003 amount to 9.39% and the increases over that period for associate chief justices and chief justices, and the Chief Justice of Canada are of the same order of magnitude.

The Association and Council submit that the salary level of a puisne judge should be set at $253,800 for April 1, 2004, which is the equivalent of the mid-point of the current remuneration of what is now the second highest level of deputy minister (DM-3), and the salaries of chief justices, associate chief justices, Supreme Court of Canada judges, and the Chief Justice of Canada, be set at the same percentage differential as at present.

The submission of the Association and Council would result in a 17.2% increase over the current salary level for puisne judges.

As well, the Association and Council propose that, in order to maintain an appropriate level of compensation throughout the four-year period until the next Quadrennial Commission, the concept of annual increases continue, except that the annual increase should be $3,000 rather than the current $2,000. This, of course, would be in addition to the annual statutory indexation for inflation.

These increases were justified by the Association and Council, in large part, by the increasing erosion of what may be termed “rough equivalence” between judicial salaries and the salaries of DM-3s. At the time of the report of the Drouin Commission award of

$198,000, the DM-3 mid-point salary level, including at-risk pay, of which more will be said later, was approximately $203,000. However, in the period 2000–01, the actual level of DM-3 income at the mid-point, including at-risk pay, had risen to $239,081 and had risen by 2003–04 to a mid point of $253,880, while judicial salaries rose to $216,600, as shown in the following table.

Table 7
**Comparison of DM–3 and Judicial Salaries**
1999–2003

| Year | DM–3 Mid-Point Salary | Estimated At-Risk Pay | Total Compensation | Judicial Salary |
|---|---|---|---|---|
| 1999 | $188,250 | $14,684 | $202,934 | $178,100 |
| 2000 | $203,300 | $35,780 | $239,080 | $198,000 |
| 2001 | $209,650 | $29,770 | $239,420 | $204,600 |
| 2002 | $214,600 | $33,049 | $247,649 | $210,200 |
| 2003 | $220,000 | $33,900 | $253,900 | $216,600 |

**Source**: Privy Council Office, Association and Council Submission, Performance Pay Information, Supplementary Material.

The position of the Government was starkly different. Taking into account its view of the consideration of fiscal restraint, the availability of a surplus of qualified applicants for the available judicial posts, the demographics of these applicants, trends in the public sector, the argument that the DM-3 salary levels have become a poor comparator and that at-risk pay awarded to DM-3s should not be taken into account, the Government proposes an increase of 4.48%, including statutory indexing as of April 1, 2004, which would bring the salary level of puisne judges to $226,300, plus annual increases of $2,000 in each of the years 2005, 2006 and 2007 in addition to statutory indexing in those years. Taking into account these increases, the Government proposal amounts to an increase of 7.25% over those years, in addition to the statutory indexing in 2005, 2006 and 2007.

## 2.3 Comparators

For reasons that will become apparent in the analysis that follows, we were disappointed, and our task made more difficult, by both the lack of available and reliable data on comparators other than the remuneration of public servants at the deputy minister level, and the lack on consensus between the principal parties on the comparative information that was available.

Current information on the income levels of lawyers in private practice in Canada seems to be significantly less reliable than it was at the time of the Drouin Commission in 1999–2000, for reasons that appear to be related to the way in which the Canada Revenue Agency (CRA) gathers and reports the statistics relating to lawyers in private practice who are not employees. We discuss later in this chapter our view of the information that is available, but it is an understatement to say that it is less than satisfactory. We will make some observations and recommendations as to how this absence of important information on a key comparator might be addressed for the benefit of future commissions.

The problem with the use of the DM-3 comparator relates to the fact that there are presently only nine[18] persons in the federal public service who have that designation, along with two more who have the recent designation of DM-4 (the Clerk of the Privy Council and the Deputy Minister of Finance). In the years since the 1998 Strong Report and the successor reports to it, the level of compensation of the DM level has, for a variety of reasons detailed in those reports, contained a significant and increasingly large element of at-risk pay, contingent upon achievement by the DM of specific defined annual goals.[19] At-risk pay, and the achievement of defined annual goals, are concepts that have no relationship whatever to the judicial function.

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[18] There were 13 such persons at the time of the Drouin Commission, Drouin (2000) at page 23, and 20 such persons at the time of the Crawford Commission, Crawford (1993) at page 11.

[19] Advisory Committee on Senior Level Retention and Compensation: 1st Report (Strong, January 1998), 2nd Report (Strong, March 2000), 3rd Report (Strong, January 2001), 4th Report (Stephenson, March 2002), 5th Report (Stephenson, August 2002), 6th Report (Stephenson, June 2003).

The problem is compounded by the starkly different positions of the principal parties as to how the DM-3 comparator should be approached. The position of the Association and Council was that, because of the historic relationship between the DM-3 salary and those of judges, and because at-risk pay should be considered as simply a part of DM-3 compensation, the mid-point of such compensation remained the most appropriate comparator, and should form the basis of the salary recommendation. The position of the Government, as outlined earlier, was that the DM-3 comparator has outlived its usefulness, or at least its importance, and at-risk pay should not be considered at all.

Given these differences, the problems with the information available concerning the current income of practicing lawyers, the lack of reliance by either party on judicial salaries elsewhere, and the lack of reference by the principal parties to any other comparator, the difficulty faced by this Commission is apparent.

We turn to a consideration of the comparators, based on the information that we have from the principal parties and our own research.

### *2.3.1 DM-3 Comparator*

The relationship between judicial salaries and DM-3 salaries goes back more than 20 years, and has been considered by every commission investigating federal and judicial salaries.[20] The theory upon which this relationship is said to be based is not that the jobs of a judge and a DM-3 are similar, but rather that the relationship is a reflection of "what the marketplace expects to pay individuals of outstanding character and ability, which are qualities shared by deputy ministers and judges".[21] That is a proposition that we can accept, but as will be shown later in this chapter, we do not apply it in the way proposed by the Association and Council or by the Government. The Association and Council concede that there can be no direct comparison between senior public servants

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[20] During the period 1975 to 1992, it appears that judges' salaries, with the exception of 1975 and 1986, were below the DM-3 mid-point and generally below the minimum of the DM-3 salary scale . . ." (Department of Justice, October 1992, *1975 Equivalence*, page 5). This document delineates the historical relationship between judicial salaries and those of senior deputy ministers. Also see Scott (1996), at page 14, "A strong case can be made that the comparison between DM-3's and judges' compensation is both imprecise and inappropriate."

[21] Drouin (2000), at page 31, quoting from Scott (1996) at page 13, and Courtois (1990) at page 10.

and judges because judges are *sui generis* and independent of government. Nevertheless, the Association and Council's salary proposal virtually equates the judicial salary of puisne judges with the current salary, including mid-point at-risk pay, of DM-3s.

The Government's submission is that the DM-3 range is a relatively poor comparator for two principal reasons: there is a difference in the security of tenure and the concept of at-risk pay is inapplicable to judges. Rather, the Government suggests we be guided by general compensation trends in the federal public service, especially in the executive and deputy minister ranks, and notes that annual salary increases, excluding at-risk pay, in the last three years have ranged from 2.5% to 3.1% and the negotiated annual increases in the same period were 2.5% to 2.7%. It argues that increases in judicial salaries should continue to be consistent with overall compensation trends in the federal public service, including DM-3s, but without any consideration given to at-risk pay. That relationship is shown in Table 8.

Table 8
**Comparison of DM–3 and Judicial Salaries**
1999–2003

| Year | DM–3 Mid-Point Salary (without at-risk pay) | Judicial Salary |
|---|---|---|
| 1999 | $188,250 | $178,100 |
| 2000 | $203,300 | $198,000 |
| 2001 | $209,650 | $204,600 |
| 2002 | $214,600 | $210,200 |
| 2003 | $220,000 | $216,600 |

**Sources**: Privy Council Office; Government Submission, December 15, 2003, Appendices Vol. II, Tab 9; Association and Council Submission, December 15, 2004, Appendices, Tab 1.

The Association and Council take exception to this position, which was argued before the Drouin Commission and expressly rejected.[22] The Association and Council strongly urged us not to accede to the Government submission that the DM-3 comparator and "rough equivalence" have become inappropriate, and to accept the proposition that at-risk pay is properly included in the comparison. While the Association and Council did not argue that we were bound to follow the reasoning and the result of the Drouin Commission, they urged that we should not fail to do so unless there were changes in the circumstances that led to that conclusion or good reasons demonstrated not to do so, and they argue that none have been shown. They point to the widening of the "gap" between DM-3 remuneration and judges salaries that has occurred since 2000. The Association and Council went so far as to say that, while they were not at this time arguing for rough equivalence with the newly created DM-4 level, they were reserving the right to do so in the future. The Association and Council acknowledged that no comparator, including the DM-3 comparator, should be determinative, and that comparators could only serve to inform the ultimate recommendation.

We have difficulty with the positions put forward by both parties. While we agree with the proposition that at-risk pay is simply a form of remuneration and cannot be ignored, to the extent that the DM class is considered a proper comparator, it is also true that since the publication of the Strong Report in 1998 and its successor reports, the concept of at-risk pay has proved a more important and increasing part of the remuneration of federal public servants at the DM level (see Table 9). It is apparent from a review of those reports that this is so in part because of the executive market pressures that exist to attract and retain talented people in the public service, as compared to the income levels available to such people in the private sector, and in part as an incentive to reward the attaining of preset and measurable annual goals of achievement. Those considerations are not relevant to the judicial context.

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[22] Drouin (2000), at pages 26–28.

Table 9
**History of At-Risk Pay for Deputy Ministers**
1999–2003

| | Target At-Risk Pay as a Percentage of Salary | | | |
|---|---|---|---|---|
| **Year, Starting** | **DM-1** | **DM-2** | **DM-3** | **DM-4** |
| April 1, 1999 | 7.5% | 10.0% | 10.0% | n/a |
| April 1, 2000 | 7.5% | 10.0% | 10.0% | n/a |
| April 1, 2001 | 15.0% | 20.0% | 20.0% | 25.0% |
| April 1, 2002 | 15.0% | 20.0% | 20.0% | 25.0% |
| April 1, 2003 | 15.0% | 20.0% | 20.0% | 25.0% |
| | **Actual At-Risk Pay as a Percentage of Salary** | | | |
| **Year, Starting** | **DM-1** | **DM-2** | **DM-3** | **DM-4** |
| April 1, 1999 | 5.85% | 7.8% | 7.8% | n/a |
| April 1, 2000 | 6.6% | 8.8% | 17.6% | n/a |
| April 1, 2001 | 10.65% | 14.2% | 14.2% | 17.75% |
| April 1, 2002 | 11.55% | 15.4% | 15.4% | 19.25% |
| April 1, 2003 | 11.55% | 15.4% | 15.4% | 19.25% |

**Sources**: Government Submission, December 15, 2003, Appendices Vol. II, Tab 9; Association and Council, February 3, 2004, Book of Additional Materials, Tab 4.

We also question the wisdom of confining the examination to the DM-3 level, rather than considering the entire group of deputy ministers from DM-1 to DM-4. The passage quoted earlier from the Courtois and Scott Commissions, and accepted by the Drouin Commission, referred to deputy ministers, not DM-3s.[23] It is apparent that the large majority of those who reach the DM-3 level have come up from the DM-1 and DM-2 levels, and that, on average, those who reach the DM-1 and DM-2 levels are public servants of long experience and demonstrable ability.[24]

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[23] In 1993, at the time of the Crawford Commission, there were 20 DM-3s in a smaller Public Service, as compared with 9 DM-3s in 2004 –Crawford (1993) at page 11.

[24] There are currently 59 Deputy Ministers, of whom 25 are DM-2s and 23 are DM-1s. The average level of experience of DM-2s is 23.5 years. Information on the average level of experience of DM-1s is not available, but is believed to be about 20 years. The average level of experience of the nine current DM-3s is 25 years. On the basis of available information, 86% were promoted from within the public service and 68% have more than 20 years experience.

The level of experience of DM-1s and DM-2s is not very much different from that of judges on their appointment, the significant majority of whom (84.2%) are between the ages of 44 and 56 years.

Since many, if not most, of those who reach the DM-1 and DM-2 levels have the qualities of character and ability that qualify them for promotion to DM-3, were openings available, there seems to us to be no good reason to exclude them from consideration. This is especially so given the importance that is accorded to the DM-3 comparison and the fact that, at present, there are only nine people who hold that rank, a very small sample upon which to base the remuneration of more than 1,100 federally appointed judges. Another consideration that influences our thinking was the difference in the pension available to those at the DM levels compared with the judicial annuity, which we will discuss in the next chapter. We are also cognizant of the fact that deputy ministers do not have the security of tenure accorded puisne judges.

If the salary and at-risk pay of all DM levels are taken into account, there are a variety of ways of looking at their remuneration.

Table 10
**DM Salaries**
2003–04

| Level | # | Mid-Point Salaries | Target At-Risk Pay | Payout Ratios | Estimated At-Risk Pay | Estimated Total Cash Compensation |
|---|---|---|---|---|---|---|
| DM-4 | 2 | $246,400 | 25% | 77% | $47,400 | $293,800 |
| DM-3 | 9 | $220,000 | 20% | 77% | $33,900 | $253,900 |
| DM-2 | 25 | $196,400 | 20% | 45% | $17,500 | $213,900 |
| DM-1 | 23 | $170,850 | 15% | 53% | $13,500 | $184,350 |

**Sources**: Government Submission, December 15, 2004, Appendices, Vol. II, Tab 9; Association and Council Submission, February 3, 2004, Supplemental Materials.

Table 11
**DM Scenarios**
2003–04

| Scenario | Description | Mid-Point Salaries | Total Cash Compensation* |
|---|---|---|---|
| 1 | Simple Average of all DM Levels | $208,400 | $236,500 |
| 2 | Weighted Average of all DM Levels (weighted by the number of incumbents) | $191,700 | $211,200 |
| 3 | Simple Average of DM-2 to DM-4 Levels | $220,900 | $253,900 |
| 4 | Weighted Average of DM-2 to DM-4 Levels (weighted by the number of incumbents) | $205,100 | $228,300 |

**Source**: Judicial Compensation and Benefits Commission.

* Includes at-risk pay and adjusted to reflect the changes in the number of DM–1s, DM–2s and DM–3s.

We do not accept the submission of the Association and Council that to look beyond the DM-3 comparator in any way politicizes the process, or makes it arbitrary. Rather, we are of the view that it is incumbent upon us to look at a broader range of the most senior public servants whose qualities, character and abilities might be said to be similar to those of judges.

We therefore looked at other classes of Governor in Council appointees. We thought that was appropriate, since the quality of a person who becomes a president or a chair of such institutions as the Canadian Institutes of Health Research (CIHR), the National Research Council (NRC), or one of the quasi-judicial commissions, which include the Canadian Radio-Television and Telecommunications Commission (CRTC), the Office of the Superintendent of Financial Institutions (OSFI), the National Energy Board (NEB), the Canadian Transportation Agency (CTA) and the Competition Bureau are likely to be as highly qualified as those who rise to the level of DM-3. Those who were appointed to these positions are recognized leaders and experts in their field. Some are lawyers. The remuneration of the chairs of the quasi-judicial commissions is more comparable in some respects to the judicial context, since there is no at-risk pay associated with these

posts (see Table 12). In addition to their quasi-judicial duties, they administer large agencies. Unlike judges, they do not have security of tenure, since the length of appointment ranges from five to ten years, with the possibility of reappointment and, while pension benefits are roughly equivalent to those at the DM-3 level, many, if not most, of such appointees come from outside the public sector, and therefore do not qualify for a full pension because of the limited number of years of service.

Table 12
**Salaries for Governor in Council and Quasi-Judicial Appointees — Top Levels**
To April 1, 2003

| | # of positions | Salary Rate | At-Risk Pay |
|---|---|---|---|
| GC–10 | 2 | $256,200 | 20% |
| GC–9 | 2 | $222,800 | 15% |
| GCQ–10 | 0 | $290,400 | n/a |
| GCQ–9 | 5 | $245,100 | n/a |

**Source**: Advisory Committee on Senior Level Retention and Compensation – 6th Report, May 2003.

The GCQ-9 level includes the chairperson's position in the largest administrative tribunals, the CRTC, NEB, CTA, CB and OSFI. There are only 2 GC-10s, the presidents of the NRC and the CIHR. There are no GCQ-10s at this time.

### *2.3.2 Incomes of Private Practitioners*

Tables 2 and 3 show that it is necessary, to the extent possible, in order to address the requirement of attracting outstanding candidates to the bench, to have regard to the income of private practitioners, since that remains the pool from which most of the appointees, and presumably most of the recommended applicants, come. Unfortunately, the information available to us was problematic, to say the least, and not

as helpful and complete as the information that appears to have been available to the Drouin Commission.[25]

The triennial commissions dealt with the relationship between the incomes of lawyers in private practice and the salaries of judges. The Scott Commission, in particular, was of the view that the commission process in the *Judges Act* was "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."[26]

The rationale, of course, is that it is in the public interest that senior members of the Bar should be attracted to the bench, and senior members of the Bar are, as a general rule, among the highest earners in private practice. While not all the "outstanding" candidates contemplated by s. 26(1.1)(*c*) of the *Judges Act* will be senior lawyers in the higher earning brackets, many will, and they should not be discouraged from applying to the bench because of inadequate compensation.

### *2.3.3 Current Information on Lawyers' Income in Private Practice*

We expected to be given information on the income of lawyers in private practice that would be sufficiently reliable for the purpose of our deliberations, and the principal parties hoped to be able to make a joint submission as to what those statistics demonstrated. They asked for, and were given, to the end of January 2004 to submit the material, so that they could use the most recent information available from CRA, which was not available in time for the initial round of submissions by the principal parties on December 15, 2003.

The information put before us for the years 2000 and 2001 was characterized by the Government as "unreliable" and "of little use" to the Commission for the purposes of establishing comparison with judicial salaries. The 2000 data suggested a significant

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[25] Drouin (2000), at pages 37–41.
[26] Scott (1996), at page 14.

decline in the number of self-employed lawyers since 1997, a suggestion that does not reflect reality. The 2001 data was said to be no better, since it showed a decline of 10% in the number of self-employed lawyers who filed income tax returns and a decline of 36% in average net income, both figures manifestly highly suspect. These problems apparently stem from the changes made by CRA in the way it now collects and analyzes lawyers' income and the difficulties that arise from the way lawyers self-identify and report income, combined with changes in the CRA's occupational coding system. Of course, CRA does not track this information for the purposes of this Commission and the principal parties were obliged to use only what CRA was able to give them.

We obtained the view of our consultant and we forwarded this to the principal parties (see the letter dated March 25, 2004, from Morneau Sobeco in Appendix 8).

The Government requested and obtained an independent analysis on the 2001 data from a compensation specialist at Western Compensation and Benefits Consultants (WCBC). The Government recommends that the Commission utilize the methodology from that firm's report in reviewing the data for the tax years provided.

The Association and Council also provided us with two reports from an independent consultant, Sack Goldblatt Mitchell (SGM). The first such report is dated January 30, 2004, and comments on the data as to the income of lawyers in private practice for the years 2000 and 2001 (the first SGM report). SGM provided a second report (the second SGM report) on February 27, 2004, responding to the Government's reply submission on the usefulness of these numbers and a reply to the WCBC report filed by the Government at the end of January.

### *2.3.4 SGM's Work in Comparing the Year 2000 Data*

The first SGM report was based on the data supplied to it through CRA for the year 2000. SGM found that there were many differences in the way that the 2000

information was presented as compared with that from 1997, particularly in the geographical designations, especially the definitions of the major metropolitan areas. SGM continued to use in its analysis a $50,000 earnings threshold, as it did in the report that it prepared for submission to the Drouin Commission, but observed that this was very conservative, and was of the view that it was reasonable to increase that threshold to account for inflation between 1997 and 2000. Because of the way that the information came to SGM from CRA, they found it impossible to present the data from 1997 in a manner that the Drouin Commission had found appropriate.

In spite of some difficulties with the 2000 data, SGM was able to verify much of it, because of work that it had done and information that it had received in connection with a report it prepared for the Ontario Conference of Judges, in the proceedings before the Fifth Triennial Provincial Judges' Remuneration Commission in Ontario in 2003.

Although it was not possible to calculate exactly to the 75th percentile of income, SGM believed that it was possible to approximate it with a reasonable degree of accuracy. SGM prepared a number of tables that compared the 1997 and 2000 data for both the country and selected metropolitan areas, using the 75th percentile of income, the 44 to 56 age group, a $50,000 exclusion, and an inflation-adjusted exclusion of $53,122. Further adjustments took into account inflation to 2003 and the results are shown in the following table. SGM notes that the 2000 data confirmed the importance of the seven largest Census Metropolitan Areas (CMAs) where more than 60% of Canada's lawyers live.

Table 13

**Income at 75th Percentile by Province and CMA[1] for Lawyers, Aged 44 to 56, after $50,000 Exclusion for 2000 Tax Year**

March 2003, Adjusted for Increased Thresholds and Inflation

| | CRA Tax Year[2] | | | |
|---|---|---|---|---|
| | **Column A** | **Column B** | **Column C** | **Column D** |
| | **Income Calculated at the 75th Percentile** | **Column A Plus 3.1% to Account for Increased Threshold** | **Column A Adjusted for Inflation to April 2004 (6.8%) without Adjustment to Threshold** | **Column B Plus 6.8%** |
| Canada | $238,816 | $246,219 | $250,055 | $262,962 |
| Newfoundland and Labrador | $229,205 | $236,310 | $244,791 | $252,379 |
| Prince Edward Island | n/a | n/a | n/a | n/a |
| Nova Scotia | $158,243 | $163,149 | $169,004 | $174,243 |
| New Brunswick | $178,838 | $184,382 | $190,999 | $196,920 |
| Quebec | $202,972 | $209,264 | $216,774 | $223,494 |
| Ontario | $276,152 | $284,713 | $294,930 | $304,973 |
| Manitoba | $188,481 | $194,324 | $201,298 | $207,538 |
| Saskatchewan | $159,994 | $164,954 | $170,874 | $176,171 |
| Alberta | $255,118 | $263,027 | $272,466 | $280,913 |
| British Columbia | $201,543 | $207,791 | $215,248 | $221,921 |
| | | | | |
| Toronto | $369,536 | $380,992 | $394,664 | $406,899 |
| Montréal | $252,571 | $260,401 | $269,746 | $278,108 |
| Vancouver | $230,482 | $237,627 | $246,155 | $253,786 |
| Ottawa–Gatineau | $225,949 | $232,953 | $241,314 | $248,794 |
| Edmonton | $164,522 | $169,622 | $175,709 | $181,156 |
| Calgary | $361,284 | $372,484 | $385,851 | $397,813 |
| Québec | $201,658 | $207,909 | $215,371 | $222,047 |

**Sources**: Canada Revenue Agency, March 2003; Sack Goldblatt Mitchell Report, January 30, 2004, page 27.

[1] CMAs are Census Metropolitan Areas.
[2] CRA Tax Year indicates the data produced by the Canada Revenue Agency in March 2003.

However, SGM also noted, as do we, significant issues that cast doubt on the accuracy of the 2000 data supplied by CRA. There is a large discrepancy in the number of filers of returns in many areas, notably British Columbia and Ontario. There are unexplained anomalies that call into question the validity of the material presented. Differences between the 2000 data supplied in March 2003 and that supplied in January 2004 remain unexplained, and in the opinion of SGM cast doubt upon the lower income levels for Canada, especially Ontario, in comparison to the March 2003 data they used for the Ontario Provincial Triennial Commission. As a result, SGM did not give much credence to the January 2004 data supplied by CRA.

With respect to the 2001 data, SGM rejected it because of inexplicable differences from both the 1997 data and the 2000 data, which differences could not be clarified or explained either by CRA or the Department of Justice. SGM concluded that the 2001 data was unreliable.

### *2.3.5 The Government's Submission*

Notwithstanding its submission that the data obtained from CRA as to the income of self-employed lawyers was of limited use to the Commission, the Government provided us with the WCBC report dated January 2004 (the first WCBC report), which was an analysis of the 2001 net income of self-employed lawyers who filed income tax returns.

WCBC concluded that a valid comparison could not be made with the 1997 data without major modifications to them, which was not possible to carry into effect.[27] The WCBC analysis concluded that the average net income for the practice of law by self-employed lawyers in 2001 across Canada was $94,000.

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[27] In its first report, submitted in January 2004, WCBC conducted tests of the 2001 data for the purposes of determining their reliability and comparability with the 1997 data submitted to the previous Commission and expressed the following concerns: the fact that the 1997 data included "tax filers who were not lawyers, such as paralegals and notaries"; the fact that the 1997 data excluded only lawyers with zero net income but did not exclude lawyers with negative net incomes; the substantial reduction in the number of reported lawyers when only income from the practice of law is taken into account; and the possibility that income from other sources than the practice of law was included.

The WCBC analysis took issue with the exclusion of self-employed lawyers' earnings below $50,000, and the decision to focus on lawyers between the ages of 44 to 56 years of age. Rather, WCBC based its opinion on the entire range of available data with "more emphasis" (p. 4) on the group from which the majority of judges was appointed. Looking at the entire group, and taking the 66th and 75th percentile for net income in 2001, and applying an age weighting to the data, WCBC found a 66 percentile average income of $105,993 and a 75th percentile, age-weighted, average income of $128,016. Their report noted the average incomes for the major metropolitan areas as well as the all Canada average. The first WCBC report went on to analyze the judicial annuity scheme, about which we will say more in the next chapter. If the value of the annuity is taken to be 24% of the current salary of $216,600, the current annual value of the judicial annuity to each judge, on average, is $51,984.

Table 14
**66th and 75th Percentile Age-Weighted Income for Major Metropolitan Centres**
2001

| Metropolitan Area | 66th Percentile Income | % Difference from Canada | 75th Percentile Income | % Difference from Canada |
|---|---|---|---|---|
| Toronto | $125,305 | 18% | $156,070 | 22% |
| Montréal | $91,941 | –13% | $114,084 | –11% |
| Vancouver | $103,663 | –2% | $128,223 | 0% |
| Edmonton | $112,250 | 6% | $129,560 | 1% |
| Calgary | $115,958 | 9% | $146,555 | 15% |
| Québec | $85,095 | –20% | $105,820 | –17% |
| Ottawa–Gatineau | $122,008 | 15% | $145,926 | 14% |
| Hamilton | $136,257 | 29% | $155,482 | 22% |
| Canada | $105,993 | | $128,016 | |

**Sources**: Canada Revenue Agency; Western Compensation and Benefits Consultants Report, January 2004, page 9.

The first WCBC report went on to calculate the percentile ranking of current judicial income with and without the annuity in the major metropolitan centres with the following result.

Table 15
**Percentile Rankings of Judicial Compensation by CMA***

| Metropolitan Area | Percentile Ranking (excluding Judicial Annuity) | Percentile Ranking (including Judicial Annuity) |
|---|---|---|
| Toronto | 83rd to 91st | 83rd to 91st |
| Montréal | 83rd to 91st | Over 91st |
| Vancouver | 83rd to 91st | Over 91st |
| Edmonton | 83rd to 91st | Over 91st |
| Calgary | 83rd to 91st | Over 91st |
| Québec | Over 91st | Over 91st |
| Ottawa–Gatineau | 83rd to 91st | Over 91st |
| Hamilton | 83rd to 91st | 83rd to 91st |
| Canada | 83rd to 91st | Over 91st |

**Source**: Western Compensation and Benefits Consultants Report on the Earnings of Self-Employed Lawyers for the Department of Justice Canada for the 2003 Judicial Compensation and Benefits Commission, January 2004, page 12.

* CMAs are Census Metropolitan Areas.

### *2.3.6 Responses by the Principal Parties*

The principal parties responded to each other's initial submissions and their experts' reports with respect to the 2000 and 2001 income data on self-employed lawyers.

The Association and Council noted the inconsistency between the Government's stated position that the 2001 data was unreliable and of limited importance, and the WCBC finding that it was reliable. The Association and Council criticized the methodology used by WCBC and its report, where it failed to accept the view that the analysis should

include a $50,000 income threshold, and the failure of WCBC to accept that the 44 to 56 age bracket was the appropriate comparator group.

The second SGM report concluded that the first WCBC report was unreliable in two respects:

a) the data upon which it was based were flawed; and
b) the analysis of the data was flawed.

It is not possible to detail here the entire basis for these criticisms. The primary criticism was the exclusion by WCBC in the 2001 data of 7,198 self-employed lawyers who earned significant professional income, which was said to be from sources other than the practice of law. The second SGM report argues that this exclusion was unreasonable and against common sense, and contrary to other available statistical information. In the view of SGM, exclusion of these individuals accounts for the discrepancy in the average income of self employed lawyers between the 1997 and 2001 data.

SGM points out that, in order for the income levels reported by WCBC to be correct, massive layoffs and significant disruption in lawyers' offices across the country would have been required, but there is no evidence of this. SGM describes many other reasons why the data relied upon by WCBC are flawed and unreliable.

SGM criticizes the failure of WCBC to use the $50,000 threshold and the failure to use the 44 to 56 year comparator group. It describes those omissions as fatal flaws to the usefulness of the report.

The Government responded to the first SGM report by way of a submission, and a second WCBC report. The Government pointed out that, given the Drouin Commission's ultimate recommendation of a judicial salary of $198,000 for judges, it could not have accepted the 1997 data, which placed the income of lawyers in the

comparator age group at the 75th percentile at $230,000 on average throughout Canada, and significantly higher in the major metropolitan areas. The Government's submission refers to the weaknesses it found in the methodology of the first SGM report. Briefly summarized, these criticisms relate to the problems inherent in using an income threshold, which fails to take into account those lawyers who, for a variety of reasons, earn less, yet are fully qualified for the bench, and the failure to exclude the highest-income earners who, so the Government argues, would never consider judicial appointment. The Government points to the lack of statistical evidence to justify a $50,000 exclusion.

The Government believes that the use of the 44-to-56 age group fails to take into account a sufficient sample of the self-employed lawyers who were appointed to the bench, since the actual age range of such appointees is between 41 and 66 years of age.

The second WCBC report comments on the first SGM report and criticizes its use of the 2000 data, rather than the more recent 2001 data.[28] It found the SGM criticism and rejection of the 2001 data to be unconvincing. WCBC criticizes the SGM methodology for the reasons outlined in the Government's submission described above and for the failure to recognize the value of the judicial annuity. WCBC was critical of the attempts made to update the 2000 data to 2004 for many reasons that need not be detailed here but relate to problems with attempts to generalize to the entire country and to assume that the income of self-employed lawyers necessarily rises with inflation or increases every year.

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[28] In a letter dated February 27, 2004, WCBC reviewed the 2000 data relative to the 2001 data and made the following comments: "When analyzing salary or income information, it is best to use the most current information available."; "Although the results might be comparable, both sets of data (that is the 1997 and 2000 data) contain extraneous information which might lead to incorrect conclusions." With reference to the comparison by SGM of the 2000 data with the data prepared for the fifth Ontario Commission, "Data that can be produced does not make the data correct, just consistent. The data still contain the same problems as identified above."

## 2.4 The Commission's View of the Available Evidence

We have taken the reader through this lengthy survey of the principal parties' positions on the current income data available with respect to self-employed lawyers in Canada because it is important to understand both the problems that exist with respect to the available data and the diametrically opposed positions taken by the principal parties on the data available. This review is also necessary because we are of the view that, given the statutory criteria that bind us, information as to self-employed lawyers' income in Canada is important, indeed critical, to our task. This is true as a stand-alone proposition, and particularly so, given the views we have outlined earlier in this chapter with respect to the DM-3 comparator and the principal parties' position on that comparator.

While we deplore the deficiencies in the material put before us with respect to the 2000 and 2001 income data of self-employed lawyers, we remain of the view that the income of self-employed lawyers in Canada is an important, and perhaps the most important, comparator for our work, and that we must do the best we can with the data available. Accordingly, we asked our consultants, Morneau Sobeco, to assist us in this endeavour.

We were of the view that, of the current information on the income of lawyers in private practice that is available, the most reliable was the 2000 data, since it was based on a total grouping of 20,670 lawyers (of whom 7,144 were between the ages of 44 and 56 and had incomes in excess of $50,000) and constitutes a sufficient sampling to provide a credible image of the net incomes of lawyers in private practice. The problems noted with the 2001 data, because of the way they are reported by CRA, are too great for them to be relied upon to any extent. We agree with SGM and the Association and Council that the 2000 data are useful, and our consultant concurs. We note that, notwithstanding the use made of the 2001 data by its consultant WCBC, the Government itself questioned the usefulness of the 2001 data in its own submissions.

The lawyers' net professional incomes reported for 1997 and 2000, while consistent, are not directly comparable because of the significant difference in the reported number of cases. Possible explanations for the reduction include the increased use of personal corporations. However, no complete and satisfactory explanation has been found for the substantial reduction in the number of reported cases.

Unfortunately, we were not provided with any more recent and reliable data. We view the 2001 data as less reliable, since the removal of notaries and paralegals should have had the effect of increasing the average net income rather than reducing it. Also, we find it difficult to accept that 7,198 lawyers could have "professional incomes", but no professional income from the practice of law.

In the final analysis, the 2000 data are more or less consistent with the 1997 data and remains the most credible and relatively recent source of information that we have on the net income of self-employed lawyers in Canada. The number of lawyers in private practice reported in 2000 (20,670), although 33.9% fewer than in 1997, still represents a very significant proportion of all lawyers in private practice in Canada and, as such, constitutes a sufficient sample to study the net income of lawyers in private practice.

We are mindful of the fact that the 1997 and 2000 data are samples and, as such, provide only estimates of the net income of lawyers in private practice in Canada. We can take some comfort in the fact that these estimates are probably conservative because:

- They include the net income of notaries and paralegals, which will tend to reduce the averages, given the information that was provided to us by the Chambre des notaires du Québec;

- The lawyers who have established personal corporations and are no longer reporting professional incomes are probably those with the higher incomes; and

- The nature of the data provided (net income for income tax purposes associated with professional income from the practice of law) is more likely to underestimate rather than overestimate the real economic benefits of lawyers in private practice.

The 44-to-56 age group continues to be the population from which the large majority of judicial appointments are made.[29] The 75th percentile of income, calculated with an income exclusion, strikes a reasonable balance between the largest self-employed income earners and those in lower brackets, given the criteria that we must apply. To the extent that there is validity in the Government's submission that lawyers at the highest income levels do not apply for the bench, of which there is no evidence, the use of the 75th percentile level takes that into account. With respect to the appropriate level of exclusion mentioned above, our view is that it would be more appropriate to increase the level to $60,000. It is unlikely that any in the pool of qualified candidates will have an income level lower than $60,000. The salaries of articling students range from $40,000 to $66,000 in major urban centres and the salaries of first-year lawyers range from $60,000 to $90,000 in those same centres, and are often augmented by bonuses. Earnings for more senior associates are significantly higher.

Accordingly, we asked Morneau Sobeco to provide us with tables comparing the 1997 and 2000 income of self-employed lawyers between the ages of 44 and 56, at the 75$^{th}$ percentile, with no income exclusion and then excluding lawyers with incomes below $60,000. The results were requested for Canada, each province and each of the largest cities with adjustments for inflation to 2004.

Morneau Sobeco used 2000 income data obtained from the CRA on behalf of the Canadian Association of Provincial Court Judges (CAPCJ). The data obtained by Morneau Sobeco allowed the identification of income from the 50$^{th}$ to the 95$^{th}$ percentile, whereas the data obtained by the Ministry of Justice and SGM required an estimation of the 75$^{th}$ percentile. The data obtained by Morneau Sobeco and the Ministry of Justice

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[29] The 1997–2003 statistics show that during this period, 84.8% of the judges appointed were from the 44 to 56 age group.

are otherwise consistent at the national and provincial levels with only minor differences in the reported number of lawyers for a few provinces. The results are also consistent for smaller municipalities. However, important differences exist in the number of lawyers reported by CRA to the Ministry of Justice and Morneau Sobeco for larger municipalities, presumably because of the difference in the approaches used by CRA in distinguishing between cities and large metropolitan areas.

The results are presented in the following Tables 16 to 19. The net income of Canadian lawyers for that taxation year 2000 were projected to 2004, on the basis of an estimated increase in the Industrial Aggregate Index (IAI) of 7.1% from the year 2000 to April 2004.

Table 16
## Net Income of Canadian Lawyers as Reported by CRA
Tax Years 2000 and 1997, No Income Exclusion

| | | All Ages | | Ages 44 to 56 | | | |
|---|---|---|---|---|---|---|---|
| **Province** | | **Number** | **Average Income** | **Number** | **Average Income** | **75th Percentile 2000** | **75th Percentile Projected to 2004** |
| Newfoundland | *(2000)* | 212 | $132,400 | 116 | $144,600 | $210,200 | $225,100 |
| | *(1997)* | 330 | $106,000 | 140 | $127,200 | | |
| | *(% change)* | –35.8% | 24.9% | –17.1% | 13.7% | | |
| Prince Edward Island | *(2000)* | 65 | $76,800 | 34 | $97,600 | n/a | n/a |
| | *(1997)* | 100 | $79,800 | 40 | $92,600 | | |
| | *(% change)* | –35.0% | –3.8% | –15.0% | 5.4% | | |
| Nova Scotia | *(2000)* | 517 | $100,700 | 285 | $111,300 | $136,400 | $146,100 |
| | *(1997)* | 810 | $95,000 | 390 | $107,200 | | |
| | *(% change)* | –36.2% | 6.0% | –26.9% | 3.8% | | |
| New Brunswick | *(2000)* | 462 | $86,400 | 242 | $88,800 | $114,500 | $122,600 |
| | *(1997)* | 650 | $80,500 | 300 | $91,700 | | |
| | *(% change)* | –28.9% | 7.3% | –19.3% | –3.2% | | |
| Quebec | *(2000)* | 5,621 | $96,900 | 2,597 | $110,600 | $136,400 | $146,100 |
| | *(1997)* | 8,850 | $65,100 | 3,220 | $85,800 | | |
| | *(% change)* | –36.5% | 48.8% | –19.3% | 28.9% | | |
| Ontario | *(2000)* | 9,258 | $152,300 | 4,471 | $176,400 | $223,700 | $239,600 |
| | *(1997)* | 12,630 | $120,600 | 5,370 | $143,600 | | |
| | *(% change)* | –26.7% | 26.3% | –16.7% | 22.8% | | |
| Manitoba | *(2000)* | 686 | $95,800 | 330 | $110,800 | $157,300 | $168,500 |
| | *(1997)* | 1,050 | $78,200 | 420 | $101,100 | | |
| | *(% change)* | –34.7% | 22.5% | –21.4% | 9.6% | | |
| Saskatchewan | *(2000)* | 487 | $93,600 | 261 | $98,000 | $135,000 | $144,600 |
| | *(1997)* | 750 | $86,043 | 320 | $95,800 | | |
| | *(% change)* | –35.1% | 8.8% | –18.4% | 2.3% | | |
| Alberta | *(2000)* | 1,361 | $138,800 | 654 | $159,300 | $191,900 | $205,500 |
| | *(1997)* | 2,210 | $109,900 | 810 | $129,400 | | |
| | *(% change)* | –38.4% | 26.3% | –19.3% | 23.1% | | |
| British Columbia | *(2000)* | 1,923 | $97,800 | 975 | $111,000 | $146,300 | $139,000 |
| | *(1997)* | 3,760 | $96,100 | 1,720 | $116,500 | | |
| | *(% change)* | –48.9% | 1.8% | –43.3% | –4.7% | | |
| Canada | *(2000)* | 20,670 | $124,600 | 9,992 | $142,800 | $176,500 | $189,000 |
| | *(1997)* | 31,270 | $97,000 | 12,770 | $119,000 | | |
| | *(% change)* | –33.9% | 28.5% | –21.8% | 20.0% | | |

**Sources**: Canada Revenue Agency; Morneau Sobeco.

Table 17

## Net Income of Canadian Lawyers as Reported by CRA

Tax Year 2000, Excluding Income Below $60,000

| | All Ages | | Ages 44 to 56 | | | |
|---|---|---|---|---|---|---|
| **Province** | **Number** | **Average Income** | **Number** | **Average Income** | **75th Percentile** | **75th Percentile Projected to 2004** |
| Newfoundland | 151 | $174,500 | 92 | $175,700 | n/a | n/a |
| Prince Edward Island | 32 | $124,300 | 23 | $128,700 | n/a | n/a |
| Nova Scotia | 339 | $139,600 | 205 | $143,300 | $163,200 | $174,800 |
| New Brunswick | 231 | $146,300 | 126 | $144,800 | $190,000 | $203,500 |
| Quebec | 2,665 | $173,700 | 1,404 | $178,800 | $219,400 | $235,000 |
| Ontario | 6,169 | $214,900 | 3,225 | $233,300 | $291,000 | $311,700 |
| Manitoba | 386 | $149,000 | 211 | $157,300 | $190,500 | $204,000 |
| Saskatchewan | 288 | $139,200 | 165 | $138,200 | $167,200 | $179,100 |
| Alberta | 870 | $201,900 | 453 | $215,700 | $278,000 | $297,700 |
| British Columbia | 1,014 | $163,800 | 565 | $172,100 | $216,900 | $232,300 |
| Canada | 12,194 | $192,500 | 6,487 | $204,100 | $247,300 | $264,900 |

**Sources**: Canada Revenue Agency; Morneau Sobeco.

Table 18
**Net Income of Canadian Lawyers by City as Reported by CRA**
Tax Years 2000 and 1997, No Income Exclusion

| | All Ages | | Ages 44 to 56 | | | |
|---|---|---|---|---|---|---|
| **City** | **Number** | **Average Income** | **Number** | **Average Income** | **75th Percentile 2000** | **75th Percentile Projected to 2004** |
| Calgary *(2000)* | 723 | $176,300 | 333 | $210,500 | $316,400 | $338,900 |
| *(1997)* | 1,200 | $140,900 | 410 | $178,400 | | |
| *(% change)* | –39.8% | 25.1% | –18.8% | 18.0% | | |
| Edmonton *(2000)* | 402 | $105,700 | 207 | $114,500 | $130,400 | $139,700 |
| *(1997)* | 640 | $78,900 | 260 | $87,300 | | |
| *(% change)* | –37.2% | 34.0% | –20.4% | 31.2% | | |
| Montréal *(2000)* | 1,676 | $138,300 | 747 | $157,500 | $218,100 | $233,600 |
| *(1997)* | 1,730 | $67,800 | 610 | $90,000 | | |
| *(% change)* | –3.1% | 104.0% | 22.5% | 75.0% | | |
| Ottawa *(2000)* | 774 | $139,900 | 370 | $147,500 | $193,300 | $207,000 |
| *(1997)* | 660 | $68,200 | 270 | $131,900 | | |
| *(% change)* | 17.3% | 105.1% | 37.0% | 11.8% | | |
| Québec *(2000)* | 142 | $98,000 | 65 | $112,100 | n/a | n/a |
| *(1997)* | 260 | $61,500 | 90 | $86,200 | | |
| *(% change)* | –45.4% | 59.3% | –27.8% | 30.0% | | |
| Toronto *(2000)* | 4,770 | $191,800 | 2,219 | $232,600 | $320,900 | $343,700 |
| *(1997)* | 5,330 | $161,000 | 2,110 | $201,800 | | |
| *(% change)* | –10.5% | 19.1% | 5.2% | 15.3% | | |
| Vancouver *(2000)* | 1,242 | $113,300 | 607 | $132,500 | $188,600 | $202,000 |
| *(1997)* | 1,360 | $122,300 | 590 | $160,000 | | |
| *(% change)* | –8.7% | –7.4% | 2.9% | –17.2% | | |
| Winnipeg* *(2000)* | 549 | $102,000 | 256 | $117,500 | $158,800 | $170,100 |

**Sources**: Canada Revenue Agency; Morneau Sobeco.

* Data for the year 1997 was not available for the city of Winnipeg.

Table 19
**Net Income of Canadian Lawyers by City as Reported by CRA**
Tax Year 2000, Excluding Income Below $60,000

| | All Ages | | Ages 44 to 56 | | | |
|---|---|---|---|---|---|---|
| **City** | **Number** | **Average Income** | **Number** | **Average Income** | **75th Percentile** | **75th Percentile Projected to 2004** |
| Calgary | 512 | $238,900 | 258 | $263,000 | $370,800 | $397,100 |
| Edmonton | 227 | $165,200 | 121 | $172,000 | $177,600 | $190,200 |
| Montréal | 952 | $223,800 | 470 | $233,600 | $312,700 | $334,900 |
| Ottawa | 537 | $190,400 | 266 | $194,800 | $244,000 | $261,300 |
| Québec | 79 | $151,900 | 40 | $161,300 | n/a | n/a |
| Toronto | 3,393 | $259,500 | 1,695 | $296,200 | $393,200 | $421,100 |
| Vancouver | 722 | $179,000 | 387 | $193,600 | $247,400 | $265,000 |
| Winnipeg | 321 | $154,700 | 168 | $164,100 | $205,300 | $219,900 |

**Sources**: Canada Revenue Agency; Morneau Sobeco.

We believe that these tables are a reliable estimate of the incomes across the country from the comparator group, that is, lawyers aged 44 to 56, with net professional income of $60,000 or more. The analysis shows that in larger cities, the current income of this comparator group exceeds the current level of judicial compensation, even taking into account the value of the judicial annuity, a matter we discuss in detail in the following chapter.

While it is true that there are undoubtedly qualified applicants who come from what may be described as the lower-income brackets of legal practice, due to the nature of their practice or because they come academe or government, the fact remains that most appointees do come from private practice.

It is also fair to say that many appointees do come from the higher-income brackets, and come from those centres where the income for self-employed lawyers is the highest. There will always be lawyers who earn significantly more than the 75$^{th}$

percentile of lawyers' professional income that we use for this comparator group and, while many in that group may choose not to seek judicial office, many highly qualified persons in that group do accept the financial sacrifice involved, because of the other attractions of judicial life. It is important, we believe, to establish a salary level that does not discourage members of that group from considering judicial office.

## 2.5 Annual Increases

The Drouin Commission recommended, in addition to the salary levels and annual indexing for inflation as provided by statute, that there be annual increases of $2,000 per year. No rationale for this was expressed in the report. The Drouin Commission was the first such commission to recommend annual increases over and above the salary recommendation.

In submissions to us, the Association and Council requested that there be, in addition to the salary that we recommend, an annual increase of $3,000 over and above statutory indexing. The Government accepted the principle of an annual increase over and above statutory indexing, but submitted that it remain at $2,000 per annum predicated, of course, on its submission that the base salary should increase by only 4.48% for 2004–05.

We have been unable to discern any rationale for this annual increase, and to the extent that there is one, we do not accept it. The *Judges Act* mandates the Quadrennial Commission process and each commission in its turn must recommend an adequate and appropriate level of salary and benefits. The statutory scheme is such that the level recommended, if accepted by the federal government, and subject to indexation, will be the level for the succeeding four years. We can see no mandate in the statute or in logic to maintain, during the succeeding four years, "rough equivalence" with any comparator, and we decline to do so. The salary level we have recommended is our best judgment in 2004 as to what is adequate and appropriate within the statutory

framework and, on the basis of the information currently available to us, we are satisfied that our recommendation meets that mandate both appropriately and fairly and in the public interest. Having done so and in the knowledge that the sum we have recommended, if accepted, will be increased by statutory indexing in each year, we decline to recommend that it be otherwise increased.

## 2.6 Recommendations Concerning Salaries for Puisne Judges

Striking the right balance, given the conflicting positions of the principal parties and the insufficiency of the available information, is not an easy task. We have considered carefully and anxiously all of the submissions and information made available in the voluminous material filed with us.

We have also taken into account the singular importance of the work done by the judiciary, its increasing complexity and the hard work involved in doing it well. We have taken into account the value of the judicial annuity, which we have more fully dealt with in the next chapter.

We combine the analysis in this chapter with the overriding considerations of the need to maintain the independence of the judiciary during the holding of office and after retirement, and to attract outstanding candidates to the judiciary. We keep in mind the current economic situation of the federal government, as we understand it. We have come to the conclusions that are embodied in the recommendations that follow, and we believe that our recommendations strike the appropriate balance and are in the public interest. We reiterate that the full public benefit of the exercise of our jurisdiction will only be achieved if the government selects the most qualified and most outstanding candidates from the pool of those available.

**Recommendation 1:**

**The Commission recommends that the salary of puisne judges be established as follows. Effective April 1, 2004, $240,000, inclusive of statutory indexing on that date; and for each of the next three years, $ 240,000, plus cumulative statutory indexing effective April 1 in each of those years.**

## 2.7 Salary Levels of Other Judges

For many years a relatively constant differential has been maintained between the salaries of puisne judges and chief justices, associate chief justices and judges of the Supreme Court of Canada. Both the Government and the Association and Council were satisfied that such a differential should continue to exist, and at approximately the same level as at present. That differential is approximately 10% between the salaries of puisne judges and the salaries of the chief justices and associate chief justices. There has also been a differential of approximately the same level, or perhaps slightly lower, between the salaries of the chief justices and associate chief justices, and the salary level of justices of the Supreme Court of Canada and the Chief Justice of Canada. We see no reason to alter this long-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, 2004, inclusive of statutory indexing, at the following levels:**

| | |
|---|---|
| **Supreme Court of Canada:** | |
| **Chief Justice of Canada** | **$308,400** |
| **Justices** | **$285,600** |
| **Federal Court and Tax Court of Canada:** | |
| **Chief Justices** | **$263,000** |
| **Associate Chief Justices** | **$263,000** |
| **Appeal Courts, Superior and Supreme Courts and Courts of Queen's Bench:** | |
| **Chief Justices** | **$263,000** |
| **Associate Chief Justices** | **$263,000** |

## 2.8 Compensation for Senior Northern Judges

The Association and Council support the position of the three Senior Northern Judges (Justice J.E. Richard of the Northwest Territories, Justice B.A. Browne of Nunavut and Justice R.S. Veale of Yukon Territory), who ask that the salary attached to the position of senior judge be the same as the salary attached to the position of the chief justice of the other superior courts in Canada, as they have the same duties, responsibilities and functions as chief justices.

The Northwest Territories and the Yukon Territory do not have chief justices for their superior courts. There are three resident superior court judges in Nunavut, three in the Northwest Territories and two in the Yukon, all of whom have extensive circuit responsibilities over large geographical areas. In each of these territories, one of these judges is designated the senior judge with administrative responsibilities for the other judges and a roster of about 40 deputy judges.

In 2000, the legislative assemblies in the three northern territories all passed legislation creating the office of a chief justice in their respective jurisdictions. Those Acts have yet to be proclaimed as the federal government has not yet agreed to create the office of chief justice, despite the fact that at the time these Acts passed the northern legislative assemblies, the then-Minister of Justice sought the concurrence of the Canadian Judicial Council to change the name and the compensation level of these northern chief justice "stand-ins". As its submission makes clear, the Canadian Judicial Council is still in agreement with the proposed change of status and remuneration.

The Commission has no mandate to recommend the creation of a judicial position to the Minister of Justice. On the other hand, each senior northern judge is responsible for the duties generally performed by a chief justice, including full representation on the Canadian Judicial Council, and the salary attached to the position ought to be the same as the salary attached to the position of chief justice of the other superior trial courts in Canada.

**Recommendation 3:**

**The Commission recommends that the senior northern judges receive equivalent compensation to that of a chief justice, until such time as chief justices are appointed in those jurisdictions.**

## 2.9 Differential Compensation for Court of Appeal Judges

We received a compelling submission made on behalf of 74 of the 142 appellate judges who serve on the courts of appeal of each province in Canada.

The proposal made was that, inasmuch as the courts in Canada (and virtually everywhere else) are established on a hierarchical basis, it is appropriate that those higher in the hierarchy be paid accordingly and receive greater compensation than trial court judges.

The same submission was made to the Drouin Commission, which declined to address the request because it had received inadequate study, apparently with respect to the relative workloads of each court. The submission before this Commission was not based on the suggestion that appellate judges have heavier workloads or that their work is more important than that of trial judges. It was specifically designed not to infer any negative or less important role for the duties and responsibilities performed by trial judges. The submission rested on the simple proposition that "advancement" or "elevation", which is the common description of a move from a trial court to an appellate court, ought to be attended with a raise in compensation such as normally would be accorded to promotion. Basically, the thesis is that colonels get paid more than majors.

The proposal by the appellate judges was not, as noted above, unanimous. The Association and Council submission neither endorsed the appellate judges' request nor opposed it. However, the Chief Justice of Nova Scotia, on behalf of her court, opposed it. The proposal had an irregular constituency. No member of the British

Columbia Court of Appeal was included in the group making the request and only a few members of the Ontario Court of Appeal belonged to the group on whose behalf the request was made.

All puisne judges have been treated in the same way from a compensation point of view since Confederation. The only compensation differentiation is for judges of the Supreme Court of Canada, save and except chief justices and associate chief justices, who receive additional compensation because of their administrative and other responsibilities.

There is no evidence that those considering an appointment to a court of appeal are in any way influenced by the compensation currently paid appeal court judges, nor is there any evidence that trial court judges are reluctant to accept “elevation” to a court of appeal because it does not come with a raise in compensation. Indeed, the amount of differential sought is not, in any event, such an amount as would be likely to influence such a decision.

In short, there is no support for the proposition that the current method of compensating all puisne judges equally, as they have been, has not been an entirely satisfactory arrangement to the functioning of the courts or the availability of suitable candidates to staff this country's courts of appeal. There is, on the other hand, some evidence that the creation of such a differential would be harmful.[30]

We also considered the mute position of approximately 50% of Canada’s court of appeal judges. It is significant that they would not join in the proposal of their contemporaries, given that the subject is of particular interest to them from a monetary perspective.

This Commission's jurisdiction, as noted earlier, is prospective in nature and the recommendations we make must be confined to the considerations identified in

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[30] See the letters in Appendix 9.

s. 26(1) of the *Judges Act*. We are not permitted nor authorized to re-design the court system in Canada. If we were, it is entirely probable we would design a system where appellate court members received higher compensation than trial court members. Ignoring the economic considerations mandated by the statute, we are obliged to consider what steps ought to be taken to ensure judicial independence including financial security and to promote a high quality of candidates for appointment to judicial office. There is no foundation for the thesis that altering the historical situation of the court of appeal judges, from a compensation perspective, would have any impact whatsoever on those considerations. Accordingly, we are obliged, in our view, to refuse to recommend the proposal made on behalf of the members of the court of appeal for differentiation in the compensation they currently receive from that of trial judges. We believe, however, that the government ought to give consideration as to whether or not a different level of compensation might be appropriate for puisne judges who sit on courts of appeal.

**Recommendation 4:**

**The Commission does not recommend a salary differentiation between puisne judges who sit on courts of appeal and puisne judges who preside at trials.**

# CHAPTER 3

# ANNUITY BENEFITS

## 3.1 The Judicial Annuity

We recognize that the judicial annuity is an important part of judicial compensation and must be taken into account when we come to set the appropriate salary level. This is because, given its unique characteristics and value, it is a significant incentive to those considering application for judicial appointment as there is nothing comparable available to self-employed lawyers in the private practice of law.

Lawyers in private practice are generally limited in their retirement planning to RRSPs and personal savings or investments from after-tax income. Therefore, a substantial portion of their net incomes must be set aside each year to ensure that they will maintain, in retirement, the standard of living they enjoyed prior to retirement. In contrast, the judicial annuity, which represents 66 2/3% of the judge's salary at retirement and is fully indexed to increases in the Consumer Price Index (CPI), guarantees that judges will be financially secure in their retirement years, thus fulfilling an important condition for judicial independence. Accordingly, unlike lawyers in private practice, judges do not need to set aside any significant portion of their income other than their contributions to the judicial annuity plan created under the *Judges Act* (7% of salary, reducing to 1% of salary when the judge is entitled to retire with his or her full unreduced annuity) to ensure their financial security at retirement.[31]

The Government's independent actuary estimated the value of the government-paid portion of the judicial annuity to be 24% of salary. Morneau Sobeco reviewed the methods and assumptions adopted by the Government's independent actuary and concluded that they were appropriate for compensation benchmarking purposes.

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[31] The actuarial report prepared in 2001 by the Chief Actuary of Canada, pursuant to the *Public Pension Reporting Act*, refers to the judicial annuity established under the *Judges Act* as a pension plan.

Morneau Sobeco noted that the value of the judicial annuity for any individual judge varies significantly according to the age at appointment and the assumed retirement age. On the basis of the age at appointment of judges appointed between January 1, 1997, and November 14, 2003 (age 51 on average), Morneau Sobeco determined that an appropriate value for the government-paid portion of the judicial annuity for compensation benchmarking purpose could be set at 22.5% of salary.

The Association and Council thought that the initial estimate of 24% of salary was too high in light of a report from their own consultant but did not disagree with the final figure of 22.5% of salary, which was also accepted by the Government.

Accordingly, recognizing the value of the government-paid portion of the judicial annuity, the current judicial salary of $216,600 has a real value of $265,300 for the average judge.

## 3.2 Comparison of the Judicial Annuity With the Deputy Minister's Pension

In comparing the salaries of judges and deputy ministers, we wanted to take into account the differences in the value of the judicial annuity and the pension benefits of a deputy minister, considering the importance of these benefits.

Comparison of the judicial annuity and deputy minister pension benefits is complicated by the fact that:

(1) the judicial annuity does not have a defined benefit accrual rate and;
(2) the service profiles of judges and DMs (age at date of appointment, prior public sector service and retirement ages) can be very different.

As mentioned before, a judge may retire with a full judicial annuity determined as 66 2/3% of his/her judge's salary, as soon as the judge has 15 years of service and the sum of age and judicial service equals 80 (the "modified Rule of 80"). In contrast, deputy ministers accumulate a pension of 2% of their best five-consecutive-year average earnings for each year of credited service up to a maximum of 35 years. A deputy minister who is responsible for a department earns an additional pension of 2% of the same best five-year average earnings for each year of service in such capacity up to a maximum of 10 years. The deputy minister's pension is payable with no reduction for early retirement at any time after:

- Age 60 with two years of contributory service; or
- Age 55 with 30 years of contributory service.

However, the deputy ministers' pensions are integrated with the Canada/Quebec Pension Plan (C/QPP). This means that their pension is reduced at age 65 by approximately 1/35 of the C/QPP pension for each year of service.

For example, a deputy minister appointed at the age of 45 who retires at the age of 65 with 20 years of service will be entitled to a pension of 40% of his or her best five-year average earnings (20 times 2%) less approximately 20/35 of the C/QPP pension. In contrast, a judge with the same service history would retire with a judicial annuity equals to 66 2/3 % of his or her final salary. In this scenario, our consultant has determined that the value of the additional annuity benefit of the judge would have been equal to 17.3% of salary each year.

If the deputy minister in the above example had been responsible for a department for 10 or more of his or her 20 years of service, the pension would be increased by 20% of the best five-year average earnings (10 times 2%), thus increasing the pension from 40% to 60% of best five-year average earnings less the same 20/35 of the C/QPP pension. The judicial annuity of 66 2/3% of the final salary would still be more generous.

It should be noted that if the deputy minister had prior years of service in the public service, the pension would be larger, thus reducing the gap between the judicial annuity and the deputy minister's pension.

Judges are generally appointed to the bench late in their career, while the typical deputy minister is usually a career public servant. Accordingly, a fair comparison of the value of their respective pension annuities is difficult.

The judicial annuity and the deputy minister pension are both fully indexed to cost of living increases.

Judges contribute 7% of their salary each year to the judicial annuity scheme, whereas deputy ministers contribute 4% of their pensionable earnings up to the Maximum Pensionable Earnings under the C/QPP and 7.5% of their pensionable earnings above that threshold. In both cases, the contribution rate is reduced to 1% once the maximum pension is reached.

The judges' survivor benefit of 50% of the judicial annuity, or 33 1/3 % of salary, exceeds that available to most deputy ministers, which is determined as 1% of the best five-year average earnings for each year of service, up to a maximum of 35 years.

This comparison shows that, in the case of both the deputy minister pension and the judicial annuity, the actual value as a percentage of annual income to individual deputy ministers or judges will vary widely, depending on age of employment or appointment and the age at retirement.

## 3.3 Division of Annuity After Conjugal Breakdown

As we have seen, the judicial annuity is not a pension, although it has many features common to pensions. While it is contributory (until the judge satisfies the modified Rule of 80), it does not result in any payment to the judge or his or her spouse until he or she retires, or dies. Judges, therefore, have a significant measure of control over when payment of the annuity occurs, since they can retire on a full annuity when they have attained a sufficient number of years of service and age to satisfy the modified Rule of 80, or they may choose to stay in regular service or as supernumerary judges for up to 10 years from that date, or defer retirement entirely until attaining the age of 75.

The judicial annuity is not subject to federal pension benefits legislation, particularly the *Pension Benefits Division Act* (PBDA).

The issue is how the judicial annuity should be treated when a judge's conjugal relationship breaks down and the parties, or courts, come to determine the division of the family assets.

We were advised that the Association and Council and the Government hoped to achieve a consensus on this issue, so that a recommendation from us would be unnecessary. Although substantial agreement was achieved, significant differences remains for us to consider in order to arrive at a recommendation.

Both parties agree that there ought to be a mechanism for the division of the judicial annuity after conjugal breakdown.

The Government takes the position, and the Association and Council agree, that no more than 50% of the value of the annuity accrued during a marriage should be available for distribution to the judge's spouse. This is an essential provision, in order to ensure the benefit of at least 50% of the annuity remaining with the judge, given the singular importance of the annuity to the concept of judicial independence.

It is also understood and agreed by both parties that the substantive rights to a portion of the annuity, as with all other aspects of conjugal property, will continue to be determined by provincial or territorial law.

What is needed, therefore, is in effect a procedural mechanism to value the portion of the annuity available for distribution upon conjugal breakdown.

Both parties agree that the objective is to be achieved by amendments to the *Judges Act*, rather than to other existing federal pension legislation.

What remains to be determined by us is the basis to be used for calculating the value of the annuity at the time of division, and the proportion to be applied to that value in order to determine the spouse's share upon division.

It is unnecessary to detail here the original positions of the principal parties on this issue, except to say that the Association and Council proposed a formula such that division would not actually occur until the judge retired, while the Government proposed that the division should occur at the time of conjugal breakdown or division of conjugal assets. There were also significant differences as to the method of calculating both the percentage of the judicial annuity available to the judge's spouse and the value of the annuity at the time of the division. As indicated above, many of the differences have been resolved. In particular, the Association and Council have now accepted that there should be a valuation of the annuity, based on actuarially-determined retirement patterns, as of the date of the division of assets. Further, the Association and Council have indicated their willingness to modify their position so as to accommodate the Government's commitment to the goals of a clean break and portability.

The Government makes it clear that its proposal facilitates the division of the annuity only, and does not interfere with the ability of the judge and his or her spouse, or the courts, to deal with the annuity in any fashion deemed appropriate and in accordance with provincial law. The Government's intention, in its proposal, is to achieve a process

and a division of the judicial annuity as closely aligned as possible to that for other federal employees under the PBDA.

The Government recognizes that conjugal breakdown can occur before a judge becomes entitled (a notional "vesting") to a judicial annuity of some amount upon death or retirement, as opposed to receiving a return of contributions only. This entitlement occurs at the point where a judge attains age 55 and has served at least 10 years in judicial office. A judge becomes entitled to retire on full annuity when he or she satisfies the modified Rule of 80, that is, when the judge has at least 15 years of service and his or her age plus service equals 80. At that point, judicial contributions to the annuity scheme cease, except for the 1% of salary contributions to pay for post retirement indexing.

The Government's proposal would, therefore, allow the judge's spouse to have a choice of either receiving an immediate lump sum transfer in the amount of his or her proportionate share of the judge's contributions or electing to wait until the judge's annuity notionally "vests" (or the judge dies or otherwise terminates judicial service) and at that date receives a lump sum transfer of either the proportionate share of contributions or the actuarial present value of the notionally-accrued annuity.

The proportionate share proposed by the Government is based upon the number of years of judicial service during the marriage relative to the number of years from the date of appointment to the date when the judge becomes entitled to a full annuity based on the modified Rule of 80. Thus, if a married judge is appointed at age 50, and conjugal breakdown occurs at age 60, the spouse will be entitled to 50% of the value of the judicial annuity accrued during the marriage, determined as 10/15, or 2/3 of the judicial annuity. In this example, the judge will have satisfied the modified Rule of 80 at age 65 after 15 years of service. The valuation of the amount to be divided on that rationale, in the Government's proposal, will be based on the demographic assumptions used by the Chief Actuary of Canada in the most recent *Actuarial Report on the Pension*

*Plan for the Federally Appointed Judges* to calculate the actuarial present value of the amount subject to division.[32]

The Association and Council submitted that both the valuation of the annuity at breakdown and the proportion to be applied to it should be determined by the actuarial data of past judicial retirement patterns.

We have devised a recommendation that incorporates aspects of both positions. We accept the rationale that there can never be a division that would lower the entitlement of the judge below 50%. We accept the Government's position that there should be a clean break, and a mechanism should be created that will allow a lump sum to be paid out at the time of the division of matrimonial property. We note that the *Judges Act* and perhaps the *Income Tax Act* may have to be amended to allow the transfer of a portion of the former spouse's lump sum settlement to an RRSP, since the judicial annuity is not a registered pension plan.

With respect to the value of the entitlement to the annuity, we agree with the Government that the demographic assumptions used by the Chief Actuary in the most recent *Actuarial Report of the Pension Plan for the Federally Appointed Judges* be used to calculate the actuarial present value of the portion of the judicial annuity subject to division. This approach should be cost-neutral, to the extent that the retirement experience of judges following their marital breakdown is consistent with the demographic assumptions developed by the Chief Actuary.

Considering the unique nature of the judicial annuity, our view is that, for purposes of determining the portion of the judicial annuity subject to division upon marital breakdown, the judicial annuity should be deemed to accrue over the entire period of judicial service. Until recently, the judicial annuity provided no early retirement benefits. Judges earned an entitlement to their full judicial annuity upon the earlier of the date of the modified Rule of 80 or attainment of age 75 with 10 years of service. In these

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[32] These reports are prepared every three years and the most recent one is dated March 31, 2001.

circumstances, the concept of pension benefit accrual did not apply. The value of accrued benefits went from a return of employee contributions to 100% of the judicial annuity overnight when the judge satisfied one of the retirement conditions. The addition of the early retirement benefits gave judges access to retirement benefits as early as age 55 with 10 years of service. However, such benefits did not change the unique nature of the judicial annuity and the fact that there is no defined benefit accrual rate.

Our recommendation provides a fairer basis for valuation than that proposed by the Government, which assumes that the annuity is fully accrued when a judge completes 15 years of service and satisfies the modified Rule of 80. Our recommendation also leaves "room" for an allocation to a second spouse, in the event of another conjugal breakdown, based on the years of the conjugal relationship, without impinging on the 50% share of the annuity remaining with the judge.

Considering the need for a clean break and full portability, we agree that the spouse should be given an option of a lump sum settlement. The judicial annuity would then be deemed to be earned over the expected judicial service, based on the demographic assumptions used for the most recent *Actuarial Report on the Pension Plan for the Federally Appointed Judges*.

In the previous example of a married judge appointed at the age of 50 and whose marriage ended at the age of 60, the portion of the judicial annuity subject to division would be 10/22, assuming that the expected retirement age of the judge is 72, based on the demographic assumptions of the last actuarial report and his or her current age (60) and service (10 years).

Should the same judge remarry at the age of 65 and subsequently be separated from the second spouse at the age of 70, the judicial annuity subject to division with the second former spouse would be 5/24 of the judicial annuity, assuming that the expected

retirement age of the judge is 74 based on the demographic assumptions of the last actuarial report and his or her current age (70) and service (20 years).

Finally, should a marital breakdown occur before the annuity is vested, that is before age 55 or the completion of 10 years of service, the former spouse would be allowed to exercise the lump-sum settlement option when the judge reaches age 55 and completes 10 years of service.

**Recommendation 5:**

**The Commission recommends that the *Judges Act* be amended to provide for**

- **the possibility of dividing, upon conjugal breakdown, the judicial annuity deemed to accrue during a relationship, up to a 50% limit;**
- **the judicial annuity to be deemed to accrue over the judge's entire period of judicial service, for the purpose of determining the portion of the judicial annuity that is subject to division upon conjugal breakdown;**
- **a lump sum settlement option, to ensure a clean break and the possibility of deferring such settlement until the date when the judge will have attained age 55 and completed 10 years of service, if applicable; and**
- **the demographic assumptions used for the most recent *Actuarial Report on the Pension Plan for the Federally Appointed Judges* to be used for purposes of determining the value of the judicial annuity and the expected retirement date of a judge in calculating the portion of the judicial annuity subject to division.**

**The Commission also recommends that the government amend the *Judges Act* and the *Income Tax Act*, as necessary, to allow the transfer of a portion of the former spouses' lump-sum settlement to RRSPs, as if the judicial annuity were a registered pension plan, at least for the portion of the judicial annuity up to the defined benefit pension limits applicable to registered pension plans under the *Income Tax Act*.**

## 3.4 Survivor Benefits for Single Judges

Madam Justice Alice Desjardins argued before us that "under the present state of affairs, married judges, those living as common-law couples and same-sex couples

enjoy benefits which are denied to single judges" and that "the exclusion of single judges from survivor benefits in the *Judges Act* infringes their rights under s.15 of the *Charter*. While a single judge is compelled to make contributions to a pension scheme in the same amount as each and every one of her colleagues, she is deprived of survivor benefits, a monetary compensation otherwise available to those of her colleagues living in a conjugal relationship."

This is the third commission to which Justice Desjardins has addressed a submission requesting that the right to survivor benefits be extended to single judges. Our predecessors rejected the submission on the grounds that it did not fall within their mandate. In this instance, Justice Desjardins, has based her case on *Charter* arguments and the extensive study *Beyond Conjugality* produced by the Law Commission of Canada, in which it concluded that the laws relating to conjugality in Canada are in need of extensive revision.

Justice Desjardins asks us to recommend that the *Judges Act* be amended to allow single judges to designate a close family member as the beneficiary of the survivor benefits attached to his or her pension.

The language of Justice Desjardins' submission and of the Government's reply is clearly *Charter*-oriented. The issue is a constitutional one. It cannot, however, be hived off from the rules that pertain across all government departments. The Law Commission report takes this broad perspective and recommends that the federal government overhaul its dependency benefits.

As its name implies, the Judicial Compensation and Benefits Commission is not a constitutional commission. It is charged with specific responsibilities having to do with recommendations concerning the remuneration and financial benefits of judges. The examples brought before us by Justice Desjardins are based on pension-related survivor benefits that can be addressed only by amendments to the legislation entailing

a redefinition of "survivor" as well as "conjugal relationship". Those amendments cannot focus on the judicial context in isolation.

In the case of federally appointed judges, the survivor benefit is 50 per cent of the judge's pension. If a judge has no eligible survivor, the death benefit is equal to a refund of his or her contributions, with accumulated interest, as set out in s. 51(3) of the *Judges Act*. In addition, a lump sum of one-sixth of the judge's yearly salary is paid to his or her estate or successors, all of which could presumably be left to a designated recipient in his or her will.

The legal definition of "survivor" for the purposes of pension and annuity payments has evolved over the last quarter of a century from married spouses to common-law spouses and now to same-sex spouses, but the definition continues to be based on a conjugal relationship. To provide single judges with prospective survivor benefits would involve a considerable shift in conceptual terms. Redefining a survivor outside the ambit of conjugality is a broadly based political exercise, well beyond our mandate. For the reasons set out above, we must refuse to entertain the request submitted by Madam Justice Alice Desjardins.

**Recommendation 6:**

**The Commission recommends that there be no change in the provision for survivor benefits for single judges until the matter is addressed by the government in the wider federal context.**

## 3.5 Annuities for Judges Who Retired During the Salary Freeze 1992–97

We received a submission from two former, now retired, judges, the Honourable Lawrence A. Poitras and the Honourable Claude Bisson, on the matter of annuities for judges who, like themselves, who retired during the 1992–97 salary freeze in Canada.

Their submission was neither supported nor opposed by the Association and Council, but the Government opposed it. A similar submission had been brought before the Drouin Commission in 2000.[33]

The argument put before the Drouin Commission was that the Scott Commission (1996) had recommended that there be a "catch up" of salaries for judges because of the freeze; then, when the Government implemented that recommendation, it did so as of April 1, 1997. It did nothing to adjust the annuity for the 131 judges who had retired in the period 1992–97 and whose annuities were based on the "frozen" salary in place when they retired. The Government's argument was that the "catch up" was done prospectively; when the freeze was lifted, all federal public servants were similarly affected by the wage freeze, and the freeze had the same effect on all such persons, active in the workplace or retired.

Messrs. Poitras and Bisson submitted to us that the approximately surviving 100 judges who retired during the freeze have been treated unfairly, and in effect have been discriminated against. They refer to the fact the increases in judicial salary that were made in 1997 and 1998 were specifically intended to make up for the effect of the wage freeze on judicial salaries. They point out that the judges who did not retire during the freeze but did so thereafter, got the benefit of those catch up increases in the calculation of their annuity upon retirement, whereas those who already had retired did not. The remedy they advocated before us was slightly different than the one advocated before the Drouin Commission. The present submission was that, at a minimum, there should be an adjustment in the annuities of those who presently receive them (and the survivors of any of the original group who receive a partial annuity), prospectively, to take into account the increases that were made to April 1998, together with the statutory indexing on the increased amount. It is proposed that these increases in the annuity take effect from April 1, 2004. In other words, they do not now look for a

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[33] Drouin (2000), at 87-8, which rejected it because "Judges were not singled out as targets of wage restraint and the adverse income of wage restraints 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. We are not prepared to recommend the adjustment of pensions for those annuitants who retired during the freeze, or their survivors."

payment for past years, only to narrow the gap between their own annuity and annuities that came into being after the freeze was lifted.

An anomaly that illustrates the unfairness they point to is demonstrated by the case of a judge who retired in 1991, just before the freeze. Such a judge would, by virtue of statutory indexing, which was not frozen in the period 1992–97, have a greater pension than a judge who retired in 1996, whose annuity was based on the unindexed judges' salary of 1991. That discrepancy, of course, continues to exist.

The Government points out that nothing has changed since the Drouin Commission reported, and that no new information has been supplied that would warrant us coming to a different conclusion on what the Drouin Commission described as a "matter of principle". The Drouin Commission pointed out that the freeze did not single out judges; rather, it affected the entire federal public service, and it would be wrong to redress the perceived unfairness for only one group of those affected by what was a matter of federal public policy during that five-year period. We were told that the number of federal public servants affected was 34,713 and that there has been no similar adjustment for any group of federal public servants affected by the freeze. The Government points out that the value of such a restraint program will be placed in jeopardy if it could be affected, after the fact, in the manner now being proposed. The anomaly with respect to the indexing of those who retired in 1991 applied over the entire public service because, even during the freeze, pensions were indexed, though salaries were not.

We have considerable sympathy with the submission of Messrs. Poitras and Bisson and their similarly situated colleagues. However, our view is that their plight is the result of the effect of the general freeze that was undertaken as a matter of public policy and the economic conditions that then prevailed, and affected the entire federal public sector. It cannot be said to have been a policy that in any way diminished the independence of the judiciary.

We do not believe that we have the jurisdiction to remedy the unfairness that is said to exist, despite our understanding of, and sympathy for, the argument. The s. 26(1) criteria are to us forward looking, to ensure that judicial salaries and benefits during the four years following our report are adequate to ensure the independence of the judiciary, its financial security, and are at a level that will continue to attract outstanding candidates. Rectifying past injustices, if such there were, is simply not within our mandate. We could not, for instance, if we thought that previous judicial salaries had been inadequate based on the statutory criteria, rectify that inadequacy for the benefit of those who suffered under it, whether they retired during its currency or were still active. We can only make recommendations for the four-year time frame from April 1, 2004 to March 30, 2008, and only with respect to judges still active, or to be appointed during that period.

While Messrs. Poitras and Bisson attempted to modify their request to fit into that mandate, by suggesting that it only operate prospectively, the melancholy fact remains that their submission is based on the failure of the 1997 and 1998 increases to be made applicable to those who retired in the period 1992–97. We are of the view that we cannot accede to this request.

**Recommendation 7:**

**The Commission declines to recommend any change to the judicial annuities payable to the judges who retired during the 1992–97 time period.**

# CHAPTER 4

# SPECIAL ALLOWANCES

## 4.1 Incidental Allowance

The Association and Council submit that the incidental allowance of federally appointed judges be increased by $1,000 effective April 1, 2004, and that a further increase of $1,000 be effective April 1, 2006, to reflect the increased cost of the expenditures for which the judges are entitled to be reimbursed.

An incidental allowance of $1,000 per annum per judge was created in 1980. It was increased to $2,500 in 1989 and then doubled to $5,000 in 2000.

The Association and Council submit that the level of the incidental allowance should be adjusted to reflect the increased cost of the expenditures for which the judges are entitled to be reimbursed under s. 27(1) of the *Judges Act.* Federally appointed judges are entitled to be reimbursed up to $5,000 per annum for "reasonable incidental expenditures that the fit and proper execution of the office of judge may require". Incidental allowances "cover such things as the cost of repair and replacement of court attire, the purchase of law books and periodicals, membership in legal and judicial organizations, the purchase of computer and other assorted expenses associated with the position."[34]

In support of the claim that, after four years, this allowance is no longer sufficient to defray the cost of the items it is intended to cover, the Association and Council offered a selected list of comparative 1999 and 2002–03 prices.[35] As an example of additional expenses that must now be incurred by individual judges, it was pointed out that judges have been advised that they may now charge the monthly fee for high-speed Internet, which used to be provided to judges free of charge, to their incidental allowance.

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[34] Association and Council Submission at pages 21–22, citing Drouin Report (2000) at page 55.

[35] Association and Council Submission, December 15, 2003, Appendix B.

The Government, on the other hand, contends that an additional $1,000 in each of 2004 and 2006 represents an increase of 20 % in 2004 and 16.7 % in 2006, which does not appear warranted by an increase in the cost of goods and services covered by this allowance. Indeed, in its response to the request for an increase, the Government pointed out that the judges had already received an increase of 100 % in 2000 and that raising that sum at this time "would far outstrip any possible increase in costs of the goods related to judicial office."[36]

The Government makes a further argument by distancing itself from the responsibility for providing the kinds of tools and materials referred to in the Association and Council's submission on the incidental allowance by claiming that these expenses are "first and foremost the responsibility of the provinces and territories in the administration of the courts and the administration of justice" in their respective jurisdictions and that therefore "there is no justification for transferring such additional cost to the Federal Government."[37]

We make no value judgment on the division of jurisdictional responsibilities except to observe that the incidental allowance is already included in the *Judges Act* and, as such, is an accepted federal government responsibility.

We have, however, attentively examined the use being made of the provision as it is administered by the Office of the Commissioner for Federal Judicial Affairs and found it to be a very flexible benefit, covering a wide range of reimbursable goods and services, within three principal guidelines:

- that the expenses are required for the fit and proper execution of the office of judge;
- that the reimbursement of the expense is not provided for under any other section of the Act; and

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[36] Government Reply Submission, January 23, 2004, at page 8.
[37] *Ibid*, at page 8.

- that the expenses are reasonable.

Examination of the issue also points to a very flexible implementation of the yearly reimbursement mechanisms. Some judges never use it up, while there are others who go over the stipulated annual amount. Judges who exceed the $5,000 limit in any given year are allowed to carry over the unpaid portion against their next year's allowance.

Table 20
**Usage of Incidental Allowance**
2000–03

| Year | # of Claims under $5,000 | # of Claims above $5,000 |
|---|---|---|
| 2000–01 | 420 | 626 |
| 2001–02 | 392 | 765 |
| 2002–03 | 236 | 828 |

**Source**: Office of the Commissioner for Federal Judicial Affairs.

In the absence of any compelling evidence that the existing $5,000 incidental allowance (which translates into $20,000 per judge per quadrennial mandate) is inadequate for the purposes for which it was created, we see no justification in increasing it at this time. We believe that $20,000 over a four-year period remains a reasonable amount to cover these incidentals. While the Association and Council provided us with a generic description of items that might be applied against the judicial allowance, we believe that if a future request is made to increase the allowance, it ought to be accompanied by access to evidence about the actual use being made of the allowance by the judiciary.

**Recommendation 8:**

**The Commission recommends that the Incidental Allowance of $5,000 per annum for each judge remain unchanged.**

## 4.2 Representational Allowance for Regional Senior Judges in Ontario

The Association and Council ask us to recommend that regional senior judges in Ontario be entitled to a representational allowance of $5,000 per annum, to reimburse expenses actually incurred by them in the discharge of their extra-judicial obligations and responsibilities. Carrying this recommendation into effect would require an amendment to s. 27 of the *Judges Act* to include regional senior judges in Ontario, and fix the amount payable under that section at a maximum of $5,000 per annum.

At present, pursuant to s. 27(7) of the *Judges Act*, those individuals entitled to a representational allowance are:

- the Chief Justice of Canada at $18,750;
- each puisne judge of the Supreme Court of Canada at $10,000;
- the Chief Justice of the Federal Court of Appeal and each provincial chief justice at $12,500;
- other chief justices mentioned in ss. 10 to 21 at $10,000;
- each of the senior judges of the Supreme Court of the Yukon Territory, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice at $10,000;
- each of the chief justices of the Court of Appeal of the Yukon Territory, the Chief Justice of the Court of Appeal of Northwest Territories and the Chief Justice of the Court of Appeal of Nunavut at $10,000; and
- the Chief Justice of the Court Martial Appeal Court of Canada at $10,000.

Alone among the provinces and territories, Ontario has divided the province into eight judicial regions, with a regional senior judge administering the judges in each of those

regions.[38] These positions were created for administrative efficacy, given the large number of judges in Ontario and its geography. The number of judges in each region who are administered by the senior regional judge is indicated in the following table.

Table 21
**Regional Distribution of Judges in Ontario**
As of March 3, 2004

| Region | # of Judges |
|---|---|
| Central East | 26 |
| Central South | 35 |
| Central West | 22 |
| East | 33 |
| Northeast | 20 |
| Northwest | 7 |
| Southwest | 33 |
| Toronto | 84 |
| Total | 262 |

**Source**: Office of the Commissioner for Federal Judicial Affairs – Judicial Appointments Secretariat.

The federal government acceded to Ontario's request that a provision be made for regional senior judges. The appointments are made by Order in Council by the federal government.

It is fair to say that, given the number of judges assigned to the various regions and the geographical size of each region, many of the regional senior judges have as many or more judges under their administrative supervision and direction than chief justices in

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38 *Courts of Justice Act*, R.S.O. 1990, c. C. 43.

many provinces. Like chief justices and associate chief justices, regional senior judges are required, among their many other duties, to host visiting judicial and legal delegations and attend many bar and judicial meetings and functions. These occur with great frequency. Given the geography of Ontario, it is not reasonable to expect that the chief justice and associate chief justice can be in the regions on a regular basis for these purposes.

At present, regional senior judges must either pay the expenses associated with these representational activities out of their own pocket or claim them against their incidental allowance provision. As indicated elsewhere in this report, we have not recommended that there be any increase in the incidental allowance for judges.

The Government concedes that the administrative responsibilities of regional senior judges in Ontario are significant. The Government's objection to a representational allowance is based on the proposition that the creation of regions in Ontario was a decision of the province, which has constitutional responsibilities for the administration of justice under s. 92 of the *Constitution Act*, *1867*. The Government concedes that, in providing in the *Judges Act* a representational allowance for chief justices and associate chief justices, it is already making a federal contribution in the area that, in its view of the Constitution, is primarily the responsibility of the provinces and territories. The Government submits that if such a representational allowance is provided for regional senior judges in Ontario, a similar request may be made in the future for judges in other provinces who carry on a similar function. There are, for instance, in Quebec four "coordinating" judges who perform administrative functions in the geographical areas in which they work. We have no evidence as to whether they carry out functions that would or would not involve the kind of expenses covered by a representational allowance. The concern of the Government is that if we make such a recommendation,

and it results in an amendment to the *Judges Act*, there is no reason why other large provinces would not seek to convert whatever delegation of administrative responsibility is currently within their jurisdictions into a similar office and request similar representational allowances.

The Government's second argument is that the representational allowances now given to the chief justice and the associate chief justices of the Superior Court are sufficient for all present purposes in Ontario.

We do not accept the Government's arguments on this issue. In a province the size of Ontario, with the number of judges that Ontario has, and the broad geographical distribution of those judges in the regions that regional senior judges administer, it is entirely reasonable and foreseeable that the expenses that would be covered by a representational allowance will be incurred on a regular basis. The allowance sought is only for reasonable expenses that are actually incurred. The federal government has established the principle of a statutory payment for representational allowances for chief justices and associate chief justices, and for senior judges in the territories. There is no reason, given the responsibilities of regional senior judges, that they should not have access to a similar representational allowance for amounts actually and reasonably spent. The $5,000 limit suggested is half, or less than half, of that paid to chief justices and associate chief justices, and is a reasonable amount.

Whether the provision for such an allowance will open the "floodgates" for other provinces is entirely speculative. We are dealing with the reality of the situation in Ontario, and the appointment of regional senior judges by Order in Council of the federal government. The position of the regional senior judge is an important one that

has onerous administrative and representational responsibilities, and a reasonable allowance for representational expenses is appropriate.

**Recommendation 9:**

**The Commission recommends that effective April 1, 2004, s. 27(6) of the *Judges Act* be amended such that regional senior judges in Ontario be added to the judges entitled to representational allowance under that section, and that the representational allowance for such regional senior judges be set, in s. 27(7), at an accountable maximum yearly amount of $5,000.**

## 4.3 Isolation Allowance – Resident Labrador Judge

The Association and Council propose that the resident Superior Court Judge in Labrador be entitled to receive the Northern Allowance currently provided to the judges of the Northern Territories. The express policy underlying the statutory provisions of the Northern Allowance to judges of the territorial superior courts is to compensate them for the higher cost of living in the territories. The same conditions pertain to the Goose Bay\Happy Valley, under the Isolated Posts Directive of the Treasury Board of Canada where federal public servants working in those isolated communities, are entitled to additional compensation to offset the abnormal cost differentials between isolated and non-isolated locations.

The Government recognizes that the situation of the judge living in Labrador, in particular the significant isolation involved, is similar to that of the judges in the Northern Territories. However, it warns that the establishment of compensation differentials based on regional disparities in cost of living is a complex issue and that any positive recommendation envisaged by this Commission be expressly confined to this specific circumstance. We accept that this provision ought to be so limited.

We find the positions adopted by the Association and Council and the Government to be both reasonable and compatible.

**Recommendation 10:**

**The Commission recommends that the *Judges Act* be amended to provide for the payment of an isolated post allowance to the resident Labrador judge in the amount of $12,000 per annum, in conformity with the isolation allowances provided to the judges of the Northern Territories.**

## 4.4 Removal Allowances

### *4.4.1 Relocation Expenses Extension*

Relocation expenses are in place to assist judges who are required to move away from their places of residence upon judicial appointment. The *Judges Act* (through the Removal Allowance Order) offers assistance to judges having to incur relocation expenses in such circumstances, including the provision of limited reimbursement of a loss on the sale of the judge's principal residence. The Removal Allowance Order provides a six-month period for the judge to sell his or her house. In specific circumstances, that six-month period may be extended for "an additional period" which can run up to a year. The Association and Council now seek a change of regulation, which would allow for more than one extension, if warranted.

The Government's position is that the Removal Allowance Order is intended to limit the personal costs to the judge of the necessary relocation. It is not, however, intended to insulate a judge from any or all circumstances that may result in a sale of a residence at a price less than satisfactory to the judge. According to the Government, the Order already provides a generous level of assistance – both in terms of costs specifically related to the move and sale of the original residence as well as in terms of additional expenses that may be claimed until the judge's move is finalized. The Government further contends that to accede to the Association and Council's request that "additional periods" be available would reduce the incentive to expedite the sale and place the full brunt of an unfavourable real estate market on the government.

The guidelines issued by the Office of the Commissioner for Federal Judicial Affairs, and approved by the Minister of Justice, indicate that in the absence of unusual circumstances, any additional extension will be limited to one additional year, over and above the six-month period already provided for in the *Judges Act*. We recommend that the Commissioner of Federal Judicial Affairs be mandated to deal with any circumstances that, in the Commissioner's view, can reasonably be deemed "unusual"; we are of the view that the 18-month limit, which is arrived at by regulation, not legislation, is already flexible.

**Recommendation 11:**

**The Commission recommends that the requested extension not be granted and that the Office of the Commissioner of Federal Judicial Affairs be mandated to deal with any circumstances that in the Commissioner's view can reasonably be deemed 'unusual'.**

### *4.4.2 Relocation Expenses Within Two Years of Retirement*

The Association and Council request that judges be reimbursed for relocation expenses incurred within two years prior to eligibility for retirement age, but in anticipation of retirement.

The Government does not oppose the proposal, but has stipulated that certain conditions would nevertheless have to be met. First, the implementation of the proposal should not conflict with any statutory residency requirements that apply to judges who benefit from this entitlement. Second, such an amendment to the current entitlement should not result in any additional costs to the public. The removal entitlement should apply only once. Furthermore, any additional travel and living costs, which might result from a judge's choice to relocate early, should not be reimbursable.

**Recommendation 12:**

**The Commission recommends that notwithstanding sections 40(1) (*c*) and (*e*) of the *Judges Act*, claims under these subsections for expenses made in anticipation of a relocation, but prior to retirement or resignation from office, be reimbursable by a removal allowance, provided that:**

**(i) these anticipated expenses are incurred no earlier than two years prior to the judge becoming eligible to retire, and**

**(ii) that all relocation expenses connected with that relocation be paid within the time frames currently provided in the Removal Allowance Order and that no later expenses should be reimbursed.**

### *4.4.3 Relocation Costs Program For Partners of Judges of the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada*

The Association and Council request that a spousal relocation costs program be set up, to an accountable maximum of $5,000 for partners of judges of the above-mentioned courts. This program would cover such services as French or English language training, employment search, employment assistance, interview travel, preparation of curriculum vitae, photocopying and transmittal costs for transcripts of academic records. It is the understanding of the judiciary that programs of this sort are now in place for the RCMP, the Canadian Forces and others within the federal public service.

The Government's position is that the general Removal Allowance Order for judges of this category already provides a generous level of assistance to judges and their families.

It is increasingly common that partners of persons who are transferred are required to incur expenses directly associated with that transfer. We have already identified what some of those expenses may be. In our judgment, it is reasonable to expect that the partner of a judicial appointee be reimbursed for such accountable expenses incurred, to a limit of $5,000.

**Recommendation 13:**

**The Commission recommends that the partners of judges of the Supreme Court of Canada, the Federal Court, the Federal Court of Appeal and the Tax Court of Canada be reimbursed for expenses incurred in the obligatory relocation, up to an accountable $5,000 limit.**

### *4.4.4 Relocation Expenses for All Superior Court Judges*

The submission of Mr. Justice Wright proposes that the entitlement to post-retirement removal allowance, currently provided to members of the Supreme Court of Canada, the Federal Court of Appeal, the Federal and Tax Courts and Northern Judges, be extended to all superior court judges.

The purpose of the removal allowance in question reflects the fact that these judges are either statutorily required to reside in Ottawa or, in the case of northern judges, must often be appointed from southern jurisdictions due to the small populations in those northern communities. This is not the case for superior court judges. The Association and Council agree with this limitation on the allowance. We find Mr. Justice Wright's request unacceptable, because of the lack of a statutory residence requirement, and we decline to make a recommendation.

**Recommendation 14:**

**The Commission recommends that there be no change to the entitlement to the post-retirement removal allowance.**

# CHAPTER 5

# OTHER ISSUES

## 5.1 Retirement Age for Justices of the Supreme Court of Canada

The Association and Council submit that judges of the Supreme Court of Canada should be entitled to retire with full annuity after 10 years of service on the court irrespective of age. The *Judges Act*, as amended in 1998, permits Supreme Court of Canada justices to retire with a full annuity upon reaching the age of 65 with 10 years of service.

The government at that time (1998) accepted the reduced years of service on the basis of the unique nature of judicial service on the Supreme Court of Canada. However, it maintained the age requirement on the grounds that it was consistent with the "overall judicial annuity scheme."[39] Supreme Court of Canada judges are entitled to retire earlier than 65 if they satisfy the modified Rule of 80, which was also implemented in 1998. However, according to the Government, any attempt to "de-link" age requirements from entitlement to an annuity is not isolated to the Supreme Court of Canada judges but has “broader policy implications”, thus raising the spectre of a comprehensive review of the whole judicial annuity scheme.

The Association and Council submit that the removal of the age requirement for eligibility to retire from the Supreme Court of Canada does not raise an annuity issue, nor does it have broad implications, when due account is taken of the small number of judges involved, and the fact that the vast majority of appointees to Canada's highest court are judges having previous judicial service. Because these appointees' eligibility for retirement is governed by the modified Rule of 80, most of them would in any event be eligible to retire after 10 years on the Supreme Court of Canada, notwithstanding the minimum age requirement of 65.

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[39] Government Reply Submission, January 23, 2004, at page 15.

The Crawford Commission in 1993 and Professor Martin L. Friedland in his 1995 book, *A Place Apart: Judicial Independence and Accountability in Canada*, prepared for the Canadian Judicial Council, endorsed the concept that "one doesn't want a judge of this important court who wants to leave to be trapped into staying after a reasonable period of service" on the grounds of "the unusually heavy burden inherent in membership on the Supreme Court of Canada".[40]

We have, after anxious consideration, come to the conclusion that an age exception should be made for the few Supreme Court of Canada justices who might want to avail themselves of it. There will always be a few who are still under 65 and qualify for having 10 years on the Supreme Court without prior judicial service. The compelling objective of the proposed policy is that 10 years may well be enough for certain appointees to that bench. That could be so whether the judges in question were 62 years of age or 72.

Accordingly, we recommend that the exception be implemented, keeping in mind that in the infrequent cases when it is exercised, it may well have a beneficial effect on the maintenance of a well-functioning Supreme Court of Canada, which is, or ought to be, an overriding consideration and is profoundly in the public interest.

**Recommendation 15:**

**The Commission recommends that justices of the Supreme Court of Canada be granted the exceptional privilege of eligibility for retirement on the full judicial annuity after 10 years of service on that bench, regardless of age.**

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[40] Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, at page 71.

## 5.2 Representational Costs For Judges to Participate in the Quadrennial Commission Review Process

The Association and Council seek reimbursement of 80 % of the judiciary's representational expenses in bringing their position on remuneration and other issues before the Commission.

At the present time, pursuant to s. 26(3) of the *Judges Act*, the judiciary is entitled to 50 per cent of their costs on a solicitor-client basis, as assessed by the Federal Court. The provision was enacted in 2001 following a recommendation from the Drouin Commission that the Government pay 80 % of the judiciary's representational costs. At the time, the Government considered the formula proposed by the Drouin Commission to be, as it said, unreasonable.

While the Association and Council did not judicially review the decision of the government not to implement the recommendation of the Drouin Commission, they have come back to us with the same request. And for similar reasons: that the proceedings had been materially improved by the active participation of both the judiciary and the Government, the latter of whose representational costs are paid out of public funds. This should also apply to all reasonable costs incurred by the Association and Council in connection with their participation in the Quadrennial Commission process.

There is agreement between the Association and Council and the Government on the principle of sharing the burden of cost. The Government argues that 50 % of assessed cost provides the judiciary, which is "the immediate beneficiary of the Commission's recommendations", with ample assistance to defray its representational costs and guards the public purse against "any largely unchecked discretion in deciding what costs would be incurred for legal counsel, expert witnesses and the like in preparation for a Commission."

The Association and Council, on the other hand, claim that their participation in the process is hardly at "their unchecked discretion", since the costs are reviewed by a Federal Court of Canada Assessment Officer and that it is unfair for them to have to pay half the expenses of a process they cannot control.

The constitutional context of Judicial Compensation and Benefits Commissions is to avoid direct, head-to-head negotiations between the federal government and federally appointed judges over the latter's remuneration by putting in place an independent, apolitical process that protects the independence of the judiciary and shields the government from accusations of trade-offs or any undue pressure (a constitutional imperative). What judges are paid is part and parcel of their standing in society. The economy and, therefore, the government's ability to pay will always have a bearing on the salaries of the judiciary. The value of the judiciary cannot be measured in terms of economic benefits or barter. It is measured by the role it plays in our society and, as such, it is in the public interest to ensure its remuneration is in line with the public trust.

Both the Government and the Association and Council were represented before this Commission by able and experienced counsel. As pointed out by the Drouin Commission and equally today, in the case of the Government, all of its representational costs are covered by public funds. In addition, it had available to it, also at public expense, the services of a variety of experts, as required or considered desirable by it and paid for by the government. We do not believe that the participation of the judiciary should become a financial burden on individual judges.

**Recommendation 16:**

**The Commission recommends that the Government pay 100% of the disbursements and two-thirds of the legal fees (subject to assessment) incurred by the Association and Council in preparing their submissions and bringing them before the Commission.**

# CHAPTER 6

# RECOMMENDATIONS FOR IMPROVEMENTS

## 1.a. Timing

The Drouin Commission noted in its report that it had nine months to consider its report.[41] This Commission effectively had six months. This was inadequate, in our view, and resulted in a compression of our activities that was inconvenient and unnecessary. The statutory requirement for reporting is May 31; the report must be completed by April 30, to permit translation and printing. Accordingly, we believe that the next commission should be constituted by June 1 of the year prior to the report date of May 31.

## 1.b. Continuity

The Drouin Commission noted that the commission infrastructure would remain in place, which concept it endorsed as being very useful.[42] Regrettably, that did not occur. As we have noted elsewhere, this Commission was first assembled in late September 2003 in Ottawa, to find that we had no staff and that the records of the Drouin Commission, which had been maintained, were not familiar to the staff we were able to enlist. We had the benefit of a very helpful memo, thoughtfully put together by the previous Executive Director, but the fact is we very nearly had to start with a blank slate, which was most inconvenient and inefficient for the work that had to be done.

We believe it would be most desirable that a staff – perhaps one person and possibly part-time – should be maintained throughout the term of the commission and perhaps from commission to commission.

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41 Drouin (2000), at page 115.
42 Ibid, at page 115.

Furthermore, we believe the Commissioners who are appointed for a four-year term should meet at least once a year to consider the events that have transpired and any trends regarding compensation or other matters within their jurisdiction. This would permit direction to be given to the staff and ensure continuity in the operation of the Commission's activities. This would better equip the next commission to more efficiently prosecute its work. To the extent this process was in place, it would ameliorate the time compression addressed in recommendation 1.a above.

## 2. Other Jurisdictions

The Drouin Commission had before it information about judicial compensation in other jurisdictions, but did not have enough information about the factors that went into that compensation to make use of the information.[43] Neither principal party to this Commission put similar information before us. In view of the problem of the existing comparators that we have noted, the study of the compensation of judges in jurisdictions with a legal system comparable to Canada's would be useful if it were completed sufficiently thoroughly to provide information on which a proper comparison could be made.

Inasmuch as we have a restricted number of comparators to start with, to expand those comparators ought to be useful. The jurisdictions that would be surveyed are those common law jurisdictions bearing most similarity to Canada, which would include the United Kingdom, some of the Commonwealth countries and probably the United States. Assembling the necessary information would be a significant undertaking at the outset, but maintaining it would be a relatively simple task. We suggest such an initiative be instituted.

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[43] Drouin (2000), at page 48.

## 3. Comparators

### *a. The DM-3 Group*

The DM-3 comparator is a very important one and, while it will continue to be important and useful, it has limitations for the reasons expressed in the Judicial Salaries chapter of our report. We have agreed that at-risk pay should be taken into account in considering the use of the comparator, since it is now clear that at-risk pay is assuming, over time, a larger importance in the determination of the income of DM-3s and, indeed, of everyone at the deputy minister level. As we have noted, however, many of the reasons why at-risk pay is awarded have very little to do with the judicial function, which makes the comparison somewhat less useful.

Similarly, there is an unfortunate disconnect between the DM-3 comparator, which has been useful in the past, and the apparent current structure to compensate DM-3s. We note that the *Advisory Committee on Senior Level Retention and Compensation* reports bear no reference at all to judicial salaries, which is odd inasmuch as those acting on behalf of the Association and Council strongly suggest that the DM-3 is the most important comparator. The reciprocal consideration simply is not there. We have no way of knowing why this should be.

Inasmuch as the A*dvisory Committee on Senior Level Retention and Compensation* reports are the basis for the DM-3 and other DM compensation plans, we suggest that a meeting held between that committee and the Quadrennial Commission at least once would be a useful exercise and would permit an exchange of information that might be useful to both the committee and the Commission.

### *b. Incomes of Senior Practitioners in Private Practice*

We were particularly troubled by the difficulties in obtaining appropriate current information on the income levels of self-employed lawyers in private practice. This is partly because of the way in which that information is collected by CRA, for which our purposes are irrelevant, and partly because there is no other currently available

method of obtaining this important information. As we have seen, both principal parties decried the usefulness of the information that was available, but to the extent they did use it, they had very different approaches as to how it could be used and what it meant.

As a result, we strongly recommend that some joint method (in conjunction with the Government and the Association and Council) be sought to provide an appropriate and common information and statistical base, the accuracy of which can be accepted by both parties as reliable. This information base is particularly important with respect to the income of self-employed lawyers and could be expanded to get some appreciation as to the income levels of those lawyers who are appointed to the judiciary.

There are many ways in which this might be done: a study by an independent consultant retained by this Commission to report to the principal parties could be commissioned. Statistical evidence could be gathered over time from those who are appointed to the bench in a way that would preserve their anonymity and privacy. There may be other ways.

There could be a clearing house for information, whereby some independent authority – such as the Quadrennial Commission – could obtain information from judges upon their appointment, by means of which their income for the three previous years could be ascertained and other useful information obtained from them with respect to their motives and expenses incurred on accepting their appointment. While this information might not be useful immediately, over a period of the next two Quadrennial Commissions it could be very useful indeed, having regard to the expected turnover of judges during that period of time.

We could meet with CRA and determine what information they would be able to extract from the income tax returns filed with the Agency.

We could begin to build a database, which, with the assistance of expert evidence of an actuarial and compensation nature, would be useful to future commissions.

The fact is that there is altogether too much speculation with respect to what senior practitioners in private practice currently earn and the extent to which the annuity and other benefits play a part in the decisions of persons on whether or not to apply for and accept judicial appointment.

The Minister of Justice has the power under s. 26(4) of the *Judges Act* to make a reference to a Quadrennial Commission with respect to the adequacy of salaries and other amounts payable under this Act. If the Minister of Justice were to so direct, we would be willing to undertake, with the help of the principal parties, any recommendations contained in this section, for the purpose of being of use to the next Quadrennial Commission, and those thereafter, with respect to important aspects of their work.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

**Roderick A. McLennan, Q.C.**
**Chair**

**Gretta Chambers, C.C., O.Q.**
**Commissioner**

**Earl A. Cherniak, Q.C.**
**Commissioner**

**May 31, 2004**

# LIST OF RECOMMENDATIONS

**Recommendation 1:**

The Commission recommends that the salary of puisne judges be established as follows. Effective April 1, 2004, $240,000, inclusive of statutory indexing on that date, and for the next three years: $ 240,000 plus cumulative statutory indexing effective April 1 of each of those years.

**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, 2004, and inclusive of statutory indexing, at the following levels:

| | |
|---|---|
| Supreme Court of Canada: | |
| Chief Justice of Canada | $308,400 |
| Justices | $285,600 |
| Federal Court and Tax Court of Canada: | |
| Chief Justices | $263,000 |
| Associate Chief Justices | $263,000 |
| Appeal Courts, Superior and Supreme Courts and Courts of Queen's Bench: | |
| Chief Justices | $263,000 |
| Associate Chief Justices | $263,000 |

**Recommendation 3:**

The Commission recommends that the senior northern judges receive equivalent compensation to that of a chief justice until such time as chief justices are appointed in those jurisdictions.

**Recommendation 4:**

The Commission does not recommend a salary differentiation between puisne judges who sit on courts of appeal and puisne judges who preside at trials.

**Recommendation 5:**

The Commission recommends that the *Judges Act* be amended to provide for

- the possibility of dividing, upon conjugal breakdown, the judicial annuity deemed to accrue during a relationship, up to a 50% limit;

- the judicial annuity to be deemed to accrue over the judge's entire period of judicial service, for the purpose of determining the portion of the judicial annuity that is subject to division upon conjugal breakdown;

- a lump sum settlement option, to ensure a clean break and the possibility of deferring such settlement until the date when the judge will have attained age 55 and completed 10 years of service, if applicable; and

- the demographic assumptions used for the most recent *Actuarial Report on the Pension Plan for the Federally Appointed Judges* to be used for purposes of determining the value of the judicial annuity and the expected retirement date of a judge in calculating the portion of the judicial annuity subject to division.

The Commission also recommends that the government amend the *Judges Act* and the *Income Tax Act*, as necessary, to allow the transfer of a portion of the former spouses' lump-sum settlements to RRSPs as if the judicial annuity were a registered pension plan, at least for the portion of the judicial annuity up to the defined benefit pension limits applicable to registered pension plans under the *Income Tax Act*.

**Recommendation 6:**

The Commission recommends that there be no change in the provision for survivor benefits for single judges until the matter is addressed by the government in the wider federal context.

**Recommendation 7:**

The Commission declines to recommend any change to the judicial annuities payable to the judges who retired during the 1992–97 time period.

**Recommendation 8:**

The Commission recommends that the Incidental Allowance of $5,000 per annum for each judge remain unchanged.

**Recommendation 9:**

The Commission recommends that effective April 1, 2004, s. 27(6) of the *Judges Act* be amended such that regional senior judges in Ontario be added to the judges entitled to a representational allowance under that section, and that the representational allowance for such regional senior judges be set, in s. 27(7), at an accountable maximum yearly amount of $5,000.

**Recommendation 10:**

The Commission recommends that the *Judges Act* be amended to provide for the payment of an isolated post allowance to the resident Labrador judge in the amount of $12, 000 per annum, in conformity with the isolation allowances provided to the judges of the Northern Territories.

**Recommendation 11:**

The Commission recommends that the requested extension not be granted and that the Office of the Commissioner of Federal Judicial Affairs be mandated to deal with any circumstances that in the Commissioner's view can reasonably be deemed 'unusual'.

**Recommendation 12:**

The Commission recommends that, notwithstanding paragraphs 40(1) (*c*) and (*e*), claims under these paragraphs for expenses made in anticipation of a relocation, but prior to retirement or resignation from office, shall be reimbursable by a removable allowance, provided that:

(i) the anticipated expenses are incurred no earlier than two years prior to the judge becoming eligible to retire, and

(ii) that all relocation expenses connected with that relocation be paid within the time frames currently provided in the Removal Allowance Order and that no later expenses should be reimbursed.

**Recommendation 13:**

The Commission recommends that the partners of judges of the Supreme Court of Canada, the Federal Court, the Federal Court of Appeal and the Tax Court of Canada be reimbursed for incurred expenses in the obligatory relocation, up to an accountable $5,000 limit.

**Recommendation 14:**

The Commission recommends that there be no change to the entitlement to the post-retirement removal allowance.

**Recommendation 15:**

The Commission recommends that justices of the Supreme Court of Canada be granted the exceptional privilege of eligibility for retirement on the full judicial annuity after 10 years of service on that bench regardless of age.

**Recommendation 16:**

The Commission recommends that the Government pay 100% of the disbursements and two-thirds of the legal fees (subject to assessment) incurred by the Association and Council in preparing their submissions and bringing them before the Commission.