JUDICIAL COMPENSATION AND BENEFITS COMMISSION

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CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

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Tab #	Description
	Jurisprudence
1	*Therrien (Re)*, 2001 SCC 35 (excerpt)
2	*Valente v. The Queen*, [1985] 2 SCR 673
	Quadrennial Commission and Parliamentary Proceedings
3	Evidence of Mr. E. Cherniak, QC to the House of Commons Standing Committee on Justice and Human Rights (Meeting No. 24, October 24, 2006), 39th Parliament, 1st Session
4	Senate Debates, 39th Parliament, 1st Session (6 December 2006) at 1520 and (13 December 2006) at 1400-1450) (Hon Mobina S.B. Jaffer)
5	Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated December 14, 2007
6	Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated December 20, 2011
7	Submission of the Government of Canada to the Levitt Commission, December 23, 2011 (excerpt)
8	Annex B to the Reply Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council before the Levitt Commission entitled "Report of Robert Levasseur and Larry Moate" dated January 27, 2012
9	Reply Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated January 30, 2012 (excerpt)
10	Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated February 29, 2016
11	Reply Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated March 29, 2016
	Advisory Committee on Senior Level Retention and Compensation
12	Advisory Committee on Senior Level Retention and Compensation, First Report: January 1998
13	Advisory Committee on Senior Level Retention and Compensation, Third Report Report: Dec 2000
14	Advisory Committee on Senior Level Retention and Compensation, Fourteenth Report: July 2011
	Economic Outlook – Historical
15	Department of Finance Canada, 'The Fiscal Monitor', January to March 2006
16	Statistics Canada, Catalogue # 13016 X, Economic accounts key indicators, Canada
17	Department of Finance Canada, 'Fiscal Reference Tables', October 2011
	Speeches
18	The Honourable Chief Justice Lamer, 'Remarks by the Rt. Honourable Antonio Lamer, P.C., Chief Justice of Canada, to the Council of the Canadian Bar Association Annual

	Meeting' (20 August 1994) at 9 [unpublished]
19	The Honourable Chief Justice McLachlin, The Challenges We Face, Remarks presented to the Empire Club of Canada, Toronto, Ontario, March 8, 2007
	Triennial Commission Reports
20	*Report and Recommendations of Commission on Judges' Salaries and Benefits*, October 6, 1983 (Lang Report)
21	*Report and Recommendations of the 1986 Commission on Judges' Salaries and Benefits*, February 27, 1987 (Guthrie Report)
22	*Report and Recommendations of the 1989 Commission on Judges' Salaries and Benefits*, March 5, 1990 (Courtois Report)
23	*Report and Recommendations of the 1992 Commission on Judges' Salaries and Benefits*, March 31, 1993 (Crawford Report)
24	*Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits*, September 30, 1996 (Scott Report)
	Office of the Commissioner for Federal Judicial Affairs
25	Office of the Commissioner for Federal Judicial Affairs, Guidelines on the Incidental Allowance dated April 1, 2020
26	Office of the Commissioner for Federal Judicial Affairs, Guidelines on the Representational Allowance dated April 1, 2020
	Other
27	Daniel Fish, "First-year salaries on Bay Street reach new heights", *Precedent Magazine* (December 4, 2018)
28	Robert Half Legal, Legal Salary Guide 2021
29	Canadian Bar Association, No Turning Back: CBA Task Force Report on Justice Issues Arising from COVID-19, February 2021
30	R. Doolittle & C. Dobby, "Female partners earned 25 percent less than their male colleagues at a major Toronto law firm, document shows", *Globe and Mail* (9 February 2021)
31	R. Doolittle, "Major Canadian law firms willing to release wage-gap data", *Globe and Mail* (25 February 2021)

TAB 1

Judge Richard Therrien, Q.C.J. *Appellant*

v.

The Minister of Justice *Respondent*

and

The Attorney General of Quebec *Respondent*

and

The Attorney General for Ontario, the Attorney General for New Brunswick, Office des droits des détenus and Association des services de réhabilitation sociale du Québec *Interveners*

INDEXED AS: THERRIEN (RE)

Neutral citation: 2001 SCC 35.

File No.: 27004.

2000: October 2; 2001: June 7.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Binnie and Arbour JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Appeal — Supreme Court of Canada — Jurisdiction — Report of inquiry panel of Quebec Court of Appeal — Judicial ethics — Report of Court of Appeal recommending removal of Judge of Court of Québec — Whether Supreme Court has jurisdiction to hear appeal from report of Court of Appeal — Whether report a "judgment" within meaning of Supreme Court Act — Supreme Court Act, R.S.C. 1985, c. S-26, ss. 2(1), 40(1) — Courts of Justice Act, R.S.Q., c. T-16, s. 95.

Courts — Jurisdiction — Quebec Court of Appeal — Superior Court — Legal ethics — Court of Appeal hearing request by Minister of Justice concerning removal of Judge of Court of Québec — Judge concerned applying to Superior Court to have report of committee of inquiry

Le juge Richard Therrien, j.c.q. *Appelant*

c.

La ministre de la Justice *Intimée*

et

La procureure générale du Québec *Intimée*

et

Le procureur général de l'Ontario, le procureur général du Nouveau-Brunswick, l'Office des droits des détenus et l'Association des services de réhabilitation sociale du Québec *Intervenants*

RÉPERTORIÉ : THERRIEN (RE)

Référence neutre : 2001 CSC 35.

N° du greffe : 27004.

2000 : 2 octobre; 2001 : 7 juin.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Binnie et Arbour.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Appel — Cour suprême du Canada — Compétence — Rapport de la formation d'enquête de la Cour d'appel du Québec — Déontologie judiciaire — Rapport de la Cour d'appel recommandant la destitution d'un juge de la Cour du Québec — La Cour suprême a-t-elle compétence pour se saisir de l'appel du rapport de la Cour d'appel? — Ce rapport constitue-t-il un « jugement » au sens de la Loi sur la Cour suprême? — Loi sur la Cour suprême, L.R.C. 1985, ch. S-26, art. 2(1), 40(1) — Loi sur les tribunaux judiciaires, L.R.Q., ch. T-16, art. 95.

Tribunaux — Compétence — Cour d'appel du Québec — Cour supérieure — Déontologie judiciaire — Cour d'appel saisie d'une requête du ministre de la Justice concernant la destitution d'un juge de la Cour du Québec — Juge concerné présentant en Cour supérieure

wise penalized in his employment owing to the mere fact that he was granted a pardon, contrary to s. 18.2 of the *Quebec Charter*. He also submits that his rights to dignity, honour and reputation, and to private life, which are protected by ss. 4 and 5 of the *Quebec Charter*, have been infringed, since the existence of his conviction has been disclosed despite the pardon, and he was defamed by members of the legislature. Finally, the appellant questions the application of the test for removal in his specific case. In his view, his conduct has not been so manifestly and profoundly destructive of the impartiality, integrity and independence of the justice system that the confidence of the public in his capacity to carry out his functions would be undermined.

canadienne et avoir été congédié ou autrement pénalisé dans le cadre de son emploi du seul fait qu'il a obtenu un pardon contrairement à l'art. 18.2 de la *Charte québécoise*. Il soutient également que ses droits à la dignité, à l'honneur et à la réputation, et à la vie privée protégés par les art. 4 et 5 de la *Charte québécoise* ont été brimés puisque l'existence de sa condamnation a été révélée malgré le pardon et qu'il fut l'objet de diffamation de la part des parlementaires. Finalement, l'appelant remet en question l'application du critère de destitution dans son cas particulier. Selon lui, sa conduite ne porte pas si manifestement et si totalement atteinte aux notions d'impartialité, d'intégrité et d'indépendance de la justice au point d'ébranler la confiance du public en sa capacité d'exercer ses fonctions.

107 By making these arguments, the appellant is inviting this Court to examine the very foundations of our justice system. The decision is, first and foremost, closely connected to the role a judge is called upon to play in that system and to the image of impartiality, independence and integrity he or she must project and strive to maintain.

En soulevant de tels arguments, l'appelant demande que notre Cour se penche sur les fondements mêmes de notre système de justice. La décision est, avant toute chose, intimement liée au rôle que le juge est appelé à y jouer et à l'image d'impartialité, d'indépendance et d'intégrité qu'il doit dégager et s'efforcer de préserver.

3. The Role of the Judge: "A Place Apart"

3. Le rôle du juge : « une place à part »

108 The judicial function is absolutely unique. Our society assigns important powers and responsibilities to the members of its judiciary. Apart from the traditional role of an arbiter which settles disputes and adjudicates between the rights of the parties, judges are also responsible for preserving the balance of constitutional powers between the two levels of government in our federal state. Furthermore, following the enactment of the *Canadian Charter*, they have become one of the foremost defenders of individual freedoms and human rights and guardians of the values it embodies: *Beauregard*, *supra*, at p. 70, and *Reference re Remuneration of Judges of the Provincial Court*, *supra*, at para. 123. Accordingly, from the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose obligations on him or her.

La fonction judiciaire est tout à fait unique. Notre société confie d'importants pouvoirs et responsabilités aux membres de sa magistrature. Mis à part l'exercice de ce rôle traditionnel d'arbitre chargé de trancher les litiges et de départager les droits de chacune des parties, le juge est aussi responsable de protéger l'équilibre des compétences constitutionnelles entre les deux paliers de gouvernement, propres à notre État fédéral. En outre, depuis l'adoption de la *Charte canadienne*, il est devenu un défenseur de premier plan des libertés individuelles et des droits de la personne et le gardien des valeurs qui y sont enchâssées : *Beauregard*, précité, p. 70, et *Renvoi sur la rémunération des juges de cours provinciales*, précité, par. 123. En ce sens, aux yeux du justiciable qui se présente devant lui, le juge est d'abord celui qui dit la loi, qui lui reconnaît des droits ou lui impose des obligations.

If we then look beyond the jurist to whom we assign responsibility for resolving conflicts between parties, judges also play a fundamental role in the eyes of the external observer of the judicial system. The judge is the pillar of our entire justice system, and of the rights and freedoms which that system is designed to promote and protect. Thus, to the public, judges not only swear by taking their oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but they are asked to embody them (Justice Jean Beetz, Introduction of the first speaker at the conference marking the 10th anniversary of the Canadian Institute for the Administration of Justice, observations collected in *Mélanges Jean Beetz* (1995), at pp. 70-71).

109 Puis, au-delà du juriste chargé de résoudre les conflits entre les parties, le juge joue également un rôle fondamental pour l'observateur externe du système judiciaire. Le juge constitue le pilier de l'ensemble du système de justice et des droits et libertés que celui-ci tend à promouvoir et à protéger. Ainsi, pour les citoyens, non seulement le juge promet-il, par son serment, de servir les idéaux de Justice et de Vérité sur lesquels reposent la primauté du droit au Canada et le fondement de notre démocratie, mais il est appelé à les incarner (le juge Jean Beetz, Présentation du premier conférencier de la Conférence du 10e anniversaire de l'Institut canadien d'administration de la justice, propos recueillis dans *Mélanges Jean Beetz* (1995), p. 70-71).

Accordingly, the personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper functioning. But beyond that, public confidence promotes the general welfare and social peace by maintaining the rule of law. In a paper written for its members, the Canadian Judicial Council explains:

110 En ce sens, les qualités personnelles, la conduite et l'image que le juge projette sont tributaires de celles de l'ensemble du système judiciaire et, par le fait même, de la confiance que le public place en celui-ci. Le maintien de cette confiance du public en son système de justice est garant de son efficacité et de son bon fonctionnement. Bien plus, la confiance du public assure le bien-être général et la paix sociale en maintenant un État de droit. Dans un ouvrage destiné à ses membres, le Conseil canadien de la magistrature explique :

> Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment.
>
> (Canadian Judicial Council, *Ethical Principles for Judges* (1998), p. 14)

> La confiance et le respect que le public porte à la magistrature sont essentiels à l'efficacité de notre système de justice et, ultimement, à l'existence d'une démocratie fondée sur la primauté du droit. De nombreux facteurs peuvent ébranler la confiance et le respect du public à l'égard de la magistrature, notamment : des critiques injustifiées ou malavisées; de simples malentendus sur le rôle de la magistrature; ou encore toute conduite de juges, en cour ou hors cour, démontrant un manque d'intégrité. Par conséquent, les juges doivent s'efforcer d'avoir une conduite qui leur mérite le respect du public et ils doivent cultiver une image d'intégrité, d'impartialité et de bon jugement.
>
> (Conseil canadien de la magistrature, *Principes de déontologie judiciaire* (1998), p. 14)

The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they

111 La population exigera donc de celui qui exerce une fonction judiciaire une conduite quasi irréprochable. À tout le moins exigera-t-on qu'il paraisse

give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens. This is eloquently expressed by Professor Y.-M. Morissette:

[TRANSLATION] [T]he vulnerability of judges is clearly greater than that of the mass of humanity or of "elites" in general: it is rather as if his or her function, which is to judge others, imposed a requirement that he or she remain beyond the judgment of others.

("Figure actuelle du juge dans la cité" (1999), 30 *R.D.U.S.* 1, at pp. 11-12)

In *The Canadian Legal System* (1977), Professor G. Gall goes even further, at p. 167:

The dictates of tradition require the greatest restraint, the greatest propriety and the greatest decorum from the members of our judiciary. We expect our judges to be almost superhuman in wisdom, in propriety, in decorum and in humanity. There must be no other group in society which must fulfil this standard of public expectation and, at the same time, accept numerous constraints. At any rate, there is no question that a certain loss of freedom accompanies the acceptance of an appointment to the judiciary.

avoir un tel comportement. Il devra être et donner l'apparence d'être un exemple d'impartialité, d'indépendance et d'intégrité. Les exigences à son endroit se situent à un niveau bien supérieur à celui de ses concitoyens. Le professeur Y.-M. Morissette exprime bien ce propos :

[L]a vulnérabilité du juge est nettement plus grande que celle du commun des mortels, ou des «élites» en général : c'est un peu comme si sa fonction, qui consiste à juger autrui, lui imposait de se placer hors de portée du jugement d'autrui.

(« Figure actuelle du juge dans la cité » (1999), 30 *R.D.U.S.* 1, p. 11-12)

Le professeur G. Gall, dans son ouvrage *The Canadian Legal System* (1977), va encore plus loin à la p. 167 :

[TRADUCTION] Les membres de notre magistrature sont, par tradition, astreints aux normes de retenue, de rectitude et de dignité les plus strictes. La population attend des juges qu'ils fassent preuve d'une sagesse, d'une rectitude, d'une dignité et d'une sensibilité quasi-surhumaines. Sans doute aucun autre groupe de la société n'est-il soumis à des attentes aussi élevées, tout en étant tenu d'accepter nombre de contraintes. De toute façon, il est indubitable que la nomination à un poste de juge entraîne une certaine perte de liberté pour la personne qui l'accepte.

112 The reasons that follow therefore cannot disregard two fundamental premises. First, and following from the foregoing, they cannot be dissociated from the very particular context of the judicial function. The judge is in "a place apart" in our society and must conform to the demands of this exceptional status (Friedland, *supra*). On the other hand, we also must not forget that this Court is sitting on appeal from the report of the inquiry panel of the Quebec Court of Appeal, to which a specific function has been assigned by s. 95 *C.J.A.* As I said earlier, the Court of Appeal, when it makes its report under that provision, is called upon to play a fundamental role in terms of both the ethical process itself and the principle of judicial independence. This Court must therefore respect that jurisdiction and show it the proper deference. This is

Les motifs qui suivent ne sauraient donc faire abstraction de deux prémisses fondamentales. D'abord et dans la lignée de ce qui précède, ils ne sauraient être dissociés du contexte très particulier dans lequel la fonction judiciaire s'inscrit. La magistrature occupe une « place à part » dans notre société et elle doit se conformer aux exigences requises par ce statut exceptionnel (Friedland, *op. cit.*). Par ailleurs, nous ne saurions également perdre de vue que notre Cour siège en appel du rapport de la formation d'enquête de la Cour d'appel du Québec, laquelle est dépositaire d'une fonction particulière qui lui est confiée par l'art. 95 *L.T.J.* Comme je le mentionnais précédemment, la Cour d'appel, lorsqu'elle rédige son rapport en vertu de cette disposition, est appelée à jouer un rôle fondamental tant au niveau du processus déontologique lui-même qu'à l'égard de l'application du principe de l'indépendance judiciaire. Notre Cour se doit

the approach that I shall now take in moving on to the final part of these reasons.

4. Meaning and Effect of the Pardon

At common law, a pardon is an expression of the sovereignty of the monarch, the result of the unilateral and discretionary exercise of the Royal prerogative of mercy or clemency. In Canada, a pardon is also derived from the powers of the Crown. Thus, the provisions contained in Canadian statute law, including the *Criminal Code*, merely prescribe various ways to exercise that prerogative, without limiting its scope: s. 749 of the *Criminal Code*. See also *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy upon Deportation Proceedings*, [1933] S.C.R. 269, *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, at pp. 876-77, and, more generally, H. Dumont, *Pénologie — Le droit canadien relatif aux peines et aux sentences* (1993), at pp. 539-70.

Professor Dumont breaks the various types of pardon found in the *Criminal Code* down into the following categories: (1) the ordinary and partial pardon provided in ss. 748(1) and 748.1(1) of the *Code*, which consists of the remission, in whole or in part, of a sentence without reviewing the issue of the person's guilt; (2) the conditional pardon granted under s. 748(2) of the *Code*, which can amend the initial sentence imposed by the court and make it subject to certain conditions; (3) the free pardon also granted under subss. 748(2) and (3) of the *Code*, by virtue of which a person is deemed never to have committed the offence in respect of which it is granted, and (4) the pardon granted after a referral for hearing or referral to a court of appeal in accordance with s. 690 of the *Code* or s. 53 *S.C.A.* which results in a new trial or a new hearing.

Also, Parliament may legislate regarding pardons in the exercise of its jurisdiction over criminal law. For example, it has established a procedure for administrative pardons, under the

donc de respecter cette compétence et de faire preuve de déférence en son endroit. C'est suivant cette approche que j'aborde à l'instant la dernière partie de ces motifs.

4. Le sens et la portée du pardon

113 En common law, le pardon est l'expression de la souveraineté du Roi, le résultat de l'exercice unilatéral et discrétionnaire de sa prérogative royale de grâce ou de clémence. Au Canada, le pardon tire également son origine des pouvoirs de la Couronne. Les textes législatifs canadiens, dont le *Code criminel*, ne font que prescrire différentes façons de l'exercer, sans pour autant en limiter la portée : art. 749 du *Code criminel*. Voir aussi *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy upon Deportation Proceedings*, [1933] R.C.S. 269; le *Renvoi: Résolution pour modifier la Constitution*, [1981] 1 R.C.S. 753, p. 876-877, et, plus généralement, H. Dumont, *Pénologie — Le droit canadien relatif aux peines et aux sentences* (1993), p. 539-570.

114 Le professeur Dumont regroupe les différentes formes de pardon que l'on retrouve au *Code criminel* dans les catégories suivantes : (1) le pardon ordinaire et partiel prévu aux par. 748(1) et 748.1(1) du *Code* qui comporte la remise d'une sentence ou d'une partie de celle-ci sans remettre en question la culpabilité de la personne; (2) le pardon conditionnel obtenu en vertu du par. 748(2) du *Code* qui permet de modifier la peine initialement imposée par le tribunal et de l'assortir de certaines conditions; (3) le pardon absolu aussi obtenu en vertu des par. 748(2) et (3) du *Code* selon lesquels une personne est réputée n'avoir jamais commis l'infraction à l'égard de laquelle il est accordé et (4) le pardon obtenu après le renvoi à procès ou le renvoi à une cour d'appel conformément à l'art. 690 du *Code* ou à l'art. 53 *L.C.S.*, qui donne lieu à la tenue d'un nouveau procès ou d'une nouvelle audition.

115 Par ailleurs, le législateur fédéral peut également légiférer en matière de pardon dans l'exercice de sa compétence en droit criminel. Il a ainsi créé une procédure de réhabilitation administrative, sous la

TAB 2

Walter Valente *Appellant*;

and

Her Majesty The Queen *Respondent*;

and

Attorney General of Canada, Attorney General of Quebec, Attorney General for Saskatchewan, Provincial Court Judges Association (Criminal Division) and Ontario Family Court Judges Association *Interveners.*

File No.: 17583.

1984: October 9, 10; 1985: December 19.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Lamer and Le Dain JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Charter of Rights — Independent tribunal — Provincial Court judge declined jurisdiction on ground Provincial Court (Criminal Division) not an independent tribunal — Whether or not judge of Provincial Court (Criminal Division) an independent tribunal.

Constitutional law — Charter of Rights — Courts — Independent tribunal — Jurisdiction declined on ground Provincial Court (Criminal Division) not an independent tribunal — Whether or not judge of Provincial Court (Criminal Division) an independent tribunal — Canadian Charter of Rights and Freedoms, s. 11(d) — Constitution Act, 1982, s. 52(1) — Provincial Courts Act, R.S.O. 1980, c. 398 — Public Service Act, R.S.O. 1980, c. 418 — Public Service Superannuation Act, R.S.O. 1980, c. 419 — Provincial Courts Amendment Act, 1983, 1983 (Ont.), c. 18, s. 1 — Provincial Judges and Masters Statute Law Amendment Act, 1983, 1983 (Ont.), c. 78, s. 2(2) — Courts of Justice Act, 1984, 1984 (Ont.), c. 11.

A judge of the Provincial Court (Criminal Division), sitting on the Crown's appeal against the sentence imposed on the appellant following conviction for careless driving, declined to hear the appeal pending determination by a superior court as to whether the Provincial Court (Criminal Division) was an independent tribunal within the meaning of s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*. Among the several reasons advanced by counsel in support of the contention

Walter Valente *Appelant*;

et

Sa Majesté La Reine *Intimée*;

et

Procureur général du Canada, Procureur général du Québec, Procureur général de la Saskatchewan, Association des juges des Cours provinciales (Division criminelle) et Ontario Family Court Judges Association *Intervenants.*

N° du greffe: 17583.

1984: 9, 10 octobre; 1985: 19 décembre.

Présents: Le juge en chef Dickson et les juges Beetz, Estey, McIntyre, Chouinard, Lamer et Le Dain.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Tribunaux — Charte des droits — Tribunal indépendant — Juge de la Cour provinciale déclinant compétence parce que la Cour provinciale (Division criminelle) n'est pas un tribunal indépendant — Un juge de la Cour provinciale (Division criminelle) est-il un tribunal indépendant?

Droit constitutionnel — Charte des droits — Tribunaux — Tribunal indépendant — Compétence déclinée parce que la Cour provinciale (Division criminelle) n'est pas un tribunal indépendant — Un juge de la Cour provinciale (Division criminelle) est-il un tribunal indépendant? — Charte canadienne des droits et libertés, art. 11d) — Loi constitutionnelle de 1982, art. 52(1) — Loi sur les cours provinciales, L.R.O. 1980, chap. 398 — Loi sur la fonction publique, L.R.O. 1980, chap. 418 — Loi sur le régime de retraite des fonctionnaires, L.R.O. 1980, chap. 419 — Provincial Courts Amendment Act, 1983, 1983 (Ont.), chap. 18, art. 1 — Provincial Judges and Masters Statute Law Amendment Act, 1983, 1983 (Ont.), chap. 78, art. 2(2) — Loi de 1984 sur les tribunaux judiciaires, 1984 (Ont.), chap. 11.

Dans un appel formé par Sa Majesté contre une peine infligée à l'appelant, reconnu coupable de l'infraction de conduite imprudente, un juge de la Cour provinciale (Division criminelle) a décliné compétence pour entendre l'appel tant qu'une cour supérieure n'aurait pas déterminé si la Cour provinciale (Division criminelle) était un tribunal indépendant au sens de l'al. 11*d*) de la *Charte canadienne des droits et libertés*. Parmi les nombreuses raisons soumises par l'avocat à l'appui de la

that the Provincial Court (Criminal Division) was not an independent tribunal were the nature of the tenure of provincial court judges, particularly those holding office under a post-retirement reappointment, the manner in which their salaries and pensions were fixed and provided for, and the extent to which they were dependent for certain advantages and benefits on the discretion of the executive government. The Ontario Court of Appeal proceeded on the basis that the provincial court judge had in effect decided that as a matter of law the Provincial Court (Criminal Division) as an institution was not independent. It allowed the appeal, holding that both the Provincial Court Judge and the Provincial Court (Criminal Division) were independent, and remitted the matter to the Provincial Court Judge to determine whether the sentence imposed was a fit and proper sentence.

Held: The appeal should be dismissed and the constitutional question answered as follows: A judge of the Provincial Court (Criminal Division) of Ontario is an independent tribunal within the meaning of s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

The concepts of "independence" and "impartiality" found in s. 11(*d*) of the *Charter*, although obviously related, are separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. "Independence" reflects or embodies the traditional constitutional value of judicial independence and connotes not only a state of mind but also a status or relationship to others—particularly to the executive branch of government—that rests on objective conditions or guarantees. Judicial independence involves both individual and institutional relationships: the individual independence of a judge as reflected in such matters as security of tenure and the institutional independence of the court as reflected in its institutional or administrative relationships to the executive and legislative branches of government.

The test for independence for purposes of s. 11(*d*) of the *Charter* should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. This perception must be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence and not a perception of how it will in fact act regardless of whether it enjoys such conditions or guarantees.

It would not be feasible to apply the most rigorous and elaborate conditions of judicial independence to the

prétention que la Cour provinciale (Division criminelle) n'est pas un tribunal indépendant, on trouve la nature de la charge des juges de cour provinciale, en particulier ceux qui occupent leur charge en vertu d'une nouvelle nomination après l'âge de la retraite, la manière dont leur traitement et pension sont fixés et versés et la mesure dans laquelle certains de leurs avantages sociaux dépendent du pouvoir discrétionnaire de l'exécutif. La Cour d'appel de l'Ontario a procédé sur le fondement que le juge de la Cour provinciale avait en réalité décidé qu'aux yeux du droit la Cour provinciale (Division criminelle), en tant qu'institution, n'était pas indépendante. Elle a accueilli l'appel, décidant que le juge de la Cour provinciale de même que la Cour provinciale (Division criminelle) étaient indépendants et a renvoyé la question au juge de la Cour provinciale pour qu'il statue sur la régularité et l'à-propos de la peine infligée.

Arrêt: Le pourvoi est rejeté et la question constitutionnelle reçoit la réponse suivante: Un juge de la Cour provinciale (Division criminelle) de l'Ontario est un tribunal indépendant au sens de l'al. 11*d*) de la *Charte canadienne des droits et libertés*.

Même s'il existe de toute évidence un rapport étroit entre les notions d'«indépendance» et d'«impartialité» que l'on trouve à l'al. 11*d*) de la *Charte*, ce sont néanmoins des valeurs ou exigences séparées et distinctes. L'impartialité désigne un état d'esprit ou une attitude du tribunal vis-à-vis des points en litige et des parties dans une affaire donnée. Le terme «indépendance» reflète ou consacre la valeur constitutionnelle traditionnelle qu'est l'indépendance judiciaire et connote non seulement un état d'esprit, mais aussi un statut ou une relation avec autrui, particulièrement avec l'organe exécutif du gouvernement, qui repose sur des conditions ou garanties objectives. L'indépendance judiciaire fait intervenir des rapports tant individuels qu'institutionnels: l'indépendance individuelle d'un juge, qui se manifeste dans certains de ses attributs, telle l'inamovibilité, et l'indépendance institutionnelle du tribunal qui ressort de ses rapports institutionnels ou administratifs avec les organes exécutif et législatif du gouvernement.

Le critère de l'indépendance aux fins de l'al. 11*d*) de la *Charte* doit être, comme dans le cas de l'impartialité, de savoir si le tribunal peut raisonnablement être perçu comme indépendant. Cette perception doit être celle d'un tribunal jouissant des conditions ou garanties objectives essentielles d'indépendance judiciaire, et non pas une perception de la manière dont il agira en fait, indépendamment de la question de savoir s'il jouit de ces conditions ou garanties.

Il ne serait pas possible d'appliquer les conditions les plus rigoureuses et les plus élaborées de l'indépendance

constitutional requirement of independence in s. 11(*d*) of the *Charter*, which may have to be applied to a variety of tribunals. The essential conditions of judicial independence for purposes of s. 11(*d*) must bear some reasonable relationship to the variety of legislative and constitutional provisions in Canada governing matters which bear on the judicial independence of tribunals trying persons charged with an offence. It is the essence of the security afforded by the essential conditions of judicial independence that is appropriate for application under s. 11(*d*) of the *Charter* and not any particular legislative or constitutional formula by which it may be provided or guaranteed. Section 11(*d*) cannot be construed and applied so as to accord provincial court judges the same constitutional guarantees of security of tenure and security of salary and pension as superior court judges for that construction would, in effect, amend the judicature provisions of the Constitution. The standard of judicial independence cannot be a standard of uniform provisions but rather must reflect what is common to the various approaches to the essential conditions of judicial independence in Canada.

Security of tenure, because of the importance traditionally attached to it, is the first of the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*. The essentials of such security are that a judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure for purposes of s. 11(*d*) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.

Notwithstanding the importance of tradition as an objective condition tending to ensure the independence in fact of a tribunal, a provincial court judge who held office during pleasure under a post-retirement reappointment prior to the amendment in 1983 to s. 5(4) of the *Provincial Courts Act* was not an independent tribunal. The reasonable perception was that by providing for two classes of tenure the Legislature had deliberately, in the case of one category of judges, reserved to the Executive the right to terminate the holding of office without the necessity of any particular jurisdiction and without any inhibition or restraint arising from perceived tradition.

judiciaire à l'exigence constitutionnelle d'indépendance qu'énonce l'al. 11*d*) de la *Charte*, qui peut devoir s'appliquer à différents tribunaux. Les conditions essentielles de l'indépendance judiciaire, pour les fins de l'al. 11*d*), doivent avoir un lien raisonnable avec cet éventail de dispositions législatives et constitutionnelles qui au Canada régissent les questions touchant à l'indépendance judiciaire des tribunaux qui jugent les personnes accusées d'une infraction. C'est l'essence de la garantie fournie par les conditions essentielles de l'indépendance judiciaire qu'il convient d'appliquer en vertu de l'al. 11*d*) de la *Charte*, et non pas quelque formule législative ou constitutionnelle particulière qui peut l'offrir ou l'assurer. L'alinéa 11*d*) ne peut pas être interprété et appliqué de manière à conférer aux juges de cour provinciale les mêmes garanties constitutionnelles d'inamovibilité et de sécurité de traitement et de pension que les juges des cours supérieures, parce qu'une telle interprétation aurait pour effet de modifier les dispositions de la Constitution relatives à la magistrature. La norme de l'indépendance judiciaire ne peut être l'uniformité des dispositions, mais doit plutôt refléter ce qui est commun aux diverses conceptions des conditions essentielles de l'indépendance judiciaire au Canada.

L'inamovibilité, de par son importance traditionnelle, est la première des conditions essentielles de l'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte*. Les conditions essentielles de l'inamovibilité sont que le juge ne puisse être révoqué que pour un motif déterminé, et que ce motif fasse l'objet d'un examen indépendant et d'une décision selon une procédure qui offre au juge visé la possibilité pleine et entière de se faire entendre. L'essence de l'inamovibilité pour les fins de l'al. 11*d*), que ce soit jusqu'à l'âge de la retraite, pour une durée fixe, ou pour une charge *ad hoc*, est que la charge soit à l'abri de toute intervention discrétionnaire ou arbitraire de la part de l'exécutif ou de l'autorité responsable des nominations.

Nonobstant l'importance de la tradition comme condition objective tendant à assurer l'indépendance de fait d'un tribunal, un juge de cour provinciale qui a occupé sa charge à titre amovible en vertu d'une nouvelle nomination après l'âge de la retraite, avant la modification apportée en 1983 au par. 5(4) de la *Loi sur les cours provinciales*, ne constituait pas un tribunal indépendant. Il est raisonnable de croire qu'en prévoyant deux genres de charge le corps législatif a délibérément, dans le cas d'une catégorie de juges, réservé à l'exécutif le droit de mettre fin à une charge, sans qu'aucune justification particulière ne soit nécessaire et sans aucune inhibition ou restriction imposée par une certaine perception de la tradition.

The Provincial Court Judge who declined jurisdiction did not hold office under a post-retirement reappointment. The fact that certain judges may have held office during pleasure at that time could not impair or destroy the independence of the Provincial Court (Criminal Division) as a whole. The objection would have to be taken to the status of the particular judge constituting the tribunal.

The second essential condition of judicial independence for purposes of s. 11(*d*) of the *Charter* is financial security—security of salary or other remuneration, and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence. In the case of pension, the essential distinction is between a right to pension and a pension that depends on the grace or favour of the Executive. Although it may be theoretically preferable that judicial salaries should be fixed by the legislature rather than the executive government and should be made a charge on the consolidated revenue fund rather than requiring annual appropriation, neither of these features should be regarded as essential to the financial security that may be reasonably perceived as sufficient for independence under s. 11(*d*) of the *Charter*. The right to salary of a provincial court judge is established by law, and there is no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge. It is impossible that the legislature would refuse to vote the annual appropriation in order to attempt to exercise some control or influence over a class of judges as a whole. The fact that the provisions respecting the pensions and other benefits of civil servants were made applicable to provincial court judges did not impair the independence of the latter. The provisions established a right to pension and other benefits which could not be interfered with by the Executive on a discretionary or arbitrary basis.

The third essential condition of judicial independence is the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function. Judicial control over such matters as assignment of judges, sittings of the court and court lists has been considered the essential or minimum requirement for institutional independence. Although an increased measure of administrative autonomy or independence for the courts may be desir-

Le juge de la cour provinciale qui s'est récusé n'occupait pas sa charge en vertu d'une nouvelle nomination postérieure à sa retraite. Le fait qu'à l'époque certains juges aient pu occuper leur charge à titre amovible ne saurait altérer ni détruire l'indépendance de la Cour provinciale (Division criminelle) dans son ensemble. L'objection aurait dû viser le statut du juge particulier qui constituait le tribunal saisi.

La deuxième condition essentielle de l'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte* est la sécurité financière, c'est-à-dire un traitement ou autre rémunération assurés et, le cas échéant, une pension assurée. Cette sécurité consiste essentiellement en ce que le droit au traitement et à la pension soit prévu par la loi et ne soit pas sujet aux ingérences arbitraires de l'exécutif, d'une manière qui pourrait affecter l'indépendance judiciaire. Dans le cas de la pension, la distinction essentielle est entre un droit à une pension et une pension qui dépend du bon vouloir ou des bonnes grâces de l'exécutif. Bien qu'il puisse être théoriquement préférable que les traitements des juges soient fixés par le corps législatif, plutôt que par le pouvoir exécutif, et qu'ils grèvent le fonds du revenu consolidé, plutôt que d'exiger une affectation de crédit annuelle, ni l'une ni l'autre de ces caractéristiques ne doit être considérée comme essentielle à la sécurité financière qui peut être raisonnablement perçue comme suffisante pour assurer l'indépendance aux termes de l'al. 11*d*) de la *Charte*. Le droit d'un juge de cour provinciale à un traitement est prévu par la loi et l'exécutif ne peut d'aucune manière empiéter sur ce droit de façon à affecter l'indépendance du juge pris individuellement. Il est impossible que le corps législatif refuse de voter l'affectation de crédit annuelle dans le but de tenter d'exercer un contrôle ou d'influer sur une catégorie de juges dans son ensemble. Le fait que les dispositions relatives aux pensions et aux autres avantages offerts aux fonctionnaires ont été rendues applicables aux juges de cour provinciale ne porte pas atteinte à l'indépendance de ces derniers. Ces dispositions créent un droit à une pension et à d'autres avantages qui ne peut faire l'objet d'une atteinte discrétionnaire ou arbitraire de l'exécutif.

La troisième condition essentielle de l'indépendance judiciaire est l'indépendance institutionnelle du tribunal relativement aux questions administratives qui ont directement un effet sur l'exercice de ses fonctions judiciaires. Le contrôle des juges sur des questions comme l'assignation des juges aux causes, les séances de la cour et le rôle de la cour est considéré comme essentiel ou comme une exigence minimale de l'indépendance institutionnelle. Même si une plus grande autonomie ou

able it cannot be regarded as essential for purposes of s. 11(*d*) of the *Charter*.

While it may be desirable that discretionary benefits or advantages such as leave of absence with pay and permission to engage in extra-judicial employment, to the extent they should exist at all, should be under the control of the judiciary rather than the Executive, their control by the Executive does not touch one of the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*. It would not, moreover, be reasonable to apprehend that a provincial court judge would be influenced by the possible desire for one of these benefits or advantages to be less than independent in his or her adjudication.

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indépendance administrative des tribunaux peut être souhaitable, elle ne saurait être considérée comme essentielle pour les fins de l'al. 11*d*) de la *Charte*.

Il est peut-être souhaitable que des bénéfices ou avantages discrétionnaires comme les congés payés et l'autorisation de s'adonner à des activités extrajudiciaires, dans la mesure où il devrait y en avoir, soient contrôlés par le pouvoir judiciaire plutôt que par l'exécutif. Toutefois, leur contrôle par l'exécutif ne touche pas à l'une des conditions essentielles de l'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte*. De plus, il ne serait pas raisonnable de craindre qu'un juge de cour provinciale, influencé par l'éventuel désir d'obtenir l'un de ces bénéfices ou avantages soit loin d'être indépendant au moment de rendre jugement.

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APPEAL from a judgment of the Ontario Court of Appeal (1983), 2 C.C.C. (3d) 417, allowing an appeal from a judgment of Sharpe Prov. Ct. J. declining jurisdiction to hear the Crown's appeal as to sentence on appellant's conviction. Appeal dismissed.

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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1983), 2 C.C.C. (3d) 417, qui a accueilli un appel contre un jugement du juge Sharpe de la Cour provinciale qui avait décliné compétence pour entendre un appel de Sa Majesté relativement à la peine infligée à l'appelant suite à sa déclaration de culpabilité. Pourvoi rejeté.

B. A. Crane, Q.C., and *R. Noel Bates*, for the appellant.

W. G. Blacklock, for the respondent.

Derek Aylen, Q.C., and *Graham Garton*, for the intervener the Attorney General of Canada.

Réal A. Forest and *Angeline Thibault*, for the intervener the Attorney General of Quebec.

James C. MacPherson, for the intervener the Attorney General for Saskatchewan.

Morris Manning, Q.C., for the interveners the Provincial Court Judges Association (Criminal Division) and Ontario Family Court Judges Association.

The judgment of the Court was delivered by

LE DAIN J.—The general question raised by this appeal is what is meant by an independent tribunal in s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, which provides:

> **11.** Any person charged with an offence has the right
>
> . . .
>
> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

The specific issue in the appeal is whether a provincial judge sitting as the Provincial Court (Criminal Division) in Ontario in December 1982 was an independent tribunal within the meaning of s. 11(*d*).

I

The appeal is by leave of this Court from the judgment of the Ontario Court of Appeal on February 15, 1983, allowing an appeal from the judgment on December 16, 1982 of Sharpe J. of the Provincial Court (Criminal Division) for the Judicial District of Halton, who, sitting on the Crown's appeal, pursuant to s. 99 of the *Provincial Offences Act*, R.S.O. 1980, c. 400, against the sentence imposed on the appellant following his conviction of the offence of careless driving contrary to s. 83 of *The Highway Traffic Act*, R.S.O. 1970, c. 202, declined jurisdiction to hear the

B. A. Crane, c.r., et *R. Noel Bates*, pour l'appelant.

W. G. Blacklock, pour l'intimée.

Derek Aylen, c.r., et *Graham Garton*, pour l'intervenant le procureur général du Canada.

Réal A. Forest et *Angeline Thibault*, pour l'intervenant le procureur général du Québec.

James C. MacPherson, pour l'intervenant le procureur général de la Saskatchewan.

Morris Manning, c.r., pour les intervenants l'Association des juges des Cours provinciales (Division criminelle) et Ontario Family Court Judges Association.

Version française du jugement de la Cour rendu par

LE JUGE LE DAIN — La question générale que soulève ce pourvoi est de savoir ce qu'on entend par tribunal indépendant à l'al. 11*d*) de la *Charte canadienne des droits et libertés*, lequel porte:

> **11.** Tout inculpé a le droit:
>
> . . .
>
> *d*) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

Le point précis en litige dans ce pourvoi est de savoir si un juge siégeant en Cour provinciale (Division criminelle) de l'Ontario, en décembre 1982, constituait un tribunal indépendant au sens de l'al. 11*d*).

I

On se pourvoit, avec l'autorisation de cette Cour, contre l'arrêt rendu le 15 février 1983 par la Cour d'appel de l'Ontario, qui a accueilli l'appel du jugement rendu le 16 décembre 1982 par le juge Sharpe de la Cour provinciale (Division criminelle) du district judiciaire de Halton qui, dans l'appel formé par Sa Majesté conformément à l'art. 99 de la *Loi sur les infractions provinciales*, L.R.O. 1980, chap. 400, contre la peine infligée à l'appelant, reconnu coupable de l'infraction de conduite imprudente décrite à l'art. 83 du *Code de la route*, S.R.O. 1970, chap. 202, a décliné compé-

appeal pending determination by a superior court whether the Provincial Court (Criminal Division) was an independent tribunal.

On the challenge before Sharpe J. to the independence of the Provincial Court (Criminal Division) counsel for the appellant advanced a number of reasons why in his submission the Court, because of the status of its judges as reflected in the provisions of the *Provincial Courts Act*, R.S.O. 1980, c. 398, the *Public Service Act*, R.S.O. 1980, c. 418, and the *Public Service Superannuation Act*, R.S.O. 1980, c. 419, as well as regulations made thereunder, was not one which satisfied the requirement of s. 11(*d*) of the *Charter*. These reasons, as summarized by Sharpe J. under the heading "Perceptions of Dependence" and set out in the reasons for judgment of the Ontario Court of Appeal, are as follows:

1. In that the salaries of the provincial judges are determined by the executive branch of the government without the benefit of the scrutiny of the legislature.

2. The judicial salaries are *not a charge* on the consolidated revenue fund, but are subject to annual appropriation.

3. Neither is there a pension charged on the consolidated revenue fund.

4. Nor is there any judicial pension other than one provided for under the *Public Service Superannuation Act*, and this notwithstanding s. 34 of the *Provincial Courts Act*.

5. Both the Act and the regulations provide for control of the judge and could be used to influence a judge or to apply real or perceived pressure to judges generally. Some of the sections that are capable of destroying the appearance of independence are as follows:

6. A judge may be appointed to sit during pleasure — s. 5(4) of the *Provincial Courts Act*. Moreover, any provincial court judge appointed after attaining the age of fifty-five years cannot receive any pension under the *Public Service Superannuation Act* unless the Cabinet reappoints him during pleasure after he reaches retirement age for a sufficient duration that he attains his minimum years of service to qualify for pension. Under the *Judges Act*, it is the *Judge* who chooses whether to retire. Can a provincial court judge under such a disabil-

tence pour entendre l'appel, tant qu'une cour supérieure n'aurait pas déterminé si la Cour provinciale (Division criminelle) était un tribunal indépendant.

Contestant devant le juge Sharpe l'indépendance de la Cour provinciale (Division criminelle), l'avocat de l'appelant a soumis un certain nombre de raisons pour lesquelles, selon lui, la cour, de par le statut de ses juges qui ressort des dispositions de la *Loi sur les cours provinciales*, L.R.O. 1980, chap. 398, la *Loi sur la fonction publique*, L.R.O. 1980, chap. 418, et la *Loi sur le régime de retraite des fonctionnaires*, L.R.O. 1980, chap. 419, ainsi que de leurs règlements d'application, ne satisferait pas à l'exigence de l'al. 11*d*) de la *Charte*. Voici ces raisons, résumées par le juge Sharpe, sous le titre [TRADUCTION] «Perceptions de dépendance», et exposées dans les motifs de l'arrêt de la Cour d'appel de l'Ontario:

[TRADUCTION] 1. En ce que les traitements des juges de cour provinciale sont fixés par l'organe exécutif du gouvernement, sans droit de regard de l'assemblée législative.

2. Les traitements des juges *ne sont pas une charge* grevant le fonds du revenu consolidé, mais dépendent d'une affectation annuelle de crédit.

3. Aucune pension ne grève non plus le fonds du revenu consolidé.

4. Il n'existe d'ailleurs aucune autre pension pour les juges que celle que prévoit la *Loi sur le régime de retraite des fonctionnaires*, et ce, malgré l'art. 34 de la *Loi sur les cours provinciales*.

5. Tant la Loi que la réglementation prévoient le contrôle du juge et pourraient être utilisées pour influencer un juge ou pour faire pression sur les juges en général, ou être perçues comme telles. Voici certains articles susceptibles de détruire toute apparence d'indépendance:

6. Un juge peut être nommé à titre amovible — par. 5(4) de la *Loi sur les cours provinciales*. De plus, tout juge de cour provinciale nommé après qu'il a atteint l'âge de cinquante-cinq ans ne peut toucher une pension en vertu de la *Loi sur le régime de retraite des fonctionnaires*, à moins que le Cabinet ne le nomme à nouveau, à titre amovible, lorsqu'il atteint l'âge de la retraite, pour une période suffisamment longue pour lui permettre de cumuler le nombre minimum d'années de service requis pour avoir droit à une pension. Aux termes de la *Loi sur*

ity be seen to be independent in a cause involving the Attorney General?

7. The Attorney General can appoint senior judges at greater pay than ordinary judges.

8. The executive branch can authorize judges to engage in any business, trade or occupation.

9. The Attorney General may authorize certain judges to do arbitrations, be conciliators, be a member of a police commission for which additional remuneration is received.

10. The executive branch purports to be able to appoint a rules committee composed of persons not necessarily judges for rules under the *Criminal Code*.

11. The executive branch has the power to make regulations for the inspection and destruction of judges' books, documents and papers (s. 34(1)(b) of the *Provincial Courts Act*).

12. In the regulations, the Attorney General can grant leave of absence for up to three years and the executive branch can grant it with pay.

13. This last mentioned regulation incorporates regulation 881 wherein judges are referred to as civil servants.

14. The judge has the same sick leave as a civil servant and his salary is reduced in the same manner as a civil servant when sick.

15. The Deputy Attorney General can require the judge to attend for medical examinations and to supply doctors' certificates.

16. A Deputy Attorney General can grant a judge a leave of absence for up to a year for employment with the Government of Canada or other public agency. A provincial judge in Ontario has been made a Deputy Minister while retaining his position as a judge, a matter deplored by Chief Justice Bora Laskin of the Supreme Court of Canada.

17. The judge receives the same financial benefits as the other civil servants as set out in s. 77, namely: (a) a basic life insurance plan, (b) a dependent's life insurance plan, (c) a long-term income protection plan, (d) a supplementary insurance plan, (e) a dental insurance plan. Some of these plans are paid for by the Government and all affect the financial status of the judge.

les juges, c'est *le juge* qui choisit ou non de prendre sa retraite. Un juge de cour provinciale assujetti à une telle incapacité peut-il être perçu comme indépendant dans une affaire impliquant le procureur général?

7. Le procureur général peut nommer des juges principaux dont le traitement est supérieur à celui des juges ordinaires.

8. Le pouvoir exécutif peut autoriser les juges à exercer tout commerce, métier ou occupation.

9. Le procureur général peut autoriser certains juges à agir à titre d'arbitres, de conciliateurs ou de membres d'une commission de police, auxquels cas ils reçoivent une rémunération supplémentaire.

10. Le pouvoir exécutif est apparemment en mesure de nommer un comité des règles de pratique, auquel ne siègent pas uniquement des juges, pour l'adoption de règles de pratique en vertu du *Code criminel*.

11. Le pouvoir exécutif peut établir des règlements portant sur l'inspection et la destruction des livres, documents et écrits des juges (al. 34(1)b) de la *Loi sur les cours provinciales*).

12. Suivant le règlement, le procureur général peut accorder un congé, pouvant aller jusqu'à trois ans, et le pouvoir exécutif peut l'accorder avec traitement.

13. Le dernier règlement mentionné incorpore le règlement 881 où l'on parle des juges comme étant des fonctionnaires.

14. Le juge a droit aux mêmes congés de maladie qu'un fonctionnaire et son traitement est réduit de la même manière qu'un fonctionnaire en cas de maladie.

15. Le sous-procureur général peut exiger d'un juge qu'il subisse des examens médicaux et fournisse des certificats médicaux.

16. Un sous-procureur général peut accorder à un juge un congé, pouvant aller jusqu'à un an, pour lui permettre de travailler pour le gouvernement du Canada ou un autre organisme public. Un juge de cour provinciale en Ontario a été nommé sous-ministre tout en conservant sa charge de juge, ce qu'a déploré le juge en chef Bora Laskin de la Cour suprême du Canada.

17. Le juge reçoit les mêmes bénéfices d'ordre financier que les autres fonctionnaires, comme l'indique l'art. 77, savoir: a) un plan d'assurance-vie de base, b) un plan d'assurance-vie pour les personnes à charge, c) un plan de protection de revenu garanti, d) un plan d'assurance supplémentaire, e) un plan d'assurance dentaire. Certains de ces plans sont payés par le gouvernement et tous influent sur la situation financière du juge.

18. The *Provincial Courts Act* provides for a procedure to remove a judge after an inquiry but it does not require a vote in the legislature as there is with a supreme court judge. The *Public Service Act* has a regulation under section [*sic*] 12 and 13 which includes a provincial court judge. The significance of this is that a provincial judge can be classified as a Crown employee and therefore under some direction by the executive branch of the government and there may be other Acts which have regulations that affect the provincial judges.

18. La *Loi sur les cours provinciales* établit une procédure de révocation d'un juge, après enquête, mais elle n'exige pas un vote de l'assemblée législative comme c'est le cas pour un juge de cour suprême. Un règlement d'application des art. 12 et 13 de la *Loi sur la fonction publique* inclut le juge de cour provinciale. Ce qui signifie qu'un juge de cour provinciale peut être classé comme employé de l'État et donc être assujetti jusqu'à un certain point aux directives de l'organe exécutif du gouvernement; il se peut qu'il y ait d'autres lois dont les règlements d'application touchent les juges de cour provinciale.

Counsel for the appellant submitted before Sharpe J. that since the Provincial Court (Criminal Division) was not an independent tribunal within the meaning of s. 11(*d*) of the *Charter*, s. 99 of the *Provincial Offences Act*, which conferred the right of appeal to the Court from the sentence imposed on the appellant, was of no force or effect by operation of s. 52(1) of the *Constitution Act, 1982*, which provides:

52. (1) The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

L'avocat de l'appelant a fait valoir devant le juge Sharpe que, puisque la Cour provinciale (Division criminelle) n'était pas un tribunal indépendant au sens de l'al. 11*d*) de la *Charte*, l'art. 99 de la *Loi sur les infractions provinciales*, qui confère le droit d'en appeler à la cour de la sentence imposée à l'appelant, était inopérant en vertu du par. 52(1) de la *Loi constitutionnelle de 1982* qui porte:

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

After consideration of the submissions in support of the contention that the Provincial Court (Criminal Division) was not an independent tribunal, Sharpe J. took the position that he was disqualified by interest from determining the question of independence, and he declined jurisdiction in order that the question be determined by a superior court.

Après examen des arguments soumis à l'appui de la prétention que la Cour provinciale (Division criminelle) n'était pas un tribunal indépendant, le juge Sharpe s'est récusé, s'estimant partie intéressée pour ce qui était de statuer sur la question d'indépendance, et il a décliné compétence afin de laisser une cour supérieure trancher cette question.

Leave to appeal to the Ontario Court of Appeal was granted on the basis that Sharpe J.'s decision that he was disqualified from determining the question of jurisdiction was a judgment from which an appeal lay under s. 114 of the *Provincial Offences Act*. At the hearing of the appeal the Court of Appeal ruled that the appeal should proceed on the basis that Sharpe J. had in effect decided that as a matter of law the Provincial Court (Criminal Division) as an institution was not independent.

L'autorisation d'interjeter appel à la Cour d'appel de l'Ontario a été accordée pour le motif que la décision du juge Sharpe, qu'il ne pouvait statuer sur la question de compétence, constituait un jugement dont appel pouvait être interjeté en vertu de l'art. 114 de la *Loi sur les infractions provinciales*. À l'audition de l'appel, la Cour d'appel a décidé que l'appel devait être fondé sur le fait que le juge Sharpe avait en réalité décidé qu'aux yeux du droit la Cour provinciale (Division criminelle), en tant qu'institution, n'était pas indépendante.

The unanimous judgment of the five-member Court of Appeal (Howland C.J.O., MacKinnon A.C.J.O., Dubin, Martin and Weatherston JJ.A.),

L'arrêt unanime de la formation de cinq membres de la Cour d'appel de l'Ontario (le juge en chef Howland, le juge en chef adjoint MacKinnon

reported at *R. v. Valente (No. 2)* (1983), 2 C.C.C. (3d) 417, was delivered by Howland C.J.O., who, after a comprehensive consideration of the issues, concluded at p. 444 as follows:

> I have reached the conclusion that the concerns raised by the counsel for the respondent neither singly nor collectively would result in a reasonable apprehension that they would impair the ability of Judge Sharpe to make an independent and impartial adjudication. In my opinion, the provincial court in this province is as a matter of law an independent tribunal. Judge Sharpe sitting as a member of the court was independent, and as has been noted earlier, he was impartial. Therefore, the respondent appeared before an independent and impartial tribunal within the Charter.
>
> Accordingly, the appeal is allowed. The purported judgment of Judge Sharpe that the provincial court (criminal division) as an institution is not an independent tribunal is set aside and the matter is remitted to Judge Sharpe to determine whether the sentence imposed was a fit and proper sentence.

On the appeal to this Court the constitutional question was framed as follows:

> Is a judge of the Provincial Court (Criminal Division) of Ontario, appointed pursuant to the provisions of the *Provincial Courts Act*, R.S.O. 1980, c. 398, an independent and impartial tribunal within the meaning of the *Constitution Act, 1982*?

Although the decision of Sharpe J. was treated as a judgment that the Provincial Court (Criminal Division) as an institution was not an independent tribunal and it was that judgment that was found by the Court of Appeal to be in error and was set aside, the Court of Appeal, as the conclusions in its reasons for judgment indicate, necessarily had to consider the independence of Sharpe J. The tribunal, for purposes of s. 11(*d*) of the *Charter*, was Sharpe J. sitting as the Provincial Court (Criminal Division) for the Judicial District of Halton. The independence of Sharpe J. for purposes of the issue in the appeal is to be determined with reference to the relevant statutory provisions and regulations that were in force at the time he declined jurisdiction on December 16, 1982. Subsequent changes in the law governing the Provincial Court (Criminal Division) and its judges are relevant to the question of the continuing inde-

et les juges Dubin, Martin et Weatherston), publié à *R. v. Valente (No. 2)* (1983), 2 C.C.C. (3d) 417, a été rendu par le juge en chef Howland qui, après un examen approfondi des points litigieux, conclut ceci à la p. 444:

> [TRADUCTION] Je suis arrivé à la conclusion que les préoccupations des avocats de l'intimé, ni individuellement ni collectivement, ne permettent pas raisonnablement de craindre qu'il y ait atteinte à la capacité du juge Sharpe de statuer en toute indépendance et impartialité. À mon avis, la Cour provinciale de notre province est, aux yeux du droit, un tribunal indépendant. Le juge Sharpe, siégeant comme membre de la cour, était indépendant et, comme on l'a déjà dit, impartial. Donc l'intimé a comparu devant un tribunal indépendant et impartial au sens de la Charte.
>
> En conséquence, l'appel est accueilli. Le prétendu jugement du juge Sharpe, portant que la Cour provinciale (Division criminelle), en tant qu'institution, n'est pas un tribunal indépendant, est annulé et l'affaire lui est renvoyée pour qu'il statue sur la régularité et l'à-propos de la peine infligée.

Dans le pourvoi devant cette Cour, la question constitutionnelle a été formulée ainsi:

> Un juge de la Cour provinciale (Division criminelle) de l'Ontario, nommé conformément aux dispositions de la *Loi sur les cours provinciales* L.R.O. 1980, chap. 398, constitue-t-il un tribunal indépendant et impartial au sens de la *Loi constitutionnelle de 1982*?

Bien que la décision du juge Sharpe ait été considérée comme un jugement portant que la Cour provinciale (Division criminelle), en tant qu'institution, n'était pas un tribunal indépendant et que ce soit ce jugement que la Cour d'appel a jugé erroné et a annulé, la Cour d'appel, comme l'indiquent les conclusions de ses motifs de jugement, devait nécessairement examiner si le juge Sharpe lui-même était indépendant. Le tribunal, pour les fins de l'al. 11*d*) de la *Charte*, était le juge Sharpe siégeant en Cour provinciale (Division criminelle) du district judiciaire de Halton. L'indépendance du juge Sharpe pour les fins du pourvoi doit être établie en fonction des dispositions législatives et réglementaires pertinentes en vigueur au moment où il a décliné compétence, le 16 décembre 1982. Les changements subséquents apportés au droit régissant la Cour provinciale (Division criminelle) et ses juges sont pertinents en ce qui

pendence of the tribunal to which the matter must be remitted for determination of this Court agrees with the Court of Appeal that Sharpe J. sitting as the Provincial Court (Criminal Division) was an independent tribunal when he declined jurisdiction.

II

The first question in the appeal is whether the Court of Appeal adopted the proper test for determining whether a tribunal is independent within the meaning of s. 11(*d*) of the *Charter*. The test applied was the one for reasonable apprehension of bias, adapted to the requirement of independence. Noting that in *Re Evans and Milton* (1979), 46 C.C.C. (2d) 129, a case involving a question of bias, the Ontario Court of Appeal has adopted the test for reasonable apprehension of bias expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, Howland C.J.O. held that this was the proper test to be applied in determining whether a tribunal is an independent tribunal.

The test for reasonable apprehension of bias was put by de Grandpré J. at p. 394 as follows:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — concluded ...."

As adapted to the requirement of an independent tribunal and to the issues in the appeal the test was stated by Howland C.J.O., at pp. 439-40 as follows:

> The question that now has to be determined is whether a reasonable person, who was informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically would conclude that a provincial court judge sitting as Judge Sharpe was to hear the appeal in this case was a tribunal which could make an independent and impartial adjudication. In answering

concerne la question de l'indépendance permanente du tribunal auquel l'affaire doit être renvoyée si cette Cour est d'accord avec la Cour d'appel pour dire que le juge Sharpe, siégeant en Cour provinciale (Division criminelle), constituait un tribunal indépendant lorsqu'il a décliné compétence.

II

La première question qui se pose dans ce pourvoi est de savoir si la Cour d'appel a adopté le bon critère pour déterminer si un tribunal est indépendant au sens de l'al. 11*d*) de la *Charte*. Le critère appliqué a été celui de la crainte raisonnable de partialité, adapté à l'exigence d'indépendance. Faisant remarquer que dans l'affaire *Re Evans and Milton* (1979), 46 C.C.C. (2d) 129, où il était question de partialité, la Cour d'appel d'Ontario a adopté le critère de la crainte raisonnable de partialité formulé par le juge de Grandpré dans l'arrêt *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369, le juge en chef Howland de l'Ontario a jugé que c'était là le critère qu'il fallait appliquer pour décider si un tribunal est un tribunal indépendant.

Le critère de la crainte raisonnable de partialité est énoncé ainsi par le juge de Grandpré, à la p. 394:

> ... la crainte de partialité doit être raisonnable et le fait d'une personne sensée et raisonnable qui se poserait elle-même la question et prendrait les renseignements nécessaires à ce sujet. Selon les termes de la Cour d'appel, ce critère consiste à se demander «à quelle conclusion en arriverait une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique...»

L'adaptant à l'exigence d'un tribunal indépendant et aux questions en litige dans cet appel, le juge en chef Howland énonce ainsi le critère aux pp. 439 et 440:

> [TRADUCTION] La question qui doit maintenant être tranchée est de savoir si une personne raisonnable, informée des dispositions législatives pertinentes, de leur historique et des traditions les entourant, après avoir envisagé la question de façon réaliste et pratique, conclurait qu'un juge de cour provinciale, chargé comme le juge Sharpe d'instruire l'appel en l'espèce, était un tribunal en mesure de statuer en toute indépendance et

this question it is necessary to review once again the specific concerns which were raised before Judge Sharpe and then conclude whether singly or collectively they would raise a reasonable apprehension that the tribunal was not independent and impartial so far as its adjudication was concerned.

In his reasons for judgment, Howland C.J.O. generally referred, as does the constitutional question, to the double requirement of an "independent and impartial tribunal". He made it clear, however, at one point in his reasons that there was no question of Sharpe J.'s impartiality, and that the sole issue was whether he, as a judge of the Provincial Court (Criminal Division), was an independent tribunal within the meaning of s. 11(*d*) of the *Charter*. On this point he said at p. 423:

It will be noted that both the Charter and the *Bill of Rights* refer to an "independent and impartial tribunal". In this appeal the Court is only concerned with the independence of the tribunal and not with its impartiality or freedom from bias except in so far as it affects that independence. There was no suggestion that Judge Sharpe was in any way biased, and therefore not impartial. A judge may be impartial in the sense that he has no preconceived ideas or bias, actual or perceived, without necessarily being independent.

The issue is whether the test applied by the Court of Appeal, clearly appropriate, because of its derivation, to the requirement of impartiality, is an appropriate and sufficient test for the requirement of independence. Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" as Howland C.J.O. noted, connotes absence of bias, actual or perceived. The word "independent" in s. 11(*d*) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

impartialité. Pour répondre à cette question, il est nécessaire d'examiner une fois de plus les préoccupations spécifiques exprimées devant le juge Sharpe, puis de décider si, prises individuellement ou collectivement, elles soulèvent une crainte raisonnable que le tribunal n'ait pas été indépendant et impartial pour rendre jugement.

Dans ses motifs de jugement, le juge en chef Howland mentionne, comme le fait la question constitutionnelle, la double exigence d'un «tribunal indépendant et impartial». Cependant, il dit clairement, en un point de ses motifs, que l'impartialité du juge Sharpe n'est pas en cause et que la seule question qui se pose est de savoir si, en tant que juge de la Cour provinciale (Division criminelle), il constituait un tribunal indépendant au sens de l'al. 11*d*) de la *Charte*. Sur ce point, il affirme à la p. 423:

[TRADUCTION] On notera que la *Charte*, tout comme la *Déclaration des droits*, parle d'un «tribunal indépendant et impartial». Dans le présent appel, la cour n'a à se préoccuper que de l'indépendance du tribunal et non de son impartialité, ou du fait qu'il soit exempt de toute partialité dans la mesure où cela influe sur cette indépendance. On n'a pas prétendu que le juge Sharpe avait un préjugé quelconque et qu'il n'était donc pas impartial. Un juge peut être impartial, en ce sens qu'il n'a aucun préjugé ou idée préconçue, réels ou apparents, sans nécessairement être indépendant.

Il s'agit de savoir si le critère appliqué par la Cour d'appel, qui de par son origine convenait à l'exigence d'impartialité, constitue un critère suffisant et approprié en ce qui concerne l'exigence d'indépendance. Même s'il existe de toute évidence un rapport étroit entre l'indépendance et l'impartialité, ce sont néanmoins des valeurs ou exigences séparées et distinctes. L'impartialité désigne un état d'esprit ou une attitude du tribunal vis-à-vis des points en litige et des parties dans une instance donnée. Le terme «impartial», comme l'a souligné le juge en chef Howland, connote une absence de préjugé, réel ou apparent. Le terme «indépendant», à l'al. 11*d*), reflète ou renferme la valeur constitutionnelle traditionnelle qu'est l'indépendance judiciaire. Comme tel, il connote non seulement un état d'esprit ou une attitude dans l'exercice concret des fonctions judiciaires, mais aussi un statut, une relation avec autrui, particulièrement avec l'organe exécutif du gouvernement, qui repose sur des conditions ou garanties objectives.

Fawcett, in *The Application of the European Convention on Human Rights* (1969), p. 156, commenting on the requirement of an "independent and impartial tribunal established by law" in article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, puts the distinction between independence and impartiality as follows:

> The often fine distinction between independence and impartiality turns mainly, it seems, on that between the status of the tribunal determinable largely by objective tests and the subjective attitudes of its members, lay or legal. Independence is primarily freedom from control by, or subordination to, the executive power in the State; impartiality is rather absence in the members of the tribunal of personal interest in the issues to be determined by it, or some form of prejudice.

The scope of the necessary status or relationship of independence has been variously defined. For example, Shetreet, in *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (1976), emphasizes in the following passage at pp. 17-18 the importance of freedom from the influence of certain powerful non-governmental interests:

> Independence of the judiciary has normally been thought of as freedom from interference by the Executive or Legislature in the exercise of the judicial fonction. This, for example, was the conception expressed by the International Congress of Jurists at New Delhi in 1959 (*The Rule of Law in a Free Society*, 11 (Report of the International Congress of Jurists, New Delhi, 1959, prepared by N. S. Marsh)) and arises from the fact that historically the independence of the judiciary was endangered by parliaments and monarchs. In modern times, with the steady growth of the corporate giants, it is of utmost importance that the independence of the judiciary from business or corporate interests should also be secured (*Accord* G. Borrie, *Judicial Conflicts of Interest in Britain*, 18 Am. J. Comp. L. 697 (1970)). In short, independence of the judiciary implies not only that a judge should be free from governmental and political pressure and political entanglements but also that he should be removed from financial or business entanglements likely to affect, or rather to seem to affect, him in the exercise of his judicial functions.

À la page 156 de son ouvrage intitulé *The Application of the European Convention on Human Rights* (1969), Fawcett parle de l'exigence d'un «tribunal indépendant et impartial, établi par la loi» que l'on trouve à l'article 6 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, et fait la distinction suivante entre l'indépendance et l'impartialité:

> [TRADUCTION] La distinction souvent ténue entre l'indépendance et l'impartialité tient principalement, semble-t-il, à celle entre le statut du tribunal, qui peut être déterminé en grande partie en fonction de critères objectifs, et les attitudes subjectives de ses membres, juristes ou non. L'indépendance consiste avant tout à échapper au contrôle du pouvoir exécutif de l'État, ou à une subordination à celui-ci; l'impartialité, c'est plutôt l'absence chez les membres du tribunal d'intérêts personnels dans les questions sur lesquelles il doit statuer ou d'une forme quelconque de préjugé.

L'étendue du statut ou de la relation d'indépendance nécessaires a été définie de diverses manières. Par exemple, dans *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (1976), Shetreet souligne dans le passage suivant, aux pp. 17 et 18, l'importance d'être à l'abri de l'influence de certains intérêts puissants non gouvernementaux:

> [TRADUCTION] L'indépendance du pouvoir judiciaire est normalement conçue comme le fait d'être à l'abri de toute intervention du pouvoir exécutif ou du corps législatif dans l'exercice des fonctions judiciaires. C'était là par exemple la conception du Congrès international de juristes qui s'est tenu à New Delhi, en 1959 (*Le principe de la légalité dans une société libre*, 11 (Rapport des travaux du Congrès international de juristes tenu à New Delhi, 1959, rédigé par N. S. Marsh)); elle découle du fait qu'historiquement l'indépendance du pouvoir judiciaire était menacée par les parlements et les monarques. De nos jours, avec la croissance incessante de sociétés géantes, il est de la plus grande importance d'assurer aussi l'indépendance du pouvoir judiciaire vis-à-vis des intérêts d'entreprises ou de sociétés (*Accord* G. Borrie, *Judicial Conflicts of Interest in Britain*, 18 Am. J. Comp. L. 697 (1970)). En bref, l'indépendance du pouvoir judiciaire implique non seulement qu'un juge doit être à l'abri des pressions gouvernementales et politiques et des démêlés politiques, mais qu'il doit aussi être tenu à l'écart des démêlés financiers ou d'affaires susceptibles d'influer, ou plutôt de sembler influer, sur lui dans l'exercice de ses fonctions judiciaires.

The scope of the status or relationship of judicial independence was defined in a very comprehensive manner by Sir Guy Green, Chief Justice of the State of Tasmania, in "The Rationale and Some Aspects of Judicial Independence," (1985), 59 *A.L.J.* 135, at p. 135 as follows:

> I thus define judicial independence as the capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extend that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control.

The focus in the appeal, as indicated by the nature of the various objections to the status of provincial court judges, is on the relationship of the judges and the Provincial Court (Criminal Division) to the executive government of Ontario, and in particular to the Ministry of the Attorney General.

It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government. See Lederman, "The Independence of the Judiciary" in *The Canadian Judiciary* (1976, ed. A. M. Linden), p. 7; and Deschênes, *Masters in their own house* (1981), *passim*, where the notion of institutional independence is referred to as "collective" independence. The objections in the present case to the status of provincial court judges under the legislation and regulations that prevailed at the time Sharpe J. declined jurisdiction raise issues of both individual and institutional independence. The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.

L'étendue du statut ou de la relation d'indépendance judiciaire a été définie de façon très exhaustive par sir Guy Green, juge en chef de l'État de Tasmanie, dans son article intitulé «The Rationale and Some Aspects of Judicial Independence» (1985), 59 *A.L.J.* 135, à la p. 135:

> [TRADUCTION] Je définis donc l'indépendance judiciaire comme la capacité des tribunaux d'exercer leurs fonctions constitutionnelles à l'abri de toute intervention réelle ou apparente de la part de toutes personnes ou institutions sur lesquelles ils n'exercent pas un contrôle direct, y compris, notamment, l'organe exécutif du gouvernement, et dans la mesure où cela est constitutionnellement possible en étant exempts de toute dépendance réelle ou apparente vis-à-vis de celles-ci.

On s'est concentré dans ce pourvoi, comme l'indique la nature des diverses objections portant sur le statut des juges de cour provinciale, sur le rapport qu'il y a entre, d'une part, les juges et la Cour provinciale (Division criminelle) et, d'autre part, le pouvoir exécutif ontarien, et en particulier le ministère du Procureur général.

On admet généralement que l'indépendance judiciaire fait intervenir des rapports tant individuels qu'institutionnels: l'indépendance individuelle d'un juge, qui se manifeste dans certains de ses attributs, telle l'inamovibilité, et l'indépendance institutionnelle de la cour ou du tribunal qu'il préside, qui ressort de ses rapports institutionnels ou administratifs avec les organes exécutif et législatif du gouvernement. Voir Lederman, «The Independence of the Judiciary» dans *The Canadian Judiciary* (1976, ed. A. M. Linden), p. 7, et Deschênes, *Maîtres chez eux* (1981), *passim*, où la notion d'indépendance institutionnelle est appelée indépendance «collective». Les objections en l'espèce concernant le statut que possédaient les juges de cour provinciale, en vertu de la législation et de la réglementation qui prévalaient à l'époque où le juge Sharpe a décliné compétence, soulèvent des questions d'indépendance tant individuelle qu'institutionnelle. Le rapport entre ces deux aspects de l'indépendance judiciaire est qu'un juge, pris individuellement, peut jouir des conditions essentielles à l'indépendance judiciaire, mais si la cour ou le tribunal qu'il préside n'est pas indépendant des autres organes du gouvernement dans ce qui est essentiel à sa fonction, on ne peut pas dire qu'il constitue un tribunal indépendant.

In his reasons for judgment Howland C.J.O. referred in various ways to the independence required by s. 11(*d*) of the *Charter*. In some expressions of the issue he suggested that the question was whether the objections to the status of a provincial court judge gave rise to a reasonable apprehension that the tribunal would not act in an independent manner in the particular adjudication. This is suggested by the words "it could not be reasonably apprehended that the tribunal would not be independent and impartial in its adjudication". This view of the issue would give the word "independent" essentially the same kind of meaning and effect as the word "impartial", as referring to the state of mind or attitude of the tribunal in the actual exercise of its judicial function. In other expressions of the issue, however, Howland C.J.O. referred to the question as being whether the various objections to the status of a provincial court judge gave rise to a reasonable apprehension that the tribunal lacked the capacity to adjudicate in an independent manner. This is suggested by the words "a tribunal which could make an independent and impartial adjudication" in the statement of the test for independence which has been quoted above and by the words "a reasonable apprehension that they would impair the ability of Judge Sharpe to make an independent and impartial adjudication". This I take to be more clearly a reference to the objective status or relationship of judicial independence, which in my opinion is the primary meaning to be given to the word "independent" in s. 11(*d*). Of course, the concern is ultimately with how a tribunal will actually act in a particular adjudication, and a tribunal that does not act in an independent manner cannot be held to be independent within the meaning of s. 11(*d*) of the *Charter*, regardless of its objective status. But a tribunal which lacks the objective status or relationship of independence cannot be held to be independent within the meaning of s. 11(*d*), regardless of how it may appear to have acted in the particular adjudication. It is the objective status or relationship of judicial independence that is to provide the assurance that the tribunal has the capacity to act in an independent manner and will in fact act in such a manner. It is, therefore, necessary to consider what should be

Dans ses motifs de jugement, le juge en chef Howland s'est référé de diverses manières à l'indépendance requise par l'al. 11*d*) de la *Charte*. Dans certaines formulations de la question en litige, il laisse entendre qu'il s'agit de déterminer si les objections au statut d'un juge de cour provinciale laissent raisonnablement craindre que le tribunal n'agira pas d'une manière indépendante dans une espèce particulière. C'est ce que donne à entendre la phrase [TRADUCTION] «on ne pouvait raisonnablement craindre que le tribunal ne serait pas indépendant et impartial pour rendre jugement». Cette conception de la question litigieuse a pour effet de donner au terme «indépendant» essentiellement les mêmes sens et effet que ceux du terme «impartial», comme désignant l'état d'esprit ou l'attitude du tribunal lorsqu'il exerce concrètement ses fonctions judiciaires. Dans d'autres formulations de la question litigieuse cependant, le juge en chef Howland parle de la question comme étant de savoir si les diverses objections au statut de juge de cour provinciale faisaient naître une crainte raisonnable que le tribunal n'ait pas la capacité de statuer d'une manière indépendante. C'est ce que laisse entendre l'expression «un tribunal en mesure de statuer en toute indépendance et impartialité» dans son exposé du critère d'indépendance que j'ai déjà cité, ainsi que la phrase «ne permettent pas raisonnablement de craindre qu'il y ait atteinte à la capacité du juge Sharpe de statuer en toute indépendance et impartialité». Je pense que c'est là plus précisément une référence au statut objectif ou à la relation d'indépendance judiciaire, qui, à mon avis, est le premier sens qu'il faut donner au terme «indépendant» de l'al. 11*d*). Naturellement, on se préoccupe finalement de la manière dont un tribunal agira concrètement dans une espèce particulière, et un tribunal qui n'agit pas en toute indépendance ne saurait être considéré comme indépendant au sens de l'al. 11*d*) de la *Charte*, quel que soit son statut objectif. Mais un tribunal dépourvu du statut objectif ou de la relation d'indépendance ne peut être considéré comme indépendant aux termes de l'al. 11*d*), quelle que soit la manière dont il paraît avoir agi dans une espèce particulière. C'est le statut objectif ou la relation d'indépendance judiciaire qui doit fournir l'assurance que le tribunal peut agir d'une manière

regarded, with reference to the various objections to the status of provincial court judges, as the essential conditions of judicial independence for purposes of s. 11(*d*). Before doing that, however, it is necessary to consider the requirement in the test applied by the Court of Appeal that the status or relationship of judicial independence for purposes of s. 11(*d*) be one which a reasonable, well informed person would perceive as sufficient.

Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, it is sound, I think, that the test for independence for purposes of s. 11(*d*) of the *Charter* should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.

This view of the test for independence is somewhat different from, but not in my opinion necessarily in conflict with, that suggested by the majority of this Court in *MacKay v. The Queen*, [1980] 2 S.C.R. 370, which was relied on to some extent by Howland C.J.O. in his reasons for judgment. In that case the relevant issue, for purposes of this appeal, was whether a Standing Court Martial trying a member of the armed forces for an offence under the criminal law and composed of

indépendante et qu'il agira effectivement de cette manière. Il est donc nécessaire de rechercher ce qui doit être considéré, en rapport avec les diverses objections au statut des juges de cour provinciale, comme les conditions essentielles de l'indépendance judiciaire aux fins de l'al. 11*d*). Avant de ce faire cependant, il est nécessaire d'examiner l'exigence du critère appliqué par la Cour d'appel, portant que le statut ou le rapport d'indépendance judiciaire aux fins de l'al. 11*d*) doit en être un qu'une personne raisonnable et bien informée percevrait comme suffisant.

Même si l'indépendance judiciaire est un statut ou une relation reposant sur des conditions ou des garanties objectives, autant qu'un état d'esprit ou une attitude dans l'exercice concret des fonctions judiciaires, il est logique, à mon avis, que le critère de l'indépendance aux fins de l'al. 11*d*) de la *Charte* soit, comme dans le cas de l'impartialité, de savoir si le tribunal peut raisonnablement être perçu comme indépendant. Tant l'indépendance que l'impartialité sont fondamentales non seulement pour pouvoir rendre justice dans un cas donné, mais aussi pour assurer la confiance de l'individu comme du public dans l'administration de la justice. Sans cette confiance, le système ne peut commander le respect et l'acceptation qui sont essentiels à son fonctionnement efficace. Il importe donc qu'un tribunal soit perçu comme indépendant autant qu'impartial et que le critère de l'indépendance comporte cette perception qui doit toutefois, comme je l'ai proposé, être celle d'un tribunal jouissant des conditions ou garanties objectives essentielles d'indépendance judiciaire, et non pas une perception de la manière dont il agira en fait, indépendamment de la question de savoir s'il jouit de ces conditions ou garanties.

Cette conception du critère de l'indépendance diffère quelque peu, quoique à mon avis elle ne soit pas nécessairement incompatible avec elle, de celle proposée par cette Cour à la majorité, dans l'arrêt *MacKay c. La Reine*, [1980] 2 R.C.S. 370, sur laquelle s'est appuyé, dans une certaine mesure, le juge en chef Howland dans ses motifs de jugement. Dans cette affaire, la question qui nous intéresse aux fins du présent pourvoi était de savoir si une cour martiale permanente, jugeant un membre des

an officer of the armed forces in the Judge Advocate General's branch was an independent tribunal within the meaning of s. 2(*f*) of the *Canadian Bill of Rights*, which provides:

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
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> . . .
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> (*f*) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; . . .

The majority held that the fact the president of the Standing Court Martial was an officer of the armed forces did not prevent the tribunal from being an independent tribunal within the meaning of s. 2(*f*). In the reasons for judgment of Ritchie J., with whom Martland, Pigeon, Beetz and Chouinard JJ. concurred, there is a suggestion that the issue of independence was viewed as being whether the tribunal had in fact acted in an idependent manner. Ritchie J. referred to the evidence and said at p. 395:

> There is no evidence whatever in the record of the trial to suggest that the president acted in anything but an independent and impartial manner or that he was otherwise unfitted for the task to which he was appointed.
>
> . . .
>
> I can find no support in the evidence for the contention that the appointment of the president of the Court resulted or was calculated to result in the appellant being deprived of a trial before an independent and impartial tribunal.

While the emphasis in these observations would appear to be on how the tribunal acted, it is my impression that both Ritchie J. and McIntyre J., who wrote separate reasons concurring in the result, and with whom Dickson J. (as he then was) concurred, both looked at the status or relationship

forces armées pour une infraction de droit criminel et composée d'un officier des forces armées relevant de la Direction du juge-avocat général, constituait un tribunal indépendant au sens de l'al. 2*f*) de la *Déclaration canadienne des droits*, qui porte:

> 2. Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme
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> . . .
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> *f*) privant une personne accusée d'un acte criminel du droit à la présomption d'innocence jusqu'à ce que la preuve de sa culpabilité ait été établie en conformité de la loi, après une audition impartiale et publique de sa cause par un tribunal indépendant et non préjugé, ou la privant sans juste cause du droit à un cautionnement raisonnable . . .

La Cour à la majorité a jugé que même si le président de la Cour martiale permanente était un officier des forces armées, cela n'empêchait pas ce tribunal d'être un tribunal indépendant au sens de l'al. 2*f*). Dans les motifs de jugement du juge Ritchie, auxquels ont souscrit les juges Martland, Pigeon, Beetz et Chouinard, on laisse entendre que la question de l'indépendance a été considérée comme s'il s'était agi de savoir si le tribunal avait en fait agi d'une manière indépendante. Le juge Ritchie se référant à la preuve affirme, à la p. 395:

> Absolument rien au dossier du procès ne laisse entendre que le président ait agi autrement que d'une façon indépendante et non préjugée ou qu'il ait par ailleurs été inapte à s'acquitter de la tâche qu'on lui avait confiée.
>
> . . .
>
> Je ne trouve rien dans la preuve qui fonde la prétention que la nomination du président de la cour pour le procès a eu pour résultat de priver l'appelant d'un procès devant un tribunal indépendant et non préjugé ou qu'elle visait ce résultat.

Si l'on paraît insister dans ces observations sur la manière dont le tribunal a agi, j'ai l'impression que le juge Ritchie et le juge McIntyre, qui a écrit des motifs distincts concordants quant au résultat, auxquels le juge Dickson (maintenant juge en chef) a souscrit, ont tous deux examiné le statut ou

to the armed forces of the president of the Standing Court Martial Appeal as an objective matter to be considered in determining whether the tribunal could be regarded as independent. Both emphasized the long-established tradition of a separate system of military law applied by tribunals presided over by military officers. Both also emphasized the status of the Court Martial Appeal Court and its independence of the armed forces as ensuring that the person charged would be presumed innocent until proved guilty by an independent tribunal. I am, therefore, of the respectful opinion that the reasoning of this Court in *MacKay* does not preclude the view that the word "independent" in s. 11(*d*) of the *Charter* is to be understood as referring to the status or relationship of judicial independence as well as to the state of mind or attitude of the tribunal in the actual exercise of its judicial function.

III

What should be considered as the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*—that is, those which may be reasonably perceived as such—is a difficult question. The concept of judicial independence has been an evolving one. See Shetreet, *op. cit.*, pp. 383-84. The history of judicial independence in Great Britain and Canada is analyzed by Professor Lederman in his classic and frequently cited essay on the subject, "The Independence of the Judiciary" (1956), 34 *Can. Bar Rev.* 769, 769-809 and 1139-1179. The reasons of Howland C.J.O. in the case at bar contain a succinct and helpful review of the main features of the development of judicial independence in England and Canada, with particular reference to the status of provincial magistrates and courts. Modern views on the subject of judicial independence are reflected in the Deschênes report to which reference has been made, and in the recent report of the Canadian Bar Association's Committee on *The Independence of the Judiciary in Canada*. There have also been a number of international declarations of principle on judicial independence, of which the Universal Declaration on the Independence of Justice produced by the First World Conference on the Independence of Justice held in Montreal in June,

la relation entre les forces armées et le président de la Cour martiale permanente, à titre de question objective dont il fallait tenir compte pour décider si le tribunal pouvait être considéré comme indépendant. Tous deux ont insisté sur la tradition fort ancienne d'un système distinct de justice militaire administré par des tribunaux présidés par des militaires. Tous deux ont aussi souligné que le statut du Tribunal d'appel des cours martiales et son indépendance des forces armées assuraient que l'inculpé serait présumé innocent, jusqu'à preuve du contraire, par un tribunal indépendant. Avec égards, je suis donc d'avis que le raisonnement de cette Cour dans l'arrêt *MacKay* n'exclut pas l'opinion que le terme «indépendant» de l'al. 11*d*) de la *Charte* doit être interprété comme visant le statut ou la relation d'indépendance judiciaire, autant que l'état d'esprit ou l'attitude du tribunal dans l'exercice concret de ses fonctions judiciaires.

III

Que doit-on considérer comme conditions essentielles de l'indépendance judiciaire aux fins de l'al. 11*d*) de la *Charte*, c.-à-d. celles qu'on peut raisonnablement percevoir comme telles? C'est là une question difficile. La notion d'indépendance judiciaire a évolué. Voir Shetreet, précité, aux pp. 383 et 384. L'histoire de l'indépendance judiciaire en Grande-Bretagne et au Canada est analysée par le professeur Lederman dans un essai classique fréquemment cité sur le sujet: «The Independence of the Judiciary» (1956), 34 *R. du B. can.* 769, 769 à 809 et 1139 à 1179. Les motifs du juge en chef Howland en l'espèce comportent une étude succincte et utile des principales caractéristiques de l'évolution de l'indépendance judiciaire en Angleterre et au Canada, où l'on mentionne de façon particulière le statut des magistrats et tribunaux provinciaux. Les points de vue contemporains sur l'indépendance judiciaire se reflètent dans le rapport Deschênes, déjà mentionné, et dans le rapport récent du Comité de l'Association du Barreau canadien sur *L'Indépendance de la magistrature au Canada*. Il y a aussi eu un bon nombre de déclarations internationales de principe sur l'indépendance judiciaire, dont la plus importante est peut-être la Déclaration universelle sur l'indépendance de la Justice de la Première conférence

1983 is perhaps the most important. The recently published collection of papers and addresses, *Judicial Independence: The Contemporary Debate* (1985), edited by Shetreet and Deschênes, reflects the most up-to-date thinking on the subject. The concluding paper by Shetreet, entitled "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges", provides a valuable overview of the conceptual development in this area.

Conceptions have changed over the years as to what ideally may be required in the way of substance and procedure for securing judicial independence in as ample a measure as possible. Opinions differ on what is necessary or desirable, or feasible. This is particularly true, for example, of the degree of administrative independence or autonomy it is thought the courts should have. It is also true of the extent to which certain extra-judicial activity of judges may be perceived as impairing the reality or perception of judicial independence. There is renewed concern about the procedure and criteria for the appointment of judges as that may bear on the perception of judicial independence. Professional and lay concern about judicial independence has increased with the new power and responsibility given to the courts by the *Charter*. Reports and speeches on the subject of judicial independence in recent years have urged the general adoption of the highest standards or safeguards, not only with respect to the traditional elements of judicial independence, but also with respect to other aspects now seen as having an important bearing on the reality and perception of judicial independence. These efforts, particularly by the legal profession and the judiciary, to strengthen the conditions of judicial independence in Canada may be expected to continue as a movement towards the ideal. It would not be feasible, however, to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s. 11(*d*) of the *Charter*, which may have to be applied to a variety of tribunals. The legislative and constitutional provisions in Canada governing matters which bear on the judicial independence of tribunals trying persons charged with an offence exhibit a great range and variety. The essential conditions of judicial in-

mondiale sur l'indépendance de la justice tenue à Montréal en 1983. Le recueil d'articles et d'allocutions récemment publié, *Judicial Independence: The Contemporary Debate* (1985), sous la direction de Shetreet et Deschênes, traduit la pensée la plus récente sur ce sujet. Servant de conclusion, l'article de Shetreet, intitulé «Judicial Independence: New Conceptual Dimensions and Contemporary Challenges», présente une vue d'ensemble précieuse de l'évolution des idées dans ce domaine.

Les idées ont évolué au cours des années sur ce qui idéalement peut être requis, sur le plan du fond comme sur celui de la procédure, pour assurer une indépendance judiciaire aussi grande que possible. Les opinions diffèrent sur ce qui est nécessaire ou souhaitable, ou encore réalisable. Cela est particulièrement vrai, par exemple, en ce qui concerne le degré d'indépendance ou d'autonomie que les tribunaux, pense-t-on devraient avoir sur le plan administratif. Cela est vrai aussi de la mesure dans laquelle certaines activités extrajudiciaires des juges peuvent être perçues comme portant atteinte à la réalité ou à la perception de l'indépendance judiciaire. Il y a un regain d'intérêt pour la procédure et les critères de nomination des juges, car ils peuvent avoir un effet sur la perception de l'indépendance judiciaire. Les préoccupations des juristes et des profanes concernant l'indépendance judiciaire se sont accrues avec les nouvelles attributions et responsabilités que la *Charte* a conférées aux tribunaux. Dans des rapports et des discours sur l'indépendance judiciaire, on a réclamé, ces dernières années, l'adoption généralisée des plus hautes normes ou garanties, non seulement à l'égard des éléments traditionnels de l'indépendance judiciaire, mais aussi à l'égard des autres aspects considérés aujourd'hui comme ayant un effet important sur la réalité et la perception de l'indépendance judiciaire. On peut s'attendre que ces efforts, déployés particulièrement par les milieux juridique et judiciaire en vue d'affermir les conditions de l'indépendance judiciaire au Canada, vont continuer à viser l'idéal. Il ne serait cependant pas possible d'appliquer les conditions les plus rigoureuses et les plus élaborées de l'indépendance judiciaire à l'exigence constitutionnelle d'indépendance qu'énonce l'al. 11*d*) de la *Charte*, qui peut devoir s'appliquer à différents tribunaux. Les dis-

dependence for purposes of s. 11(*d*) must bear some reasonable relationship to that variety. Moreover, it is the essence of the security afforded by the essential conditions of judicial independence that is appropriate for application under s. 11(*d*) and not any particular legislative or constitutional formula by which it may be provided or guaranteed.

Counsel for the Provincial Court Judges Association submitted that there should be a uniform standard of judicial independence under s. 11(*d*) and that it should be essentially the one embodied by ss. 99 and 100 of the *Constitution Act, 1867*, which provide:

99. (1) Subject to subsection two of this section, the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

(2) A Judge of a Superior Court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

These provisions are generally regarded as representing the highest degree of constitutional guarantee of security of tenure and security of salary and pension. They find their historical inspiration in the provisions of the *Act of Settlement* of 1701 [12 & 13 Will. 3, c. 2], which provided that judges should hold office during good behaviour, subject to removal on an address of both Houses of Parliament, and that their salaries should be "ascertained and established". Provincial court judges contend that they should have the same constitutional guarantees of security of tenure and security

positions législatives et constitutionnelles qui, au Canada, régissent les questions ayant une portée sur l'indépendance judiciaire des tribunaux qui jugent les personnes accusées d'une infraction sont fort diverses et variées. Les conditions essentielles de l'indépendance judiciaire, pour les fins de l'al. 11*d*), doivent avoir un lien raisonnable avec cette diversité. De plus, c'est l'essence de la garantie fournie par les conditions essentielles de l'indépendance judiciaire qu'il convient d'appliquer en vertu de l'al. 11*d*), et non pas quelque formule législative ou constitutionnelle particulière qui peut l'offrir ou l'assurer.

Les avocats de l'Association des juges des cours provinciales ont fait valoir qu'il devrait y avoir une norme uniforme d'indépendance judiciaire en vertu de l'al. 11*d*) et que ce devrait essentiellement être celle que l'on trouve aux art. 99 et 100 de la *Loi constitutionnelle de 1867*, qui portent:

99. (1) Sous réserve du paragraphe (2) du présent article, les juges des cours supérieures resteront en fonctions à titre inamovible, mais ils pourront être révoqués par le gouverneur général sur une adresse du Sénat et de la Chambre des communes.

(2) Un juge d'une cour supérieure, nommé avant ou après l'entrée en vigueur du présent article, cessera de détenir sa charge lorsqu'il aura atteint l'âge de soixante-quinze ans, ou à la date d'entrée en vigueur du présent article si, à cette date, il a déjà atteint cet âge.

100. Les traitements, allocations et pensions des juges des cours supérieures, de district et de comté (sauf les cours de vérification en Nouvelle-Écosse et au Nouveau-Brunswick) et des cours de l'Amirauté, lorsque ces juges reçoivent actuellement un traitement, seront fixés et assurés par le Parlement du Canada.

Ces dispositions sont généralement considérées comme représentant le plus haut degré de garantie constitutionnelle d'inamovibilité et de sécurité de traitement et de pension. Elles s'inspirent historiquement des dispositions de l'*Acte d'établissement* de 1701 [12 & 13 Will. 3, chap. 2], qui prévoyait que les juges occuperaient leur charge durant bonne conduite, sous réserve de révocation par une adresse des deux chambres du Parlement, et que leur salaire serait [TRADUCTION] «fixé et établi». Les juges de cour provinciale soutiennent qu'ils devraient jouir des mêmes garanties constitution-

of salary and pension as superior court judges. Whatever may be the merits of this contention from the point of view of legislative or constitutional policy, I do not think that it can be given effect to in the construction and application of s. 11(*d*). To do so would be, in effect, to amend the judicature provisions of the Constitution. The standard of judicial independence for purposes of s. 11(*d*) cannot be a standard of uniform provisions. It must necessarily be a standard that reflects what is common to, or at the heart of, the various approaches to the essential conditions of judicial independence in Canada.

IV

It is necessary then to consider the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*, as they relate to the various objections to the status of provincial court judges raised before Sharpe J. Certain of these objections touch on the question of security of tenure. Security of tenure, because of the importance that has traditionally been attached to it, must be regarded as the first of the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*.

The provisions in Ontario governing the security of tenure of provincial court judges up to the age of retirement at the time Sharpe J. declined jurisdiction were contained in s. 4 of the *Provincial Courts Act*. Section 4 provided that a provincial court judge could be removed from office only "for misbehaviour or for inability to perform his duties properly" and only after an inquiry by a superior court judge at which the Provincial Court judge affected had been given a full opportunity to be heard. The report of the inquiry had to be laid before the Legislative Assembly, but the Lieutenant Governor in Council was not bound to act in accordance with its findings or recommendations. Under the provision for removal before retirement which now applies to provincial court judges—s. 56(1) of the *Courts of Justice Act, 1984*, 1984 (Ont.), c. 11, which came into force on January 1, 1985—a judge may be removed from office before

nelles d'inamovibilité et de sécurité de traitement et de pension que les juges des cours supérieures. Quel que soit le bien-fondé de cet argument du point de vue de la politique législative ou constitutionnelle, je ne pense pas qu'il puisse s'appliquer quand il s'agit d'interpréter et d'appliquer l'al. 11*d*). Ce faire reviendrait en fait à modifier les dispositions de la Constitution relatives à la magistrature. La norme de l'indépendance judiciaire, pour les fins de l'al. 11*d*), ne peut être l'uniformité des dispositions. Ce doit nécessairement être une norme qui reflète ce qui est commun aux diverses conceptions des conditions essentielles de l'indépendance judiciaire au Canada ou ce qui est au centre de ces conceptions.

IV

Il est donc nécessaire d'examiner les conditions essentielles de l'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte*, étant donné le rapport qu'elles ont avec les diverses objections au statut des juges de cour provinciale soulevées devant le juge Sharpe. Certaines de ces objections touchent à la question de l'inamovibilité. L'inamovibilité, de par l'importance qui y a été attachée traditionnellement, doit être considérée comme la première des conditions essentielles de l'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte*.

Les dispositions ontariennes régissant l'inamovibilité des juges de cour provinciale jusqu'à l'âge de la retraite, à l'époque où le juge Sharpe a décliné compétence, se trouvaient à l'art. 4 de la *Loi sur les cours provinciales*. L'article 4 portait qu'un juge de cour provinciale ne pouvait être démis de ses fonctions que [TRADUCTION] «pour mauvaise conduite ou pour incapacité d'exercer convenablement ses fonctions», et ce, uniquement après la tenue d'une enquête par un juge de cour supérieure, au cours de laquelle le juge de cour provinciale en cause avait eu pleinement l'occasion de se faire entendre. Le rapport de l'enquête devait être déposé à l'Assemblée législative, mais le lieutenant-gouverneur en conseil n'était pas obligé de se conformer à ses conclusions ou recommandations. En vertu de la disposition de révocation avant retraite qui s'applique aujourd'hui aux juges de cour provinciale—le par. 56(1) de la *Loi de 1984*

the age of retirement only if a complaint has been made to the Judicial Council for Provincial Judges and if the removal is recommended by a judicial inquiry on the ground that the judge has become incapacitated or disabled from the due execution of the office by reason of infirmity, by conduct that is incompatible with the execution of the office, or by having failed to perform the duties of the office. The judge may be removed by the Lieutenant Governor in Council only on an address of the Legislative Assembly.

There are, of course, a variety of ways in which the essentials of security of tenure may be provided by constitutional or legislative provision. As I have indicated, superior court judges in Canada enjoy what is generally regarded as the highest degree of security of tenure in the constitutional guarantee of s. 99 of the *Constitution Act, 1867* that they shall hold office during good behaviour until the age of seventy-five, subject to removal by the Governor General on address of the Senate and House of Commons. The judges of this Court, the Federal Court of Canada and the Tax Court of Canada also enjoy, under their respective governing statutes, a tenure during good behaviour until a specified age of retirement, subject to removal only on address of the Senate and House of Commons. The judges of the county courts hold office during good behaviour but are removable by the Governor in Council, on the recommendation of the Minister of Justice, following an inquiry or investigation and report by the Canadian Judicial Council, pursuant to ss. 40 and 41 of the *Judges Act*, R.S.C. 1970, c. J-1. Under these sections, which provide for an inquiry or investigation by the Council into the conduct or capacity of a judge of a superior, district or county court or of the Tax Court of Canada, the Council is empowered to recommend the removal of a judge. The grounds on which it may do so, as set out in s. 41, are that the judge has become incapacitated or disabled from the due execution of office by age or infirmity, by having been guilty of misconduct, by having failed in the due execution of office, or by having been placed by misconduct or otherwise in a position incompatible with the due execution of office.

sur les tribunaux judiciaires, 1984 (Ont.), chap. 11, entré en vigueur le 1er janvier 1985—un juge ne peut se voir démis de ses fonctions avant l'âge de la retraite que par suite d'une plainte portée au Conseil de la magistrature des juges provinciaux et que si la révocation est recommandée, après enquête judiciaire, pour le motif que le juge est devenu incapable de remplir dûment ses fonctions pour cause d'infirmité ou de conduite incompatible avec sa charge, ou parce qu'il n'a pas rempli les devoirs de sa charge. Le lieutenant-gouverneur en conseil ne peut démettre le juge de ses fonctions que sur adresse de l'Assemblée législative.

Il existe bien entendu diverses façons de prévoir les conditions essentielles de l'inamovibilité par une disposition constitutionnelle ou législative. Comme je l'ai indiqué, les juges de cour supérieure au Canada jouissent de ce qui est généralement considéré comme le plus haut degré d'inamovibilité qu'offre la garantie constitutionnelle de l'art. 99 de la *Loi constitutionnelle de 1867*: ils occupent leur charge à titre inamovible jusqu'à l'âge de soixante-quinze ans à moins d'être révoqués par le gouverneur général sur adresse du Sénat et de la Chambre des communes. En vertu des lois qui les régissent respectivement, les juges de cette Cour, ceux de la Cour fédérale du Canada et ceux de la Cour canadienne de l'impôt occupent également leur charge à titre inamovible jusqu'à un âge précis de mise à la retraite, à moins seulement d'être révoqués sur adresse du Sénat et de la Chambre des communes. Les juges des cours de comté occupent leur charge à titre inamovible, mais peuvent être démis de leurs fonctions par le gouverneur en conseil, sur la recommandation du ministre de la Justice, après enquête et rapport du Conseil canadien de la magistrature, conformément aux art. 40 et 41 de la *Loi sur les juges*, S.R.C. 1970, chap. J-1. En vertu de ces articles qui prévoient la tenue d'une enquête sur la conduite ou la capacité d'un juge d'une cour supérieure, d'une cour de district, d'une cour de comté ou de la Cour canadienne de l'impôt, le Conseil peut recommander la révocation d'un juge. Les motifs pour lesquels il peut le faire, énoncés à l'art. 41, sont que le juge est frappé d'une incapacité ou d'une invalidité qui l'empêche de remplir utilement ses fonctions et est due à l'âge ou à une infirmité, au fait qu'il s'est

office. The judge must be given an opportunity to be heard, in person or by counsel, and to cross-examine witnesses and adduce evidence. Where a judge may be removed by the Governor in Council following a report of the Council, as in the case of a county court judge, the Governor in Council is not bound by the report. The security of tenure provided for provincial court judges in Canada is, generally speaking, that they may be removed by the executive government before the age of retirement only for misbehaviour or disability following a judicial inquiry. There is considerable variation in the relevant provisions of the provincial legislation. In some cases it is expressly provided that they shall hold office during good behaviour; in others, the specific grounds for removal are spelled out and may, as I have indicated, be generally summarized as misbehaviour or misconduct rendering the judge unfit for office or incapacity by reason of infirmity. The essence of these provisions is that a provincial judge may be removed before the age of retirement only for cause. There is also provision for a judicial inquiry into whether there is cause at which the judge affected is afforded a full opportunity to be heard. In some cases the executive government is bound by the report of the inquiry; in most cases the government is not bound by it.

The Deschênes report recommended that all judges should enjoy a tenure expressly defined as being "during good behaviour" and that they should be removable only upon an address of the legislature. Alternatively, the report recommended that if the power of removal by the executive without an address of the legislature were retained, the executive should be bound by the report of the judicial inquiry. The report of the Canadian Bar Association Committee on judicial independence recommended that "All judges of Canadian Courts be guaranteed tenure during good behaviour". There is also an implication at p. 16 of the report that the committee was of the view that a

rendu coupable de mauvaise conduite, au fait qu'il n'a pas rempli utilement ses fonctions ou à celui que, par sa conduite ou pour toute autre raison, il s'est mis dans une situation telle qu'il ne peut remplir utilement ses fonctions. Le juge doit avoir la possibilité de se faire entendre, personnellement ou par avocat, et de contre-interroger des témoins et de produire une preuve. Lorsqu'un juge ne peut être révoqué que par le gouverneur en conseil après rapport du Conseil canadien de la magistrature, le gouverneur en conseil n'est pas lié par le rapport. L'inamovibilité prévue pour les juges de cour provinciale au Canada consiste, en général, dans le fait qu'ils ne peuvent être révoqués par le pouvoir exécutif avant l'âge de la retraite que pour mauvaise conduite ou invalidité, après enquête judiciaire. Les dispositions pertinentes des lois provinciales présentent une grande diversité. Dans certains cas, il est expressément prévu qu'ils occupent leur charge à titre inamovible. Dans d'autres cas, les motifs spécifiques de révocation sont énoncés bien clairement et, comme je l'ai déjà indiqué, se ramènent à la mauvaise conduite ou à un mauvais comportement qui rend le juge indigne de sa charge, ou à l'incapacité pour cause d'infirmité. Essentiellement, ces dispositions prévoient qu'un juge de cour provinciale ne peut être révoqué avant l'âge de la retraite que pour un motif déterminé. Une enquête judiciaire est aussi prévue pour établir si ce motif existe, le juge visé devant avoir pleinement l'occasion de s'y faire entendre. Dans certains cas, le pouvoir exécutif est lié par le rapport d'enquête; dans la plupart des cas, le gouvernement ne l'est pas.

Le rapport Deschênes recommande que tous les juges occupent leur charge à titre expressément défini comme «inamovible» et qu'ils ne puissent être révoqués que sur adresse du corps législatif. Subsidiairement, le rapport recommande que si le pouvoir de l'exécutif de révoquer sans adresse du corps législatif devait être maintenu, l'exécutif devrait être lié par le rapport d'enquête judiciaire. Le rapport d'un comité de l'Association du Barreau canadien sur l'indépendance de la magistrature recommande que «tous les juges des cours canadiennes soient nommés à titre inamovible». Il découle aussi du rapport, à la p. 17, que le comité était d'avis qu'un juge ne devrait être révoqué que

judge should be removable only on an address of the legislature. After referring to s. 99 of the *Constitution Act, 1867* respecting the tenure of superior court judges, the committee said: "Since the independence of the judiciary depends to a significant extent on the judges' security of tenure it is appropriate that their removal be a major undertaking, bringing the politicians who must accomplish it under close scrutiny. The removal of a judge is not to be undertaken lightly." It may be desirable that the tenure of judges should be expressed as being during good behaviour, which leaves cause for removal to be determined according to the common law meaning of those words (see Shetreet, *op. cit.*, pp. 89*ff* for the meaning of "during good behaviour" at common law) rather than have the grounds for removal specified in legislation, but I do not think it is reasonable to require that as an essential condition of judicial independence for purposes of s. 11(*d*) of the *Charter*. It is sufficient if a judge may be removed only for cause related to the capacity to perform judicial functions. It may be, as suggested by the Deschênes report, that the specified grounds for removal to be found in some of the provincial legislation are too broad, but this would not appear to be true of the grounds for removal specified in s. 4 of the *Provincial Courts Act* and s. 56(1) of the *Courts of Justice Act, 1984*. Similarly, it may be desirable, as now provided for in s. 56(1), that a judge should be removable from office only on an address of the legislature, but again I do not think it is reasonable to require this as essential for security of tenure for purposes of s. 11(*d*) of the *Charter*. It may be that the requirement of an address of the legislature makes removal of a judge more difficult in practice because of the solemn, cumbersome and publicly visible nature of the process, but the requirement of cause, as defined by statute, together with a provision for judicial inquiry at which the judge affected is given a full opportunity to be heard, is in my opinion a sufficient restraint upon the power of removal for purposes of s. 11(*d*). Whether or not the Executive should be bound by the report of the judicial inquiry—that is, whether the power to remove should be conditional upon a finding of cause by the judicial inquiry, as is now provided by

sur adresse du corps législatif. Après avoir mentionné l'art. 99 de la *Loi constitutionnelle de 1867*, concernant l'inamovibilité des juges de cour supérieure, le comité affirme: «Puisque l'indépendance du pouvoir judiciaire dépend dans une très large mesure de l'inamovibilité des juges, il est normal que leur destitution soit une décision majeure impliquant les politiciens, qui doivent accomplir leur travail sous l'œil vigilant du public. La destitution d'un juge ne peut pas être prise à la légère.» Il est peut-être souhaitable que la charge des juges soit déclarée inamovible, les motifs de révocation devant alors être déterminés en fonction du sens qu'ont ces termes en *common law* (voir Shetreet, précité, aux pp. 89 et suiv. pour la signification du terme «inamovibilité» en *common law*) plutôt que de les voir spécifiés dans les lois; cependant, je ne pense pas qu'il soit raisonnable d'exiger cela comme condition essentielle d'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte*. Il suffit qu'un juge ne puisse être révoqué que pour un motif lié à sa capacité d'exercer les fonctions judiciaires. Il se peut, comme le laisse entendre le rapport Deschênes, que les motifs exprès de révocation que l'on trouve dans certaines lois provinciales soient trop larges, mais il ne semble pas que ce soit le cas des motifs de révocation prévus par l'art. 4 de la *Loi sur les cours provinciales* et par le par. 56(1) de la *Loi de 1984 sur les tribunaux judiciaires*. De même, il est peut-être souhaitable, comme le prévoit maintenant le par. 56(1), qu'un juge ne puisse être révoqué que sur adresse du corps législatif mais, ici encore, je ne pense pas qu'il soit raisonnable d'exiger cela comme étant essentiel à l'inamovibilité pour les fins de l'al. 11*d*) de la *Charte*. Il se peut que la nécessité d'une adresse du corps législatif rende la révocation d'un juge plus difficile en pratique à cause de la solennité, de la lourdeur et de la visibilité de la procédure, mais qu'un motif soit nécessaire, comme le définit la loi, et qu'une enquête judiciaire soit prévue au cours de laquelle le juge visé a pleinement l'occasion de se faire entendre, constituent à mon avis, une restriction suffisante du pouvoir de révocation pour les fins de l'al. 11*d*). J'estime qu'il est plus difficile de déterminer si l'exécutif doit ou non être lié par le rapport de l'enquête judiciaire, c.-à-d. si le pouvoir de révocation doit être assujetti

s. 56(1) of the *Courts of Justice Act, 1984*—I find more difficult. Certainly, it is preferable, but I do not think it can be required as essential to security of tenure for purposes of s. 11(*d*). The existence of the report of the judicial inquiry is a sufficient restraint upon the power of removal, particularly where, as provided by s. 4 of the *Provincial Courts Act*, the report is required to be laid before the legislature.

In sum, I am of the opinion that while the provision concerning security of tenure up to the age of retirement which applied to provincial court judges when Sharpe J. declined jurisdiction falls short of the ideal or highest degree of security, it reflects what may be reasonably perceived as the essentials of security of tenure for purposes of s. 11(*d*) of the *Charter*: that the judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure for purposes of s. 11(*d*) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.

The most serious issue with respect to the security of tenure of provincial court judges under the statutory provisions that applied when Sharpe J. declined jurisdiction is the provision in s. 5(4) of the *Provincial Courts Act* for the reappointment of a judge, upon attaining the age of retirement, to hold office during pleasure. Such reappointment, to be made by the Lieutenant Governor in Council upon the recommendation of the Attorney General, was the subject of two objections: first, that an appointment to hold office during the pleasure of the Executive was incompatible with the requirement of judicial independence; and second, that the need in some cases of such a reappointment to complete entitlement to pension could give rise to a reasonable perception of dependence upon the

à la condition que l'enquête judiciaire ait constaté l'existence d'un motif, comme le prévoit maintenant le par. 56(1) de la *Loi de 1984 sur les tribunaux judiciaires*. Cela est certainement préférable, mais je ne pense pas que cela puisse être posé comme essentiel à l'inamovibilité pour les fins de l'al. 11*d*). L'existence du rapport d'enquête judiciaire constitue une restriction suffisante du pouvoir de révocation, particulièrement lorsque, comme le prévoit l'art. 4 de la *Loi sur les cours provinciales*, le rapport doit être déposé devant le corps législatif.

En somme, je suis d'avis que si la disposition concernant l'inamovibilité jusqu'à l'âge de la retraite, qui s'appliquait aux juges de cour provinciale lorsque le juge Sharpe a décliné compétence, ne fournit une inamovibilité ni idéale ni parfaite, elle fait néanmoins ressortir ce qu'on peut raisonnablement percevoir comme les conditions essentielles de l'inamovibilité pour les fins de l'al. 11*d*) de la *Charte*: que le juge ne puisse être révoqué que pour un motif déterminé, et que ce motif fasse l'objet d'un examen indépendant et d'une décision selon une procédure qui offre au juge visé toute possibilité de se faire entendre. L'essence de l'inamovibilité pour les fins de l'al. 11*d*), que ce soit jusqu'à l'âge de la retraite, pour une durée fixe, ou pour une charge *ad hoc*, est que la charge soit à l'abri de toute intervention discrétionnaire ou arbitraire de la part de l'exécutif ou de l'autorité responsable des nominations.

Le point le plus sérieux, en ce qui concerne l'inamovibilité des juges de cour provinciale conférée par les dispositions légales qui s'appliquaient lorsque le juge Sharpe a décliné compétence, c'est ce que prévoit le par. 5(4) de la *Loi sur les cours provinciales* au sujet de la nouvelle nomination à titre amovible d'un juge, lorsqu'il atteint l'âge de la retraite. Cette nouvelle nomination, qui doit être faite par le lieutenant-gouverneur en conseil sur la recommandation du procureur général, a fait l'objet de deux objections: premièrement, une nomination à titre amovible par l'exécutif est incompatible avec l'exigence d'indépendance judiciaire et, deuxièmement, la nécessité dans certains cas de procéder à cette nouvelle nomination afin de rendre admissible à la pension, peut susciter une

Executive. Under the pension provisions which applied when Sharpe J. declined jurisdiction, a provincial court judge was entitled to a pension upon attaining the age of sixty-five if he or she had served ten or more years. A judge who had been appointed after the age of fifty-five might be perceived as dependent upon the favour of the Executive for a post-retirement reappointment to complete pension entitlement. The first objection to the provision for post-retirement reappointment in s. 5(4) of the *Provincial Courts Act* relates to the question of security of tenure, which is the issue presently being considered. The second objection falls into the general category of objections to the status of provincial court judges based upon alleged dependence on the Executive for discretionary benefits or advantages. I propose to address that issue later.

Howland C.J.O. disposed of the objections to the provision for post-retirement reappointment which applied when Sharpe J. declined jurisdiction mainly on the ground that the incumbent Attorney General had, during his seven years in office, always acted with respect to such reappointments on the recommendation of the chief judge of the provincial court in question. That practice or "tradition", as it was referred to, was perhaps more relevant to the second objection to the provision for post-retirement appointment at pleasure—the dependence of provincial court judges on such reappointment to complete pension entitlement—than to the first objection—the lack of security of tenure under such a reappointment—but it may have been assumed that if the Attorney General made a post-retirement reappointment only on the recommendation of a chief judge he could be expected to act only on such recommendation with respect to the termination of such a reappointment. In any event, Howland C.J.O. placed considerable emphasis on the role of tradition as an objective condition or safeguard of judicial independence. Since tradition has most often been invoked in connection with the issue of security of

perception raisonnable de dépendance envers l'exécutif. En vertu des dispositions portant sur la pension, qui s'appliquaient lorsque le juge Sharpe a décliné compétence, un juge de cour provinciale avait droit à une pension quand il atteignait l'âge de soixante-cinq ans, s'il avait occupé sa charge pendant dix ans ou plus. Le juge nommé après l'âge de cinquante-cinq ans pouvait être perçu comme dépendant du bon vouloir de l'exécutif s'il voulait obtenir une nouvelle nomination après avoir atteint l'âge de retraite, en vue de devenir admissible à la pension. La première objection à la nouvelle nomination après avoir atteint l'âge de la retraite, prévue au par. 5(4) de la *Loi sur les cours provinciales*, touche à la question de l'inamovibilité, le point présentement examiné. La seconde objection se situe dans la catégorie générale des objections au statut des juges de cour provinciale, fondées sur une prétendue dépendance envers l'exécutif pour ce qui est d'obtenir des bénéfices ou avantages discrétionnaires. Je propose de traiter cette question plus loin.

Le juge en chef Howland a repoussé les objections à la disposition relative à la nouvelle nomination après l'âge de la retraite, qui s'appliquait lorsque le juge Sharpe a décliné compétence, principalement pour le motif que le procureur général en poste avait, durant les sept ans d'exercice de son mandat, toujours agi, en ce qui concerne ces nouvelles nominations, sur la recommandation du juge en chef de la cour provinciale en question. Cette pratique ou «tradition», comme on l'a appelée, est peut-être plus pertinente dans le cas de la seconde objection à la disposition sur les nominations à titre amovible après l'âge de la retraite—le fait que des juges de cour provinciale dépendent de cette nouvelle nomination pour avoir droit à leur pension—que dans le cas de la première objection—l'amovibilité dans le cas d'une nouvelle nomination—mais on peut avoir présumé que si le procureur général ne procédait à une nouvelle nomination après l'âge de la retraite que sur la recommandation d'un juge en chef, on pouvait s'attendre à ce qu'il n'agisse que sur une telle recommandation pour mettre fin à cette nouvelle nomination. De toute façon, le juge en chef Howland a accordé une importance considérable au

tenure it is convenient to consider its general role here.

I quote a passage on this subject from the reasons of Howland C.J.O., which refers to the opinions of several learned commentators on the importance of tradition. He said at pp. 431-32:

> Having considered the historical development of judicial independence in England and in Canada, it is necessary to refer to the importance of traditions. Quite apart from the Constitution or any statutory provisions, tradition has been an important factor in preserving judicial independence both in England and in Canada. In England a majority of the judges can be removed by the Lord Chancellor, who is an active member of the Government. However, the high tradition of the office of Lord Chancellor has resulted in very few abuses of this power. As Hogg states in his text *Constitutional Law of Canada* (1977), p. 120:
>
> > The independence of the judiciary has since become such a powerful tradition in the United Kingdom and Canada that there may be little point in a fine analysis of the language of the provisions by which it is formally guaranteed.
>
> Shetreet's text *Judges on Trial, a Study of the Appointment and Accountability of the English Judiciary* (1976), emphasized the importance of tradition so far as judicial independence is concerned. At pp. 392-3 he stated:
>
> > . . . no executive or legislature can interfere with judicial independence contrary to popular opinion, and survive. "In Britain" wrote Professor de Smith, "the independence of the Judiciary rests not on formal constitutional guarantees and prohibitions but on an admixture of statutory and common-law rules, constitutional conventions and parliamentary practice, fortified by professional tradition and public opinion." (S.A. de Smith *Constitutional and Administrative Law* (1st ed. 1971), pp. 365-366 n. 35) Lord Sankey, L.C., said in Parliament:
>
> > > "The independence and prestige which our judges have enjoyed in their position have rested far more upon the great tradition and long usage with which

rôle de la tradition en tant que condition ou garantie objectives de l'indépendance judiciaire. Étant donné que la tradition est, la plupart du temps, invoquée relativement à la question de l'inamovibilité, il convient d'examiner ici son rôle général.

À ce propos, je cite un passage des motifs de jugement du juge en chef Howland qui se réfère aux opinions de plusieurs savants glossateurs sur l'importance de la tradition. Il dit aux pp. 431 et 432:

> [TRADUCTION] Après l'examen de l'évolution historique de l'indépendance judiciaire en Angleterre et au Canada, il est nécessaire de mentionner l'importance des traditions. Tout à fait indépendamment de la Constitution ou des dispositions législatives, la tradition a été un facteur important pour la préservation de l'indépendance judiciaire tant en Angleterre qu'au Canada. En Angleterre, la majorité des juges peuvent être révoqués par le lord Chancelier, un membre actif du gouvernement. Toutefois, la haute tradition entourant l'office de lord Chancelier a fait qu'il n'y a eu qu'un fort petit nombre d'abus de ce pouvoir. Comme Hogg le dit dans son traité *Constitutional Law of Canada* (1977), à la p. 120:
>
> > L'indépendance du pouvoir judiciaire est devenue depuis une tradition tellement puissante au Royaume-Uni et au Canada que procéder à une analyse subtile des textes qui la garantissent formellement n'aurait guère d'utilité.
>
> La monographie de Shetreet, *Judges on Trial, a Study of the Appointment and Accountability of the English Judiciary* (1976), souligne l'importance de la tradition en ce qui concerne l'indépendance judiciaire. Aux pages 392 et 393, il dit:
>
> > . . . aucun exécutif ou corps législatif ne peut porter atteinte à l'indépendance judiciaire contrairement à l'opinion publique, et survivre. «En Grande-Bretagne, écrit le professeur de Smith, l'indépendance du pouvoir judiciaire repose non sur des garanties et prohibitions constitutionnelles formelles, mais sur un mélange de règles de droit écrit et de *common law*, de conventions constitutionnelles et de pratiques parlementaires, fortifiées par la tradition du monde juridique et l'opinion publique.» (S. A. de Smith, *Constitutional and Administrative Law* (1st ed. 1971), aux pp. 365 et 366, note 35). Le lord chancelier Sankey a dit au Parlement:
>
> > «L'indépendance et le prestige dont nos juges jouissent en occupant leur charge reposent beaucoup plus sur la grande tradition et le long usage qui les

they have always been surrounded, than upon any Statute. The greatest safeguard of all may be found along these lines for traditions cannot be repealed, but an Act of Parliament can be."

The strength of tradition is measured not only by its observance but also by the intensity of the reaction to its violation .... Strong public reaction to a breach of tradition demonstrates that the violation will not pass unnoticed.

To these opinions on the importance of tradition as a safeguard of judicial independence may be added the following statement by Lord Denning in *The Road to Justice* (1955), at pp. 16-17:

The County Court judges have some measure of protection but the stipendiary magistrates and the justices of the peace have no security of tenure at all. They hold office during pleasure ....

Nevertheless, although these lesser judges can theoretically be dismissed at pleasure, the great principle that judges should be independent has become so ingrained in us that it extends in practice to them also. They do in fact hold office during good behaviour and they are in fact only dismissed for misconduct. If any Minister or Government Department should attempt to influence the decision of any one of them, there would be such an outcry that no Government could stand against it.

Tradition, reinforced by public opinion, operating as an effective restraint upon executive or legislative action, is undoubtedly a very important objective condition tending to ensure the independence in fact of a tribunal. That it is not, however, regarded by itself as a sufficient safeguard of judicial independence is indicated by the many calls for specific legislative provisions or constitutional guarantees to ensure that independence in a more ample and secure measure. Shetreet himself makes this point later on in the discussion of the role of tradition from which Howland C.J.O. quoted, where he says at pp. 392-93:

Others, however, do not entertain this unreserved trust in tradition and popular opinion. A growing number of legal scholars, lawyers and even judges are advocating a written and entrenched constitution to protect civil liberties and other important parts of constitutional law against alteration by a small temporary majority in Parliament. Significant support for this view came from Lord Justice Scarman, who in his Hamlyn

ont toujours entourés que sur quelque loi. La meilleure garantie peut s'y trouver, car les traditions ne peuvent être abrogées, alors qu'une loi du Parlement peut l'être.»

La force de la tradition se mesure non seulement par son observance, mais aussi par l'intensité de la réaction que soulève sa violation ... Une forte réaction de l'opinion publique à une atteinte à la tradition démontre qu'une violation ne saurait passer inaperçue.

À ces opinions sur l'importance de la tradition comme garantie de l'indépendance judiciaire, on peut ajouter ce que dit lord Denning dans *The Road to Justice* (1955), aux pp. 16 et 17:

[TRADUCTION] Les juges de cour de comté sont protégés dans une certaine mesure, mais les magistrats stipendiaires et les juges de paix sont tout à fait amovibles. Ils occupent leur charge durant bon plaisir ...

Néanmoins, si ces juges d'instance inférieure sont théoriquement amovibles, le grand principe que les juges doivent être indépendants est tellement ancré en nous qu'il s'applique en pratique à eux aussi. Ils sont en fait inamovibles et ne peuvent être révoqués que pour mauvaise conduite. Si un ministre ou un ministère tentait d'influencer la décision de l'un deux, cela soulèverait un tel tollé qu'aucun gouvernement ne pourrait y résister.

La tradition, renforcée par l'opinion publique, joue le rôle d'un frein efficace à l'action de l'exécutif ou du législatif et constitue sans nul doute une condition objective fort importante qui tend à assurer l'indépendance effective d'un tribunal. Que cela n'est pas cependant considéré en soi comme une garantie suffisante de l'indépendance judiciaire ressort des nombreux appels réclamant des dispositions législatives ou des garanties constitutionnelles spécifiques assurant cette indépendance d'une manière plus large et plus certaine. Shetreet lui-même le dit plus loin dans son analyse du rôle de la tradition, que cite le juge en chef Howland, aux pp. 392 et 393:

[TRADUCTION] D'autres toutefois ne partagent pas cette confiance absolue dans la tradition et l'opinion populaire. Un nombre croissant d'auteurs, de juristes et même de juges réclament une constitution écrite et enchâssée qui protégerait les libertés publiques et d'autres portions importantes du droit constitutionnel contre toute modification par une petite majorité provisoire au Parlement. Cette opinion a reçu un appui de taille, celui

Lectures 1974 proposed a written Bill of Rights and judicial review of statutes. Individual rights, judicial independence and other parts of a democratic system of government can be better safeguarded by a written constitution supported by tradition and public opinion than by the latter alone.

Reports and addresses on judicial independence in recent years have indicated that the nature and importance of this constitutional value are not so well and widely understood as to give grounds for confidence that its protection can be safely left to the operation of tradition alone. This is clear, for example, from the observations and recommendations of the Deschênes report and from the recent report of the Canadian Bar Association committee on judicial independence. Indeed, a constitutional requirement of judicial independence such as that in s. 11(*d*) of the *Charter* presupposes that it does not automatically exist by reason of tradition alone. Important as tradition is as a support of judicial independence, I do not think that reliance on it should go so far as to treat other conditions or guarantees of independence as unnecessary or of no practical importance. I do not read the reasons of the Court of Appeal as suggesting that. It is a question of the relative importance that one is going to attach to tradition in a particular context as ensuring respect for judicial independence despite an apparent or potential power to interfere with it. Moreover, while tradition reinforced by public opinion may operate as a restraint upon the exercise of power in a manner that interferes with judicial independence, it cannot supply essential conditions of independence for which specific provision of law is necessary.

With the greatest respect for the contrary view, where, as in the case of provincial court judges at the time Sharpe J. declined jurisdiction, the legislature has expressly provided for two kinds of tenure—one under which a judge may be removed from office only for cause and the other under which a judge of the same court holds office during pleasure—I am of the opinion that the

du lord juge Scarman qui, dans ses Hamlyn Lectures de 1974, a proposé une déclaration des droits écrite et le contrôle judiciaire des lois. Les droits de l'individu, l'indépendance judiciaire et d'autres aspects d'un système démocratique de gouvernement pourraient être mieux protégés par une constitution écrite, appuyée par la tradition et l'opinion publique, que par cette dernière seulement.

Ces dernières années, des rapports et des allocutions sur l'indépendance judiciaire ont montré que la nature et l'importance de cette valeur constitutionnelle ne sont pas si bien et si largement comprises au point de justifier de croire que cette protection peut, en toute sécurité, être laissée à la tradition seule. Cela ressort clairement, par exemple, des observations et des recommandations du rapport Deschênes et du récent rapport du Comité de l'Association du Barreau canadien sur l'indépendance de la magistrature. D'ailleurs, une exigence constitutionnelle d'indépendance judiciaire, comme celle de l'al. 11*d*) de la *Charte*, présuppose qu'elle n'existe pas automatiquement en raison de la tradition seule. Si importante que soit la tradition en tant que support de l'indépendance judiciaire, je ne pense pas qu'on devrait s'y fier au point de considérer que les autres conditions ou garanties d'indépendance sont inutiles ou sans importance pratique. Suivant mon interprétation, les motifs de la Cour d'appel ne laissent pas entendre cela. Il s'agit plutôt de l'importance relative à donner à la tradition, dans un contexte particulier, en tant que moyen d'assurer le respect de l'indépendance judiciaire malgré l'existence d'un pouvoir apparent ou virtuel d'y porter atteinte. En outre, si la tradition, renforcée par l'opinion publique, peut permettre de freiner l'exercice d'un pouvoir qui porte atteinte à l'indépendance judiciaire, elle ne peut fournir les conditions essentielles d'indépendance qui doivent être prévues expressément par la loi.

Avec le plus grand respect pour les tenants de l'opinion contraire, lorsque, comme dans le cas des juges de cour provinciale à l'époque où le juge Sharpe a décliné compétence, le corps législatif a prévu expressément deux genres de charge, l'une où un juge peut être révoqué uniquement pour un motif déterminé, et l'autre où un juge du même tribunal est nommé à titre amovible, j'estime que

second class of tenure cannot reasonably be perceived as meeting the essential requirement of security of tenure for purposes of s. 11(*d*) of the *Charter*. The reasonable perception is that the legislature has deliberately, in the case of one category of judges, reserved to the Executive the right to terminate the holding of office without the necessity of any particular justification and without any inhibition or restraint arising from perceived tradition. I am thus of the view that a judge of the Provincial Court (Criminal Division) who held office during pleasure at the time Sharpe J. declined jurisdiction could not be an independent tribunal within the meaning of s. 11(*d*) of the *Charter*.

This conclusion could not, however, affect the independence of Sharpe J. personally because, as noted by the Court of Appeal, he did not hold office under a post-retirement reappointment. It was, nevertheless, contended that the provision for post-retirement reappointment at pleasure prevented the Provincial Court (Criminal Division) as a whole from being an independent tribunal within the meaning of s. 11(*d*) of the *Charter*. In my opinion, the fact that certain judges of the Court may have held office during pleasure at the time Sharpe J. declined jurisdiction could not impair or destroy the independence of the Court as a whole. The objection would have to be taken to the status of the particular judge constituting the tribunal.

As a further reason for rejecting the objections to the provision for post-retirement reappointment Howland C.J.O. referred to the declared intention of the Attorney General to introduce legislation at the next session of the legislature to make post-retirement reappointment subject to the approval of the Chief Judge of the Provincial Court. Such legislation was in fact introduced by s. 1 of the *Provincial Courts Amendment Act, 1983*, 1983 (Ont.) c. 18, which came into force on May 26, 1983 and amended s. 5(4) of the *Provincial Courts Act* to permit a provincial court judge who has attained the age of retirement to continue in office, with the annual approval of the chief judge of the court, until the age of seventy, and to continue in

la charge du second genre ne peut être raisonnablement perçue comme satisfaisant à l'exigence essentielle d'inamovibilité pour les fins de l'al. 11*d*) de la *Charte*. Il est raisonnable de croire que le corps législatif a délibérément, dans le cas d'une catégorie de juges, réservé à l'exécutif le droit de mettre fin à une charge, sans qu'aucune justification particulière ne soit nécessaire et sans aucune inhibition ou restriction imposée par une certaine perception de la tradition. Je suis donc d'avis qu'un juge de la Cour provinciale (Division criminelle), qui occupait sa charge à titre amovible à l'époque où le juge Sharpe a décliné compétence, ne pouvait pas être un tribunal indépendant au sens de l'al. 11*d*) de la *Charte*.

Cette conclusion ne peut toutefois influer sur l'indépendance du juge Sharpe personnellement parce que, comme l'a noté la Cour d'appel, il n'occupait pas sa charge en vertu d'une nouvelle nomination faite après qu'il eut atteint l'âge de la retraite. On a néanmoins soutenu que la disposition sur la nouvelle nomination à titre amovible, après l'âge de la retraite, empêchait la Cour provinciale (Division criminelle), dans son ensemble, d'être un tribunal indépendant au sens de l'al. 11*d*) de la *Charte*. À mon avis, le fait que certains juges de la cour aient pu occuper leur charge à titre amovible, au moment où le juge Sharpe a décliné compétence, ne saurait altérer ni détruire l'indépendance de la cour dans son ensemble. L'objection aurait dû viser le statut du juge particulier qui constituait le tribunal saisi.

Comme motif supplémentaire de rejet des objections apportées à la disposition relative aux nouvelles nominations après l'âge de la retraite, le juge en chef Howland a mentionné l'intention déclarée du procureur général de présenter, à la session suivante de l'Assemblée législative, un projet de loi qui assujettirait ces nouvelles nominations après l'âge de la retraite à l'approbation du juge en chef de la Cour provinciale. Cette mesure a en fait été déposée; c'est l'art. 1 de la *Loi de 1983 modifiant la Loi sur les cours provinciales*, 1983 (Ont.), chap. 18, qui est entré en vigueur le 26 mai 1983 et a modifié le par. 5(4) de la *Loi sur les cours provinciales* pour permettre à un juge de cour provinciale ayant atteint l'âge de la retraite de

office thereafter until the age of seventy-five, with the annual approval of the Judicial Council for Provincial Judges, a body composed of the Chief Justice of Ontario, the Chief Justice of the High Court, the Chief Justice of the District Court, the Chief Judges of the various divisions of the Provincial Court, the Treasurer of the Law Society of Upper Canada, and not more than two other persons appointed by the Lieutenant Governor in Council. The same provision is now found in s. 54(4) of the *Courts of Justice Act, 1984*, which came into force on January 1, 1985. This change in the law, while creating a post-retirement status that is by no means ideal from the point of view of security of tenure, may be said to have removed the principal objection to the provision which applied when Sharpe J. declined jurisdiction since it replaces the discretion of the Executive by the judgment and approval of senior judicial officers who may be reasonably perceived as likely to act exclusively out of consideration for the interests of the Court and the administration of justice generally.

V

The second essential condition of judicial independence for purposes of s. 11(*d*) of the *Charter* is, in my opinion, what may be referred to as financial security. That means security of salary or other remuneration, and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence. In the case of pension, the essential distinction is between a right to a pension and a pension that depends on the grace or favour of the Executive.

The salaries of provincial court judges were at the time Sharpe J. declined jurisdiction, and still are, fixed by regulation made by the Lieutenant Governor in Council pursuant to the authority formerly conferred by s. 34(1) of the *Provincial*

continuer d'occuper sa charge, avec l'approbation annuelle du juge en chef de la cour, jusqu'à l'âge de soixante-dix ans, et de continuer à siéger par la suite jusqu'à l'âge de soixante-quinze ans, avec l'approbation annuelle du Conseil de la magistrature pour les juges de la Cour provinciale, composé du juge en chef de l'Ontario, du juge en chef de la Haute Cour, du juge en chef de la Cour de district, des juges en chef des diverses divisions de la Cour provinciale, du trésorier de la Law Society of Upper Canada et d'au plus deux autres personnes nommées par le lieutenant-gouverneur en conseil. La même disposition se retrouve maintenant au par. 54(4) de la *Loi de 1984 sur les tribunaux judiciaires*, qui est entrée en vigueur le 1er janvier 1985. Ce changement dans la loi, même s'il crée un statut d'après-retraite qui est loin d'être idéal du point de vue de l'inamovibilité, peut être considéré comme ayant supprimé l'objection principale apportée à la disposition qui s'appliquait lorsque le juge Sharpe a décliné compétence, puisqu'il remplace le pouvoir discrétionnaire de l'exécutif par le jugement et l'approbation d'officiers de justice supérieurs qu'on peut raisonnablement percevoir comme susceptibles d'agir exclusivement en fonction des intérêts de la cour et de l'administration de la justice en général.

V

La deuxième condition essentielle de l'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte* est, à mon avis, ce que l'on pourrait appeler la sécurité financière. Cela veut dire un traitement ou autre rémunération assurés et, le cas échéant, une pension assurée. Cette sécurité consiste essentiellement en ce que le droit au traitement et à la pension soit prévu par la loi et ne soit pas sujet aux ingérences arbitraires de l'exécutif, d'une manière qui pourrait affecter l'indépendance judiciaire. Dans le cas de la pension, la distinction essentielle est entre un droit à une pension et une pension qui dépend du bon vouloir ou des bonnes grâces de l'exécutif.

Les traitements des juges de cour provinciale étaient, à l'époque où le juge Sharpe a décliné compétence, et le sont toujours, fixés par règlement pris par le lieutenant-gouverneur en conseil, conformément à l'autorité que lui conférait aupa-

Courts Act and now conferred by s. 87(1) of the *Courts of Justice Act, 1984*, which came into force on January 1, 1985. The amount of the salary has been fixed by s. 2 of Regulation 811 of the Revised Regulations of Ontario, 1980, as amended from time to time. The government receives recommendations concerning the salaries of provincial court judges from the Ontario Provincial Courts Committee, which was first established by Order in Council 643/80 dated March 5, 1980 and was later given statutory recognition by s. 2(2) of the *Provincial Judges and Masters Statute Law Amendment Act, 1983*, 1983 (Ont.), c. 78, which added a new s. 35 to the *Provincial Courts Act*, establishing the Committee with three members: one appointed by provincial court and family court judges' associations; one appointed by the government; and the third, the chairman, appointed jointly by the associations and the government. Section 35 provided that the annual report and recommendations of the Committee be laid before the Legislative Assembly. The same provision is now made for the Committee and its role in relation to the remuneration, allowances and benefits of provincial court judges in s. 88 of the *Courts of Justice Act, 1984*, which came into force on January 1, 1985.

ravant le par. 34(1) de la *Loi sur les cours provinciales*, et que lui confère maintenant le par. 87(1) de la *Loi de 1984 sur les tribunaux judiciaires*, entrée en vigueur le 1er janvier 1985. Le montant du traitement est fixé par l'art. 2 du règlement 811 des Règlements refondus de l'Ontario de 1980 et ses modifications. Le gouvernement reçoit des recommandations concernant les traitements des juges de cour provinciale de l'Ontario Provincial Courts Committee qui a été établi initialement par le décret 643/80 en date du 5 mars 1980 et qui, par la suite a reçu reconnaissance légale par le par. 2(2) de la *Provincial Judges and Masters Statute Law Amendment Act, 1983*, 1983 (Ont.), chap. 78, qui a ajouté à la *Loi sur les cours provinciales* un nouvel art. 35 créant un comité formé de trois membres: un membre nommé par les associations des juges de cour provinciale et de cour de la famille, un membre nommé par le gouvernement et, troisièmement, le président, nommé conjointement par les associations et le gouvernement. L'article 35 prévoyait que le rapport annuel et les recommandations du comité, devaient être déposés à l'Assemblée législative. On trouve maintenant la même disposition, concernant le comité et son rôle en matière de rémunération, d'allocations et de bénéfices pour les juges de cour provinciale, à l'art. 88 de la *Loi de 1984 sur les tribunaux judiciaires*, entrée en vigueur le 1er janvier 1985.

The principal objections to the manner in which the salaries of provincial court judges are provided for is that they are not fixed by the legislature and they are not made a charge on the Consolidated Revenue Fund. These two requirements have traditionally been regarded as affording the highest degree of security in respect of judicial salaries. Section 100 of the *Constitution Act, 1867* requires that the salaries of superior, district and county court judges be fixed by Parliament. The salaries of these and other federally-appointed judges are fixed by Parliament in the *Judges Act*, which provides in s. 33(1) that the salaries payable under the Act shall be paid out of the Consolidated Revenue Fund. In all of the other provinces the salaries of provincial judges are, as in Ontario, fixed by the executive government by regulation.

La principale objection apportée à la façon dont les traitements des juges de cour provinciale sont fixés, est qu'ils ne sont pas fixés par le corps législatif et qu'ils ne grèvent pas le Fonds du revenu consolidé. Ces deux conditions ont traditionnellement été considérées comme offrant le plus haut degré de sécurité en matière de traitement des juges. L'article 100 de la *Loi constitutionnelle de 1867* requiert que les traitements des juges des cours supérieures, de district et de comté, soient fixés par le Parlement. Les traitements de ceux-ci et des autres juges de nomination fédérale sont fixés par le législateur fédéral dans la *Loi sur les juges* qui prévoit, au par. 33(1), que les traitements payables en vertu de cette loi seront prélevés sur le Fonds du revenu consolidé. Dans toutes les autres provinces, les traitements des juges de cour provinciale sont, comme en Ontario, fixés par règlement par le pouvoir exécutif. Dans certaines

In some, but not all provinces, they are paid out of the Consolidated Revenue Fund.

Although it may be theoretically preferable that judicial salaries should be fixed by the legislature rather than the executive government and should be made a charge on the Consolidated Revenue Fund rather than requiring annual appropriation, I do not think that either of these features should be regarded as essential to the financial security that may be reasonably perceived as sufficient for independence under s. 11(*d*) of the *Charter*. At the present time in Canada the amount of judges' salaries is a matter for the initiative of the Executive, whether they are fixed by act of the legislature or by regulation. Moreover, it is far from clear that having to bring proposed increases to judges' salaries before the legislature is more desirable from the point of view of judicial independence, and indeed adequate salaries, than having the question determined by the Executive alone, pursuant to a general legislative authority. In the case of the salaries of provincial court judges in Ontario, assurance that proper consideration will be given to the adequacy of judicial salaries is provided by the role assigned to the Ontario Provincial Courts Committee, although I do not consider the existence of such a committee to be essential to security of salary for purposes of s. 11(*d*). The essential point, in my opinion, is that the right to salary of a provincial court judge is established by law, and there is no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge. Making judicial salaries a charge on the Consolidated Revenue Fund instead of having to include them in annual appropriations is, I suppose, theoretically a measure of greater security, but practically it is impossible that the legislature would refuse to vote the annual appropriation in order to attempt to exercise some control or influence over a class of judges as a whole. For these reasons I am of the opinion that under the provisions of law which applied when Sharpe J. declined jurisdiction and which now apply, provincial court judges may be reasonably perceived to have the

provinces, mais non dans toutes, ils sont prélevés à même le Fonds du revenu consolidé.

Bien qu'il puisse être théoriquement préférable que les traitements des juges soient fixés par le corps législatif, plutôt que par le pouvoir exécutif, et qu'ils grèvent le Fonds du revenu consolidé, plutôt que d'exiger une affectation de crédit annuelle, je ne pense pas que l'une ou l'autre de ces caractéristiques doive être considérée comme essentielle à la sécurité financière qui peut être raisonnablement perçue comme suffisante pour assurer l'indépendance au sens de l'al. 11*d*) de la *Charte*. À l'heure actuelle au Canada, le montant du traitement des juges est laissé à l'initiative de l'exécutif peu importe qu'ils soient fixés par une loi ou par règlement. De plus, il est loin d'être clair que l'obligation de soumettre au corps législatif les projets de hausses de traitement des juges soit plus souhaitable du point de vue de l'indépendance judiciaire et, d'ailleurs, de celui d'un traitement adéquat, que de laisser à l'exécutif le soin de régler la question seul, conformément à une autorisation législative générale. Dans le cas des traitements des juges de cour provinciale en Ontario, le rôle assigné à l'Ontario Provincial Courts Committee donne l'assurance qu'on veillera dûment à ce que les traitements des juges soient suffisants, quoique je n'estime pas que l'existence de ce comité soit essentielle à la sécurité de traitement pour les fins de l'al. 11*d*). L'essentiel, à mon avis, est que le droit du juge de cour provinciale à un traitement soit prévu par la loi et qu'en aucune manière l'exécutif ne puisse empiéter sur ce droit de façon à affecter l'indépendance du juge pris individuellement. Faire en sorte que les traitements des juges grèvent le Fonds du revenu consolidé, plutôt que d'avoir à les inclure dans les affectations annuelles de crédit est, je suppose, une mesure de sûreté plus grande théoriquement mais, en pratique, il est impossible que le corps législatif refuse de voter l'affectation de crédit annuelle dans le but de tenter d'exercer un contrôle ou d'influer sur une catégorie de juges dans son ensemble. Pour ces motifs, je suis d'avis qu'en vertu des dispositions législatives qui s'appliquaient lorsque le juge Sharpe a décliné compétence et qui s'appliquent aujourd'hui, on peut raisonnablement considérer que les juges de cour provinciale jouissent de la

essential security of salary required for independence within the meaning of s. 11(*d*).

Although at the time Sharpe J. declined jurisdiction s. 34(1) of the *Provincial Courts Act* empowered the Lieutenant Governor in Council to make provision by regulation for the pensions of provincial court judges, no such regulation had been adopted. The right to pension enjoyed by provincial court judges was that provided for members of the public service by the *Public Service Superannuation Act*, R.S.O. 1980, c. 419, which was made applicable by s. 26 to every full time provincial judge. It was not until May 25, 1984 that Ontario Regulation 332/84 under the *Provincial Courts Act* was adopted making special provision for the pensions of provincial court judges.

The chief objection to the provision for pension which applied when Sharpe J. declined jurisdiction was, as I understood the argument, that it treated provincial court judges in the same way as civil servants. Indeed, the same objection was made to the provision for other benefits of a financial nature, such as sick leave with pay and group insurance benefits of various kinds. The provisions which governed these benefits in Ontario Regulation 881, under the *Public Service Act* were made applicable to provincial court judges by s. 7 of Ontario Regulation 811, under the *Provincial Courts Act*. It was not until May 25, 1984 that Ontario Regulation 332/84, to which reference has been made, made special provision for such benefits in the case of provincial court judges, although some of the provisions in Ontario Regulation 881, that had been made applicable to provincial court judges continued to apply to them.

In my opinion this objection to the provisions for pension and other financial benefits which were applicable to provincial court judges at the time Sharpe J. declined jurisdiction does not touch an essential condition of the independence required by s. 11(*d*). The provisions established a right to pension and other benefits which could not be

sécurité de traitement essentielle pour être indépendants au sens de l'al. 11*d*).

Bien que, à l'époque où le juge Sharpe a décliné compétence, le par. 34(1) de la *Loi sur les cours provinciales* habilitait le lieutenant-gouverneur en conseil à pourvoir par règlement aux pensions des juges de cour provinciale, aucun règlement de ce genre n'a été adopté. Le droit à une pension, dont jouissent les juges de cour provinciale, était celui prévu pour les fonctionnaires par la *Loi sur le régime de retraite des fonctionnaires*, L.R.O. 1980, chap. 419, rendue applicable, en vertu de son art. 26, à tout juge de cour provinciale à plein temps. Ce n'est que le 25 mai 1984 que le Règlement de l'Ontario 332/84, adopté en vertu de la *Loi sur les cours provinciales*, a prévu par une disposition spéciale des pensions pour les juges de cour provinciale.

La principale objection apportée à la disposition sur la pension qui s'appliquait lorsque le juge Sharpe a décliné compétence était, si j'ai bien compris l'argument, qu'elle traitait les juges de cour provinciale comme des fonctionnaires. D'ailleurs, la même objection a été apportée à la disposition régissant d'autres avantages de nature financière, comme les congés de maladie payés et les indemnités d'assurance-groupe de divers genres. Les dispositions qui régissent ces avantages dans le Règlement de l'Ontario 881, pris en application de la *Loi sur la fonction publique*, ont été rendues applicables aux juges de cour provinciale par l'art. 7 du Règlement de l'Ontario 811, pris en application de la *Loi sur les cours provinciales*. Ce n'est que le 25 mai 1984 que le Règlement de l'Ontario 332/84, déjà mentionné, a prévu spécialement ces avantages dans le cas des juges de cour provinciale, bien que certaines des dispositions du Règlement de l'Ontario 881, qui avaient été étendues aux juges de cour provinciale, aient continué de leur être applicables.

À mon avis, cette objection apportée aux dispositions relatives à la pension et aux autres avantages financiers, qui étaient applicables aux juges de cour provinciale à l'époque où le juge Sharpe a décliné compétence, ne touche pas une condition essentielle de l'indépendance requise par l'al. 11*d*). Ces dispositions créent un droit à une pension et à

interfered with by the Executive on a discretionary or arbitrary basis. That, as I have indicated, is the essential requirement for purposes of s. 11(*d*). Making the provisions governing civil servants applicable to the provincial court judges did not purport to characterize provincial judges as civil servants or increase the discretionary control of the Executive over the judges. It may well be preferable that the pensions and other financial benefits of judges should be given special and separate treatment in the law, as they now are, because of the special position and requirements of judges in this respect, but the application of the civil standards to provincial court judges at the time Sharpe J. declined jurisdiction did not, for the reasons I have indicated, affect their essential security in respect of pensions and benefits.

VI

The third essential condition of judicial independence for purposes of s. 11(*d*) is in my opinion the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function. The degree to which the judiciary should ideally have control over the administration of the courts is a major issue with respect to judicial independence today. Howland C.J.O. drew a distinction, for purposes of the issues in the appeal, between adjudicative independence and administrative independence, which is reflected in the following passages from his reasons for judgment at pp. 432-33:

> When considering the independence of the judiciary, it is necessary to draw a careful distinction between independent adjudication and independent administration. It is independent adjudication about which the Court is concerned in this appeal. The position of the judiciary under the English and Canadian Constitutions is quite different from that under the American Constitution. In the United States the federal judiciary is a separate branch which includes judicial administration. While the report of Chief Justice Jules Deschênes, "Masters in their Own House", September, 1981, recommended the independent judicial administration of the courts, the Canadian Judicial Council, in Septem-

d'autres avantages qui ne peut pas faire l'objet d'une atteinte discrétionnaire ou arbitraire de l'exécutif. C'est là, comme je l'ai dit, l'exigence essentielle pour les fins de l'al. 11*d*). Rendre applicables aux juges de cour provinciale les dispositions régissant les fonctionnaires n'avait pas pour but de qualifier de fonctionnaires les juges de cour provinciale, ni d'accroître le contrôle discrétionnaire de l'exécutif sur les juges. Il est sans doute préférable que les pensions et autres avantages financiers des juges reçoivent un traitement spécial et distinct dans la loi, comme c'est maintenant le cas, vu la situation et les exigences spéciales des juges à cet égard, mais l'application de normes de la Fonction publique aux juges de cour provinciale à l'époque où le juge Sharpe a décliné compétence n'a pas, pour les raisons que j'ai données, affecté leur sécurité essentielle en matière de pensions et d'avantages.

VI

La troisième condition essentielle de l'indépendance judiciaire pour les fins de l'al. 11*d*) est, à mon avis, l'indépendance institutionnelle du tribunal relativement aux questions administratives qui ont directement un effet sur l'exercice de ses fonctions judiciaires. Le degré de contrôle que le pouvoir judiciaire devrait idéalement exercer sur l'administration des tribunaux est un point majeur de l'indépendance judiciaire aujourd'hui. Le juge en chef Howland a fait la distinction, pour les fins des questions visées par l'appel, entre l'indépendance en matière de décisions et l'indépendance en matière d'administration, qu'on trouve dans les passages suivants de ses motifs de jugement aux pp. 432 et 433:

> [TRADUCTION] Lorsqu'on étudie l'indépendance du pouvoir judiciaire, il est nécessaire de distinguer soigneusement entre l'indépendance en matière de décisions et l'indépendance en matière d'administration. C'est l'indépendance en matière de décisions qui intéresse la cour dans le présent appel. La situation du pouvoir judiciaire sous le régime des constitutions anglaise et canadienne est fort différente de celle sous le régime de la constitution américaine. Aux États-Unis, la magistrature fédérale est un pouvoir distinct qui comprend l'administration judiciaire. Si le rapport du juge en chef Jules Deschênes, «Maîtres chez eux», en date de septembre 1981, a recommandé que l'administration

ber, 1982, only approved of the first two stages of consultation and decision sharing between the Executive and the Judiciary and was not prepared to approve at that time of the third stage of independent judicial administration.

In Ontario, the primary role of the judiciary is adjudication. The Executive on the other hand is responsible for providing the court rooms and the court staff. The assignment of judges, the sittings of the court, and the court lists are all matters for the judiciary. The Executive must not interfere with, or attempt to influence the adjudicative function of the judiciary. However, there must necessarily be reasonable management constraints. At times there may be a fine line between interference with adjudication and proper management controls. The heads of the judiciary have to work closely with the representatives of the Executive unless the judiciary is given full responsibility for judicial administration.

In his conclusions Howland C.J.O. observed at p. 443:

> On the hearing of this appeal, no submission was made that the Attorney General in his role as prosecutor interfered in any way with the sittings of the court, its lists, or the process of adjudication.

Judicial control over the matters referred to by Howland C.J.O.—assignment of judges, sittings of the court, and court lists—as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions, has generally been considered the essential or minimum requirement for institutional or "collective" independence. See Lederman, "The Independence of the Judiciary" in *The Canadian Judiciary* (1976, ed. A. M. Linden), pp. 9-10; Deschênes, *Masters in their own house*, pp. 81 and 124.

As the reasons of Howland C.J.O. indicate, however, the claim for greater administrative autonomy or independence for the courts goes considerably beyond these matters. The insistence is chiefly on a stronger or more independent role in the financial aspects of court administration—budgetary preparation and presentation and allo-

judiciaire des tribunaux soit indépendante, le Conseil canadien de la magistrature, en septembre 1982, n'a approuvé que les deux premiers stades, ceux de la consultation et du partage des décisions entre le pouvoir exécutif et le pouvoir judiciaire, n'étant pas prêt à approuver à cette époque le troisième stade, celui d'une administration judiciaire indépendante.

En Ontario, le rôle premier du pouvoir judiciaire est de rendre des décisions. L'exécutif, d'autre part, a la responsabilité de fournir les salles d'audience et le personnel judiciaire. L'assignation des juges à une cause, les séances de la cour et son rôle relèvent tous du pouvoir judiciaire. L'exécutif ne doit pas s'immiscer dans la fonction décisionnelle du pouvoir judiciaire ni tenter de l'influencer. Toutefois, il doit nécessairement y avoir des contraintes raisonnables de gestion. Parfois la démarcation entre l'immixtion dans la fonction décisionnelle et les contrôles adéquats de gestion est ténue. Les responsables du pouvoir judiciaire doivent collaborer étroitement avec les représentants de l'exécutif à moins que le pouvoir judiciaire ne se voie conférer l'entière responsabilité de l'administration judiciaire.

Dans ses conclusions, le juge en chef Howland souligne à la p. 443:

> [TRADUCTION] À l'audition de l'appel, on n'a pas prétendu que le procureur général, dans son rôle de poursuivant, s'est immiscé de quelque manière dans les séances de la cour, dans la confection du rôle ou dans le processus décisionnel.

Le contrôle judiciaire sur les questions mentionnées par le juge en chef Howland, savoir l'assignation des juges aux causes, les séances de la cour, le rôle de la cour, ainsi que les domaines connexes de l'allocation de salles d'audience et de la direction du personnel administratif qui exerce ces fonctions, a généralement été considéré comme essentiel ou comme une exigence minimale de l'indépendance institutionnelle ou «collective». Voir Lederman, «The Independence of the Judiciary», dans *The Canadian Judiciary* (1976, ed. A. M. Linden), aux pp. 9 et 10; Deschênes, *Maîtres chez eux*, aux pp. 83, 84 et 130.

Cependant, comme l'indiquent les motifs du juge en chef Howland, la demande d'une plus grande autonomie ou indépendance administrative pour les tribunaux va beaucoup plus loin que cela. On insiste surtout sur un rôle plus important et plus autonome dans les aspects financiers de l'administration d'un tribunal, dont la préparation du

cation of expenditure—and in the personnel aspects of administration—the recruitment, classification, promotion, remuneration, and supervision of the necessary support staff. Probably the fullest exposition of the recommended enlargement of administrative autonomy or independence for the courts is to be found in the Deschênes report, with its three stage proposal for realization referred to by Howland C.J.O. consisting of consultation, decision sharing and independence. Strong support for the Deschênes recommendations in this area was recently expressed in the report of the Canadian Bar Association's Committee on judicial independence, which, while noting the reservations referred to by Howland C.J.O. concerning the third stage of full administrative autonomy or independence, recommended that the first two stages of consultation and decision sharing be implemented as soon as possible. The desirability of greater administrative independence, particularly with respect to financial and personnel matters, has also been the subject of important public addresses by leaders of the judiciary. In an address entitled "Some Observations on Judicial Independence" in 1980 the late Chief Justice Laskin had this to say on the subject:

> Coming now to other elements which I regard as desirable supports for judicial independence, I count among them independence in budgeting and in expenditure of an approved budget, and independence in administration, covering not only the operation of the Courts but also the appointment and supervision of the supporting staff. Budget independence does not mean that Judges should be allowed to fix their own salaries; it means simply that the budget should not be part of any departmental budget but should be separately presented and dealt with. I do not, of course, preclude its presentation by a responsible Minister, but he should do this as a conduit, and yet as one able to support the budget after its preparation under the direction of the Chief Justice or Chief Judge and the chief administrative officer of the Court. So, too, should the Court, through its Chief Justice or Chief Judge and chief administrative officer, have supervision and direction of the staff of the Court

budget et la présentation et la répartition des dépenses, et dans les aspects de l'administration qui concernent le personnel, comme le recrutement, la classification, la promotion, la rémunération et la supervision du personnel de soutien nécessaire. Probablement l'exposé le plus complet de l'élargissement recommandé de l'autonomie ou de l'indépendance administrative des tribunaux se trouve dans le rapport Deschênes, et sa proposition en trois stades de réalisation, que mentionne le juge en chef Howland, comprenant la consultation, la participation et l'indépendance. Les recommandations Deschênes dans ce domaine ont récemment reçu l'appui, non négligeable, du rapport du Comité de l'Association du Barreau canadien sur l'indépendance de la magistrature qui, tout en prenant note des réserves que mentionne le juge en chef Howland concernant le troisième stade, celui de l'indépendance ou de l'autonomie administrative totale, a recommandé que les deux premiers stades de la consultation et de la participation soient mis en œuvre dès que possible. Le caractère souhaitable d'une plus grande indépendance administrative, particulièrement dans les domaines des finances et du personnel, a aussi fait l'objet d'allocutions publiques importantes de la part des leaders du pouvoir judiciaire. Dans un discours intitulé [TRADUCTION] «Quelques observations sur l'indépendance judiciaire», en 1980, feu le juge en chef Laskin avait eu ceci à dire à ce sujet:

> [TRADUCTION] Pour en venir maintenant aux autres éléments que je considère comme souhaitables pour consolider l'indépendance judiciaire, j'y inclus l'indépendance dans la confection et dans les dépenses d'un budget approuvé, et l'indépendance dans l'administration, s'étendant non seulement au fonctionnement des tribunaux, mais aussi à la nomination et à la supervision du personnel de soutien. L'indépendance budgétaire ne signifie pas que les juges devraient être autorisés à fixer leur propre traitement; cela signifie simplement que le budget ne devrait faire partie d'aucun budget ministériel, mais qu'il devrait être présenté et traité séparément. Je ne m'oppose pas, bien entendu, à sa présentation par un ministre responsable, mais il devrait le faire comme intermédiaire, tout en étant en position de l'appuyer, après qu'il a été préparé sous la direction du juge en chef, ou du premier juge, et de l'administrateur en chef du tribunal. De même aussi, la cour, par son juge en chef, ou premier juge, et par l'administrateur en chef, devrait être chargée de la supervision et de la direction

and of the various supporting services such as the library and the Court's law reports.

The present Chief Justice of Canada, in his recent address to the annual meeting of the Canadian Bar Association, referred with approval to this statement of Laskin C.J. and said that "Preparation of judicial budgets and distribution of allocated resources should be under the control of the Chief Justices of the various courts, not the Ministers of Justice" and "Control over finance and administration must be accompanied by control over the adequacy and direction of support staff".

It is not entirely clear as to the extent to which the issue of institutional independence is actually raised by the various objections to the status of provincial court judges at the time Sharpe J. declined jurisdiction. As I understood the argument, the chief objection which could be said to relate to institutional independence was the extent to which the judges were treated as civil servants for purposes of pension and other financial benefits, such as group insurance and sick leave, and the control exercised by the Executive over such discretionary benefits or advantages as post-retirement reappointment, leave of absence with or without pay and the right to engage in extra-judicial employment. The contention was that the treatment of these matters and the executive control over them were calculated to make the Court appear as a branch of the Executive and the judges as civil servants. This impression, it was said, was reinforced by the manner in which the Court and its judges were associated with the Ministry of the Attorney General in printed material intended for public information. Dependence on the Executive for discretionary benefits or advantages was also said to affect the reality and the perception of the individual independence of the judges, an issue which must be considered separately from the question of institutional independence.

Although the increased measure of administrative autonomy or independence that is being recommended for the courts, or some degree of it,

de son personnel et des divers services de soutien, tels la bibliothèque et les recueils de jurisprudence de la cour.

L'actuel Juge en chef du Canada, dans un récent discours à l'assemblée annuelle de l'Association du Barreau canadien, s'est référé à ce qu'avait dit le juge en chef Laskin, l'approuvant et disant que [TRADUCTION] «La préparation des budgets judiciaires et la répartition des ressources allouées devraient être sous le contrôle des juges en chef des divers tribunaux, et non des ministres de la justice» et [TRADUCTION] «Le contrôle sur les finances et l'administration doit être assorti du contrôle sur la compétence et la direction du personnel de soutien.»

On ne voit pas tout à fait clairement dans quelle mesure la question de l'indépendance constitutionnelle est vraiment posée par les diverses objections apportées au statut des juges de cour provinciale de l'époque où le juge Sharpe a décliné compétence. Si je comprends bien l'argument, l'objection principale qui serait apportée en matière d'indépendance institutionnelle aurait trait à la mesure dans laquelle les juges étaient considérés comme des fonctionnaires aux fins des pensions et d'autres avantages financiers, tels l'assurance-groupe, les congés de maladie et le contrôle qu'exerce l'exécutif sur des bénéfices ou avantages discrétionnaires comme les nouvelles nominations après l'âge de la retraite, les congés payés ou non payés et le droit de s'adonner à des activités extrajudiciaires. On a soutenu que la façon de traiter ces questions et le contrôle de l'exécutif sur celles-ci étaient conçus de manière à faire percevoir la cour comme un organe de l'exécutif et les juges, comme des fonctionnaires. Cette impression, a-t-on dit, était renforcée par la manière dont la cour et ses juges étaient associés au ministère du Procureur général dans les brochures destinées à informer le public. La dépendance envers l'exécutif dans le cas des bénéfices ou avantages discrétionnaires, a-t-on ajouté, influait sur l'indépendance véritable des juges, pris individuellement, et sur l'idée qu'on s'en faisait, un point qui doit être examiné indépendamment de la question de l'indépendance institutionnelle.

Si la plus grande autonomie ou indépendance administrative qu'il est recommandé d'accorder aux tribunaux, ou une partie de celle-ci, peut se

may well be highly desirable, it cannot in my opinion be regarded as essential for purposes of s. 11(*d*) of the *Charter*. The essentials of institutional independence which may be reasonably perceived as sufficient for purposes of s. 11(*d*) must, I think, be those referred to by Howland C.J.O. They may be summed up as judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function. To the extent that the distinction between administrative independence and adjudicative independence is intended to reflect that limitation, I can see no objection to it. It may be open to objection, however, in so far as the desirable or recommended degree of administrative autonomy or independence of the courts is concerned. In my opinion, the fact that certain financial benefits applicable to civil servants were also made applicable to provincial court judges, that the Provincial Court (Criminal Division) and its judges were shown in printed material as associated with the Ministry of the Attorney General and that the Executive exercised administrative control over certain discretionary benefits or advantages affecting the judges did not prevent the Provincial Court (Criminal Division) at the time Sharpe J. declined jurisdiction from being reasonably perceived as possessing the essential institutional independence required for purposes of s. 11(*d*).

VII

It is necessary now to consider the effect on the individual independence of provincial court judges of the control exercised by the Executive over certain discretionary benefits or advantages. I have referred to the provisions of the *Provincial Courts Act* and the *Courts of Justice Act, 1984* concerning post-retirement reappointment or continuation in office, which may be necessary to permit a judge to complete entitlement to pension. Objection was also taken to the provisions for leave of absence with or without pay and for permission to engage in extra-judicial employment. The provisions for leave of absence that were applicable to provincial court judges at the time Sharpe J. declined jurisdiction were found in ss. 4 and 5 of Regulation 811 of the Revised Regulations of

révéler hautement souhaitable, elle ne saurait, à mon avis, être considérée comme essentielle pour les fins de l'al. 11*d*) de la *Charte*. Les aspects essentiels de l'indépendance institutionnelle qui peuvent raisonnablement être perçus comme suffisants pour les fins de l'al. 11*d*) doivent, je pense, se limiter à ceux mentionnés par le juge en chef Howland. On peut les résumer comme étant le contrôle par le tribunal des décisions administratives qui portent directement et immédiatement sur l'exercice des fonctions judiciaires. Dans la mesure où la distinction entre l'indépendance dans l'administration et l'indépendance dans les décisions se veut le reflet de cette limitation, je n'y vois aucune objection. On peut s'y opposer toutefois dans la mesure où le degré souhaitable ou recommandé d'indépendance ou d'autonomie administrative des tribunaux est concerné. À mon avis, le fait que certains avantages financiers applicables aux fonctionnaires soient aussi applicables aux juges de cour provinciale, que la Cour provinciale (Division criminelle) et ses juges soient, dans des brochures, associés au ministère du Procureur général, et que l'exécutif exerce un contrôle administratif sur certains bénéfices ou avantages discrétionnaires touchant les juges, n'empêchait pas la Cour provinciale (Division criminelle), à l'époque où le juge Sharpe a décliné compétence, d'être raisonnablement perçue comme possédant l'indépendance institutionnelle essentielle pour les fins de l'al. 11*d*).

VII

Il est maintenant nécessaire d'examiner l'effet qu'a, sur l'indépendance individuelle des juges de cour provinciale, le contrôle exercé par l'exécutif sur certains bénéfices ou avantages discrétionnaires. J'ai mentionné les dispositions de la *Loi sur les cours provinciales* et de la *Loi de 1984 sur les tribunaux judiciaires*, concernant les nouvelles nominations ou le maintien des juges dans leur charge après l'âge de la retraite, qui peuvent se révéler nécessaires pour permettre à un juge d'être admissible à une pension. On s'est aussi opposé aux dispositions concernant les congés payés ou non payés et l'autorisation de s'adonner à des activités extrajudiciaires. Les dispositions portant sur les congés qui s'appliquaient aux juges de cour provinciale, à l'époque où le juge Sharpe a décliné

Ontario, 1980, made under the *Provincial Courts Act*, and in ss. 75 and 76 of Regulation 881 of the Revised Regulations of Ontario, 1980, made under the *Public Service Act*. Sections 4 and 5 of Regulation 811 provide that the Attorney General, upon the recommendation of the chief judge of the provincial courts, may grant to a judge leave of absence without pay and without the accumulation of sick leave credits for a period up to three years, and that the Lieutenant Governor in Council, upon the recommendation of the Attorney General, may grant special leave of absence with pay to a judge for special or compassionate purposes for a period not exceeding one year. Sections 75(1) and 76(1) of Regulation 881, which were made applicable to provincial court judges by s. 7 of Regulation 811, provided that a deputy minister could grant to an employee in his ministry leave of absence with pay for a period of not more than one year for the purpose of undertaking employment under the auspices of the Government of Canada or other public agency and leave of absence without pay and without accumulation of credits for a period of not more than one year for the purpose of undertaking employment under the auspices of the Government of Canada or other public agency, or by a public or private corporation. A leave of absence granted under s. 75 or s. 76 of Regulation 881 could be renewed from year to year. By s. 32(3) of Ontario Regulation 332/84, made on May 25, 1984, the Chief Judge of the Provincial Court (Criminal Division) was given the authority, in place of the deputy minister, to grant leave of absence to provincial court judges under ss. 75 and 76 of Regulation 881. The provision concerning permission to engage in extra-judicial employment at the time Sharpe J. declined jurisdiction was s. 12 of the *Provincial Courts Act*, which read as follows:

12.—(1) Subject to subsection (2), unless authorized by the Lieutenant Governor in Council, a judge shall not practise or actively engage in any business, trade or occupation but shall devote his whole time to the performance of his duties as a judge.

compétence, se retrouvent aux art. 4 et 5 du règlement 811 des Règlements refondus de l'Ontario de 1980, pris en application de la *Loi sur les cours provinciales*, et aux art. 75 et 76 du règlement 881 des Règlements refondus de l'Ontario de 1980, pris en application de la *Loi sur la fonction publique*. Les articles 4 et 5 du règlement 811 prévoient que le procureur général, sur la recommandation du juge en chef des cours provinciales, peut accorder à un juge un congé, non payé et sans crédit de congés de maladie, pour une période pouvant aller jusqu'à trois ans, et que le lieutenant-gouverneur en conseil, sur la recommandation du procureur général, peut accorder un congé payé spécial à un juge, pour des raisons humanitaires ou spéciales, pour une durée maximale d'un an. Les paragraphes 75(1) et 76(1) du règlement 881, rendus applicables aux juges de cour provinciale par l'art. 7 du règlement 811, prévoient qu'un sous-ministre peut accorder à un employé de son ministère un congé payé d'une durée maximale d'un an, pour lui permettre de travailler sous les auspices du gouvernement du Canada ou d'un autre organisme public, et un congé, non payé et sans crédit de congés de maladie, d'une durée maximale d'un an, pour lui permettre de travailler sous les auspices du gouvernement du Canada ou d'un autre organisme public ou d'une société publique ou privée. Un congé accordé en vertu des art. 75 ou 76 du règlement 881 peut être renouvelé d'année en année. Selon le par. 32(3) du Règlement de l'Ontario 332/84, pris le 25 mai 1984, le juge en chef de la Cour provinciale (Division criminelle) a reçu le pouvoir, en lieu et place du sous-ministre, d'accorder un congé aux juges de cour provinciale en vertu des art. 75 et 76 du règlement 881. La disposition concernant l'autorisation de s'adonner à une activité extrajudiciaire, à l'époque où le juge Sharpe a décliné compétence, était l'art. 12 de la *Loi sur les cours provinciales*, dont voici le texte:

[TRADUCTION] **12.**—(1) Sous réserve du paragraphe (2), à moins d'une autorisation du lieutenant-gouverneur en conseil, un juge ne doit s'adonner à aucun commerce, métier ou occupation, ni y participer activement, mais doit consacrer tout son temps à l'exercice de ses fonctions de juge.

(2) A judge, with the previous consent of the Minister, may act as arbitrator, conciliator or member of a police commission.

The provision with respect to extra-judicial employment of provincial judges in the *Courts of Justice Act, 1984* is s. 53, which came into force on January 1, 1985 and reads as follows:

53.—(1) A provincial judge shall devote his or her whole time to the performance of his or her duties as a judge, except as authorized by the Lieutenant Governor in Council.

(2) Notwithstanding subsection (1), a provincial judge who, before the coming into force of this Part, had the consent of the Attorney General to act as an arbitrator or conciliator may continue to so act.

There are similar provisions respecting extra-judicial employment in the provincial courts legislation of the other provinces. In some cases it is specified that a judge shall not receive any additional remuneration for such employment.

While it may well be desirable that such discretionary benefits of advantages, to the extent that they should exist at all, should be under the control of the judiciary rather than the Executive, as recommended by the Deschênes report and others, I do not think that their control by the Executive touches what must be considered to be one of the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*. In so far as the subjective aspect is concerned, I agree with the Court of Appeal that it would not be reasonable to apprehend that a provincial court judge would be influenced by the possible desire for one of these benefits or advantages to be less than independent in his or her adjudication.

For the foregoing reasons I am of the opinion that at the time he declined jurisdiction on December 16, 1982 Sharpe J. sitting as the Provincial Court (Criminal Division) was an independent tribunal within the meaning of s. 11(*d*) of the *Charter*. The same is true in my opinion of all the judges of the Court since the amendment in 1983 to s. 5(4) of the *Provincial Courts Act* removed the objection to the nature of the tenure under a post-retirement appointment or continuation in office. Accordingly I would dismiss the appeal and

(2) Un juge peut, après avoir reçu l'autorisation du Ministre, agir comme arbitre, conciliateur ou membre d'une commission de police.

La disposition concernant les emplois extrajudiciaires des juges provinciaux dans la *Loi de 1984 sur les tribunaux judiciaires* est l'art. 53, entré en vigueur le 1er janvier 1985, dont voici le texte:

53.—(1) Le juge d'une cour provinciale se consacre à ses fonctions à l'exclusion de toutes autres, sauf avec l'autorisation du lieutenant-gouverneur en conseil.

(2) Par dérogation au par. (1), le juge qui, avant l'entrée en vigueur de la présente partie, avait l'autorisation du procureur général pour agir à titre d'arbitre ou de conciliateur peut continuer d'occuper ces fonctions.

Il y a des dispositions semblables concernant les activités extrajudiciaires dans la législation des autres provinces sur les cours provinciales. Dans certains cas, il est spécifié qu'un juge ne touchera aucune rémunération additionnelle pour une telle activité.

S'il peut être souhaitable que ces bénéfices ou avantages discrétionnaires, dans la mesure où il devrait y en avoir, soient contrôlés par le pouvoir judiciaire plutôt que par l'exécutif, comme le rapport Deschênes et d'autres l'on recommandé, je ne pense pas que leur contrôle par l'exécutif touche à ce qui doit être considéré comme l'une des conditions essentielles de l'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte*. Pour ce qui est de l'aspect subjectif, je conviens avec la Cour d'appel qu'il ne serait pas raisonnable de craindre qu'un juge de cour provinciale, influencé par l'éventuelle volonté d'obtenir l'un de ces bénéfices ou avantages, soit loin d'être indépendant au moment de rendre jugement.

Pour les motifs qui précèdent, je suis d'avis qu'à l'époque où il a décliné compétence, soit le 16 décembre 1982, le juge Sharpe siégeant en Cour provinciale (Division criminelle) constituait un tribunal indépendant au sens de l'al. 11*d*) de la *Charte*. On peut dire la même chose, selon moi, de tous les juges de la cour puisque la modification apportée en 1983 au par. 5(4) de la *Loi sur les cours provinciales* a fait disparaître l'objection à la nature de la charge par suite d'une nomination après l'âge de la retraite ou du maintien en poste.

answer the constitutional question as follows: A judge of the Provincial Court (Criminal Division) of Ontario is an independent tribunal within the meaning of s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

Appeal dismissed.

Solicitor for the appellant: Noel Bates, Burlington.

Solicitor for the respondent: Attorney General for Ontario, Toronto.

Solicitor for the intervener the Attorney General of Canada: R. Tassé, Ottawa.

Solicitors for the intervener the Attorney General of Quebec: Réal A. Forest and Angeline Thibault, Ste-Foy.

Solicitor for the intervener the Attorney General for Saskatchewan: Richard Gosse, Regina.

Solicitor for the interveners The Provincial Court Judges Association (Criminal Division) and Ontario Family Court Judges Association: Morris Manning, Toronto.

En conséquence, je suis d'avis de rejeter le pourvoi et de répondre ainsi à la question constitutionnelle: Un juge de la Cour provinciale (Division criminelle) de l'Ontario constitue un tribunal indépendant au sens de l'al. 11*d*) de la *Charte canadienne des droits et libertés*.

Pourvoi rejeté.

Procureur de l'appelant: Noel Bates, Burlington.

Procureur de l'intimée: Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Canada: R. Tassé, Ottawa.

Procureurs de l'intervenant le procureur général du Québec: Réal A. Forest et Angeline Thibault, Ste-Foy.

Procureur de l'intervenant le procureur général de la Saskatchewan: Richard Gosse, Regina.

Procureur des intervenants l'Association des juges des Cours provinciales (Division criminelle) et Ontario Family Court Judges Association: Morris Manning, Toronto.

TAB 3

House of Commons
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 024 • 1st SESSION • 39th PARLIAMENT

EVIDENCE

Tuesday, October 24, 2006

Chair

Mr. Art Hanger

The commission's report recommended a salary increase of $23,400 per year, retroactive to 2004. The government's position is $15,700 per year, retroactive to 2004. If we adopt one or the other, I don't think we're in danger of the judiciary falling into that temptation.

Mr. Roderick McLennan: Certainly not, and that's not what I've suggested.

The Chair: I wonder if Mr. McLennan would respond to that. I think it's important that he does.

Mr. Roderick McLennan: Yes.

Certainly there's no suggestion that corruption starts around the $220,000-a-year level. At either level, they're not likely to be corrupted. But I'm talking philosophically.

Why does our Constitution establish that Parliament sets the salary of judges? Judges are the third arm of the government and they have to be independent. In order to be independent, they have to have a standard of living that's commensurate with the job they do. And amongst other things, philosophically it prevents them from being subject to corruption. It has nothing to do with whether it's $220,000 or $240,000 or $180,000.

● (1710)

Mr. Rob Moore: Thanks for clarifying that.

Some of what we've heard is that in order to attract candidates, this has to be the amount. I know Mr. Bagnell had some questions on it. I know there's a recognition that the Supreme Court has been pretty clear that it is Parliament that has final authority on the public purse. We are ultimately responsible for how taxpayers' money is spent even in this current system.

When we hear about those who have put their names forward for judicial appointment, the number of vacancies that are available, and the number of applicants who are in there as either recommended or highly recommended, then with the government's proposed increase of 7.25%, I fail to see how someone is somehow being denied the opportunity or is being discouraged from seeking judicial appointment.

I know a great deal of weight was put on the commission's work, and I certainly respect the work the commission has done. But I don't see any evidence that somehow we wouldn't be able to attract highly qualified candidates if the wages that judges are currently paid were increased by 7.25% per year.

Mr. Roderick McLennan: First of all, the statistics that are referred to are statistics from 2000 and are not available to us. But there's no doubt that it has been the case for many years that there are many more applicants for judicial office than there are judicial offices. The question is, what is the appropriate level of compensation, and what do you do to ensure that the best and the brightest are in the pool from which candidates can be selected?

Mr. Rob Moore: Do you see evidence among the current pool of applicants that the best and the brightest are not in that pool? Are people of less than stellar qualifications applying? The individual committees provincially have to recommend or highly recommend these individuals, so do you see evidence that there's any shortage of anyone recommended or highly recommended? When we look at what the committees are putting forward, there seem to be many. The minister testified that there are many who are recommended and highly recommended.

Mr. Roderick McLennan: Of course, the minister's statistics are from 2006. I don't know what they were when this committee was sitting, but we obviously didn't have 2006 numbers.

It's just one of the factors in arriving at a number, but it's not *the* factor. With respect, if you're hunting for the new president of Canada Post, you don't put the job up for bid and describe its marvellous pension and the corporate jet and ask people to bid for it. If there are 100 qualified people, 25 of whom are really qualified, you don't have a Dutch auction to see what the lowest one is going to work for. You ought not to do that with judges either, in my submission.

The Chair: Thank you, Mr. Moore.

Ms. Barnes.

Hon. Sue Barnes (London West, Lib.): Thank you very much.

I would apologize for us not being here all the time. The government has chosen to call another piece of legislation at the same time, which necessitates some of us being in the House to speak on it.

I want to first of all put on the record how grateful most Canadians are for the work that you've done and the professional manner in which you have done it for us. I would also like to say that I think it's incredibly important that the concept of the independence of the judiciary is understood by Canadians.

Perhaps this has been canvassed on, but maybe I'll go to Mr. Cherniak to just do a bit of an education process for most Canadians who might be hearing this.

Why should we not be discussing the things we're being forced to discuss at this time?

Mr. Earl Cherniak: Well, the reason is that there was a constitutional process that came about because of the disaster that preceded, which resulted in the P.E.I. reference being necessary in the first place. The constitutional process was to appoint an independent, high-quality commission to work independently, not as an arbitration group but in the public interest, to hear input from the public, from the participants, and to come up with recommendations that, except with very good reason, would be accepted by Parliament to set judicial salaries.

Therein the process mandated not only the method of selecting the commission but the way in which the commission's report was to be addressed by Parliament. The commission had a mandate to report by May 31, 2004—and every fourth year on May 31—which we did. The government had an obligation, under the legislation, to respond in six months, which it did, and either accept the recommendations of the commission or give cogent reasons why it didn't and why the recommendations of the commission should not be accepted.

The government of the day did that, and with one minor exception, which isn't germane to what we're talking about, the government of the day accepted every one of the recommendations we made.

There is no provision in that constitutionally mandated process for what transpired after that. There's no provision for a second report after a new government comes in a year and a half or two years later. In my view, that politicizes the process, and it's extremely dangerous because it causes disrespect for the process among the judiciary, among the public, and it will make it more....

I say, immodestly, this was a very talented commission, and we thought what we were doing was very important to the public of this country. If a future commission's recommendations can be treated in the way that the process has transpired here, there will be a great deal of difficulty finding the kind of commissioners that this country needs to conduct this process every four years.

● (1715)

Hon. Sue Barnes: Thank you very much. So in your opinion there was no legal authority to place before Parliament a second report that differed in nature from the first report. Am I hearing you correctly?

Mr. Earl Cherniak: I don't think I should give a legal opinion. I can read the statute. You can read the statute. There's a provision for the response in six months. That happened. There's no provision for any further response.

Hon. Sue Barnes: Thank you. I think that does answer the concern there.

The Chair: You have time for one more question, Ms. Barnes.

Hon. Sue Barnes: Thank you.

One thing that concerned us at this table is that to increase the numbers, to put this provision back to the original report—as I know some of us would like to do—we need a royal recommendation. Without the royal recommendation of this government, we don't have the authority to spend more money. That puts us in a very difficult position. I just put that on the table so people understand that we can take it down under the rules, but we cannot increase without the government allowing us to do so. We will see how this plays out.

I know my colleague, the former Minister of Justice, wanted to be here, but he's now at another place doing this.

I want to say, at least from my party, and I think from all the opposition parties, with the respect we hold for the judiciary, this attack that seems to be coming from the current government is not only disrespectful, but it is harmful to the whole system of justice in this country. This is a hard-working system of justice. It's led by judicial officers who have been chosen for their talents, as you well know. The fact that we are put in this position today by the current government, I think is wrong. I believe we have sufficient case law on point telling us that.

The Minister of Justice stood in the House, when I responded to it the first time, saying to plead less money in the area, when we had the best surplus ever. To plead that we could get people for cheaper was just a spurious argument. I feel somewhat ashamed to be in this situation at the current time.

I hope that in the future we are able to have people of your calibre doing this work, because it's important for all of us.

If anybody would care to make a comment, I certainly would give my time to them.

● (1720)

The Chair: Thank you, Ms. Barnes.

Would the witnesses like to comment?

Mr. Roderick McLennan: The minister was inviting what would virtually be a free vote, wasn't he? As I understood the minister, I thought he invited the committee to do what they thought was appropriate.

Hon. Sue Barnes: With respect, the minister may have left out the fact that if we want to raise the moneys up, the government has to give its consent, because we don't have that power. That was what I put on the table seconds after he made his statement in the House originally. It's called a royal recommendation.

The Chair: Thank you, Ms. Barnes.

One comment that Ms. Barnes brought up was whether the commission looks at this settlement as an attack on the judiciary.

Mr. Roderick McLennan: I wouldn't say so, Mr. Chair. I don't think it's an attack on the judiciary. The judiciary are much more sensitive about these things than I am, so I don't know what the judiciary would think, but I wouldn't see it that way.

The Chair: Thank you very much.

Hon. Sue Barnes: Mr. Chair, I'd like to clarify. I don't think that's what I was saying at all. I was saying that the government is often attacking the discretion of the judiciary, and they do so with their bills, with certain points.

I do not want my words reinterpreted from the chair.

Thank you.

The Chair: Thank you for the point of clarification, Ms. Barnes.

I would like to thank the witnesses for their appearance.

I think this has been a valuable discussion. It's unfortunate we can't continue on a little longer. I know there are other points the members would like to question further, but time does not permit.

Thank you for your attendance.

I'm going to suspend the meeting for about one minute.

[*Proceedings continue in camera*]

TAB 4

CANADA

Debates of the Senate

1st SESSION • 39th PARLIAMENT • VOLUME 143 • NUMBER 57

OFFICIAL REPORT
(HANSARD)

Wednesday, December 6, 2006

THE HONOURABLE NOËL A. KINSELLA
SPEAKER

I am concerned that the Kelowna Accord and funding for that accord is not in this document. Once again, this is a government finding resources on the backs of some of the weakest, most vulnerable members of our society. That is not a legacy about which this government should be particularly proud.

I am concerned that there is no money in this bill for new prisons. Mandatory minimums and initiatives on conditional sentences will not reduce crime. What they will do is put enormous pressure on prisons, and we will need hundreds of millions of dollars to create new spaces in prisons for the people who will be imprisoned more often and longer. There is none of that money in this proposed legislation.

I am concerned by the fact that this bill also incorporates a reduction in infrastructure funding to the Pacific Gateway strategy. The Pacific Gateway strategy, which originated under the former government, represents a breakthrough for the diversification particularly of rural and agricultural economies in the Western provinces — in B.C., the Prairie provinces, in northern Alberta, my home province. Instead of pursuing that initiative, with its great value for diversification for an economy of the future, this government has cut the program dramatically, from $590 million over five years to $163 million only over five years for infrastructure.

• (1510)

More important, honourable senators, is they have also completely and utterly retreated. In fact, they have not just neglected China; they have actually provoked China, and relationships with China are fundamental to that Pacific Gateway strategy.

I will close simply by saying that I am fundamentally disappointed in what I see in this piece of legislation. I see themes that pick on women and on the more vulnerable of our society. It misses opportunities to promote productivity and misses the opportunity to be a leader on one of the major issues facing our generation and our world in this 21st century, which is Kyoto and the environment. It fails to address the leadership that we can provide on another important international issue: AIDS. It also fails to provide leadership on equality.

Honourable senators, this legislation diminishes whatever status this government thought it might once have had.

The Hon. the Speaker: Is it your pleasure, honourable senators, to adopt the motion?

Motion agreed to and bill read third time and passed.

APPROPRIATION BILL NO. 3, 2006-07

THIRD READING

Hon. Nancy Ruth moved third reading of Bill C-39, for granting to Her Majesty certain sums of money for the federal public administration for the financial year ending March 31, 2007.

Hon. Joseph A. Day: Honourable senators, as indicated earlier, this is the supply bill, appropriation bill, based on the Supplementary Estimates (A). It is for a little over $5 billion and deals with new initiatives that were not reflected in the Main Estimates that we looked at earlier.

The only point that I would like to make specific to this particular document, honourable senators, is to point out that there are schedules 1 and 2, and some of the appropriation that honourable senators are being asked to approve now runs over a period of two years.

Honourable senators may have felt that what they are agreeing to is appropriation that must be used before the end of March 2007, but there are listed here a number of departments requesting appropriation over a two-year period. In addition, there is a provision for a 5 per cent carry-forward in operating budgets for departments, and that is to avoid the rush to spend what had been approved before the end of March. That was a good initiative, and Senator Murray asked some questions in that regard. I was glad to hear that it was not kept at the 5 per cent. It is a safety gauge, but it is not being abused. My recollection is that the average is about 3 per cent, which is an indication that it is being used for the purpose for which it was created.

Honourable senators, we have checked and verified that the schedules attached to this appropriation bill are the same schedules that form part of the Supplementary Estimates (A) document that we have had for over a month to study, and we are prepared to support the government's request for this appropriation.

The Hon. the Speaker: Is it your pleasure, honourable senators, to adopt the motion?

Motion agreed to and bill read third time and passed.

JUDGES ACT

BILL TO AMEND—SECOND READING—DEBATE CONTINUED

On the Order:

> Resuming debate on the motion of the Honourable Senator Meighen, seconded by the Honourable Senator Comeau, for the second reading of Bill C-17, to amend the Judges Act and certain other Acts in relation to courts.

Hon. Mobina S. B. Jaffer: Honourable senators, I want to begin my remarks on Bill C-17 by speaking briefly about the role of judges in society and of Parliament's role in relation to them.

As Senators Meighen and Grafstein have reminded us, Parliament is called upon by section 100 of the Constitution Act, 1867, to "fix and provide" the salaries, allowances and pensions of judges of the Superior Courts. Judges are the only persons in Canadian society whose compensation is set by Parliament, and section 100 is the only section of the Constitution that mandates the expenditure of money. This reflects the role of the judiciary as a third, equal, branch of government.

The Lang Triennial Commission of 1981 specifically addressed the place of the judiciary in Canada in the following terms:

> The Commission believes the position of judge in our society and in our political framework to be unique and vital. A free and independent judiciary is the single greatest guarantee of our constitutional rights and liberties.
>
> Under the Canadian Constitution, the judiciary exercised its authority independently of the executive and the legislature. The Constitution Act itself evidences this intent, by fixing the power to appoint the judges of the superior, district and county courts of the provinces upon the Governor General, and by imposing the duty upon Parliament to fix and provide their salaries, pensions and allowances.

The current McLennan commission report described the legal principles and constitutional imperatives underlying judicial compensation as necessary in order to ensure they "may function fearlessly and impartially in the advancement of government and all litigants appearing before them."

Honourable senators, this is a very important section. Section 100 does not give us a free hand to choose any level of remuneration we like. Constitutionally, it must "fix and provide" for judges in a way that reflects the constitutional status of the judiciary and the requirement that they be able to devote their full time to their responsibilities and discharge them with absolute independence.

It is also important that we recognize the role judges play in our society because judges cannot speak out for themselves. Because of their position, they are constitutionally prohibited from negotiating any part of their compensation arrangements with the executive or with representatives of Parliament. This is a prohibition that applies to no other class of person in Canada. This obviously imposes upon parliamentarians a duty of good faith toward the judiciary and toward the protection of the interests of Canadian society in their independence. For this reason we have the constitutional requirement of an independent commission process to provide a forum for these matters to be addressed.

Judges are also prohibited from engaging in any other occupation or business: What Parliament "fixes and provides" is what they get. They have no means of supplementing their incomes.

The role of the judiciary is such that we should be seeking the best possible people to place in that office. They must be respected among lawyers as leaders of the legal profession. Of course, it goes without saying that they must also have the respect of all Canadians, as their role is fundamental to our rights and to the functioning of our society.

As someone who has practised in front of judges for over 30 years, I can vouch for their complete commitment to their work. For the most committed, dedicated judges, their work is their vocation. They work long hours in order to serve all Canadians.

When we ask qualified people to devote themselves entirely to the demands of this office, to put the other things aside, to turn their backs on the marketplace and on public life, to live the relatively isolated life of a judge, not only for themselves but also for their families, we take on an obligation to recognize those sacrifices and to treat the judges fairly.

All of us in this chamber understand the rewards and demands of public service, but we are not required to sacrifice everything else; however, judges are. We want the office of judges filled with lawyers who have earned the respect of the members of their profession. Therefore, the notion that judges' salaries should be based only on the availability of applicants completely misses the point. We want to attract the very best from among people of the highest qualifications.

• (1520)

I want to now turn to what Senator Meighen said when introducing this bill. One of his first remarks was that "a government must publicly respond to the report of the commission within a reasonable period of time." A little later, he stated that "the Judges Act was amended in 1998 in order to strengthen the current procedures of the commission consistent with the constitutional requirements defined by the Supreme Court of Canada."

This should not be allowed to pass without comment. The principal way the Judges Act was strengthened, as Senator Meighen suggests, was by adding a time limit for the government's response. This was because there had been problems in the past with the government responding too slowly to commissions.

The time limits are clear. Section 26(7) of the act states:

> The Minister of Justice shall respond to a report of the Commission within six months after receiving it.

This is not "within a reasonable time," as Senator Meighen suggested. It is a mandatory six months from the time the report is received. The McLennan commission reported on time and the Minister of Justice of the day responded by accepting the principal recommendation of the report, the 10.8 per cent salary increase.

That was the opportunity the Government of Canada had to address the report. There is absolutely no legal basis for the new Minister of Justice to behave as if the report had not been received by his office. This is a completely irregular reading of the statute, one that goes against the very strengthening, by means of effective time limits, that Senator Meighen spoke about.

This government believes, to quote the Honourable Senator Meighen, that "it had a responsibility to take the time to consider the report and recommendations in light of the mandate and priorities upon which it had been elected." With the greatest respect, this government had no such right and the act provides no such opportunity. The statute is clear and the time limit for the response had long passed before this minister took office. However, this is not the only way the government has failed to respect the process.

Senator Meighen states that Bill C-17 proposes to implement virtually all of the commission's recommendations, the exception being the commission's recommendation for a 10.8 per cent salary increase. However, the salary increase is the principal

recommendation of the commission, and it was the main focus of the report. The other matters are largely of a housekeeping nature. The government has in fact rejected most of the commission's work.

The government finally decided on a 7.25 per cent increase. The government states that it arrived at this figure by giving careful consideration to all four criteria established by the Judges Act and to two of them in particular — the prevailing economic conditions in Canada and the need to attract outstanding candidates to the judiciary.

This is very interesting. If one turns to the report of the commission, one can find a summary of the submissions by the government and the judiciary. There, we can see that an increase of 7.25 per cent was in fact the original proposal of the government; it was an opening offer. This is to say that what this government calls "careful consideration" of the commission's recommendations has led it to conclude that its original position was correct and that the work of the commission, which Senator Meighen has told us was very careful and thorough, was, in respect of its principal recommendation, a complete waste of time.

How does making a submission to the commission, awaiting its recommendations and then saying, "Thanks, but we prefer our opening position," respect the process? Could the process be accorded less respect?

The senator also alluded to the very balanced guidance that has been provided by the Supreme Court in the *P.E.I. Judges Reference* and in the *Bodnar* decision. He went on to say:

> In both decisions, the court has quite rightly acknowledged that allocation of public resources belongs to the legislatures and to governments.
>
> Careful reading of these cases also indicates that governments are fully entitled to reject and modify commission recommendations provided that a public, rational justification is given, one that demonstrates overall respect for the commission process.

With the utmost respect to Senator Meighen, the context of the *Bodnar* decision must also be understood. Following the *P.E.I. Reference*, provincial governments were obliged to set up commissions similar to the quadrennial commission for the judges of the provincial courts. The first experiences with these new commissions were not happy. In four of the ten provinces, litigation resulted. When the cases came before the Supreme Court, Madam Justice McLachlin observed that the guidance given by the *P.E.I. Reference*, which was meant to depoliticize the process, had been frustrated in practice.

The Supreme Court then added a third stage of consideration to the two-step analysis set down in the *P.E.I. Reference*. This new test is as follows: First, has the government articulated a legitimate reason for departing from the commission's recommendations? Second, do the government's reasons rely upon a reasonable factual foundation? Third, viewed globally, has the commission process been respected and have the purposes of the commission process been respected and have the purposes of the commission — preserving judicial independence and depoliticizing the setting of judicial remuneration — been achieved?

The Chief Justice went on to note that "a bald expression of disagreement with the recommendation of the commission, or a mere assertion that judges' current salaries are 'adequate' would be insufficient."

Looking at what this government has done, how can we say that the goal of depoliticization has been achieved? The judges have seen the government's position relative to the current commission change to their disadvantage as a result of politics. How does that honour the strengthened process that Senator Meighen spoke of?

When we actually look at the reasons given for rejecting the commission's recommendation, one again sees a complete lack of respect for the process. The government feels that "the commission did not pay sufficient heed to the need to balance judicial compensation proposals within the overall context of economic pressures, fiscal priorities and competing demands on the public purse." With respect, this seriously misstates the responsibilities of the commission.

Section 26(1.1.)(*a*) of the Judges Act obliges it to consider:

> The prevailing economic conditions in Canada, including the cost of living and the overall economic and current financial position of federal government.

This provision obviously addresses what the government can afford to pay.

The commission's observation was as follows:

> 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 economic condition in Canada does not restrain this Commission from arriving at the compensation recommendations we believe are appropriate.

The several sources supporting this conclusion are set out at pages 10 and 11 of the report. Against this, the government apparently suggests that the obligation of the commission is to anticipate the government's spending priorities and to give effect to them. This reasoning is deeply flawed. So, too, is the second objection, that the commission accorded "a disproportionate weight to the incomes earned by self-employed lawyers and, in particular, to those practitioners in Canada's eight largest urban centres."

This was the subject of detailed consideration by the commission, which was specifically critical of the data submitted by the government. In the circumstances, the government's response is exactly the sort of "bald statement of disagreement" the Chief Justice identified in *Bodnar* as an insufficient or inadequate response.

The government says it was not satisfied that the appropriate weight had been given to judicial annuity. This was, however, addressed by the commission in some detail, and it was again critical of the state of the data, including the data tendered by the government. This is another completely unsupported statement of disagreement.

• (1530)

It must be said that the government's position that it can — almost two years later, on the basis of vaguely stated misgivings — undo the work of a commission before which it had every opportunity to make its case violates the most basic norms of fairness.

The report was based on the conditions at the time it was presented, a point made by Mr. McLennan when he appeared before the committee in the other place. For the government now to take the position that it has, based on its view of current circumstances, completely negates the purpose of a periodic review and again shows its utter disregard for fairness and due process.

Lastly, honourable senators, Honourable Senator Meighen's observation that it was up to Parliament and not the executive alone to decide on judicial compensation is again misleading —

The Hon. the Speaker *pro tempore*: I am sorry to interrupt, but I must advise that the honourable senator's time has expired. Is she asking for more time?

Senator Jaffer: May I have two minutes?

Hon. Gerald J. Comeau (Deputy Leader of the Government): Two minutes.

Senator Jaffer: Thank you.

I was saying that Honourable Senator Meighen's observation that it was up to Parliament and not the executive alone to decide on judicial compensation is again misleading, given the government's refusal to commit to a Royal Recommendation, should Parliament have expressed a will to raise the amounts proposed by the government. Before the House of Commons Justice Committee, a motion to restore the commission's salary recommendations was ruled out of order. Parliament's hands were completely tied by this manoeuvre.

Honourable senators, I fear we are faced with a bill based on a reasoning that is, on the one hand, deeply flawed and, on the other hand, extremely overdue. We have a responsibility to give this bill careful consideration, but we also have a responsibility not to further delay. On that note, I hope we can refer this matter quickly to committee and look at many of these issues more closely.

Hon. Jerahmiel S. Grafstein: I have a question.

[Senator Jaffer]

The Hon. the Speaker *pro tempore*: Senator Grafstein has a question, but there is only one minute left in Senator Jaffer's time. Will Senator Jaffer accept questions?

Senator Jaffer: Yes.

Senator Grafstein: I was out of the chamber, and I hope I did not mishear the honourable senator. The constitutionality of Parliament to deal with the measure of judicial compensation under sections 99 and 100 of the Constitution is clear. Is that so?

Senator Jaffer: I think that is something that the committee will have to look at.

Hon. Grant Mitchell: Honourable senators, I spoke about this earlier in the context of the supplementary estimates, and I would like to get it on the record on this bill as well.

I am concerned about the implications of this bill. It will reduce a more than 10 per cent increase in the salaries of judges down to about 7.25 per cent. In doing so, it negates the recommendations of the quadrennial commission. That commission was set up with one fundamental principle in mind, and that was to maintain the independence of the Canadian judiciary. That is a fundamentally important principle. It is one of the pillars that makes our judicial system as successful, fair and world renowned as it is. If there were a good reason for the government to make that decision, I have not heard it. The reason they gave is that there are parameters under which they can review the recommendations of the quadrennial commission. One key parameter is whether or not the recommendation is consistent with the current fiscal or financial context of the government. At the time when the bill was originally initiated, there was a $3 billion surplus. At this time, there is a $13 billion surplus. The government said there was a tight fiscal circumstance, and therefore they had to cut the percentage. In fact, there is not anywhere near that tight a fiscal circumstance; therefore, logic dictates they do not have to cut it.

Having come to that conclusion, one has to ask: What would be the reason to cut the amount of the increase? The conclusion I have come to is this "judge-made law" concern of the Conservative government. This is not about doing what is right. This is not about worrying about the independence of the judiciary. This is about penalizing the judiciary because this government thinks they are not interpreting the legislation and the Constitution in a way that is appropriate. In fact, this judiciary is above reproach. It does not deserve to be penalized. This is a cheap shot, and it should not occur.

On motion of Senator Cools, debate adjourned.

INFORMATION COMMISSIONER

MOTION TO APPROVE APPOINTMENT OF MR. ROBERT MARLEAU—ORDER STANDS

On Motion No. 1 by Senator Comeau:

> That in accordance with section 54 of the *Access to Information Act*, Chapter A-1, R.S.C. 1985, the Senate approve the appointment of Robert Marleau as Information Commissioner for a term of seven years.

CANADA

Debates of the Senate

1st SESSION • 39th PARLIAMENT • VOLUME 143 • NUMBER 61

OFFICIAL REPORT
(HANSARD)

Wednesday, December 13, 2006

THE HONOURABLE NOËL A. KINSELLA
SPEAKER

> ... I also want to add that the Minister of Transport has asked me to convey to the Senate that upon passage of Bill C-3 the government will undertake to move as quickly as possible to ease congestion at all of Canada's bridge and tunnel crossings with the United States, particularly at Windsor and Fort Erie.

Later on, I requested an undertaking of him.

• (1440)

This appears on page 1523 of yesterday's Hansard. This is directed toward my honourable friend Senator Tkachuk:

> Would the sponsor of the bill give the Senate of Canada assurance that the Government of Canada is committed to a speedy expansion of border crossings at the Windsor-Detroit and Buffalo-Niagara regions, which would be in the great interest of Canada's productivity and economy?

I ask the honourable senator if he is prepared to repeat those commitments on behalf of the government.

Senator Eyton: The question was posed to me, Senator Grafstein. Senator Tkachuk's answer yesterday was the one word, "Yes." I suppose I can repeat it by saying, "Yes." I also observe there are a number of projects going on now.

The honourable senator's concern is legitimate. I think the government had made the commitment given those projects need to proceed.

Senator Grafstein: In light of those commitments, I understand the complexity of the bill, but I want to reiterate one more time for the government that it is in our national interest to have those two major points expanded as quickly as possible. I understand the private interests. I understand the complex interests. I understand the quandary Senator Mercer has raised. However, in the national interest, it is in our interest to make sure those border points are expanded as quickly as possible.

In light of the government's commitment to do that, which I hope will bind subsequent governments as well, I am prepared to support this bill.

The Hon. the Speaker: Are honourable senators ready for the question?

Is it your pleasure, honourable senators, to adopt the motion?

Motion agreed to and bill read third time and passed.

JUDGES ACT

BILL TO AMEND—THIRD READING

On the Order:

> Resuming debate on the motion of the Honourable Senator Nolin, seconded by the Honourable Senator Stratton, for the third reading of Bill C-17, to amend the Judges Act and certain other Acts in relation to courts.

[Senator Grafstein]

Hon. Mobina S. B. Jaffer: Honourable senators, I rise again to speak on Bill C-17, dealing with judges' salaries and benefits at third reading.

Let me preface my remarks by saying that I do not intend to repeat what I have already said at second reading. Senator Meighen's remarks in introducing the bill largely match those made by Minister Toews before us. What I said on that occasion remains applicable. I would not modify one word of what I said.

When I concluded those remarks, I noted that this legislation was both extremely flawed and well overdue. As one of the members of the Quadrennial Commission on Judicial Compensation and Benefits, Earl Cherniak, Q.C., noted before the Standing Senate Committee on National Finance yesterday, it has now been two and a half years since the commission first issued its report. Our judges have been waiting that long for this legislation to reach the final stage of consideration.

It was this rush that caused us to take the extraordinary step of hearing from the commissioner and the Minister of Justice and Attorney General of Canada back to back before immediately moving to clause-by-clause consideration. While I am glad we were able to expedite this long-overdue piece of legislation, I feel through this bill the government may be causing a great deal of damage to the quadrennial process and interfering unfairly with the rights of Parliament. Worst of all, I fear it is furthering an attack on the rights and rules of our judiciary, which other senators have rightly mentioned is a source of pride for all Canadians and respected the world over.

Much has been said about judges over the course of this debate.

Honourable senators, my mother was a probation officer, and as a young child I used to often accompany her to the courts. I observed the robed judges wearing wigs in the courtroom making very stern and tough pronouncements. Later, I would observe them in their chambers with their wigs on the table, compassionately struggling with what the appropriate sentences should be.

Every Asian Ugandan as long as they live will relate that as long as the judiciary was able to function in Uganda, we were able to live in Uganda. We all have the memory of when our Chief Justice Benedicto Kiwanuka stood up to Idi Amin ingrained in our psyche. He never gave in to Idi Amin.

Justice Kiwanuka lost his life. He was forcibly taken directly from his courtroom by Amin's goons and shoved into the boot of a car. We never saw him again.

In Canada, this great country, we can truly take pride in the independence of our judiciary. Today, they work very long hours due to the increasing number of complicated trials, which involve thousands of documents. They start early to deal with pretrial motions, have a full day in court, and then sometimes have to deal with matters after court hours.

To add to their challenges, they increasingly have to deal with unrepresented claimants, which requires them to undertake the difficult task of being both judge and lawyer in a case.

Only today in *The Globe and Mail* there is a heading: "Judges told to help lawyerless litigants," by Kirk Makin. It reads:

> The growing flood of litigants appearing in court without a lawyer has reached a point where judges should take special steps to help them, the Canadian Judicial Council said in a "statement of principles" released yesterday.

Further:

> "The council views the increasing numbers of self-represented persons who appear in court system as a serious matter," Chief Justice Beverly McLaughlin, chair of the council, said in a commentary.

Honourable senators, in the last few years, we have observed how judges have stood up for what is right.

We have seen it in the Air India case when Justice Josephson took the difficult step of acquitting two people. This was a very courageous act, and he did it because he believed there was not sufficient evidence to convict.

Five years ago, we passed the Anti-terrorism Act, Bill C-36, very quickly. As long as I live, I will remember the words of the then Minister of Justice when she assured us publicly and privately that the legislation was "Charter proof." We believed her. I believed her. We passed the legislation.

Recently, Justice Rutherford in *R. v. Khawaja* struck down parts of the definition of terrorist activity, saying that it is:

> ...not only novel in Canadian criminal law but...constitutes an infringement of certain fundamental freedoms guaranteed in section 2 of the Charter of Rights and Freedoms, including those of religion, thought, belief, opinion, expression and association.

Honourable senators, yesterday, and a few months ago before that, Justice O'Connor returned Maher Arar's life to him by standing up for what was right. He stood up for a lone man and declared that Maher Arar was not a terrorist. Justice O'Connor not only assisted Arar, but a whole community was given hope that in our great country no one is above the law.

Honourable senators, I want to now turn to some of the issues that were raised at second reading. As I said before, I do not believe many of these issues have been addressed and, indeed, the committee members raised a number of new issues in their observations.

One issue I want to put on the record, because I think it is a very important point for many of us here, is the issue that Honourable Senator Grafstein raised at second reading concerning a potential of conflict of interest in the quadrennial commission process. Mr. Cherniak, who had been appointed as the nominee of the judges, was asked the following in committee by Senator Murray — who I quote only in part for the sake of time. Senator Murray asked:

> What would we lose if we changed the membership to exclude a representative of the judiciary?

Mr. Cherniak responded:

> I am not a judge. I have never been a judge, and I do not expect I ever will be a judge, and I have no aspiration to be a judge. I reject the suggestion that I was a representative of the judiciary on the commission. I was the nominee of the judiciary. They have to nominate someone. That is the way the statute reads.

He went on to say:

> The commission is formed by a nominee of the government, a nominee of the judiciary and, to secure the independence of the commission, those two nominees chose the chair. I can assure you that all three members of the commission took the view that they were in no way the representative of the body that nominated them.

• (1450)

Honourable senators, I am satisfied that the spirit of impartiality is being respected in the quadrennial process.

As to another matter that I raised when I spoke earlier on second reading, as to revisiting the decision made by the former government on the salary, Mr. Cherniak's remarks on the process accord entirely with my own assessment. He says:

> I do not think this government can legitimately do what it has done: that is, to revisit the recommendations of the commission two years after the fact and long after the government of the day had already responded.

Honourable senators, the Judges Act clearly states that the government has six months to respond to the report of the quadrennial commission. The limit was respected by the previous government, which accepted the main recommendation of the committee on judicial compensation.

Upon coming to power, the new government said that it would re-examine this response, and ultimately rejected the main recommendation, returning to the original position that is expressed in this bill.

The Justice Minister clearly wishes to avoid the subject altogether. Yesterday, he said:

> Is our government functus because another government made a decision? I prefer not to get into that legal entanglement.

Well, of course he does not. He is wrong.

In response to the question from Senator Cowan on this topic, the minister said:

> The government is required to look at all the facts available to it. I believe there is nothing preventing the government from looking retroactively at what the commission has determined and having the benefit of that insight that has occurred as a result of the passage of time.

With all respect to the minister, it is the Judges Act that prevents them from looking retroactively at what the commission has determined. The timelines are clear. His suggestion that the

government should benefit from the insight gained through the passage of time is especially difficult to reconcile with the spirit of the law. These time limits were meant to ensure that the recommendations of the commission were addressed in a timely manner. When the government says it needs the benefit of over two years of 20/20 hindsight to properly assess the report, it risks causing real damage to the quadrennial process. We now have to wonder how the next quadrennial commission will operate, considering it will be starting its work so shortly after action on the previous commission was implemented.

The minister then intimates that it really does not matter, because the government's position is just a recommendation to Parliament. The minister says elsewhere that his government invited the committee in the other place to make a recommendation. He says that they did not do so because they simply could not agree for one reason or another. He further goes on to say that he does not remember all of the details of the fight. Let me respectfully remind Minister Toews, and this chamber, that there was no fight. When an attempt was made to restore the commission's salary recommendation, the government member chairing the committee simply ruled the motion out of order.

Despite Minister Toews' repetition of the proposition that it is up to Parliament to fix the salary of the judges, he knows that his government has effectively tied Parliament's hands by refusing to commit to a Royal Recommendation should Parliament differ with the government's position.

Parliament's authority is even further usurped by the fact that the Justice Minister has chosen to attach unrelated amendments to other acts to this bill. As our committee points out, this is a clear attempt to tie the hands of parliamentarians, presenting technical amendments with these long overdue changes to the Judges Act and forcing us to accept the whole package. Were it not for time constraints, I might be persuaded to support Senator Joyal's suggestion of splitting this bill into its component parts. However, we learned during the debate on the animal cruelty bill in a previous session that this is a very complicated process, and time simply will not allow it.

As a final point, I am very troubled by the way the justice ministers in our country have started to muse about our judiciary. Yesterday, in committee, the minister was asked about his attitude and some of his statements regarding the judiciary. He responded by saying that he was not the only one, and he gave the example of the Minister of Justice in my province of British Columbia.

The Minister of Justice in my province had commented on the working day of judges. Minister Oppal of B.C. had asked why trials start at 10 a.m. and not at 9 a.m. I know Mr. Oppal; I know Minister Oppal knows the answer to that question as well as I do. His government has cut back court staffing and sheriff services. His government has failed to provide pre-trial holding facilities in downtown Vancouver. Prisoners, who must be present at their own trials, must be brought in from the Fraser Valley every morning, and they seldom arrive in time. Judges cannot start trials earlier than 10 a.m. in Vancouver because government cutbacks have made it impossible for them to do so.

I should also point out that I know, and I know Minister Oppal knows, that notwithstanding these difficulties, superior court judges start their working days early and are often in their courtrooms by 9 a.m. on motions and other civil matters. Minister Oppal also knows that judges' sitting time is only a fraction of their working time. Every week, dozens of considered written decisions are posted on the court website. They do not come out of thin air, and they are not prepared while judges are sitting in court. Judges spend many evenings and weekends at work.

It is unfortunate that Minister Toews seems to take some comfort in this unfortunate incident, but it is not surprising. I will make one more observation that sums up Minister Toews' attitude, and that of this government toward our judiciary. In answer to a question from Senator Cowan, Mr. Toews said this:

> I think despite the fact that the Supreme Court of Canada outlined this process for the commission to make these determinations, it must be remembered that this was a process that has been somehow constitutionally grafted into our Constitution. It does not appear anywhere in the same way that section 100 does in the Constitution Act, 1867. Section 100 of that Act clearly indicates constitutionally that it is the responsibility of Parliament to set that compensation so we have to then meld the constitution doctrine imported into this whole process by the court in the Prince Edward Island Judges' Reference Case and as defined in the *Bodner v. Alberta* decision.

The process was not "somehow constitutionally grafted" into our constitution. Honourable senators, the issue of the responsibilities of legislatures was submitted to the courts in those cases. The courts were simply doing what they were constitutionally obliged to do in interpreting those responsibilities.

As I said in my remarks at second reading, section 100 imposes a responsibility upon Parliament to fix judicial remuneration —

The Hon. the Speaker: The honourable senator's time has been exhausted.

Senator Jaffer: May I have two minutes?

Hon. Senators: Agreed.

Senator Jaffer: — at a level which appropriately reflects the crucial place of the courts in our democratic system. Section 100 is not an unfettered prerogative. That is all the courts have said.

I am very reluctantly agreeing to support this bill. We, of course, cannot change the percentage increase in this house as it is not within our powers.

Honourable senators, today, in my presentation, I would be remiss if I did not acknowledge another great jurist, former Supreme Court Justice Thomas Dohm. When I first came to this country as a refugee, in my first month I was flatly refused by the Law Society of British Columbia when I asked them to assess my credentials as a lawyer. I was very fortunate, at that time in 1974, that a great jurist, Tom Dohm, came to my aid. I have been working for him for the last 30 years. Honourable senators, I am here with you today because of the work of that great jurist, Tom Dohm, who took on the law society in my province. Judges truly work for all Canadians; Canadians from all walks of life. We Canadians should be very proud of them.

Therefore for me, this is not a happy day. The process for fixing judicial remuneration has not been respected by this government. However, we must nevertheless support the immediate passage of this bill because we recognize that even more harm can come from any further delay.

• (1500)

Hon. Jerahmiel S. Grafstein: Honourable senators, again I beg your indulgence. I happen to have been a critic of both the Bridges and Tunnels Act and the Judges Act, and I would like to conclude my comments by covering some of the ground that we discussed yesterday, and that the previous speaker just commented on.

Let us start with this: Justice delayed is justice ignored. Just as we ask judges for justice without delay, so we must be just to judges in giving them their timely compensation. Our quandary, however, is the process. The Judges Act and this amendment to it beg serious questions. I intend to return once again to the Constitution, because it makes absolutely clear that judges' compensation is a question for Parliament. This is not contested. I listened carefully to the arguments made by other senators about the judicial precedence dealing with judicial compensation, but on a fair reading of it, there is no question at all that Parliament is supreme when it comes to judicial compensation.

However, it is clear that, over the years, judges have become frustrated by the delays in their compensation and they were very unhappy with the process of adjudging their compensation, and so they sought to intervene in their own courts by judicial precedent.

Let me turn to a recent article by an outstanding legal scholar to again give the Senate a flavour of this issue and how the court, on the one side, and legal commentators, on the other side, have thought about this issue. This is a brief article written by Professor Jacob Ziegel of the University of Toronto Law School.

Again, I want to state my conflict of interest. I came from that esteemed institution. Having said that, I quote Professor Ziegel's comments with great interest, and I think they will be of interest to the Senate.

The title of the article is *Judicial Compensation Review, Light at the End of the Tunnel?* He says:

> In 1998, the Supreme Court of Canada decided in the *Prince Edward Island Reference* case that the federal and provincial governments were obliged to establish independent commissions to make periodic recommendations with respect to the salaries, pensions and other benefits to be paid to federally and provincially appointed judges. The Court justified its novel interpretation of the Canadian constitution on the ground that independence of the judiciary was a cornerstone of Canada's legal system. Accordingly, judges could not engage in salary negotiations with federal and provincial governments without appearing to compromise their impartiality in cases to which the Crown was a party.
>
> Chief Justice Lamer made it clear in the course of his majority judgment that governments were not obliged to accept a commission's recommendations, but that if a government elected to reject the recommendations it had to give reasons for its decision and that the decision could be challenged in court. If it was challenged, the test of the reasonableness of the decision was one of "simple rationality."
>
> That inner tension in the Supreme Court's judgment in the *P.E.I. Reference* case laid the groundwork for a flurry of court cases from coast to coast challenging the validity of provincial government decisions not to implement all or part of a commission's recommendations. The litigation reached a crescendo in four consolidated appeals from New Brunswick, Quebec, Ontario and Alberta that argued before the Court last fall.

This is a current argument, so that means this last fall.

> The key issue in all four cases was when a court is entitled to reject the reasons given by a government for refusing to implement a commission's recommendations. The Court's unanimous judgment rendered this July is a major setback for the strategy successfully employed by the aggrieved judges before the lower courts and a major victory for provincial governments.
>
> The Supreme Court adopted a three-part test to determine whether a government's refusal satisfies the test of rationality. None of them are difficult to meet. Even more important was the Court's emphasis that the allocation of public funds is governmental responsibility, not the courts'. So far as the present appeals were concerned, the Court found that out of the four challenged refusals only the Quebec government's reasons failed to pass the rationality test. However, even in Quebec's case, the Court made it clear that the Quebec courts were not entitled to give effect to the Commission's recommendations because they weren't satisfied with the Quebec government's reasons. The correct remedy, the Supreme Court ruled, was for the court hearing the case to ask the nonconforming government to give further and better reasons for its decision. (The Court did not explain what the result would be if the respondent government gave a second set of inadequate reasons.)

He concludes by saying:

> The federal and provincial judges' associations probably feel that the Supreme Court's pronouncement in the current cases has undermined the Court's 1997 judgment. My own view is that the Court corrected the false impression left by an earlier judgment and that it was right to resile from a position that appeared to make the courts judges in their own cause and led them into direct conflict with the federal and provincial governments in a particularly sensitive area of public policy.

Honourable senators, I generally agree with that statement, and it strikes me that we do have a light at the end of the tunnel.

Let me now turn to the excellent work done by the finance committee under the chairmanship of Honourable Senator Joseph Day. Last night, I read the transcript in full. I ask all senators who are interested in this question to read the transcript. Some of the points they will be interested in and some they will find intriguing.

TAB 5

SUBMISSION

of the

CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

to the

JUDICIAL COMPENSATION AND BENEFITS COMMISSION

Pierre Bienvenu
Azim Hussain
Ogilvy Renault LLP

December 14, 2007

TABLE OF CONTENTS

I. INTRODUCTION

1. These submissions to the Judicial Compensation and Benefits Commission (the "**Commission**") are made on behalf of the Canadian Superior Courts Judges Association (the "**Association**") and the Canadian Judicial Council (the "**Council**").

2. The Association is successor to the Canadian Judges Conference, which was founded in 1979 and incorporated in 1986. Its objects include:

   i) the advancement and maintenance of the judiciary as a separate and independent branch of government;

   ii) liaison with the Council to improve the administration of justice and to complement its functions through conferences and various educational programs;

   iii) taking such actions and making such representations as may be appropriate in order to assure that the salaries and other benefits guaranteed by section 100 of the *Constitution Act, 1867*,[1] and provided by the *Judges Act*[2] are maintained at levels and in a manner which is fair and reasonable and which reflect the importance of a competent and dedicated judiciary;

   iv) seeking to achieve a better public understanding of the role of the judiciary in the administration of justice;

   v) monitoring and, where appropriate, seeking to enhance the level of support services made available to the judiciary in cooperation with the Council; and

   vi) addressing the needs and concerns of supernumerary and retired judges.

3. As of December 1, 2007, 974 (or 93%) of Canada's approximately 1050 federally appointed judges are members of the Association.

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[1] Reproduced in the judiciary's Book of Cited Documents.

[2] R.S. 1985, c. J-1, as amended

4. In furtherance of the Association's objects that relate to judicial salaries and other benefits, a Compensation Committee was established to study and make recommendations to the Association's Executive Committee and Board of Directors in respect of issues regarding judicial compensation.

5. The Council was established by Parliament in 1971. It consists of the Chief Justice of Canada and the Chief Justices and Associate Chief Justices of the provincial and territorial superior courts, the Federal Court of Appeal, the Federal Court, the Tax Court of Canada and the Court Martial Appeal Court of Canada.

6. The objects of the Council are to promote and improve efficiency, uniformity and quality of judicial service in superior courts.[3]

7. As part of its mandate to improve the quality of judicial service, the Council has established a Judicial Salaries and Benefits Committee. The Council, aided by that Committee, and the Association have made joint submissions, written and oral, to each of the five Triennial Commissions and to the first and second Quadrennial Judicial Compensation and Benefits Commissions (the "**Drouin Commission**" and the "**McLennan Commission**", respectively[4]).

8. The Association and the Council have worked closely together in preparing these submissions on behalf of federally appointed judges. The recommendations sought from this Commission by the federal judiciary have been approved by the Compensation Committee and the Executive Committee of the Association, and by the Executive Committee of the Council.

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[3] The objects of the Council are set out in section 60 of the *Judges Act.*

[4] The Drouin Commission issued its report (the "**Drouin Report**") on May 31, 2000. The McLennan Commission issued its report (the "**McLennan Report**") on May 31, 2004.

II. BACKGROUND

A. Judicial Independence and Judicial Compensation

9. Judicial independence is a fundamental principle of our democracy and legal tradition. This principle, whose historical origins can be traced back to the *Act of Settlement, 1701*,[5] is incorporated in the Constitution of Canada through the preamble and the judicature sections of the *Constitution Act, 1867* and section 11(d) of the *Canadian Charter of Rights and Freedoms*. For ease of reference, these provisions of the Constitution of Canada are reproduced in the judiciary's Book of Cited Documents.

10. Judicial independence and judicial compensation are intimately connected. In *Reference Re Provincial Court Judges*[6] ("***PEI Reference***"), and more recently in *Bodner v. Alberta*[7] ("***Bodner***"), the Supreme Court of Canada confirmed that financial security, both in its individual and institutional dimensions, is, with security of tenure and administrative independence, one of the three core characteristics of judicial independence.[8]

11. It is important to keep in mind that financial security through adequate judicial compensation ultimately benefits the public, as emphasized by Chief Justice Lamer in the *PEI Reference*:

> I want to make it very clear that the guarantee of a minimum salary is not meant for the benefit of the judiciary. Rather, financial security is a means to the end of judicial independence, and is therefore for the benefit of the public.[9]

12. Under s. 100 of the *Constitution Act, 1867*, the Parliament of Canada has the duty to fix the compensation of federally appointed judges. Section 100 provides as follows:

> The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the

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5 (U.K.), 12-13. Will. III, c. 2.

6 [1997] 3 S.C.R. 3.

7 [2005] 2 S.C.R. 286.

8 *PEI Reference*, *supra* at paras. 115-122; *Bodner* at paras. 7-8.

9 *PEI Reference*, *supra* at para. 193.

> Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

13. The process for determining judicial compensation, which is now provided in the *Judges Act*, has evolved over time.

14. Prior to 1981, advisory committees reviewed judges' compensation and made recommendations to the Government.[10] As noted by the Drouin Commission, this process was unsatisfactory to the judiciary because the advisory committee recommendations were often ignored and judges felt that the process was tantamount to petitioning the Government to fulfill its constitutional obligations.[11]

15. In 1982, the Triennial Commission process was established. Under s. 19.3 of the *Judges Act* as it read at the time, the Triennial Commission was required to inquire into the adequacy of judicial compensation and to make recommendations to the Minister of Justice. The objective of the Triennial Commission process was to depoliticize the determination of judicial salaries and benefits in order to preserve judicial independence. However, there was no obligation on the part of the Government under that process to respond or act upon the recommendations made by Triennial Commissions.

16. It is widely acknowledged that the Triennial Commission process was a failure. The salary recommendations of the five Triennial Commissions were generally ignored, left unimplemented and often became the subject of a politicized debate.[12]

17. In the twilight of the Triennial Commission process, the Scott Commission said in 1996:

> The purpose of the Commission was to ensure that, through the creation of a body which would be independent both of the judiciary and Government, Parliament would be presented with an objective and fair set of recommendations dictated by the public interest, having the effect of maintaining the independence of the judiciary while at the same time

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10 Two advisory committees were chaired by Irwin Dorfman, Q.C. (report issued on November 22, 1978) and Jean de Grandpré (report issued on December 21, 1981) respectively, reproduced in the judiciary's Book of Cited Documents.

11 Drouin Report (2000) at 2.

12 The reports of the Triennial Commissions were as follows: Lang Report (1983), Guthrie Report (1987), Courtois Report (1990), Crawford Report (1993), and Scott Report (1996), reproduced in the judiciary's Book of Cited Documents.

> attracting those pre-eminently suited for judicial office. The theory was that, by way of such recommendations, emanating from regularly convened independent commissions, the process would be de-politicized and judicial independence would be thus maintained.
>
> While the idea was sound, the underlying assumptions appear to have been naïve. The result has been a failure in practice to meet the desired objectives. Since the first Triennial, there have been four Commissions (Lang (1983), Guthrie (1986), Courtois (1989) and Crawford (1992)). In spite of extensive inquiries and exhaustive research in each case, recommendations as to the establishment of judicial salaries and other benefits have fallen almost totally upon deaf ears. The reasons for this state of affairs have been largely political.[13]

18. Similarly, the Crawford Commission in 1993 lamented Government delays in acting upon recommendations made by the Commission:

> The respect shown for the concept of judicial independence in the design of the Triennial Commission process has been tainted by the business-as-usual attitude of successive Governments once the Commission reports have been presented to Ministers of Justice and tabled in Parliament. This failure to act with reasonable promptness cannot but lead to the entire review process losing credibility. This Commission notes, for example, that the legislation (Bill C-50) comprising the Government's response to the 1989 Commission on Judges' Salaries and Benefits (the Courtois Commission), was not introduced in Parliament until December 1991, and that by the end of the mandate of the current Commission, this relatively uncomplicated legislation had not yet been enacted.[14]

19. The regrettable state of affairs of this important process was commented upon by former Chief Justice Lamer in 1994, in an address to the Council of the Canadian Bar Association, when he said that the Triennial Commission "looks good on paper, but it has one problem. It doesn't work. Why? Because the Executive and Parliament have never given it a fair chance."[15]

20. In 1997, the Supreme Court of Canada in the *PEI Reference* explained that the Constitution requires the existence of a body such as a commission that is interposed between the judiciary and the other branches of the state. The constitutional function of

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13 Scott Report (1996) at 7.

14 Crawford Report (1993) at 7.

15 The Honourable Chief Justice Lamer, "Remarks by the Rt. Honourable Antonio Lamer, P.C., Chief Justice of Canada, to the Council of the Canadian Bar Association Annual Meeting" (20 August 1994) at 9 [unpublished], reproduced in the judiciary's Book of Cited Documents.

this body is to depoliticize the process of determining changes to or freezes in judicial compensation.

21. This objective is achieved by entrusting that body with the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature. The Court said that the body must be independent, objective, and effective in order to be constitutional.[16] Any changes to judicial salaries without prior recourse to this body would be unconstitutional.[17]

22. The existence of this body also ensures that the judiciary does not find itself in a position of having to negotiate its salary directly with the government, something that is fundamentally at odds with judicial independence.[18]

23. A necessary component of the effectiveness of this body is the timely implementation of its recommendations, or a prompt response from the government in question providing legitimate reasons for a refusal to implement.[19]

B. The Quadrennial Commission Process

24. Acting upon the constitutional imperative enunciated by the Supreme Court of Canada in the *PEI Reference*, Parliament amended the *Judges Act* in 1998 and established the Quadrennial Commission. A key aspect of these amendments was the requirement that the Minister of Justice respond to the recommendations of the Quadrennial Commission within six (6) months of receiving them. Since the mandate of the Commission begins on September 1, and since it must issue its report within nine (9) months from the start of its mandate, the deadline for the issuance of the Minister's response is the end of November of the subsequent year.

25. The first Quadrennial Commission was chaired by Mr. Richard Drouin, QC, in 1999. The other commissioners were Ms. Eleanore Cronk (now of the Ontario Court of Appeal)

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16 *PEI Reference*, *supra* at para. 169-175; see also *Bodner*, *supra* at para. 16.

17 *PEI Reference*, *supra* at para. 147.

18 *PEI Reference*, *supra* at para. 186.

19 *PEI Reference*, *supra* at para. 179-180.

and Mr. Fred Gorbet. The Drouin Report was issued on May 31, 2000. It was an impressive, well-reasoned report by any standard. The Drouin Commission took note that the Triennial Commission had failed despite the goal of depoliticizing the process.[20]

26. The Government's response to the Drouin Report marked an improvement as compared to previous Government responses to Triennial Commission reports. On December 13, 2000, the Government responded to the Drouin Report pursuant to s. 26(7) of the *Judges Act*. The Government accepted all but two of the Drouin Commission's recommendations,[21] and amendments to the *Judges Act* implementing the Government's Response were adopted expeditiously, in June 2001.

27. In one respect—the delayed implementation of the recommendation relating to the right to elect supernumerary status[22]—the Government's response to the Drouin Commission was a source of disappointment and concern for the Association and Council. The Drouin Commission had recommended that, effective April 1, 2000, judges have the right to elect supernumerary status for a period not exceeding ten years upon attaining eligibility for a full pension (Recommendation 8). In her response to the Drouin Report, the Minister indicated that the Government was not prepared to accept Recommendation 8 at that time. The reasons given included the need to consult the provinces and territories, the fact that the Supreme Court of Canada would soon consider, in *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*,[23] important constitutional issues relating to the status of supernumerary judges, and, more generally, the need for better information concerning the contribution of supernumerary judges.

28. The judgment of the Supreme Court of Canada in *Mackin* was released on February 14, 2002. As for the intended consultations with the provincial and territorial governments, it

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20 Drouin Report (2000) at 2.

21 The two exceptions were eligibility for supernumerary status and reimbursement of costs of the judiciary before the Quadrennial Commission.

22 Supernumerary judges are judges who are eligible to retire but choose instead to continue sitting. Their workload is determined in consultation with their respective chief justices. Sometimes the workload is full-time, and often is nearly so. In no event is it less than 50% of a full-time workload.

23 [2002] 1 S.C.R. 405.

was expected that they would be carried out in a timely fashion. In the event, it was only on August 19, 2003, that the judiciary was advised that the Government had decided to accept Recommendation 8. Moreover, the Government took the position that the necessary amendments to the *Judges Act* would only be made as part of the overall package of amendments that would follow the Government's response to the report of the subsequent commission, the McLennan Commission. Those amendments were only made in December 2006, six and a half (6½) years after the Drouin Commission's recommendation. In the meantime, judges who were eligible to take advantage of this recommendation were deprived of its benefit. It is worth noting that, unlike a delay in the implementation of a salary recommendation, the delay in implementing Recommendation 8 could not be, and was not, remedied retroactively.

C. The McLennan Commission

29. The second Quandrennial Commission, the McLennan Commission, was established in September 2003. It was chaired by Roderick McLennan, Q.C., and its two members were Gretta Chambers, C.C. and Earl Cherniak, Q.C. As required by the *Judges Act*, the Commission issued its report on May 31, 2004.

30. The principal issue of contention between the judiciary and the Government before the McLennan Commission was the determination of the amount of judicial salary. When the McLennan Commission began its inquiry, the salary of a puisne judge was $216,600.

31. The Association and Council submitted to the Commission, based on the level of remuneration of traditional comparators, as applied in the Drouin Report, that the salary of a puisne judge should be increased to $253,880 as of April 1, 2004, plus annual salary increments of $3,000 in 2005, 2006 and 2007, in addition to indexation for cost of living. For its part, the Government proposed an increase to $226,300 as of April 1, 2004, inclusive of indexation for cost of living for 2004, plus annual salary increments of $2,000 in 2005, 2006 and 2007, in addition to statutory indexation for cost of living for 2005, 2006 and 2007. As the McLennan Commission observed, when the $2,000 annual salary increments contemplated by the Government are taken into account, the

Government's proposal represented an increase of 7.25% over those years, in addition to indexation for cost of living in 2005, 2006 and 2007. [24]

32. The McLennan Commission recommended an increase of judicial salary for puisne judges to $240,000 as of April 1, 2004, inclusive of indexation for cost of living in that year, plus the cost-of-living indexing effective April 1 in each of the next three years, as already provided for in the *Judges Act*. The Commission did not accept to recommend annual salary increments, as proposed by the Government and supported by the Association and Council, in addition to the annual cost-of-living indexation already provided for in the *Judges Act*. The Commission's recommendation represented a one-time 10.8% increase for the four-year period commencing April 1, 2004, in addition to cost-of-living indexation in the years 2005, 2006 and 2007, as compared to the 7.25% increase proposed by the Government.

D. The Government's Response to the McLennan Report

33. The Government's response to, and delayed partial implementation of the McLennan Report has been a source of grave concern for the judiciary. As elaborated below, the Association and Council are concerned that politicization is creeping into the process yet again, and is undermining the nascent and still fragile Quadrennial Commission process, much as the Triennal Commission process was undermined and ultimately came to fail.

34. On November 20, 2004, the Minister of Justice issued the Government's response (the "**First Response**") to the McLennan Report, as required by s. 26(7) of the *Judges Act*.[25] The Response accepted all but one[26] of the recommendations of the McLennan Commission.

35. With respect to judicial salary, the Minister stated in the First Response that the McLennan Commission had "engaged in a careful balancing of all the [statutory]

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[24] McLennan Report (2004) at 23.

[25] The full text of the First Response is reproduced in the judiciary's Book of Cited Documents.

[26] The Government refused to accept the McLennan Commission's recommendation that the judiciary be reimbursed for 100% of its disbursements and 66% of its legal fees. Instead, the Government's First Response proposed that the reimbursement be a total of 66% for all costs.

factors"[27] and provided "thorough and thoughtful"[28] explanations for its conclusions. The Minister noted that the salary increase recommended by the McLennan Commission "appears reasonable".[29]

36. On May 20, 2005, the Government introduced Bill C-51 to implement its acceptance of the McLennan Commission's recommendations, notably its salary recommendation. The Bill passed first reading and was supposed to be referred to committee after second reading. However, the Bill died on the order paper when Parliament was dissolved on November 29, 2005.

37. A new Government was elected on January 23, 2006. Shortly after the new Government came to power, the then Minister of Justice purported to issue a second response to the McLennan Report on May 29, 2006 (the "**Second Response**").[30] On May 31, 2006, the Government tabled Bill C-17 in the House of Commons, which would implement the recommendations of the McLennan Report only to the extent that they were accepted in the Second Response.

38. The Second Response contradicted the First Response. The Government no longer accepted the salary recommendation set out in the McLennan Report. In its Second Response, the Government proposed an increase of judicial salary of 7.25% as of April 1, 2004.[31] There was no mention of the fact that this increase was the exact percentage increase that the Government had proposed in its submission to the McLennan Commission in 2003-2004. In effect, the Government sought to impose the increase that it had proposed in the first place, as if the Commission process was of no consequence.

39. The Second Response stated that the McLennan Commission's recommendations must be analyzed in light of the mandate and priorities upon which the Government had recently

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27 First Response at 3.

28 First Response at 2.

29 First Response at 4.

30 The full text of the *Response of the Government of Canada to the Report of the 2003 Judicial compensation and Benefits Commission* (May 29, 2006) is reproduced in the judiciary's Book of Cited Documents.

31 Second Response at 2.

been elected.[32] A summary list of the new Government's budget priorities and measures of "fiscal responsibility" was given in the Second Response.[33] It further stated that Canadians expect that expenditures from the public purse should be reasonable and generally proportional to these economic pressures and priorities, and that the McLennan Commission's salary recommendation did not pay heed to this reality.[34] Significantly, the Government did not attempt to argue that the economic conditions in Canada were not as strong as when the First Response had been made.

40. On June 2, 2006, counsel for the Association wrote to the Minister of Justice to protest the issuance of the Second Response and to invite the Government to reconsider the position adopted in the Second Response.[35] The Association also expressed the hope that Bill C-17 would be amended in the committee stage.

41. The Association's letter also made the point that the so-called reasons put forward in the Second Response were not "legitimate reasons" for departing from the Commission's salary recommendation, as required by the relevant constitutional jurisprudence.[36]

42. On July 31, 2006, the Minister of Justice responded by simply stating that the Government had regard for the principles set out in the *PEI Reference* and *Bodner* in developing its Second Response.[37] The Minister omitted to respond to the Association's point that the Second Response was statutorily and constitutionally invalid as a question of process, and constitutionally invalid as a question of content.

43. The fact that the majority opposition parties did not amend Bill C-17 cannot be taken as Parliamentary acceptance of the way in which the Government conducted itself. Opposing Bill C-17 or proposing to amend it with the risk of defeating it carried with it

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32 Second Response at 4, 6.

33 Second Response at 6.

34 Second Response at 7.

35 The Association's letter of June 2, 2006 is reproduced in the judiciary's Book of Cited Documents.

36 The Supreme Court in the *PEI Reference*, *supra* at para. 183 spoke of the need for the government to provide a "legitimate reason" for refusing to accept commission recommendations. The Supreme Court had occasion to elaborate on that requirement in *Bodner*, *supra* at paras.23-27.

37 The Minister's letter of July 31, 2006 is reproduced in the judiciary's Book of Cited Documents.

the probability of the proverbial Pyrrhic victory: the Bill would have been defeated, thereby communicating Parliament's displeasure with the conduct of the Government, but the judiciary would be left with the status quo, which was even less than what the newly elected Government was prepared to accept in its Second Response. This would have been particularly unfair to judges eligible to elect supernumerary status pursuant to a recommendation from the Drouin Report in 2000 that had yet to be implemented.

44. The Second Response was implemented through Bill C-17,[38] which received Royal Assent on December 14, 2006. Puisne judges' salary was fixed retroactively at $232,300 as of April 1, 2004, rather than at $240,000 had the Commission's recommendation and the First Response been implemented. The current salary for puisne judges, statutorily indexed for cost-of-living adjustments, is $252,000, rather than $262,240 had the Commission's recommendation and the First Response been implemented.

45. The *Judges Act* does not contemplate multiple government responses. The Association and Council are firmly of the view that multiple responses undermine the cardinal constitutional requirement of effectiveness and are inconsistent with the Supreme Court's rationale for requiring of government that it formally respond, with diligence, to a commission report.

46. The Association and Council submit that the Second Response was, in essence, the expression of a newly elected Government's disagreement, for political reasons, with a previous government's formal response to the McLennan Report. While the original Response was issued under, in accordance with, and within the time-limit set out in the *Judges Act*, the Second Response has no status whatsoever under the *Judges Act* or the constitutional process expounded in the *PEI Reference*.

47. The Association and Council further submit that the inordinate delay of 2½ years between the issuance of the McLennan Report and the implementation of the flawed Second Response undermined the effectiveness of the process, in addition to depriving members of the judiciary of the time value of the salary increase that the Government

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[38] *An Act to amend the Judges Act and certain other Acts in relation to courts*, S.C. 2006, c. 11.

finally accepted and the actual time lost for those judges who would have been able to elect supernumerary status earlier had the Government implemented that recommendation more promptly.

48. On March 12, 2007, the Association and Council through their counsel wrote to the Minister of Justice to reiterate the contents of the Association's letter of June 2, 2006, namely that the Second Response was constitutionally and statutorily invalid, and therefore that the prescribed process had not been respected.[39] The letter also indicated that the judiciary intended to make representations to the next Commission in order to record the judiciary's objection to, and serious concern with, the manner in which the Government has dealt with its constitutional obligations in respect of judicial independence.

49. On March 20, 2007, the Minister of Justice responded through his counsel to the judiciary's letter of March 12, 2007.[40] The Minister failed to take any substantive position on the judiciary's assertion that the Second Response was invalid. Rather, the Minister simply responded that the Commission has no jurisdiction to consider legal or constitutional concerns about the Government's conduct in relation to the process, and that the judiciary should seek judicial review of the Government's conduct if it is a source of concern to the judiciary. The letter also took the position that the pace at which a bill moves through Parliament is a question of Parliamentary process and procedure, a sovereign domain immune from judicial review.

E. Restoring Confidence in the Process

50. It should be a priority for this Commission to ensure that the process over which it is presiding is preserved and respected. Any action that results in a loss of confidence in the process by either one of the principal parties should be of concern to the Commission.

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[39] See letter of March 12, 2007, reproduced in the judiciary's Book of Cited Documents.

[40] See letter of March 20, 2007, reproduced in the judiciary's Book of Cited Documents.

51. The Association and Council reject the notion that litigation is the only way by which the Government can be told that its conduct risks undermining this important and fragile constitutional process.[41] Indeed, the Supreme Court has recently commented that litigation surrounding judicial compensation casts a "dim light" on all involved.[42]

52. It cannot be doubted that the First Response was legally and constitutionally valid. It is equally clear in the face of the issuance of the Second Response, the nature of its contents, and the inordinate delay in implementing the McLennan Commission recommendations, that the determination of judicial remuneration following the last Quadrennial Commission was not depoliticized and, accordingly, that the Commission's process was not respected.

53. Compensation commissions have been described in the *PEI Reference* as an institutional sieve.[43] As such, the Commission acts as an intermediary between the judiciary and the Government in relation to judicial compensation, an alternative to direct contact between the two. As the Supreme Court said in the *PEI Reference*, the Commission "provides a forum in which members of the judiciary can raise concerns about the level of their remuneration that might have otherwise been advanced at the bargaining table."[44]

54. The Commission should not remain passive in the face of Government conduct that undermines its role and effectiveness, and it should not be content simply to make recommendations in response to submissions made to it. The Commission must take an active role in preserving the process, including by speaking to the parties in its report.

55. The Crawford Commission in 1993 expressed the view that commissioners "should be prepared to become advocates for their recommendations".[45] More recently, all members of the McLennan Commission appeared before Parliamentary committee in the Fall of

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41 The litigation leading up to the *Bodner* decision spawned by the refusal of four provincial governments to implement commission recommendations offers evidence of the need for commissions to be more proactive in their capacity as the neutralizing body between the judiciary and the government.

42 *Bodner*, *supra* at para. 12.

43 *PEI Reference, supra* at para. 189.

44 *PEI Reference*, *supra* at para. 189.

45 Crawford Report (1993) at 8.

2006 to explain their recommendations. It stands to reason that Commission members should also be advocates for the integrity and respect of the Commission process itself, as has already been done in the past. As set out above, successive Triennial Commissions have complained about the disregard and politicization of the process.

56. The Association and Council call upon the Commission to state in its report that the manner in which the McLennan Report has been dealt with is most unsatisfactory, and to express its concern that the constitutional process expounded in the *PEI Reference* is threatened by such Government conduct. The Commission should emphasize the importance of strict adherence to all aspects of the Commission process.

57. The Association and Council reject the Government's view that this Commission has no jurisdiction to comment on the Government's conduct. The Commission is the touchstone and guardian of the process to determine judicial compensation. This process is undermined if the Government rejects Commission recommendations for illegitimate reasons, or delays implementation of its response. If the process is undermined, the Commission ceases to be effective, one of the essential constitutional prerequisites set out by the Supreme Court of Canada.

III. THE COMMISSION'S MANDATE

58. The mandate of the Commission is set out in section 26 of the *Judges Act*, which reads, in part, as follows:

> Commission
>
> 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.

59. The *Judges Act* does not equate "adequacy" of judicial salaries and benefits with the minimum necessary to guarantee the financial security of judges. Compensation commissions are not to determine at what point financial security is undermined with a view to recommending a salary merely above that mark. Rather, the Commission must inquire into the adequacy of salaries and benefits with the dual purpose of ensuring public confidence in the independence of the judiciary and attracting outstanding candidates to the Bench.

60. The Drouin Commission said the following about the relationship between judicial compensation and the role of the judiciary in modern Canadian society:

> In response to the *Charter of Rights and Freedoms* (the "*Charter*"), and the growing complexity of our social and economic relationships, the Judiciary is playing an increasingly public role in key decisions that affect us all. Moreover, the characteristics of the Judiciary have changed and continue to shift: judges are being appointed at a younger age, and more females are being appointed to the Bench. The caseload of judges has grown, as more cases move to the higher courts for determination. Many of these cases are high profile and controversial. They capture the public interest and become the focus of media attention. Judicial decisions often generate considerable political debate. The reality of these trends must be recognized when considering the salary and benefits that are adequate to secure judicial independence and attract outstanding candidates to the Bench.[46]

61. The McLennan Commission for its part observed that

> [t]he *sui generis* nature of the role and responsibilities of judges in Canada requires that they be provided with salary and benefits, before and after 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."[47]

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46 Drouin Report (2000) at 10.

47 McLennan Report (2004) at 3-4.

IV. ISSUES

62. The Association and Council set out below the issues that they submit for this Quadrennial Commission's consideration. The recommendations sought by the judiciary are provided at the end of the discussion for each of those issues, and repeated *in seriatim* for convenience at the end of these submissions.

A. JUDICIAL SALARIES

1. Overview

63. An increase in the salaries of federally appointed judges is necessary in order to bridge the gap that persists between judicial salaries and the compensation of the most senior deputy ministers within the Government of Canada. An increase is also warranted by current income levels of senior private practitioners in Canada.

64. The Association and Council are therefore seeking, over the mandate of this Commission, phased salary increases of 3.5% as of April 1, 2008 and 2% as of each of April 1, 2009, 2010, and 2011, the whole exclusive of statutory indexing.

65. The above phased increases will mitigate a further erosion of the important principle of maintaining a rough equivalence between the remuneration of the judiciary and the compensation paid to senior deputy ministers.

2. The *Judges Act* criteria

66. In inquiring about the adequacy of judicial salaries, the Commission must consider a number of criteria set out in s. 26(1.1)(a) of the *Judges Act*. Each of those criteria is addressed below.

a) The economic conditions in Canada and the financial position of the federal Government

67. The first statutory criterion to be considered under subsection 26 (1.1) of the *Judges Act* is "the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government".

68. According to the Organization for Economic Cooperation and Development (OECD), when all levels of government are taken into account, Canada was the only G7 country to record a surplus in 2006.[48]

69. In the fiscal year ending on March 31, 2007, the federal Government recorded its tenth consecutive budget surplus. In the Economic Statement released on October 30, 2007, the federal Government announced that the surplus for the fiscal year ending on March 31, 2007 was $13.8 billion, which is significantly more than the $9.2 billion predicted in the March 2007 budget.[49] It is no wonder that the Government, in this same Economic Statement, referred to Canada's economic and fiscal fundamentals as "rock solid".[50]

70. Despite the recent downturn in the United States in the wake of the sub-prime mortgage crisis, the Canadian economy remains strong. The Canadian dollar in 2007 closed above parity for the first time since 1976, buoyed by the country's strong commodity exports, its current account surplus and repeated federal budget surpluses.[51] The Government projects that it will meet its target of a 25% debt-to-GDP ratio by 2012-2013,[52] one year ahead of the original target,[53] and down from a peak of nearly 70% in 1995-1996.[54]

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48 As cited in Government of Canada, *The Budget Plan 2007* at 310, reproduced in the judiciary's Book of Cited Documents.

49 Government of Canada, *Economic Statement* (2007) at 44, reproduced in the judiciary's Book of Cited Documents.

50 Government of Canada, *Economic Statement* (2007) at 7, reproduced in the judiciary's Book of Cited Documents.

51 "The Loonie Takes Wing" *The Economist* (27 September 2007), reproduced in the judiciary's Book of Cited Documents.

52 Government of Canada, *The Budget Plan 2007* at 152, reproduced in the judiciary's Book of Cited Documents.

53 Government of Canada, *The Economic and Fiscal Update* (2006) at 32, reproduced in the judiciary's Book of Cited Documents.

54 Government of Canada, *The Budget Plan 2007* at 307, reproduced in the judiciary's Book of Cited Documents.

71. Canada's employment performance is at its strongest in 30 years and consumer confidence remains high.[55] Between 2001 and 2005, the gross national income per capita in Canada increased by 17.5%.[56]

72. Robust economic growth and federal budget surpluses are expected to continue for the foreseeable future. In its Budget Plan of March 19, 2007, the Department of Finance, relying on a survey of private-sector forecasters, expected real GDP to increase by 2.3% in 2007 and 2.9% in 2008.[57] The outgoing governor of the Bank of Canada, Mr. David Dodge, has stated that he expects mineral and energy prices to remain strong for the foreseeable future, due to strong demand in emerging economies such as China. If this prediction holds true, *The Economist* predicted that Canada should successfully weather a recession in the United States, should one occur.[58]

73. Since 2006,[59] the Government has published on three occasions budget surplus projections for the period between 2006 and 2012. The projection of $4.2 billion for 2006-2007 was revised upward to $9.2 billion in the 2007 budget, and it was finally determined to be nearly $14 billion, as noted above. Furthermore, as of September 28, 2007, the Government was already operating at a $7.8 billion surplus,[60] meaning that its earlier projection of $3.5 billion for 2007-2008 was also too low. The revised projected underlying surplus as of October 30, 2007 is now $11.6 billion for 2007-08 and $4.4 billion for 2008-09.[61] It appears that the Government prefers to make very conservative projections, which are subsequently adjusted upwards in order to reflect the actual

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55 Government of Canada, *The Budget Plan 2007* at 10, reproduced in the judiciary's Book of Cited Documents.

56 Organization for Economic Cooperation and Development, *OECD Factbook 2007* at 29, reproduced in the judiciary's Book of Cited Documents.

57 Government of Canada, *The Budget Plan 2007* at 36, reproduced in the judiciary's Book of Cited Documents.

58 "The Loonie Takes Wing" *The Economist* (27 September 2007).

59 Government of Canada, *The Economic and Fiscal Update* (2006) at 30, reproduced in the judiciary's Book of Cited Documents.

60 "Government posts second large surplus in two days" *The Globe and Mail* (28 September 2007), reproduced in the judiciary's Book of Cited Documents.

61 Government of Canada, *Economic Statement* (2007) at 43, reproduced in the judiciary's Book of Cited Documents.

position. It can be concluded that the Government's financial position will continue to be exceptionally strong in the coming years.

74. A robust economy does not justify granting a windfall to the judiciary. The Association and Council therefore agree with the McLennan Commission when it concluded that healthy prevailing economic conditions in Canada can never serve as a licence for being "overly generous or spendthrift".[62] However, Parliament's intention is that the Commission should not view economic considerations as an impediment to an otherwise appropriate salary increase when the overall economic conditions are good and the current financial position of the Government is healthy.

b) The role of financial security in ensuring judicial independence

75. The second criterion to be considered by the Commission is "the role of financial security of the judiciary in ensuring judicial independence". In relation to this factor, the Drouin Commission stated:

> We strongly affirm the importance of an independent judiciary, and we recognize the role that financial security plays as a fundamental component of independence as set out in the second enumerated factor under subsection 26(1.1).[63]

76. In the *PEI Reference* case, Chief Justice Lamer sought to demonstrate the link between financial security for judges and the concept of the separation of powers. He said:

> What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be depoliticized. [...]
>
> […]
>
> The depoliticized relationships I have been describing create difficult problems when it comes to judicial remuneration. On the one hand, remuneration from the public purse is an inherently political concern, in the sense that it implicates general public policy. [...]

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62 McLennan Report (2004) at 9.

63 Drouin Report (2000) at 8.

> On the other hand, the fact remains that judges, although they must ultimately be paid from public monies, are not civil servants. Civil servants are part of the executive; judges, by definition, are independent of the executive. The three core characteristics of judicial independence - security of tenure, financial security, and administrative independence - are a reflection of that fundamental distinction, because they provide a range of protections to members of the judiciary to which civil servants are not constitutionally entitled.[64]

77. The role and responsibilities of judges are *sui generis*, as the Government acknowledged in its submissions to the Drouin Commission.[65] Indeed, judges occupy a unique position in our society and that uniqueness in all of its manifestations must be taken into account by the Commission. Those manifestations include the following :

i) Federally appointed judges are the only persons in Canadian society whose compensation, by constitutional requirement, must be set by Parliament. Once a judge accepts appointment, he or she becomes dependent on Parliament in respect of salaries and benefits.

ii) Judges are prohibited from negotiating any part of their compensation arrangement with the party who pays their salaries, a restriction that applies to no other person or class of persons in Canada.

iii) Judges are prohibited by the *Judges Act* - with good reason - from engaging in any other occupation or business beyond their judicial duties. It follows that judges cannot supplement their income by embarking upon other endeavours.

iv) Judges must divest themselves of any commercial endeavour that may involve litigious rights. This is a significant sacrifice that other members of society are not called upon to make.

v) Judges' compensation cannot be tied to performance or determined by commonly used incentives such as bonuses, stock options, at-risk pay, etc.

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64 *PEI Reference Case*, *supra* at paras. 140, 142, 143 [emphasis in original].

65 As cited in the Drouin Report (2000) at 13.

vi) Finally, there is no concept of promotion or merit in the discharge of judicial duties and there is no marketplace by which to measure the performance or compensation of individual judges.

c) The need to attract outstanding candidates to the judiciary

78. It is axiomatic that there is a correlation between the ability to attract talented individuals and adequate compensation. The McLennan Commission recognized this when it stated that

> [j]udicial 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 not be deterred from seeking judicial office.[66]

79. The connection between talent and adequate compensation was the impetus for the Government's decision to strike the first Advisory Committee on Senior Level Retention and Compensation, which reported in 1998 (the "**Strong Committee**"). The Strong Committee's mandate was the following:

> To provide independent advice and recommendations to the President of the Treasury Board concerning executives, deputy ministers and other Governor-in-Council appointees of the federal Public Service and public sector on:
>
> - developing a long-term strategy for the senior levels of the Public Service that will support the human resource management needs of the next decade,
> - compensation strategies and principles, and
> - overall management matters comprising among other things human resource policies and programmes, terms and conditions of employment, classification and compensation issues including rates of pay, rewards and recognition. [67]

80. The Strong Committee had this to say about the correlation between compensation and the calibre of candidates:

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66 McLennan Report (2004) at 15.

67 Advisory Committee on Senior Level Retention and Compensation, *First Report: January 1998* at 40, reproduced in the judiciary's Book of Cited Documents.

> In our view, compensation policy should be designed to attract and retain the appropriate calibre of employees to achieve an organization's objectives. Such compensation policy needs to be internally equitable, to be responsive to the economic and social environment, and to encourage and reward outstanding performance. Salary is usually the major driver of such policy. Salary depends upon responsibility, individual performance and comparability with relevant markets. Typically, standard practices and techniques are used to evaluate each of these objectively and transparently.[68]

81. While adequate compensation is required to attract outstanding candidates to the Bench, there are particularities in the setting of judicial compensation that the Commission must take into account. In the words of the McLennan Commission:

> 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.[69]

82. The need to attract outstanding candidates to the Bench, coupled with the fact that the vast majority of appointees come from private practice, explain the importance of private sector income in the determination of judicial salaries. The Scott Commission considered the relationship between judicial salaries and private sector income to be very important. Indeed, the Scott Commission characterized the statutory indexing of judges' salary as

> a statutory mechanism for ensuring that there will be, to the extent possible, a constant relationship, in terms of degree, between judges' salaries and the incomes of those members of the Bar most suited in experience and ability for appointment to the Bench. The importance of the maintenance of this constant cannot be overstated. It represents, in effect, a social contract between the state and the judiciary. [70]

83. The McLennan Commission made the point succinctly when it said that "it is in the public interest that senior members of the Bar should be attracted to the bench, and senior

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68 Advisory Committee on Senior Level Retention and Compensation, *First Report: January 1998* at 7, reproduced in the judiciary's Book of Cited Documents.

69 McLennan Report (2004) at 5.

70 Scott Report (1996) at 14.

members of the Bar are, as a general rule, among the highest earners in private practice."[71]

d) Other objective criteria

84. Among the "other objective criteria" that the Commission will no doubt wish to consider in its determination of judicial salaries is the evolution of the role and responsibilities of Canadian judges in recent years. The following observations of the Drouin Commission are still apposite today:

> There are increasing, and ever-shifting, demands placed upon the Judiciary. As a result of the introduction of the *Charter*, the growth in litigation in Canada, the complexity of the matters which actually proceed before the courts, and intensified public scrutiny of judicial decisions, the process and requirements of "judging" have become more onerous at both the trial and appellate levels.[72]

85. Judicial decisions at all levels are becoming increasingly complex and continue to be the focus of attention by the media and the public. Judges are repeatedly called upon to adjudicate on sensitive and contentious matters of a socio-political nature, a trend that has been accentuated by the continued willingness of Parliament and the provincial legislatures to leave many controversial issues for determination by the courts. A vivid illustration of this phenomenon can be found in the role played by Canadian courts in respect of the difficult issue of same-sex marriage.

86. The McLennan Commission echoed this point and explicitly supported the factors set out by the Drouin Commission, quoted above:

> 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

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71 McLennan Report (2004) at 32.

72 Drouin Report (2000) at 17.

that the relevant sections of the *Criminal Code* violated the provisions of the *Canadian Charter of Rights and Freedoms*.[73]

3. The comparators

87. In considering the adequacy of judicial salaries, two principal comparators have traditionally been relied upon by the judiciary and the Government, and by past commissions. They are:

i) the remuneration of the most senior level of deputy ministers within the federal Government; and

ii) the incomes of senior lawyers in the private practice of law in Canada.

88. While judges, particularly senior judges, in other jurisdictions such as England, Australia, New Zealand and the United States of America have been mentioned in the reports of previous commissions, the task of comparing, on the one hand, the complete context of Canadian judicial responsibilities, salaries and benefits within the Canadian economy, with the complete context of foreign judicial responsibilities, salaries and benefits within their respective economies, on the other hand, presents far too many variables in terms of duties, jurisdictions, currency values and fluctuations, cost of living, tax regimes, etc. to be useful as a comparative exercise.

a) The most senior deputy ministers

i) DM-3s and DM-4s

89. From at least the advent of the Triennial Commission process to the most recent Quadrennial Commission, judicial salaries have been compared with the remuneration of the most senior level of deputy ministers within the Government.[74]

90. With time, what started as a benchmark matured into the principle that there should be a rough equivalence between the salaries of federally appointed puisne judges and the

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73 McLennan Report (2004) at 5.

74 See Lang Report (1983) at 6.

midpoint of the remuneration of DM-3s, until recently the most senior level of deputy ministers within the federal Government.

91. Until the Crawford Commission reported on March 31, 1993, continual reference was made to the 1975 amendments to the *Judges Act* which had made the salary level of puisne judges roughly equivalent with the midpoint salary of the most senior level of deputy ministers. That rough equivalence was then adjusted regularly for inflation. Triennial Commissions prior to the Crawford Commission referred to that exercise as "1975 equivalency", and each of them successively recommended salary increases for judges as a function of the 1975 level, adjusted for inflation.

92. In its submission to the Crawford Commission, in 1993, the Government argued in support of direct equivalency with the highest deputy minister as opposed to the application of the "1975 equivalency", which entailed going back to the 1975 DM midpoint and adjusting for inflation in the years since that point.[75]

93. The Crawford Commission accepted that submission and found that the concept of "1975 equivalency" was no longer a particularly helpful benchmark as a determinant of judges' salaries. Instead, the Crawford Commission preferred to refer directly to a rough equivalence with the midpoint of the salary range of the most senior level of federal public servant, the DM-3.[76]

94. It is important to note that the midpoint is a midpoint of a salary range, not of the actual salary paid. Given that the upper and lower limits of the salary range for each of the DMs are theoretical limits rather than actual pay levels received, the Association and Council submit that it is more accurate to rely upon the average salary and/or compensation of senior deputy ministers, now that such averages are available, since those figures reflect actual remuneration paid on average.

95. Past commissions were of course fully appreciative of the fact that use of the DM-3 comparator for the purpose of setting judges' salaries does not amount to equating judges

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75 As cited in the Drouin Report (2000) at 28.

76 Crawford Report (1993) at 11.

to public servants.[77] As noted by the Crawford Commission, rough parity of this nature between judges and top level public servants finds support in the comparative salary figures from a number of other common law democracies.[78]

96. While making clear that no one comparator should be determinative, the Drouin Commission endorsed the principle of a relationship between judicial salaries and the remuneration of DM-3s. It stated:

> While we agree that the DM-3 comparator should not be determinative of our recommendations concerning judicial salaries, in our view, it is an appropriate and useful comparator at this time. More particularly, we have concluded that the important aspect of the DM-3 comparator, for the purposes of our inquiry, is the maintenance of a relationship between judges' salaries and the remuneration of those senior federal public servants whose skills, experience and levels of responsibilities most closely parallel those of the Judiciary. We agree with the substance of the observation by both the Courtois and Scott Commissions (1990 and 1996) that the relationship between the remuneration of DM-3s and judges should be maintained, not as a precise measure of "value" but as a reflection of "what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges." [79]

97. In the time period between the report of the Drouin Commission in 2000 and the beginning of the mandate of the McLennan Commission in 2003, the Government created a category above the DM-3. The DM-4 category was created as a consequence of a recommendation of the Strong Committee in its third report, dated December 2000.[80] It is interesting to note that one of the factors behind the recommendation of the Strong Committee was the need to "[send] an important message in terms of the government's willingness to attract and retain qualified and experienced staff."[81]

98. At the time of the McLennan Commission, it was understood that there were only two DM-4s, the Clerk of the Privy Council and the Deputy Minister of Finance. The

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77 See *e.g.* Crawford Report (1993) at 11.

78 Crawford Report (1993) at 11.

79 Drouin Report (2000) at 30-31.

80 Advisory Committee on Senior Level Retention and Compensation, *Third Report: December 2000* at 41, reproduced in the judiciary's Book of Cited Documents.

81 *Ibid.*

Association and Council have recently been informed by the Government that while there are still only two incumbents in the DM-4 category, the identity of their respective departments is now confidential on the ground that it would identify the particular individuals. The Government has advised that, in general, DM classification is personal to the incumbent and based on merit, and that it is not linked to particular departments.

99. It was explicitly stated before the McLennan Commission that, while the Association and Council reserved the right to use DM-4 as a comparator before subsequent Commissions, the judiciary was willing at that point to forego comparison with the compensation of DM-4s since the category was new and still in a state of flux. There is at present no indication that the DM-4 category will be phased out, and there is no reason to ignore it in the comparison between judicial compensation and the compensation of the most senior deputy ministers.

100. The McLennan Commission expressed some concern about confining the comparison to the DM-3 category,[82] and it also considered information relating to other DM categories. It seemed also to have drawn comparisons with other Governor-in-Council appointees, known as GC and GCQ categories, noting that some of these positions are quasi-judicial in nature.[83]

101. The Association and Council submit that judicial salaries should continue to be compared with the remuneration of the most senior deputy ministers. This comparator has withstood the test of time, and it is one that the Government itself submitted before the Crawford Commission as a formal comparator that should be adopted.[84]

102. To expand the comparative exercise would create the risk of diluting the comparator to a point where there would be no underlying principled logic justifying the comparison. The comparison of judicial salaries with the compensation of the most senior deputy ministers is required on the principled basis that the judiciary is not subordinate to the

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82 McLennan Report (2004) at 28.

83 McLennan Report (2004) at 30.

84 The Government's submission on this point before the Crawford Commission is cited in the Drouin Report (2000) at 28.

executive. Members of the judiciary should earn at the same general level as the senior members of the executive since it would otherwise upset the political equilibrium between these two branches of the state.

103. Consideration of the DM-1 is an example of how the comparator risks being diluted if other Governor-in-Council appointees are considered. The Association and Council have been informed by the Government that the DM-1 is normally an Associate Deputy Minister reporting to a DM or to a Deputy Secretary to the Privy Council Office. DM-1s can therefore fairly be described as "DMs in training". It is submitted that any comparison between the judiciary and this category would be bereft of principle.

104. As stated above and by many successive compensation commissions, comparison between the remuneration of the most senior deputy ministers and that of judges should continue, not because it is a precise measure of "value", but as a reflection of what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by senior deputy ministers and judges. Just as the senior deputy ministers are outstanding professionals who must execute with excellence heavy responsibilities regarding the conduct of the affairs of the executive branch, judges are appointed because of their outstanding performance as lawyers and because they must impartially and independently adjudicate disputes that have significant ramifications in the public and private spheres.

ii) At-risk pay

105. In recent years, a variable component described as "at-risk pay" has become a significant component of the remuneration of DMs (and certain other Governor-in-Council appointees). That component arose out of the recommendations of the Strong Committee, which said the following about "at-risk" pay for deputy ministers:

> […]we are proposing a compensation system where the job rate, the fixed component of compensation that is paid for fully satisfactory performance, is adjusted at intervals using market comparisons of total compensation in appropriate comparator groups. The proposed compensation system would have no overtime payments or automatic annual increments. It would, however, include a considerable amount of pay "at risk"—a variable component of compensation that is tied to

> corporate and individual achievement against targets, but that is integral to the total package.[85] [emphasis added]

106. More recently, the 2007 Advisory Committee on Senior Level Retention and Compensation, chaired by Carol Stephenson (the "**Stephenson Committee**"), has used the expression "performance award" or "performance pay" to refer to the variable part of the compensation paid to DMs,[86] although the Government continues to refer to it as "at-risk pay".

107. The Association and Council took the position before both the Drouin Commission and the McLennan Commission that at-risk-pay, for the purpose of making comparison with judicial salaries, should be considered an integral part of the compensation of DMs.

108. The Drouin Commission quite appropriately rejected the notion, put forward by the Government, that when considering the DM-3 comparator regard should be had only to the midpoint of the base salary range of DM-3s, without regard to at-risk awards. The Drouin Commission chose to consider the average of actual at-risk awards, an approach that is sound and that reflects the fact that the variable pay component of the remuneration of DM-3s is in reality an integral part of the total compensation for DM-3s, and was regarded as such by the Advisory Committee on Senior Level Retention and Compensation.[87] The Association and Council submit that this Commission should adopt the same approach.

109. While the McLennan Commission acknowledged that judicial salaries cannot include an at-risk component,[88] it nonetheless concluded that this component "cannot be ignored" [89] and indeed took it into account in its analysis.[90]

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85 Advisory Committee on Senior Level Retention and Compensation, *First Report: January 1998* at 20, reproduced in the judiciary's Book of Cited Documents.

86 The Stephenson Committee issued its report in the form of a letter addressed to the Honourable Vic Toews dated March 28, 2007, reproduced in the judiciary's Book of Cited Documents.

87 Drouin Report (2000) at 25-26.

88 See McLennan Report (2004) at 27-28.

89 McLennan Report (2004) at 27.

90 McLennan Report (2004) at 28-31.

110. Regrettably, the Government appears to want to continue to re-litigate this issue. In its Second Response, the Government attempted to impugn the McLennan Report because of the latter's consideration of at-risk pay in the analysis of DMs' compensation.[91]

111. It will be important for this Commission emphatically to reiterate that there is no credibility to a comparison of remuneration if one category is amputated of a significant component that forms an integral part of the recipient's total remuneration package.[92]

iii) Current compensation levels of DM-3s and DM-4s

112. The Stephenson Committee issued its Spring report on March 28, 2007.[93] It recommended, for implementation as of April 1, 2007, a 3.9% blended average increase in total compensation for DMs, apportioned as a 2.1% increase in base salaries and the balance apportioned differentially based on level. For DM-3s, the Committee recommended a 2.1% increase in base salaries and a maximum performance award of 27.4% up from 21.1%. For DM-4s, the recommendation was a 2.1% increase and a maximum performance award of 32.4% up from 26.1%.

113. On June 28, 2007, the Government accepted all of the recommendations of the Stephenson Committee and stated that they will be implemented immediately.[94]

114. The chart below provides compensation information for the DM-3s from 2003 to 2007. The actual at-risk component of the compensation of DM-3s for the year 2007-2008 will only be determined in the Summer of 2008. However, if an average is taken of the

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91 Second Response at 7.

92 We note that in the most recent report of the Advisory Committee on Senior Level Retention and Compensation, the Stephenson Committee, a recommendation was made to increase further the amount of at-risk compensation available. This is discussed below.

93 The Stephenson Committee issued its report in the form of a letter addressed to the Honourable Vic Toews dated March 28, 2007, reproduced in the judiciary's Book of Cited Documents.

94 "President of the Treasury Board welcomes recommendations of the Advisory Committee on Senior Level Retention and Compensation" (June 28, 2007), online: http://www.psagency-agencefpgc.ca/media/2007/20070628_e.asp, reproduced in the judiciary's Book of Cited Documents.

previous three years since April 1, 2004,[95] the average at-risk pay as a proportion of average salary would be 11.7%, and the at-risk pay would be $30,505, for an estimated total average compensation of $291,235 for the year 2007-2008.

DM-3 COMPENSATION INFORMATION						
Date	**Salary Range**	**Mid-Point Salary**	**Average Salary**	**Average at Risk Pay**	**Average at Risk Pay as % of Average Salary**	**Total Average Compensation**
April 1, 2003	$202,100 - $237,800	$219,950	$236,863	$30,188	12.7% (max. 20%)	$267,051
April 1, 2004	$207,200 - $243,800	$225,500	$239,980	$27,690	11.5% (max. 20%)	$267,670
April 1, 2005	$213,500 - $251,200	$232,350	$248,644	$26,200	10.5% (max. 20%)	$274,844
April 1, 2006	$218,800 - $257,500	$238,150	$255,178	$33,670	13.2% (max. 21.1%)	$288,848
April 1, 2007	$223,600 - $263,000	$243,300	$260,730	(est. $30,505)*	(est. 11.7%)* (max. 27.4%)	(est. $291,235)*

* Unavailable until Summer 2008

115. The chart below provides the available compensation information for DM-4s. The current midpoint of the base salary of a DM-4 is $272,400, while it was $266,750 between April 1, 2006 and March 31, 2007. This does not include the substantial at-risk component of the remuneration of DM-4s. The average base salary and the average at-risk pay awarded to DM-4s are not available due to confidentiality concerns. However, if it is assumed that the DM-4 incumbents receive in 2007-2008 an average salary that bears a relationship to the midpoint which parallels the relationship of the DM-3 average salary to the DM-3 midpoint in 2007-2008, it would mean that the DM-4 average salary is 7.2% more than the midpoint of $272,400, *i.e.* $291,915. Similarly, for the maximum DM-4 at-risk award of 32.4%, if it is assumed that DM-4s will receive for the 2007-2008 year an average at-risk pay in the same proportion as DM-3s are projected to receive (11.7% out of a maximum 27.4%), it would mean that the DM-4 average at-risk pay is 42.7% of

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95 The rationale for going back to April 1, 2004 as opposed to April 1, 2003 is that the former date facilitates a clearer comparison with judicial salaries since that date is the most recent watershed for judicial salary increases.

the maximum 32.4%, which is 13.8% of $291,915, resulting in $40,284 as average at-risk pay. Therefore, the estimated total average compensation of DM-4s for 2007-2008 would be $332,199 ($291,915 + $40,284). If this estimation methodology is applied to previous years for DM-4s, the calculation yields the figures found in the table below.

DM-4 SALARY INFORMATION						
Date	**Salary Range**	**Mid-Point Salary**	**Average Salary**	**Average at Risk Pay**	**Average at Risk Pay as % of Average Salary**	**Total Average Compensation**
April 1, 2003	$226,400 - $266,400	$246,400	(est. $265,347) *	*	*	*
April 1, 2004	$232,100 - $273,100	$252,600	(est. $268,820) *	(est. $38,710)*	(est. 14.4%)*	(est. $307,530)*
April 1, 2005	$239,100 - $281,300	$260,200	(est. $278,447)*	(est. $36,477)*	(est. 13.1%)*	(est. $314,924)*
April 1, 2006	$245,100 - $288,400	$266,750	(est. $285,823)*	(est. $46,589)*	(est. 16.3%)* (max. 26.1%)	(est. $332,412)*
April 1, 2007	$250,300 - $294,500	$272,400	(est. $291,915)*	(est. $40,284)**	(est. 13.8%)** (max. 32.4%)	(est. $332,199)**

* Unavailable due to confidentiality concerns

** Unavailable due to confidentiality concerns and unavailable until Summer 2008

iv) Compensation levels of other senior civil servants

116. The same compensation information as that provided above for DM-3s and DM-4s is reproduced in Appendix A for DM-1s and DM-2s. There were three other categories of Governor-in-Council appointees considered by the McLennan Commission: GC, GCQ, and heads of Crown corporations. The composition of these categories can be found in Appendix B and their salary information can be found in Appendix C.

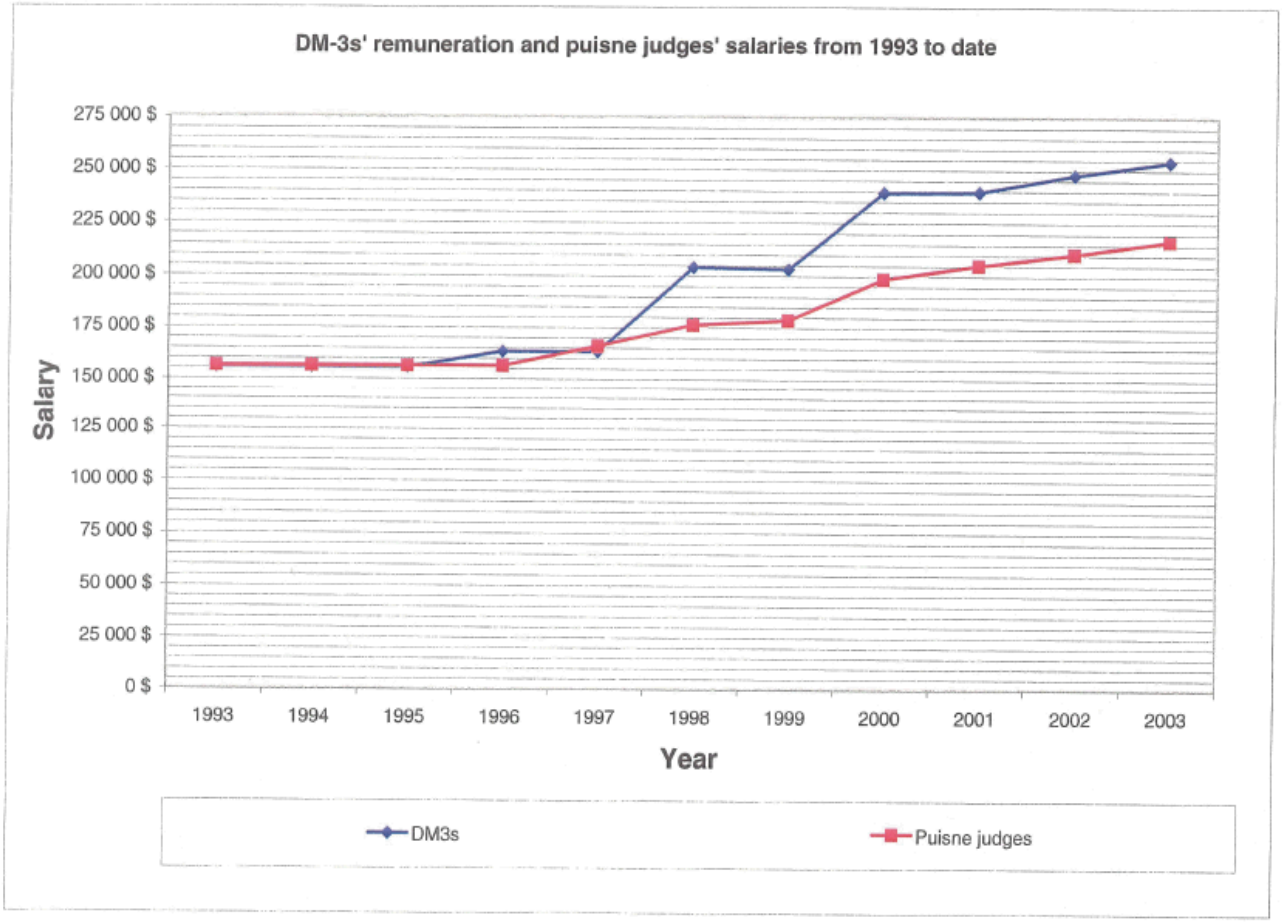
v) Comparison with judicial salaries

117. It is important to note that the most recent available compensation information relates to the year April 1, 2007 - March 31, 2008. This Commission must make its recommendations in light of an effective date of April 1, 2008, by which time there will of course have been another increase in the compensation of DMs and the other above-mentioned Governor-in-Council appointees. Therefore, DM compensation as a

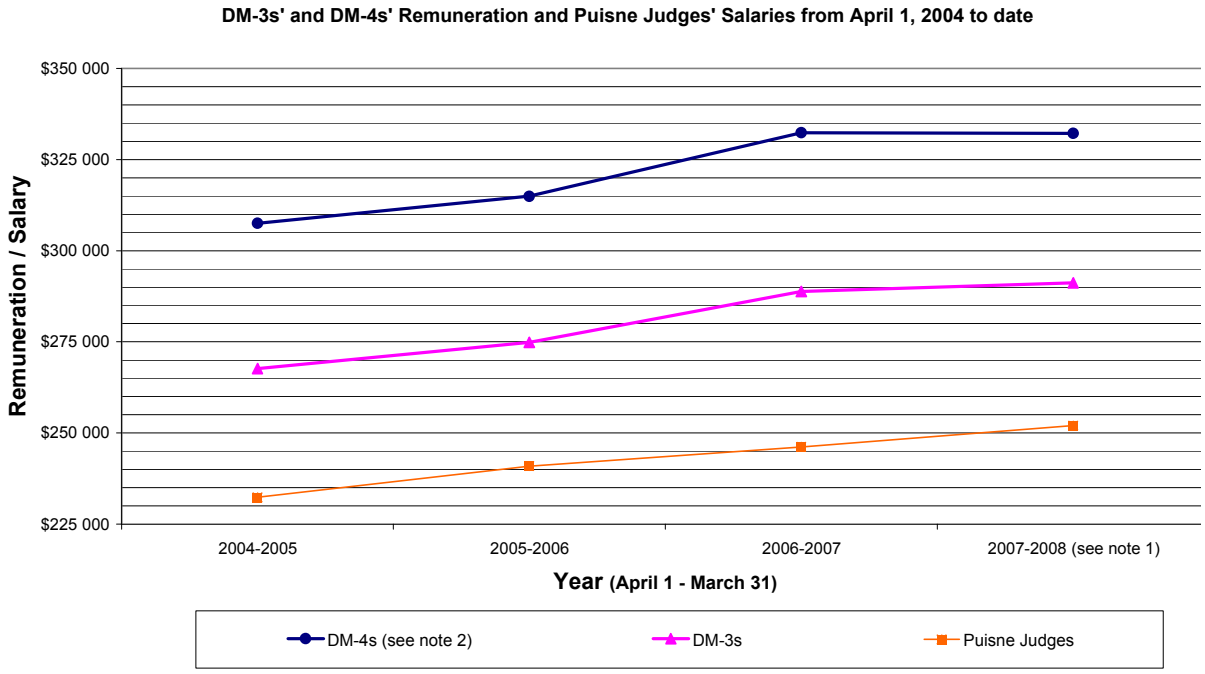
comparator for judicial salaries is necessarily a conservative comparator since judicial salaries will always be one year behind DM compensation, even if there is an attempt at maintaining rough equivalence.

118. The current salary of a puisne judge, in effect between April 1, 2007 and March 31, 2008, is $252,000. The total average compensation of a DM-3 *last* year (*i.e.* from April 1, 2006 to March 31, 2007) was $288,848. Once at-risk pay, as determined in the summer of 2008 for the current fiscal year, is added to the current average base salary of a DM-3 of $260,730, the total average compensation of DM-3s this year will undoubtedly increase, likely to more than $290,000.

119. Before the McLennan Commission, the Association and Council expressed concern that there was an increasing disparity between the salary of puisne judges and the midpoint of the DM-3 remuneration range, as illustrated by the graph below (and also in Appendix F).



120. Since April 1, 2004, the salary of puisne judges and the average compensation of DM-3s and DM-4s have evolved as set out in the graph below (and also in Appendix G).



Note 1
The "at risk" portion of the 2007-2008 DM-3 salary is currently unavailable and has been projected based on the immediately preceding 3-year average calculated as a percentage of average base salary, being 11.7%.

Note 2
The average salary and the "at risk" portion of the DM-4s' salaries are not made available due to confidentialityconcerns. Accordingly, the total average compensation of the DM-4s, including the "at risk" portion, has been estimated for each annual period based on the assumption that the DM-4 incumbents received average salaries and average "at risk" paythat bear the same relation to the DM-3s' average pay to mid-point salary and average "at risk" pay to maximum at risk pay, respectively.

121. As illustrated in Appendix G and above, the gap between judicial remuneration and that of the most senior deputy ministers is persisting. The longer this situation is allowed to persist, the more difficult it will be to narrow the gap. Yet, there is no comparator that embodies the democratic principle of equilibrium between the branches of the state the way this comparator does.

b) Private-sector lawyers' income

i) Introduction

122. The incomes of private practitioners have been considered by all judicial compensation commissions as an important comparator in the setting of adequate judicial salaries. As noted earlier in these submissions, this comparator has particular relevance in view of the third criterion provided in subsection 26(1.1) of the *Judges Act*, namely, "the need to attract outstanding candidates to the judiciary".

123. Lawyers in private practice have long been the primary source of candidates to the Bench. The Drouin Commission noted that in the years 1990 to 1999, 73% of those appointed to the Bench came from the private Bar, a proportion that increases to 82% if judges elevated from the provincial or territorial Bench are excluded from the calculation.[96] As the McLennan Commission reported in May 2004, based on information from the Judicial Appointments Secretariat, approximately 73% (268/368) of appointees during the period from January 1, 1997 to March 30, 2004 came from private practice.[97] For the period April 1, 2004 to March 31, 2007, a majority of 78% (110/141) continued to be appointed from the private sector. This proportion increases to 84% (110/131) if judges elevated from the provincial Bench and masters are excluded.[98] In short, it has been and will continue to be the case that the overwhelming majority of judges come from the private Bar.

124. Among the judges appointed between April 1, 2004 and March 31, 2007, 61.7% came from the ten largest urban centres.[99] In order to ensure that outstanding candidates from

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96 Drouin Report (2000) at 36-37.

97 See McLennan Report (2004) at 17, Table 2.

98 Information provided to Justice Canada and the Association by the Judicial Appointments Secretariat, Tables 7 and 8: "Appointees in Private Practice, Predominant Area of Practice, April 1, 2004 to March 31, 2007" and "Appointees Not in Private Practice, Predominant Area of Practice, April 1, 2004 to March 31, 2007", reproduced in the judiciary's Book of Cited Documents.

99 The following are the 10 largest Census Metropolitan Areas, according to the 2006 census: Toronto, Montreal, Vancouver, Ottawa-Gatineau, Calgary, Edmonton, Quebec City, Winnipeg, Hamilton, and London. See Table 4, "Place of Practice/Employment at Time of Appointment, City/Province/Territory, April 1, 2004 to March 31, 2007", provided by the Judicial Appointments Secretariat, and reproduced in the judiciary's Book of Cited Documents.

the private Bar will continue to seek judicial appointments, judicial salaries must be fixed taking into account the higher level of earnings that such practitioners enjoy as well as the higher cost of living that prevails in such centres.

125. The McLennan Commission found that the income of self-employed lawyers in the larger Canadian cities exceeded the current level of judicial compensation, even when the value of the judicial annuity is factored in.[100] Observing that many appointees come from higher-income brackets, the McLennan Commission expressed the view that it is important "to establish a salary level that does not discourage members of that group from considering judicial office."[101]

126. The *Judges Act* speaks of the need to attract "outstanding" candidates to the judiciary. Accordingly, it has long been acknowledged that what matters is not to count the numbers of applications for appointment but, rather, to create conditions that will encourage applications from outstanding candidates. While there are no doubt exceptions, the income derived from private practice by lawyers whom one would categorize as "outstanding" will almost always exceed the judicial salary. The Association and Council submit that Quadrennial Commissions must be forward-looking in establishing judicial salaries so as to ensure that outstanding candidates will be willing to seek judicial appointment throughout the four-year period covered by a Commission's salary recommendations.

127. Income is of course not the only measure of the quality of candidates from the Bar. It is also clear that the judicial annuity is a substantial benefit to judges which is not enjoyed by private practitioners. In addition, as the Lang Commission noted some twenty-four years ago, there is real value to be placed upon the opportunity for public service which is offered to members of the judiciary.[102] Nevertheless, judicial compensation, including

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100 McLennan Report (2004) at 48. The McLennan Commission estimated, based on the advice of its experts, that the value of the government-paid portion of the judicial annuity could be set at 22.5% of salary (see McLennan Report (2004) at 58).

101 McLennan Report (2004) at 49.

102 See Lang Report (1983) at 2-3.

judicial annuities, remains a factor of significant importance in the need to attract outstanding candidates to the judiciary.

128. In sum, the income level of senior lawyers in the private practice of law in Canada should continue to serve as a comparator by this Commission, and judicial salaries must be at a level sufficient to ensure that outstanding practitioners will continue to be prepared to consider judicial appointment.

ii) The Navigant Study

129. In view of the McLennan Commission's findings that the data provided by the Canada Revenue Agency ("**CRA**") for 2001 lawyers' income was generally unreliable, and its urging that some means be found to collect data on which future commissions could rely,[103] the Association commissioned Navigant Consulting, Inc. ("**Navigant**") to obtain data about private-sector lawyers' income in Canada. Navigant conducted a country-wide survey administered by way of e-mails sent to lawyers.

130. Navigant determined the level of income, both at the provincial level and across the country, at the 75th percentile. The McLennan Commission agreed with the application of the 75th percentile:

> The 75th percentile of income, calculated with an income exclusion [of $60,000], 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.[104]

131. The low-income cut-off of $60,000 was applied by the McLennan Commission because it was of the view that it would be unlikely that lawyers from the pool of qualified candidates would have an income level lower than $60,000.[105] The Navigant survey similarly excluded part-time practitioners, respondents who were not lawyers, and

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103 McLennan Report (2004) at 91-92.

104 McLennan Report (2004) at 43.

105 *Ibid.*

respondents who have less than 10 years membership at the Bar,[106] all with a view to ensuring that only the pool of qualified candidates was being analyzed.

132. As set out in greater detail in its report (the "**Navigant Report**"), Navigant found that lawyers' income in the private sector at the 75th percentile for Canada as a whole in 2006 was $366,216.[107] In Ontario, the income at the 75th percentile was $437,500.[108] Only Saskatchewan had income at the 75th percentile which was less than $252,000, the current salary of puisne judges.[109]

iii) The 2005 CRA data

133. CRA was mandated by the Government to assemble a database consisting of the 2005 tax returns of self-employed individuals who identified themselves as lawyers on forms T2032, "Statement of Professional Activities", or T2124, "Statement of Business Activities".[110] This database was then used to generate tables based on certain parameters.

134. As discussed in the Navigant report, when CRA was asked to generate a table of net professional income of all self-employed lawyers in Canada for 2005, with low-income exclusion of $60,000, the income at the 75th percentile was $304,276. A similar table for the top ten Census Metropolitan Areas yielded income at the 75th percentile of $362,944. These 2005 incomes are substantially higher than the 2007 salary of $252,000 for puisne judges, higher even when taken together with the attributed value of the judges' annuity.[111]

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106 These exclusions seem to have had the same effect as the $60,000 exclusion since applying the $60,000 exclusion to the Navigant data did not change the resulting income level at the 75th percentile.

107 Navigant Report at 15.

108 *Ibid*.

109 The data for Yukon, Nunavut and the Northwest Territories was aggregated to protect confidentiality.

110 According to the methodology used by CRA, filers who incorrectly filed a business income tax return form instead of a professional form were re-assigned to a professional income return form.

111 The McLennan Commission estimated, based on the advice of its experts, that the value of the government-paid portion of the judicial annuity could be set at 22.5% of salary (see McLennan Report (2004) at 58).

135. There are two important caveats to note. First, the CRA data is 2005 incomes. Salary levels in the private sector have increased since then. There should therefore be an adjustment in line with increases in private-sector lawyers income, which in recent years have been significantly higher than inflation. Second, the CRA data does not necessarily show the full picture of the income-earning capacity of a lawyer and his/her family. Lawyers in private practice are in a position to structure their affairs to achieve a measure of income-splitting with other family members or family-owned entities such that a portion of the consolidated profit from a professional business often accrues to taxpayers other than the lawyer in question.

4. Salary increases sought by the judiciary

136. The Association and Council seek the following salary increases, phased over the mandate of this Commission: 3.5% as of April 1, 2008 and 2.0% as of each of April 1, 2009, 2010, and 2011, the whole exclusive of statutory indexing.

137. The current salary of puisne judges is $252,000 and, as of April 1, 2008, will be increased by statutory indexing of, as currently estimated, 2.4% to $258,048.[112] If the proposed 3.5% increase were awarded, total remuneration would be $266,868 as of April 1, 2008. With an annual 2% increase thereafter and estimated annual statutory indexations in subsequent years of 2.6%, 2.8%, and 3%, respectively, the salary of puisne judges at the end of this Commission's mandate would be $307,170.

138. Statutory indexing is excluded from the increases sought by the Association and Council because, while statutory indexing protects adequate compensation (within the meaning of s. 26(1) of the *Judges Act*) against inflation, it is not a means to determine adequate compensation.

139. The principal rationale for the proposed annual phased increases is that it reflects the reality that salary increases are meant to cover the four years of the mandate of the Commission. Both the Government and the judiciary invited the McLennan Commission

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[112] This figure is based on current IAI projections by the Office of the Superintendent of Financial Institutions, see Appendix D.

to adopt this approach, which the Drouin Commission had itself adopted by recommending increases in instalments over the course of its mandate.

5. Payment of interest on retroactive salary increases

140. Government implementation of Commission recommendations has often been delayed. Most recently, when the salary recommendation of the McLennan Commission was partially implemented, it was implemented woefully late.

141. The statute by which the Second Response was implemented was adopted on December 14, 2006, and the increased salary was paid in January 2007. The McLennan Commission issued its recommendations in May 2004. The Government therefore took 2½ years to implement an increase.

142. While the salary increase was made retroactive to April 1, 2004, and included cumulative statutory indexing for cost of living since April 1, 2004, members of the judiciary were deprived of the benefit of that increase between April 1, 2004 and December 14, 2006, the latter being the beginning of the period of the increased salary.

143. Interest is the only way to compensate for the benefit lost during the period of delayed implementation. A salary increase is not truly retroactive unless interest is applied to capture the benefit lost during the period of retroactivity.

144. Accordingly, the Association and Council urge the Commission to recommend that payment of a retroactive salary adjustment to federally appointed judges shall always include interest at the rate prescribed pursuant to the *Income Tax Act* from the day on which the adjustment is effective, such interest rate to be applied to the modified base amount if it is further adjusted for cost of living on April 1 in the intervening year or years, between the effective date of the retroactive adjustment and the date of implementation.

6. Salary differentials between chief justices and associate chief justices, puisne judges of the Supreme Court of Canada and the Chief Justice of Canada

145. For many years, relatively constant salary differentials have existed between puisne judges, chief justices and associate chief justices, puisne judges of the Supreme Court of Canada, and the Chief Justice of Canada. Neither the Drouin Commission nor the McLennan Commission saw any reason to alter these differentials, and it is submitted by the Association and Council that they ought to remain unchanged.

7. Salary differential between appellate and trial court judges

146. The Association's membership includes trial as well as appellate judges. Therefore, the Association and Council have historically adopted a position of neutrality on the question of whether the Commission should recommend a salary differential between appellate and trial court judges.

147. While maintaining this traditional position of neutrality, the Association and Council submit that this Commission has the jurisdiction to consider the issue of a salary differential.

8. Salary recommendations sought by the judiciary

148. The Association and Council urge the Commission to make the following salary recommendations:

That the salary of puisne judges be increased by 3.5% as of April 1, 2008 and by 2.0% as of each of April 1, 2009, 2010, and 2011, the whole exclusive of statutory indexing.

That payment of a retroactive salary adjustment to federally appointed judges shall always include interest at the rate prescribed pursuant to the *Income Tax Act* from the day on which the adjustment is effective, such interest rate to be applied to the modified base amount if it is further adjusted for cost of living on April 1 in the intervening year or years, between the effective date of the retroactive adjustment and the date of implementation.

That the salary differential between puisne judges, chief justices and associate chief justices, puisne judges of the Supreme Court of Canada and the Chief Justice of Canada be maintained in the same proportion as currently exists.

B. OTHER ITEMS

1. Relocation upon retirement

149. Paragraphs 40(1)(c)-(f) of the *Judges Act* provide for the payment of a retirement removal allowance to judges of the Supreme Court, the Federal Courts, the Tax Court, and the territorial courts. This removal allowance is payable upon, or in anticipation of, the judge's retirement. It is also payable upon the judge's death, in which case payment is made to the survivor and children. The removal allowance covers the costs of moving to a place in Canada outside the area in which the judge was required to reside by the relevant statute.

150. The above provisions omit judges of the provincial superior courts and courts of appeal, even though those judges may also be required to relocate upon appointment or during their tenure, as acknowledged in paragraphs 40(a) and (b) of the *Judges Act* and as reflected in the various provincial statutes requiring judges to relocate so that they reside in the districts where they sit.

151. Before the McLennan Commission, Justice Wright in his own capacity had proposed an extension of the allowance provided for in s. 40(1)(c)-(f) to all provincial superior court and appellate judges. The McLennan Commission did not accept Justice Wright's submission and recommended that there be no change to the entitlement to the post-retirement removal allowance.[113]

152. It is submitted that it is anomalous for only a certain category of federally appointed judges needing to relocate by reason of their appointment to be reimbursed for their relocation expenses in relation to retirement. This asymmetry should be corrected. The McLennan Commission declined to accept Justice Wright's submission because it thought that there was no statutory requirement for superior court judges to reside in a specific area. In fact, statutes such as the *Court of Appeal Act* and *Court of Queen's Bench Act* in Alberta, the *Queen's Bench Act* in Saskatchewan, the *Court of Queen's*

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[113] McLennan Report (2004) at 84.

Bench Act in Manitoba, the *Courts of Justice Act* in Quebec, the *Judicature Act* in New Brunswick, and the *Judicature Act* in Nova Scotia all contain residency requirements for superior court judges in those jurisdictions.

153. The Association and Council therefore urge the Commission to make the following recommendation:

That, in light of the various provincial statutes imposing residency requirements, section 40 of the *Judges Act* be amended so that judges of the provincial superior courts and courts of appeal are treated similarly to the judges of the Supreme Court, the Federal Courts, the Tax Court, and the territorial courts as far as relocation upon retirement, or relocation of survivors and children upon death, is concerned.

2. Northern judges' annuity

154. Subsections 43(1) and (2) of the *Judges Act* respectively provide that where a judge who previously held the office of chief justice or associate chief justice elects supernumerary status, or elects to cease performing the duties of that office and perform only the duties of a judge, his or her annuity shall be based on the salary annexed to the office of chief justice or associate chief justice, as the case may be.

155. The senior judges of the territorial courts are not included in s. 43(1) and (2) of the *Judges Act*. Yet, they are in every other respect the same as the chief justices or associate chief justices of the provincial superior courts. This inconsistency should be corrected.

156. The Association and Council therefore urge this Commission to make the following recommendation:

That the *Judges Act* be amended, where necessary, so as to ensure that "chief justice" includes senior judges of the territorial courts in respect of the matter of their annuities.

3. Increase in representational allowance

157. A representational allowance for chief justices and associate chief justices, as well as for puisne judges of the Supreme Court of Canada, was introduced by an amendment to the

Judges Act effective April 1, 1979. The amounts of the allowance were doubled effective April 1, 1985 and were only subsequently increased effective April 1, 2000.[114]

158. The representational allowance is used to defray the costs arising from the supplementary obligations attached to the post of those who benefit from this allowance, namely chief justices and associate chief justices, senior judges and regional senior judges of certain courts, and puisne judges of the Supreme Court of Canada.

159. The current levels of the representational allowance are set out in s. 27(6) of the *Judges Act*. Most of those who benefit from this allowance are currently entitled to receive $10,000 as a representational allowance, except for the Chief Justice of Canada, who is entitled to $18,750, and the Chief Justice of the Federal Court of Appeal and the chief justices of each province, who are entitled to $12,500.

160. It will be eight years since these representational allowances were last adjusted. In light of the significant increase in the administrative tasks and representational functions of those who benefit from this allowance, the current levels are inadequate and no longer commensurate with the responsibilities attached to these offices.

161. Figures from the Office of the Commissioner of Federal Judicial Affairs indicate that around 50% of those who are entitled to the allowance draw on the full amount of the allowance, while the overall usage rate of this benefit is 88%. Anecdotal evidence indicates that those who draw on the full amount of the allowance actually need more than is currently available to adequately perform their representational functions.

162. The Association and Council submit that the base allowance of $10,000 should be increased to $12,000 and that the other representational allowances should be similarly increased by approximately 20% of their current levels, *i.e.* $22,550 for the Chief Justice of Canada and $15,000 for chief justices of the provinces and of the Federal Court of Appeal. This increase essentially reflects the cumulative IAI increases since 2000. Additionally, the Association and Council submit that the representational allowance for

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114 See Table attached as Appendix E.

Ontario regional senior judges, including the senior family law judge, should be increased to $5,600, which reflects the cumulative IAI increases since 2004.

163. The Association and Council therefore urge this Commission to make the following recommendation:

That s. 27(6) of the *Judges Act* be amended in order to increase the current levels of representational allowances to $5,600 for Ontario regional senior judges, including the senior family law judge, $12,000 for chief justices and associate chief justices, senior judges, and puisne judges of the Supreme Court of Canada, $15,000 for chief justices of the provinces and of the Federal Court of Appeal, and $22,550 for the Chief Justice of Canada.

C. PROMOTING PROMPT GOVERNMENT IMPLEMENTATION OF COMMISSION RECOMMENDATIONS

164. The judiciary's serious concern with the Government's conduct in relation to the McLennan Report, including the issuance of a Second Response and the delayed partial implementation of its recommendations, has already been expressed at the outset of these submissions. The judiciary has also expressed the need to restore confidence in the Commission process.

165. The Association and Council reiterate their call on this Commission to state in its report that the manner in which the McLennan Report has been dealt with is most unsatisfactory, and to express its concern that the constitutional process expounded in the *PEI Reference* is threatened by such Government conduct.

166. In this section, the judiciary urges the Commission to invite the Government to give consideration to amending the *Judges Act* so as to promote prompt Government implementation of Commission recommendations after the Minister of Justice has issued a response under s. 26(7) of the *Judges Act*.

167. As far back as the first Triennial Commission, the Lang Commission, there have been deliberations on effective means of implementing recommendations of compensation commissions. The Lang Report (1983) recommended that the Government develop a

formula for the fixing of salaries similar to that in effect in New South Wales, Australia.[115] In that jurisdiction, the recommendations of an independent Remuneration Tribunal become law after the passage of a fixed time if no specific objection is made to its recommendations by 50% of the legislature.

168. Such a formula is often referred to as a negative-resolution model. The Lang Commission considered the fact that s. 100 of the *Constitution Act, 1867* provides for Parliament to fix the salaries of superior court judges, but concluded that the provision was not a "final barrier" to the adoption of the negative-resolution formula.[116] The Lang Commission suggested as well that the possibility of a constitutional amendment be considered as part of the adoption of this formula.

169. The Guthrie Report (1987) also considered the "New South Wales formula".[117] It took note of the fact that both the Joint Committee on Judicial Benefits and the Canadian Bar Association made representations before the Commission to the effect that the Government should adopt the New South Wales formula. However, the Guthrie Commission declined to endorse the formula, concluding that it would not "be such an improvement on the present system as to justify a constitutional amendment."[118] Nonetheless, the Guthrie Commission did call on Parliament to be prompt in its implementation of, or expression of disagreement with, recommendations, lamenting the fact that there had been no action on the recommendations of the Lang Commission or the Dorfman and de Grandpré Committees before it.[119]

170. It should be noted that the "New South Wales formula" is no longer confined to that Australian state. In 1989, the Australian Parliament amended the *Remuneration Tribunal Act 1973* to provide for a negative-resolution procedure at the federal level as well.[120]

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115 Lang Report (1983) at 13 and 16.

116 Lang Report (1983) at 14.

117 Guthrie Report (1987) at 25.

118 *Ibid.*

119 Guthrie Report (1987) at 6.

120 *Remuneration Tribunal Act 1973* (Aus.), ss. 7(5)-7(8), reproduced in the judiciary's Book of Cited Documents.

Since 1989, the Remuneration Tribunal is required to "determine" the remuneration of Federal Court and territorial Supreme Court judges. It must give the Minister a copy of every determination it makes. The Minister must cause a copy of the determination to be laid before each House of Parliament within 15 sitting days of that House after the Minister receives the determination.

171. The legislation provides that the determination comes into effect on the latest of the date specified in the determination and the day after the 15th sitting day of the House of Representatives or the Senate after a copy of the determination is laid before the House or Senate. If either House of Parliament, within 15 sitting days of that House after a copy of the determination has been laid before it, passes a resolution disapproving of the determination, then the determination either does not come into operation or has no force or effect as of the date of the disapproval. As a practical matter, the Tribunal can set a date for coming into force that ensures that the disapproval deadline has expired before the determination comes into force.

172. Given that critics of a negative-resolution model for the federal level in Canada point to s. 100 of the *Constitution Act, 1867*, and the fact that it provides that judicial salaries shall be “fixed” by Parliament, it is noted that the Australian Constitution also requires that judicial remuneration be "fixed" by Parliament. Section 72(iii) of the *Commonwealth of Australia Constitution Act* states:

> 72. The Justices of the High Court and of the other courts created by the Parliament:
>
> [. . .]
>
> (iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office. [Emphasis added.]

173. The Courtois Report (1990) recommended that there be time limits within which the Government would have to respond to the Commission.[121] Following the Supreme Court

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[121] Courtois Report (1990) at 7.

decision in the *PEI Reference*,[122] such a time limit now exists in the *Judges Act* at s. 26(7).[123]

174. The Crawford Report (1993) recommended not only that the Government respond within a fixed period, but also that it introduce resultant legislation as soon as feasible and no later than 20 sitting days after the expiry of a nine-month period immediately following the submission of the Commission report to the Minister.[124] While the Crawford Commission declined to recommend that its recommendations be binding on the Government, stating that it would be neither desirable nor constitutional, it insisted on the need for the process to be effective and depoliticized.

175. The Scott Report (1996) had extensive passages on means to reform the process of Government treatment of Commission recommendations.[125] Two options were considered: the negative-resolution formula and a fixed time period for the tabling of a bill incorporating the desired changes to judicial remuneration.

176. The Scott Commission concluded that the negative-resolution formula "has much to recommend it", but that it was not likely to be taken seriously by the Government. The Scott Commission also saw a risk that future reports of the Commission might be discarded in their entirety by the Government as a way to pre-empt the effect of the negative-resolution formula.[126]

177. Accordingly, the Scott Commission confined itself to the more "modest" proposal of having a fixed time period for the tabling of a bill incorporating the desired changes to judicial remuneration. Its specific recommendation was formulated as follows:

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122 *PEI Reference* at para. 179.

123 However, it arguably falls short of what the Supreme Court said the Constitution required since the *Judges Act* only requires the Minister of Justice to respond, whereas the Supreme Court said that the body that is responsible for setting judicial salaries, in this case, Parliament, must respond (*PEI Reference* at para. 179).

124 Crawford Report (1993) at 7-8.

125 Scott Report (1996) at 6-12.

126 Scott Report (1996) at 11.

> It is therefore recommended that: section 26(3) of the *Judges Act* be amended to require that the Minister, after a fixed period of time (three months), shall cause the Report of the Triennial Commission to be tabled in the House of Commons, together with the Government's response to the Report and a Government Bill incorporating those matters requiring legislative change as part of the process of implementing the same; both the Response and the Bill to be filed within a fixed number of sitting days (30 days) after the expiry of the initial period noted above.[127]

178. The Scott Commission warned that if corrective measures were not introduced, "the statutory scheme will collapse of its own weight with the attendant damage to the institution of the judiciary which can be expected to occur."[128]

179. As already noted, following the *PEI Reference* the *Judges Act* was amended to reflect the constitutional requirement that the Government formally respond to the report of the Commission. In spite of these amendments, there remains a significant lacuna in the *Judges Act* in that there is an abrupt end to the Commission process once the Minister of Justice issues a response to the Commission's report under s. 26(7). The absence of any formal steps provided for by the statute after the response is given allows for inordinate delays after a response has been issued. This is contrary to the constitutional norm that requires diligence in dealing with the Commission's recommendations, a requirement which necessarily extends to implementing the Government's response.

180. Based on the options canvassed by past Commissions and the Supreme Court in the *PEI Reference*, the following three models are options to promote the prompt implementation of the Commission's recommendations:

i) Negative-resolution procedure, where Commission recommendations become effective unless the House of Commons or the Senate passes a resolution rejecting them within a specified period of time.

ii) Affirmative-resolution procedure, where Commission recommendations become effective only if the House of Commons and the Senate pass a resolution accepting them.

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127 Scott Report (1996) at 12.

128 *Ibid.*

iii) Statutory provisions requiring the Minister of Justice, within a set time period, to table a bill implementing the Commission's recommendations, to the extent that the executive branch has accepted them, and/or requiring Parliament to complete the legislative process in relation to an implementation bill within a specified time period.

181. The Association and Council do not espouse any particular option before the Commission. These options are simply presented in order to inform the recommendation sought by the judiciary for changes to the *Judges Act* providing for prompt implementation.

182. The Association and Council are aware that doubts have been raised in the past about the constitutional validity of some of these options. The Association and Council point out, however, that consideration of these options predates the *PEI Reference*, which has elevated the commission process to a constitutional status.

183. The Association and Council urge this Commission, in addition to stating in its report that the manner in which the McLennan Report has been dealt with is most unsatisfactory, and to express its concern that the constitutional process expounded in the *PEI Reference* is threatened by such Government conduct, to make the following recommendation:

That consideration be given to amending the *Judges Act* in order to provide for steps towards prompt implementation of the Commission's recommendations after the Minister of Justice has issued a response, to the extent of that response.

D. COSTS

184. Under s. 26.3(2) of the *Judges Act*, the judiciary is entitled to a reimbursement of two-thirds of the costs arising from its participation in the Commission's inquiry. It is important to recount the genesis of this provision since the advent of the Quadrennial Commission process.

185. The Drouin Commission was of the opinion that some reimbursement of the judiciary's representational costs was both desirable and necessary to ensure the efficacy of the Commission's proceedings.[129]

186. The Drouin Commission noted that its proceedings had been materially improved by the active participation by both the judiciary and Government.[130] It added that it was highly desirable that members of the judiciary participate fully in the Commission process.[131]

187. After careful consideration of the issue, the Commission recommended that the Government pay 80% of the total representational costs of the Association incurred in connection with the judiciary's participation in commission process.[132]

188. In the Minister's response to the Drouin Report, the Government stated that it did not accept this recommendation. Instead, the Government announced that it would propose an amendment to the *Judges Act* providing that 50% of judicial representational costs be paid to the judiciary on a solicitor/client basis, subject to taxation in the Federal Court. The *Judges Act* was amended accordingly.

189. The judiciary urged the McLennan Commission to reiterate the Drouin Commission's recommendation in this respect, on the basis of the compelling reasoning set out in the Drouin Report. The McLennan Commission reasoned as follows:

> 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.[133]

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129 Drouin Report (2000) at 103.

130 Drouin Report (2000) at 104.

131 Drouin Report (2000) at 105.

132 Drouin Report (2000) at 111.

133 McLennan Report (2004) at 88.

190. As a result, the McLennan Commission recommended that the Government pay 100% of the disbursements and two-thirds of the legal fees incurred by the judiciary.

191. Once again, the Government did not accept this recommendation. Rather, the Government responded by substituting the two-thirds reimbursement now provided for in the *Judges Act* for the formula recommended by the McLennan Commission.

192. The Association and Council deplore that, for the second time, a carefully considered and well-reasoned recommendation has been rejected by the Government and replaced by a variance thereof which is financially more burdensome to the judiciary. Accordingly, the Association and Council submit that the Commission should recommend that the Government ought to pay 100% of the disbursements and two-thirds of the legal fees incurred by the judiciary.

193. If the Commission were to decline to recommend a change to the formula set out in s. 26.3(2) of the *Judges Act*, the judiciary submits in the alternative that at least the costs arising from the survey conducted by Navigant should be reimbursed in their entirety since it was at the McLennan Commission's behest that the judiciary took it upon itself to retain Navigant, with a view to providing reliable private-sector data that would be useful to the Commission and all parties.

194. The Association and Council therefore urge the Commission to make the following recommendation:

That the Government should reimburse 100% of the disbursements and two-thirds of the legal fees of the judiciary.

Alternatively,

That, by way of exception to the formula set out in s. 26.3(2) of the *Judges Act,* the fees and expenses of Navigant Consulting, Inc. in connection with the survey of Canadian private-sector lawyers' income be reimbursed in full to the Association.

V. SUMMARY OF RECOMMENDATIONS SOUGHT

195. The following is a summary of the recommendations sought by the judiciary:

1. **That the salary of puisne judges be increased by 3.5% as of April 1, 2008 and by 2.0% as of each of April 1, 2009, 2010, and 2011, the whole exclusive of statutory indexing.**

2. **That payment of a retroactive salary adjustment to federally appointed judges shall always include interest at the rate prescribed pursuant to the *Income Tax Act* from the day on which the adjustment is effective, such interest rate to be applied to the modified base amount if it is further adjusted for cost of living on April 1 in the intervening year or years, between the effective date of the retroactive adjustment and the date of implementation.**

3. **That the salary differential between puisne judges, chief justices and associate chief justices, puisne judges of the Supreme Court of Canada and the Chief Justice of Canada be maintained in the same proportion as currently exists.**

4. **That, in light of the various provincial statutes imposing residency requirements, section 40 of the *Judges Act* be amended so that judges of the provincial superior courts and courts of appeal are treated similarly to the judges of the Supreme Court, the Federal Courts, the Tax Court, and the territorial courts as far as relocation upon retirement, or relocation of survivors and children upon death, is concerned.**

5. **That the *Judges Act* be amended, where necessary, so as to ensure that "chief justice" includes senior judges of the territorial courts in respect of the matter of their annuities.**

6. **That s. 27(6) of the *Judges Act* be amended in order to increase the current levels of representational allowances to $5,600 for Ontario regional senior judges, including the senior family law judge, $12,000 for chief justices and associate chief justices, senior judges, and puisne judges of the Supreme Court of Canada, $15,000 for chief justices of the provinces and of the Federal Court of Appeal, and $22,550 for the Chief Justice of Canada.**

7. **That consideration be given to amending the *Judges Act* in order to provide for steps towards prompt implementation of the Commission's recommendations after the Minister of Justice has issued a response, to the extent of that response.**

8. a) That the Government should reimburse 100% of the disbursements and two-thirds of the legal fees of the judiciary.

Alternatively,

b) That, by way of exception to the formula set out in s. 26.3(2) of the *Judges Act*, the fees and expenses of Navigant Consulting, Inc. in connection with the survey of Canadian private-sector lawyers' income be reimbursed in full to the Association.

The whole respectfully submitted.

Montréal, December 14, 2007

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APPENDIX A -

Compensation information for DM-1s and DM-2s

DM-1 COMPENSATION INFORMATION						
Date	**Salary Range**	**Mid-Point Salary**	**Average Salary**	**Average at Risk Pay**	**Average at Risk Pay as % of Average Salary**	**Total Average Compensation**
April 1, 2003	$157,000 - $184,700	$170,850	$178,667	$13,338	7.5% (max: 15%)	$192,005
April 1, 2004	$160,900 - $189,400	$175,150	$182,485	$11,631	6.4% (max. 15%)	$194,116
April 1, 2005	$165,800 - $195,100	$180,450	$191,587	$13,970	7.3% (max. 15%)	$205,557
April 1, 2006	$170,000 - $200,000	$185,000	$198,804	$16,431	8.3% (max. 16.1%)	$215,235
April 1, 2007	$173,600 - $204,200	$188,900	$200,816	(est. $14,660)*	(est. 7.3%)* (max. 22.4%)	(est. $215,476)*

* Unavailable until Summer 2008

DM-2 COMPENSATION INFORMATION						
Date	**Salary Range**	**Mid-Point Salary**	**Average Salary**	**Average at Risk Pay**	**Average at Risk Pay as % of Average Salary**	**Total Average Compensation**
April 1, 2003	$180,500 - $212,300	$196,400	$208,548	$18,996	9.1% (max. 20%)	$227,544
April 1, 2004	$185,000 - $217,700	$201,350	$213,465	$19,494	9.1% (max. 20%)	$232,959
April 1, 2005	$190,600 - $224,300	$207,450	$217,552	$19,588	9% (max. 20%)	$237,140
April 1, 2006	$195,500 - $230,000	$212,750	$225,912	$25,339	11.2% (max. 21.1%)	$251,251
April 1, 2007	$199,700 - $234,900	$217,300	$230,498	(est. $22,589)*	(est. 9.8 %)* (max 27.4%)	(est. $253,087)*

* Unavailable until Summer 2008

APPENDIX B -

Description of GC, GCQ and heads of Crown corporations

GC AND GCQ POSITIONS	
Level	**Name of Positions**
GC-9	1. President, Natural Sciences and Engineering Research Council 2. President, Social Sciences and Humanities Research Council
GC-10	1. President, Canadian Institutes of Health Research 2. President, National Research Council of Canada
GCQ-09	1. Chairperson and Member, Canadian Radio-television and Telecommunications Commission 2. Chairperson and Member, Canadian Transportation Agency 3. Chairman and Member, National Energy Board 4. Commissioner of Competition, Office of the Commissioner of Competition 5. Superintendent, Office of the Superintendent of Financial Institutions
GCQ-10	No Positions

HEADS OF CROWN CORPORATIONS	
Level	**Name of Positions**
GRP07	1. President, Business Development Bank of Canada 2. Master of the Mint, Royal Canadian Mint 3. President and Chief Executive Officer, Via Rail Canada Inc. 4. President, Export Development Canada 5. President, Farm Credit Canada
GRP08	1. President, Canada Mortgage and Housing Corporation 2 President and Chief Executive Officer, Atomic Energy of Canada Limited
GRP09	1. President, Canadian Broadcasting Corporation
GRP10	1. President, Canada Post Corporation

APPENDIX C -

Salary ranges and maximum performance awards for DMs and other Governor-in-Council appointees recommended by the Stephenson Committee and accepted by the Government

Cash Compensation for the DM Group				
Level	April 1, 2006 – March 31, 2007		Accepted for April 1, 2007 – March 31, 2008	
	Salary Range Maximum $	Maximum Performance Award	Salary Range Maximum $	Maximum Performance Award
DM-1	200,000	16.1%	204,200	22.4%
DM-2	230,000	21.1%	234,900	27.4%
DM-3	257,500	21.1%	263,000	27.4%
DM-4	288,400	26.1%	294,500	32.4%

Cash Compensation for the GC Group				
Level	April 1, 2006 – March 31, 2007		Accepted for April 1, 2007 – March 31, 2008	
	Salary Range Maximum $	Maximum Performance Award	Salary Range Maximum $	Maximum Performance Award
Level GC-9	234,800	15%	239,800	21.3%
Level GC-10	270,000	20%	275,700	26.3%

Cash Compensation for the GCQ Group		
Level	**April 1, 2006 – March 31, 2007**	**Accepted for April 1, 2007 – March 31, 2008**
Level GCQ-9	258,300	276,500
Level GCQ-10	306,000	327,000

Cash Compensation for CEOs of Crown corporations				
Level	**April 1, 2006 – March 31, 2007**		**Accepted for April 1, 2007 – March 31, 2008**	
	Salary Range Maximum $	**Maximum Performance Award**	**Salary Range Maximum $**	**Maximum Performance Award**
Group-7	269,000	15%	274,700	15%
Group-8	309,400	15%	315,900	15%
Group-9	371,300	20%	379,100	20%
Group-10	445,600	25%	455,000	25%

Compensation information for GCs, GCQs and CEOs (2003-2006)

GC-09 Salary Information		
Date	**Salary Range**	**Mid-Point Salary**
April 1, 2003	$189,000 - $222,400	$205,700
April 1, 2004	$192,900 - $226,900	$209,900
April 1, 2005	$197,700 - $232,600	$215,150
April 1, 2006	$199,700 - $234,800	$217,250

GC-10 Salary Information		
Date	**Salary Range**	**Mid-Point Salary**
April 1, 2003	$217,400 – $255,800	$236,600
April 1, 2004	$221,800 - $260,900	$241,350
April 1, 2005	$227,400 - $267,500	$247,450
April 1, 2006	$229,500 - $270,000	$249,750

GCQ-09 Salary Information		
Date	**Salary Range**	**Mid-Point Salary**
April 1, 2003	$207,900 - $244,600	$226,250
April 1, 2004	$212,200 - $249,600	$230,900
April 1, 2005	$217,500 - $255,900	$236,700
April 1, 2006	$219,600 - $258,300	$238,950

GCQ-10 Salary Information		
Date	**Salary Range**	**Mid-Point Salary**
April 1, 2003	$246,400 - $289,900	$268,150
April 1, 2004	$251,300 - $295,700	$273,500
April 1, 2005	$257,700 - $303,200	$280,450
April 1, 2006	$260,100 - $306,000	$283,050

GRP07 Salary Information		
Date	**Salary Range**	**Mid-Point Salary**
April 1, 2003	$209,900 - $246,900	$228,400
April 1, 2004	$215,200 - $253,200	$234,200
April 1, 2005	$221,700 - $260,800	$241,250
April 1, 2006	$228,700 - $269,000	$248,850

GRP08 Salary Information		
Date	**Salary Range**	**Mid-Point Salary**
April 1, 2003	$289,600 - $340,700	$315,150
April 1, 2004	$297,000 - $349,400	$323,200
April 1, 2005	$305,900 - $359,900	$332,900
April 1, 2006	$315,600 - $371,300	$343,450

GRP09 Salary Information		
Date	**Salary Range**	**Mid-Point Salary**
April 1, 2003	$241,300 - $283,900	$262,600
April 1, 2004	$247,500 - $291,200	$269,350
April 1, 2005	$255,000 - $300,000	$277,500
April 1, 2006	$263,000 - $309,400	$286,200

GRP10 Salary Information		
Date	**Salary Range**	**Mid-Point Salary**
April 1, 2003	$347,500 - $408,800	$378,150
April 1, 2004	$356,400 - $419,300	$387,850
April 1, 2005	$367,100 - $431,900	$399,500
April 1, 2006	$378,800 - $445,600	$412,200

APPENDIX D -

IAI Projections by the Office of the Superintendent of Financial Institutions

PROTECTED B

Our File: P6120-5

22 October 2007

Mr. David Murchie
Senior Policy Advisor
Judicial Affairs, Courts & Tribunal Policy
Public Law Sector East Memorial Building 5211
284 Wellington St.
Ottawa, ON
K1A 0H8

Dear David:

Subject: Industrial Aggregate

Further to your request, the following is our most recent assumption for the Industrial Aggregate Index (IAI) to which judges' salaries are indexed. We had provided an estimate of these numbers to you in March, but we have since revised our assumptions for the 31 March 2007 valuation report, which should be tabled soon.

Year	IAI
1 April 2008	2.4%
1 April 2009	2.6%
1 April 2010	2.8%
1 April 2011	3.0%

Should you have any question, do not hesitate to contact me.

Yours truly,

M. Mercier
Actuary
(613) 990-7861

APPENDIX E -

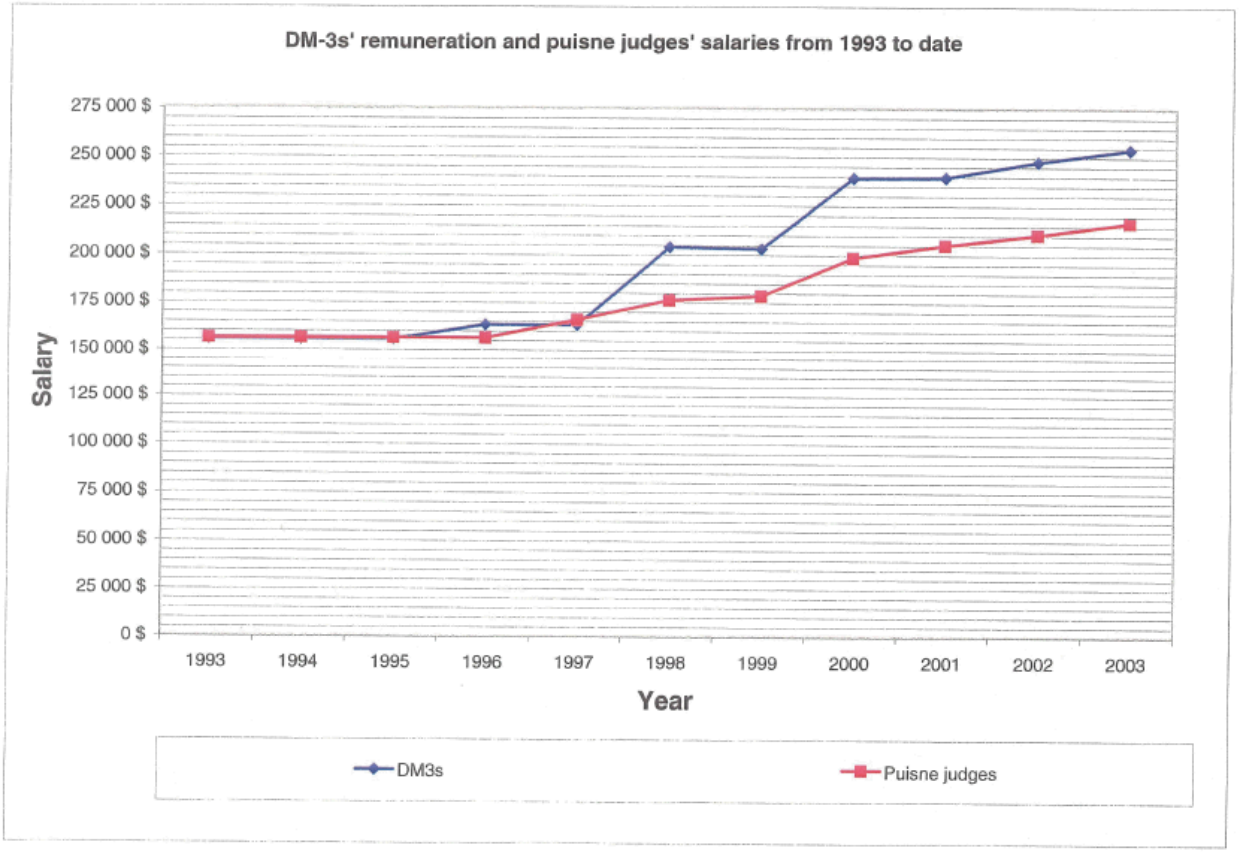
Current representational allowances under s. 27(6) of the *Judges Act*

	April 1, 79	**April 1, 85**	**April 1, 00**	**April 1, 04**
Chief Justice of Canada	$5,000	$10,000	$18,750	$18,750
Each puisne judge of the Supreme Court of Canada	$2,500	$5,000	$10,000	$10,000
Chief Justice of the Federal Court of Appeal and each chief justice described in ss. 12 to 21 of the *Judges Act* as the chief justice of a province	$3,500	$7,000	$12,500	$12,500
Each other chief justice referred to in ss. 10 to 21 of the *Judges Act*	$2,500	$5,000	$10,000	$10,000
Chief justices of the Court of Appeal of Yukon, the Court of Appeal of the Northwest Territories, and the Court of Appeal of Nunavut, and the senior judges of the Supreme Court of Yukon, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice			$10,000	$10,000
Chief Justice of the Court Martial Appeal Court of Canada.			$10,000	$10,000
Each regional senior judge of the Superior Court of Justice in and for the Province of Ontario				$5,000 [(1)]

[(1)] Giving effect to one of the recommendations of the last Quadrennial Commission, the Act was amended, effective April 1, 2004, to provide for representational allowances to the regional senior judges in Ontario.

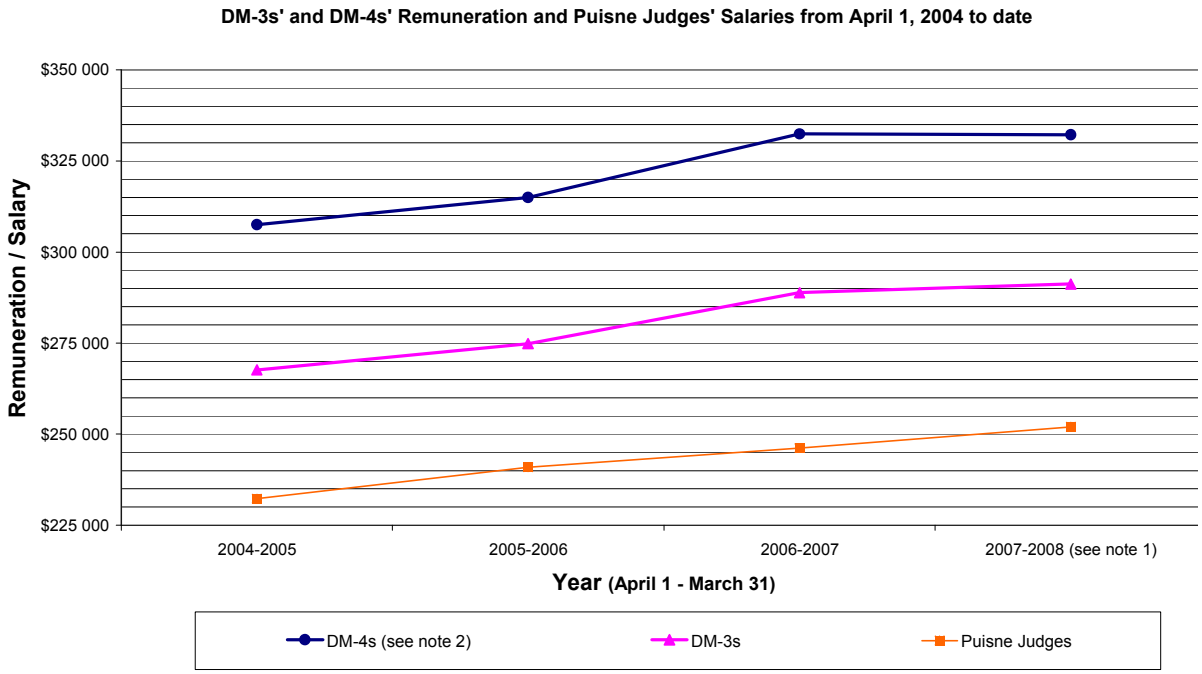
APPENDIX F -

Comparative graph of DM-3s' compensation and puisne judges' salaries from 1993 to March 31, 2003



APPENDIX G -

Comparative graph of DM-3s' and DM-4s' compensation and puisne judges' salaries from April 1, 2004 to date



Note 1

The "at risk" portion of the 2007-2008 DM-3 salary is currently unavailable and has been projected based on the immediately preceding 3-year average calculated as a percentage of average base salary, being 11.7%.

Note 2

The average salary and the "at risk" portion of the DM-4s' salaries are not made available due to confidentiality concerns. Accordingly, the total average compensation of the DM-4s, including the "at risk" portion, has been estimated for each annual period based on the assumption that the DM-4 incumbents received average salaries and average "at risk" pay that bear the same relation to the DM-3s' average pay to mid-point salary and average "at risk" pay to maximum at risk pay, respectively.

TAB 6

SUBMISSION

of the

CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

to the

JUDICIAL COMPENSATION AND BENEFITS COMMISSION

December 20, 2011

Pierre Bienvenu, Ad. E.
Azim Hussain
Norton Rose OR LLP

TABLE OF CONTENTS

OVERVIEW

1. On May 31, 2008, the Judicial Compensation and Benefits Commission (the "**Commission**") chaired by Ms. Sheila Block (the "**Block Commission**") issued its report (the "**Block Report**") in which it made recommendations regarding the salary of federally appointed puisne judges, a salary differential for appellate judges, and various other issues.

2. The Minister of Justice failed to respond to the Block Report by the statutory deadline of November 30, 2008 and, instead, on February 11, 2009, simply declined to implement any of the Block Commission's recommendations on the ground of the general economic crisis at that time. The Minister went on to state that in the event that economic circumstances were to improve before the next Commission such as to justify salary enhancements, such circumstances could be taken into account by the Commission. Since then, the Block Commission's recommendations remain unimplemented.

3. **The Canadian Superior Courts Judges Association (the "Association") and the Canadian Judicial Council (the "Council"), on behalf of federally appointed judges, submit that the present Commission should endorse and adopt as its own each of the recommendations made by the Block Commission, including the recommendations regarding salary.**

4. For the reasons set out in these submissions, the Association and Council submit that an endorsement of the Block Commission's recommendations and a recommendation calling for their prompt implementation are appropriate in light of the criteria set out in the *Judges Act*.

5. The submissions of the Association and Council are organized as follows: in the Introduction, the respective objects of the Association and the Council are described, notably in connection with the process for the determination of judicial compensation and benefits; in the Background section, a brief history of the Commission is recounted; the section entitled "The Commission's Mandate" is self-explanatory; and in the Issues section, the Association and the Council discuss both process and substantive issues and

set out the reasons supporting their position calling for the implementation of the Block Commission's recommendations on a prospective basis, as of April 1, 2012.

I. INTRODUCTION

6. These submissions to the Commission are made on behalf of the Association and the Council.

7. The Association is successor to the Canadian Judges Conference, which was founded in 1979 and incorporated in 1986. Its objects include:

(i) the advancement and maintenance of the judiciary as a separate and independent branch of government;

(ii) liaison with the Council to improve the administration of justice and to complement its functions through conferences and various educational programs;

(iii) taking such actions and making such representations as may be appropriate in order to assure that the salaries and other benefits guaranteed by section 100 of the *Constitution Act, 1867*,[1] and provided by the *Judges Act*[2] are maintained at levels and in a manner which is fair and reasonable and which reflect the importance of a competent and dedicated judiciary;

(iv) seeking to achieve a better public understanding of the role of the judiciary in the administration of justice;

(v) monitoring and, where appropriate, seeking to enhance the level of support services made available to the judiciary in cooperation with the Council; and

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[1] Reproduced in the Joint Book of Documents ("**JBD**") prepared with the Government.

[2] R.S. 1985, c. J-1, as amended.

(vi) addressing the needs and concerns of supernumerary and retired judges.

8. As of November 2011, 1016 (or 91%) of Canada's approximately 1117 federally appointed judges are members of the Association.

9. In furtherance of the Association's objects that relate to judicial salaries and other benefits, a Compensation Committee was established to study and make recommendations to the Association's Executive Committee and Board of Directors in respect of issues regarding judicial compensation.

10. The Council was established by Parliament in 1971. It consists of the Chief Justice of Canada and the Chief Justices and Associate Chief Justices of the provincial and territorial superior courts, the Federal Court of Appeal, the Federal Court, the Tax Court of Canada and the Court Martial Appeal Court of Canada.

11. The objects of the Council are to promote and improve efficiency, uniformity and quality of judicial service in superior courts.[3] As part of its mandate, the Council has established a Judicial Salaries and Benefits Committee.

12. The Council and the Association have made joint submissions, written and oral, to each of the five Triennial Commissions (1982-1996) and to the three Quadrennial Judicial Compensation and Benefits Commissions (the "**Drouin Commission**", the "**McLennan Commission**", and the Block Commission). The Drouin Commission issued its report (the "**Drouin Report**") on May 31, 2000. The McLennan Commission issued its report (the "**McLennan Report**") on May 31, 2004. The Block Report was issued on May 30, 2008.

13. The Association and the Council have worked closely together in preparing these submissions on behalf of federally appointed judges. The recommendations sought from this Commission by the federal judiciary have been approved by the Compensation Committee, the Executive Committee and the Directors of the Association, and by the Executive Committee of the Council.

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[3] The objects of the Council are set out in s. 60 of the *Judges Act.*

II. BACKGROUND

A. Judicial Independence and Judicial Compensation

14. Judicial independence is a fundamental principle of our democracy and legal tradition. This principle, whose historical origins can be traced back to the *Act of Settlement, 1701*,[4] is incorporated in the Constitution of Canada through the preamble and the judicature sections of the *Constitution Act, 1867* and section 11(d) of the *Canadian Charter of Rights and Freedoms*.[5]

15. Judicial independence and judicial compensation are inextricably bound to each other. In *Valente v. The Queen*,[6] *Reference Re Provincial Court Judges*[7] ("***PEI Reference***"), and more recently in *Bodner v. Alberta*[8] ("***Bodner***"), the Supreme Court of Canada confirmed that financial security, both in its individual and institutional dimensions, is, with security of tenure and administrative independence, one of the three core characteristics of judicial independence.[9]

16. It is important to keep in mind that financial security through adequate judicial compensation ultimately benefits the public, as emphasized by Chief Justice Lamer in the *PEI Reference*:

> I want to make it very clear that the guarantee of a minimum salary is not meant for the benefit of the judiciary. Rather, financial security is a means to the end of judicial independence, and is therefore for the benefit of the public.[10]

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4 (U.K.), 12-13. Will. III, c. 2.

5 For ease of reference, these provisions of the Constitution of Canada are reproduced in the JBD.

6 [1985] 2 S.C.R. 673

7 [1997] 3 S.C.R. 3.

8 [2005] 2 S.C.R. 286.

9 *Valente*, *supra* at para. 40; *PEI Reference*, *supra* at paras. 115-122; *Bodner* at paras. 7-8.

10 *PEI Reference*, *supra* at para. 193.

17. Under s. 100 of the *Constitution Act, 1867*, the Parliament of Canada has the duty to fix the compensation of federally appointed judges. Section 100 provides as follows:

> The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

18. The Triennial Commission chaired by David W. Scott, Q.C. (the "**Scott Commission**") observed in its 1996 report that judges are in a unique position in their remuneration being the subject of an obligation imposed on Parliament by the Constitution. The Scott Commission explained the value of this responsibility:

> Western democracies rooted in English constitutional tradition have been at pains to ensure that judicial independence, which ensures accountability on the part of the executive branch of Government, is uncontaminated by uncertainty (and thus preoccupation) on the part of the judges with their economic security. Under our Constitution the obligation is upon Parliament to "fix and provide" the salaries and benefits of judges. It is implicit in this constitutional imperative that the process be undertaken in an environment in which judicial independence is enhanced and the consequences of dependency eliminated.[11]

19. The process for determining judicial compensation, which is now provided in the *Judges Act*, has changed over time.

20. Prior to 1981, advisory committees reviewed judges' compensation and made recommendations to the Government.[12] As noted by the Drouin Commission, this process was unsatisfactory because the advisory committee recommendations "generally were unimplemented or ignored", and "the process merely amounted to petitioning the government to fulfill its constitutional obligations."[13]

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[11] Scott Report (1996) at 6.

[12] Two advisory committees were chaired by Irwin Dorfman, Q.C. (report issued on November 22, 1978) and Jean de Grandpré (report issued on December 21, 1981) respectively.

[13] Drouin Report (2000) at 2.

21. In 1982, the Triennial Commission process was established. Under s. 19.3 of the *Judges Act* as it read at the time, the Triennial Commission was required to inquire into the adequacy of judicial compensation and to make recommendations to the Minister of Justice. The objective of the Triennial Commission process was to depoliticize the determination of judicial salaries and benefits in order to preserve judicial independence. However, there was no obligation on the part of the Government under that process to respond or act upon the recommendations made by Triennial Commissions.

22. No one disputes that the Triennial Commission process was a failure. The salary recommendations of the five Triennial Commissions were generally ignored, left unimplemented and often became the subject of a politicized debate.[14]

23. In light of the treatment afforded by the Government of Canada to the McLennan and Block Reports, described below, it is relevant to cite what the Scott Commission said in 1996, in the twilight of the Triennial Commission process:

> The purpose of the Commission was to ensure that, through the creation of a body which would be independent both of the judiciary and Government, Parliament would be presented with an objective and fair set of recommendations dictated by the public interest, having the effect of maintaining the independence of the judiciary while at the same time attracting those pre-eminently suited for judicial office. The theory was that, by way of such recommendations, emanating from regularly convened independent commissions, the process would be de-politicized and judicial independence would be thus maintained.
>
> While the idea was sound, the underlying assumptions appear to have been naïve. The result has been a failure in practice to meet the desired objectives. Since the first Triennial, there have been four Commissions (Lang (1983), Guthrie (1986), Courtois (1989) and Crawford (1992)). In spite of extensive inquiries and exhaustive research in each case, recommendations as to the establishment of judicial salaries and other benefits have fallen

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[14] The reports of the Triennial Commissions were as follows: Lang Report (1983), Guthrie Report (1987), Courtois Report (1990), Crawford Report (1993), and Scott Report (1996); all are reproduced in the JBD.

> almost totally upon deaf ears. The reasons for this state of affairs have been largely political.[15]

24. Previously, the Crawford Commission in 1993 had lamented Government delays in acting upon recommendations made by the Commission:

> The respect shown for the concept of judicial independence in the design of the Triennial Commission process has been tainted by the business-as-usual attitude of successive Governments once the Commission reports have been presented to Ministers of Justice and tabled in Parliament. This failure to act with reasonable promptness cannot but lead to the entire review process losing credibility. This Commission notes, for example, that the legislation (Bill C-50) comprising the Government's response to the 1989 Commission on Judges' Salaries and Benefits (the Courtois Commission), was not introduced in Parliament until December 1991, and that by the end of the mandate of the current Commission, this relatively uncomplicated legislation had not yet been enacted.[16]

25. The regrettable state of affairs of this important process was commented upon by former Chief Justice Lamer in 1994, in an address to the Council of the Canadian Bar Association, when he said that the Triennial Commission "looks good on paper, but it has one problem. It doesn't work. Why? Because the Executive and Parliament have never given it a fair chance."[17]

B. The *PEI Reference*

26. In 1997, the Supreme Court of Canada in the *PEI Reference* explained that the Constitution requires the existence of a body such as a commission that is interposed between the judiciary and the other branches of the state. The constitutional function of this body is to depoliticize the process of determining changes to or freezes in judicial compensation.

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[15] Scott Report (1996) at 7.

[16] Crawford Report (1993) at 7.

[17] The Honourable Chief Justice Lamer, "Remarks by the Rt. Honourable Antonio Lamer, P.C., Chief Justice of Canada, to the Council of the Canadian Bar Association Annual Meeting" (20 August 1994) at 9 [unpublished], reproduced in the JBD.

27. This objective is achieved by entrusting that body with the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature. The Court said that the body must be independent, objective, and effective in order to be constitutional.[18] Any changes to judicial salaries without prior recourse to this body would be unconstitutional.[19]

28. The existence of this body also ensures that the judiciary does not find itself in a position of having to negotiate its salary directly with the government, something that is fundamentally at odds with judicial independence.[20]

29. A necessary component of the effectiveness of this body is the timely implementation of its recommendations, or a prompt response from the government in question providing legitimate reasons for a refusal to implement.[21]

C. The Quadrennial Commission Process and the First Quadrennial Commission

30. Acting upon the constitutional imperative enunciated by the Supreme Court of Canada in the *PEI Reference*, Parliament amended the *Judges Act* in 1998 and established the Quadrennial Commission. A key aspect of these amendments was the requirement that the Minister of Justice respond to the recommendations of the Quadrennial Commission within six (6) months of receiving them. Since the mandate of the Commission begins on September 1, and since it must issue its report within nine (9) months from the start of its mandate, the deadline for the issuance of the Minister's response is the end of November of the subsequent year.

31. The first Quadrennial Commission was chaired by Mr. Richard Drouin, QC, in 1999. The other members were Ms. Eleanore Cronk (now of the Ontario Court of Appeal) and Mr. Fred Gorbet. The Drouin Report was issued on May 31, 2000. It was an impressive,

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[18] *PEI Reference*, *supra* at para. 169-175; see also *Bodner*, *supra* at para. 16.

[19] *PEI Reference*, *supra* at para. 147.

[20] *PEI Reference*, *supra* at para. 186.

[21] *PEI Reference*, *supra* at para. 179-180.

well-reasoned report by any standard. The Drouin Commission took note that the Triennial Commissions had failed despite the goal of depoliticizing the process.[22]

32. The Government's response to the Drouin Report marked an improvement as compared to previous Government responses to Triennial Commission reports. On December 13, 2000, the Government responded to the Drouin Report pursuant to s. 26(7) of the *Judges Act*. The Government accepted all but two of the Drouin Commission's recommendations,[23] and amendments to the *Judges Act* implementing the Government's Response were adopted expeditiously, in June 2001.

D. The McLennan Commission

33. The second Quadrennial Commission, the McLennan Commission, was established in September 2003. It was chaired by Roderick McLennan, Q.C., and its two members were Gretta Chambers, C.C. and Earl Cherniak, Q.C. As required by the *Judges Act*, the Commission issued its report on May 31, 2004.

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[22] Drouin Report (2000) at 2.

[23] The two exceptions were eligibility for supernumerary status and reimbursement of costs of the judiciary before the Quadrennial Commission. Supernumerary judges are judges who are eligible to retire but choose instead to continue sitting. Their workload is determined in consultation with their respective chief justices. Sometimes the workload is full-time, and often is nearly so. In no event is it less than 50% of a full-time workload. The Drouin Commission had recommended that, effective April 1, 2000, judges have the right to elect supernumerary status for a period not exceeding ten years upon attaining eligibility for a full pension (Recommendation 8). In her response to the Drouin Report, the Minister indicated that the Government was not prepared to accept Recommendation 8 at that time. The reasons given included the need to consult the provinces and territories, the fact that the Supreme Court of Canada would soon consider, in *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405, important constitutional issues relating to the status of supernumerary judges, and, more generally, the need for better information concerning the contribution of supernumerary judges. The judgment of the Supreme Court of Canada in *Mackin* was released on February 14, 2002. As for the intended consultations with the provincial and territorial governments, it was expected that they would be carried out in a timely fashion. In the event, it was only on August 19, 2003, that the judiciary was advised that the Government had decided to accept Recommendation 8. Moreover, the Government took the position that the necessary amendments to the *Judges Act* would only be made as part of the overall package of amendments that would follow the Government's response to the report of the subsequent commission, the McLennan Commission. Those amendments were only made in December 2006, six and a half (6½) years after the Drouin Commission's recommendation. In the meantime, judges who were eligible for this recommendation were deprived of its benefit. It is worth noting that, unlike a delay in the implementation of a salary recommendation, the delay in implementing Recommendation 8 could not be, and was not, remedied retroactively.

34. The principal issue of contention between the judiciary and the Government before the McLennan Commission was the determination of the amount of judicial salary. When the McLennan Commission began its inquiry, the salary of a puisne judge was $216,600.

35. The Association and Council submitted to the Commission, based on the level of remuneration of traditional comparators, as applied in the Drouin Report, that the salary of a puisne judge should be increased to $253,880 as of April 1, 2004, plus annual salary increments of $3,000 in 2005, 2006 and 2007, in addition to indexation for cost of living. For its part, the Government proposed an increase to $226,300 as of April 1, 2004, inclusive of indexation for cost of living for 2004, plus annual salary increments of $2,000 in 2005, 2006 and 2007, in addition to statutory indexation for cost of living for 2005, 2006 and 2007. As the McLennan Commission observed, when the $2,000 annual salary increments contemplated by the Government are taken into account, the Government's proposal represented an increase of 7.25% over those years, in addition to indexation for cost of living in 2005, 2006 and 2007.[24]

36. The McLennan Commission recommended an increase for the salary of puisne judges to $240,000 as of April 1, 2004, inclusive of indexation for cost of living in that year, plus the cost-of-living indexing effective April 1 in each of the next three years, as already provided for in the *Judges Act*. The Commission did not recommend annual salary increments, as proposed by the Government and supported by the Association and Council, in addition to the annual cost-of-living indexation already provided for in the *Judges Act*.

37. The Commission's recommendation represented a one-time 10.8% increase for the four-year period commencing April 1, 2004, in addition to cost-of-living indexation in the years 2005, 2006 and 2007, as compared to the 7.25% increase proposed by the Government.

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[24] McLennan Report (2004) at 23.

1. The Government's response to the McLennan Report

38. The Government's response to, and delayed partial implementation of the McLennan Report was a source of grave concern for the judiciary. As elaborated below, the Association and Council were concerned that politicization was creeping into the process yet again, and was undermining the nascent and still fragile Quadrennial Commission process, much as the Triennial Commission process was undermined and ultimately came to fail.

39. On November 20, 2004, the Minister of Justice issued the Government's response (the "**First Response**") to the McLennan Report, as required by s. 26(7) of the *Judges Act*.[25] The First Response accepted all but one[26] of the recommendations of the McLennan Commission.

40. With respect to judicial salary, the Minister stated in the First Response that the McLennan Commission had "engaged in a careful balancing of all the [statutory] factors"[27] and provided "thorough and thoughtful"[28] explanations for its conclusions. The Minister noted that the salary increase recommended by the McLennan Commission "appears reasonable".[29]

41. On May 20, 2005, the Government introduced Bill C-51 to implement its acceptance of the McLennan Commission's recommendations, notably its salary recommendation. The Bill passed first reading and was supposed to be referred to committee after second reading. However, the Bill died on the order paper when Parliament was dissolved on November 29, 2005.

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[25] The full text of the *Response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission* (November 20, 2004) is reproduced in the JBD.

[26] The Government refused to accept the McLennan Commission's recommendation that the judiciary be reimbursed for 100% of its disbursements and 66% of its legal fees. Instead, the Government's First Response proposed that the reimbursement be a total of 66% for all costs.

[27] First Response at 3.

[28] First Response at 2.

[29] First Response at 4.

2. The newly elected Government's second response to the McLennan Report

42. A new Government was elected on January 23, 2006. Shortly after the new Government came to power, the then Minister of Justice purported to issue a second response to the McLennan Report on May 29, 2006 (the "**Second Response**").[30] On May 31, 2006, the Government tabled Bill C-17 in the House of Commons, which would implement the recommendations of the McLennan Report only to the extent that they were accepted in the Second Response.

43. The Second Response contradicted the First Response. The Government no longer accepted the salary recommendation set out in the McLennan Report. In its Second Response, the Government proposed an increase to judicial salaries of 7.25% as of April 1, 2004.[31] There was no mention of the fact that this increase was the exact percentage increase that the Government had proposed in its submission to the McLennan Commission in 2003-2004. In effect, the Government's Second Response unilaterally imposed what the Government had proposed in the first place, as if the Commission process had been of no consequence.

44. The Second Response stated that the McLennan Commission's recommendations must be analyzed in light of the mandate and priorities upon which the Government had recently been elected.[32] A summary list of the new Government's budget priorities and measures of "fiscal responsibility" was given in the Second Response.[33] It further stated that Canadians expect that expenditures from the public purse should be reasonable and generally proportional to these economic pressures and priorities, and that the McLennan Commission's salary recommendation did not pay heed to this reality.[34]

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[30] The full text of the *Response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission* (May 29, 2006) is reproduced in the JBD.

[31] Second Response at 2.

[32] Second Response at 4, 6.

[33] Second Response at 6.

[34] Second Response at 7.

45. Significantly, the Government did not attempt to argue that the economic conditions in Canada were not as strong as when the First Response had been made. In fact, the Second Response was delivered at a time when economic conditions in Canada were very strong, with a real economic growth of 2.8% for 2006[35] and the Government having a budgetary surplus of $4.7 billion[36] in the first quarter of 2006 and of $13.2 billion for the fiscal year 2005-2006.[37]

46. On June 2, 2006, counsel for the Association wrote to the Minister of Justice to protest the issuance of the Second Response and to invite the Government to reconsider the position adopted in the Second Response.[38] The Association also expressed the hope that Bill C-17 would be amended in the committee stage.

47. The Association's letter also made the point that the so-called reasons put forward in the Second Response were not "legitimate reasons" for departing from the Commission's salary recommendation, as required by the relevant constitutional jurisprudence.[39]

48. On July 31, 2006, the Minister of Justice responded by simply stating that the Government had regard for the principles set out in the *PEI Reference* and *Bodner* in developing its Second Response.[40] The Minister omitted to respond to the Association's

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[35] Statistics Canada, Catalogue # 13-016-X, Economic accounts key indicators, Canada, at 22. The indicator is the real gross domestic product (GDP).

[36] Department of Finance Canada, "The Fiscal Monitor", January to March 2006. The budgetary surplus was $1.7 billion in January 2006 and $4.1 billion in February 2006. In March 2006, there was a budgetary deficit of $1.1 billion.

[37] Department of Finance Canada, "Fiscal Reference Tables", October 2011.

[38] The Association's letter of June 2, 2006 is reproduced in the JBD.

[39] The Supreme Court in the *PEI Reference*, *supra* at para. 183 spoke of the need for the government to provide a "legitimate reason" for refusing to accept commission recommendations. The Supreme Court had occasion to elaborate on that requirement in *Bodner*, *supra* at paras. 23-27.

[40] The Minister's letter of July 31, 2006 is reproduced in the JBD. The statement in *Bodner, supra* that the process appears to be working satisfactorily at the federal level (para. 12), requires context. *Bodner* addressed the nascent commissions in four provinces, set up in response to the *PEI Reference*, *supra*. It was decided at a point in time (July 2005) after the Government's First Response to the McLennan Report had been given, and before the Second Response (May 2006). Accordingly, it was possible at that time for the Supreme Court to point to the Quadrennial Commission process for federally appointed judges as appearing to be working satisfactorily. Subsequent events proved otherwise.

point that the Second Response was statutorily and constitutionally invalid as a question of process, and constitutionally invalid as a question of substance.

49. The Second Response was implemented through Bill C-17,[41] which received Royal Assent on December 14, 2006.[42] Puisne judges' salary was fixed retroactively at $232,300 as of April 1, 2004, rather than at $240,000 had the McLennan Commission's recommendation and the First Response been implemented. At the beginning of the following Quadrennial Commission cycle, the salary for puisne judges, statutorily indexed for cost-of-living adjustments, was $252,000 as of April 1, 2007, rather than $262,240 had the McLennan Commission's recommendation and the First Response been implemented.

3. The inconsistency of the Second Response with applicable constitutional principles

50. The *Judges Act* does not contemplate multiple government responses. The Association and Council are firmly of the view that multiple responses undermine the cardinal constitutional requirement of effectiveness and are inconsistent with the Supreme Court's rationale for requiring of government that it formally respond, with diligence, to a Commission report. While the original Response was issued under, in accordance with, and within the time-limit set out in the *Judges Act*, the Second Response has no status whatsoever under the *Judges Act*[43] or the constitutional process expounded in the *PEI Reference*.

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[41] *An Act to amend the Judges Act and certain other Acts in relation to courts*, S.C. 2006, c. 11.

[42] The fact that the majority opposition parties did not amend Bill C-17 cannot be taken as Parliamentary acceptance of the way in which the Government conducted itself. Opposing Bill C-17 or proposing to amend it with the risk of defeating it carried with it the probability of the proverbial Pyrrhic victory: the Bill would have been defeated, thereby communicating Parliament's displeasure with the conduct of the Government, but the judiciary would be left with the status quo, which was even less than what the newly elected Government was prepared to accept in its Second Response. This would have been particularly unfair to judges eligible to elect supernumerary status pursuant to a recommendation from the Drouin Report in 2000 that had yet to be implemented. The dilemma was set out in Senator Jaffer's speeches in the Senate on December 6 and December 13, 2006, see JBD.

[43] Section 26(7) of the *Judges Act* provides: "The Minister of Justice shall respond to a report of the Commission within six months after receiving it." The statute makes no allowance for a further report. The Block

51. The Second Response, by a newly elected government, also served to politicize the Quadrennial Commission process since such a response was sought to be justified on the basis of the new Government's priorities. The Association and Council submit that the Second Response was, in essence, the expression of a newly elected Government's disagreement, for political reasons, with a previous government's formal response to the McLennan Report.[44]

52. The Association and Council further submit that the inordinate delay of 2½ years between the issuance of the McLennan Report and the implementation of the flawed Second Response undermined the effectiveness of the process, in addition to depriving members of the judiciary of the time value of the salary increase that the Government finally accepted and the actual time lost for those judges who would have been able to elect supernumerary status earlier had the Government implemented that recommendation more promptly.

53. The Association and Council submitted these concerns to the Block Commission, which agreed that they were well placed. The Block Report states in this regard:

> 42. Without commenting on the substance of the second Government response, we wish to express our concern with the issuance of more than one response in principle. As the Association and Council note, such a practice is not provided for under the current process. Not only does the issuance of a second response not conform to the current process, it also has significant Constitutional implications.
>
> 43. Apart from concerns about whether a second response may have the effect, real or perceived, of threatening the apolitical nature of the Commission process, it also has the very real effect of introducing an additional step and therefore additional delay in a process that imposes strict timelines on all parties involved. In this case, the second response was issued 18 months after the first

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Commission expressed serious concern about the issuance of more than one response, see Block Report at paras 42-45.

[44] The Block Commission correctly observed that judicial independence cannot be seen as just another government priority, and that there was no statutory justification for increases in judicial compensation to be measured against the "expenditure priority that the Government has accorded to attracting and retaining professionals of similarly high qualities and capacity within the federal public sector." (Block Report at para 58)

response, and 18 months after the expiry of the legislative deadline for responding to a Commission report under the *Judges Act*. Although the Government tabled draft legislation almost immediately after issuing the second response, this still resulted in an additional four-month delay which could have been avoided had the new Government moved to re-introduce legislation reflecting the first response upon being elected.

44. The Commission acknowledges the potential challenges of advancing a legislative agenda faced by a minority government. This does increase the possibility that legislation tabled to enact the Government responses to Commission recommendations could die on the order table, as occurred in November 2005. Should this occur again in the future, we submit that the integrity of the Commission process is only maintained if the newly elected Government proceeds with the process of implementation, even where the election has resulted in a change of Government. Any deviation from the process as currently outlined raises questions about whether a Commission's recommendations have had a meaningful effect on the legislative outcome and risks undermining the integrity of the Commission process.

45. While the Commission's effectiveness is most important in the context of the preservation of judicial independence, on a related note, the perceived effectiveness of the Commission is likely to influence the ability of the parties to convince nominees to accept appointment to future Commissions. Advisory committees, Triennial Commissions and Quadrennial Commissions have been populated by individuals who considered it an honour to serve the public interest in this capacity; the current Commission is no exception. However, continuing to attract suitable members for future Commissions will depend to a large extent on the ability to assure them that they will be participating in a process that is independent, objective and effective.[45]

E. The Block Commission

54. The third Quadrennial Commission, the Block Commission, was established in October 2007. It was chaired by Sheila Block, and its two members were Paul Tellier, C.C., Q.C. and Wayne McCutcheon. The Commission issued its report on May 30, 2008.

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[45] Block Report at paras 42-45. See also the evidence of Mr. E. Cherniak, QC to the House of Commons Standing Committee on Justice and Human Rights (Meeting No. 24, October 24, 2006), 39th Parliament, 1st Session, JBD.

55. Apart from process issues related to the serious concerns expressed by the judiciary with the Government's lack of solicitude for the Quadrennial Commission process, as exemplified by its tabling of the Second Response, the principal issue before the Block Commission was the determination of the judicial salary for the puisne judges. The Commission also made a number of other substantive recommendations.

1. Salary and other substantive recommendations

56. As already mentioned, when the Block Commission began its inquiry, the salary of a puisne judge was $252,000. The Association and Council proposed a salary increase of 3.5% as of April 1, 2008, and 2% for 2009, 2010, and 2011, in addition to the statutory indexation (Industrial Aggregate Index, or "**IAI**") for cost of living provided for under the *Judges Act.*[46] Under this proposal, the salary of puisne judges at the end of the Block Commission's mandate, *i.e.* as of April 1, 2011, would have been $302,800. The actual salary of puisne judges since April 1, 2011, is $281,100.

57. The Government proposed a salary increase of 4.9% as of April 1, 2008, inclusive of statutory indexation, which was 3.2% on that date, for a proposed net increase of 1.7%. For the subsequent years, it proposed nothing except to leave the existing statutory indexation in place. Statutory indexation was 2.8% on April 1, 2009, 1.6% on April 1, 2010, and 3.6% on April 1, 2011. Under the Government's proposal, the salary of puisne judges would thus have been $286,000 as of April 1, 2011.

58. The Government's proposed increase as of April 1, 2008, of 4.9% inclusive of IAI, must necessarily be interpreted to mean that the Government was of the view that, as of April 1, 2008, some kind of increase was indeed appropriate, even though it was not of the same order of magnitude as that proposed by the Association and Council.

59. The Block Commission reviewed the various comparators proposed by the parties, ultimately deciding that DM-3s and lawyers in private practice were the appropriate comparator groups to arrive at recommendations on judicial salaries. The Block

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[46] Statutory indexation under the *Judges Act*, it is noted, exists to protect judicial salaries against erosion from cost-of-living increases, not to enhance judicial salaries.

Commission rejected the Government's position that the most relevant comparator group was all of the strata among the most senior federal public servants, namely EX 1-5, DM 1-4, and Senior LA (lawyer cadre).

60. The Block Commission also rejected as unhelpful the Government's attempt to use the pre-appointment income data of judges as support for the argument that current judicial salaries are not a disincentive to attracting significant numbers of judges who enjoyed high pre-appointment incomes. The judiciary had objected to the collection and use of this data because of concerns for individual privacy and the unreliability of the data.

61. The Block Commission came to the conclusion that the appropriate comparator among senior deputy ministers, namely DM-3s and DM-4s, was the midpoint of the DM-3 salary range plus one-half of the maximum performance pay[47] for which DM-3s are eligible. As for lawyers in private practice, the Block Commission noted that there was no certainty that the Government would continue to be successful in attracting outstanding judicial candidates from the senior Bar in Canada if the income spread between lawyers in private practice and judges were to increase markedly.

62. Using the comparator of the midpoint of the DM-3 salary range[48] plus one-half of eligible performance pay, the Block Commission noted that the resulting figure for DM-3s was $276,632 for the 2007-2008 fiscal year. The salary of puisne judges was $252,000 in that year, or 91% of the DM-3 comparator.[49]

63. To achieve "rough equivalence" with the DM-3 salary range midpoint plus one-half eligible performance pay, the Block Commission recommended an increase of 4.9%,

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[47] In its most recent report of July 2011, the Advisory Committee on Senior Level Retention and Compensation, chaired by Carol Stephenson (the "**Stephenson Committee**"), used the expression "performance pay" as a synonym for at-risk pay, although the Government continues to refer to the variable part of the compensation paid to DMs, including bonuses, as "at-risk pay".

[48] "Midpoint" should not be confused with median. The midpoint figure is simply the halfway point of the theoretical salary range, whereas the median figure would be the actual salary of the person falling in the middle of the range of persons arranged from lowest to highest.

[49] Block Report at para. 119.

inclusive of statutory indexation, for a salary of $264,300 effective April 1, 2008, and an increase of 2% for each of 2009, 2010, and 2011, in addition to statutory indexation.

64. If the Block Commission's recommendation had been implemented, the salary for puisne judges in the 2011-2012 fiscal year would have been $302,800, a figure roughly equivalent to the figure of $303,249.50, which is the midpoint of the DM-3 salary range plus one-half of eligible performance pay for 2011-2012. The actual salary of puisne judges for 2011-2012 is $281,100. For comparison purposes, the overall *average* DM-3 compensation for the 2010-2011 fiscal year was $331,557.

65. In addition to its salary recommendation, the Block Commission made recommendations regarding the retirement annuity of senior judges of the territorial courts, representational allowances, and an appellate differential. The list of the salary and other recommendations made by the Block Commission is reproduced for convenience in Appendix "A" to this submission.

2. Observations and recommendations as to process

66. The Block Commission made a number of important observations relating to process, an overriding one being that Quadrennial Commissions should serve as the guardian of the Quadrennial Commission process. The Block Commission expressed the view that process-related issues should be the subject neither of direct discussions between the Government and the judiciary, which are inadvisable, nor of litigation before the courts, if at all possible, the latter being an option that must be "carefully weighed".[50] The Block Commission added:

> 37. The parties nevertheless require access to a forum where concerns related to process can legitimately be raised. It is our view that Quadrennial Commissions, by virtue of their independence and objectivity, are well-placed to serve as that forum and to offer constructive comments on process issues as they arise. While the structure and mandate of the Commission are outlined in statute, any question of process that affects the independence, objectivity or effectiveness of the Commission is

[50] Block Report at para. 33ff.

> properly within its mandate. It is entirely appropriate and arguably imperative that the Commission serve as guardian of the Quadrennial Commission process and actively safeguard these Constitutional requirements.

67. In addition to its concerns with the issuance of the Second Response, another important observation contained in the Block Report concerns the need to respect, and reflect in the future submissions of the parties, the consensus that has emerged around particular issues during a previous Commission inquiry.[51] The Block Commission gave as an example of such an issue the relevance of DM-3 as a comparator. The judiciary follows this recommendation in its present submission on that issue as well as on such issues as the relevant calculations for the use of the DM-3 comparator and the reimbursement of the judiciary's costs, among others.

3. The Government's response to the Block Report

68. Under the *Judges Act*, the Minister of Justice was required to respond to the Block Report by November 30, 2008, six months after receiving it. This statutory deadline came and went without a response being made by the Minister, as required by the Act.[52]

69. On February 11, 2009, well beyond the strict statutory deadline, the Minister of Justice issued a response declining to implement, at that time, any of the recommendations made by the Block Commission. Importantly, the Minister's response did not reject any of the Commission's recommendations. Rather, the Minister invoked the economic crisis that began in late 2008 as the reason for the Government's decision.

70. The Association issued a press release on February 11, 2009, stating that federally appointed judges recognized that the Canadian economy was facing unprecedented challenges calling for various temporary measures. However, it emphasized that the applicable constitutional principles would require that the Block Commission's recommendations be reconsidered once the economic situation improved. The

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[51] Block Report at paras. 21, 201.

[52] *Judges Act*, s. 26(7).

Association also expressed its deep concern about the violation by the Minister of Justice of the statutory deadline for issuing his response to the Block Report.

III. THE COMMISSION'S MANDATE

71. The mandate of the Commission is set out in section 26 of the *Judges Act*, which reads, in part, as follows:

> Commission
>
> 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.

72. The *Judges Act* does not equate "adequacy" of judicial salaries and benefits with the minimum necessary to guarantee the financial security of judges. Rather, the Commission must inquire into the adequacy of salaries and benefits with the dual purpose of ensuring public confidence in the independence of the judiciary and attracting outstanding candidates to the Bench.

73. The Drouin Commission said the following about the relationship between judicial compensation and the role of the judiciary in modern Canadian society:

> In response to the *Charter of Rights and Freedoms* (the "*Charter*"), and the growing complexity of our social and economic relationships, the Judiciary is playing an increasingly public role in key decisions that affect us all. Moreover, the

> characteristics of the Judiciary have changed and continue to shift: judges are being appointed at a younger age, and more females are being appointed to the Bench. The caseload of judges has grown, as more cases move to the higher courts for determination. Many of these cases are high profile and controversial. They capture the public interest and become the focus of media attention. Judicial decisions often generate considerable political debate. The reality of these trends must be recognized when considering the salary and benefits that are adequate to secure judicial independence and attract outstanding candidates to the Bench.[53]

IV. ISSUES

74. The Association and Council set out below the issues that they submit for this Quadrennial Commission's consideration. The recommendations sought by the judiciary are provided at the end of the discussion for each of those issues, and repeated *in seriatim* for convenience at the end of these submissions.

A. PROCESS ISSUES

75. As already mentioned, the Block Commission concluded not only that the Quadrennial Commission has jurisdiction to deal with concerns raised by the parties in respect of the Commission process, but indeed that it is "arguably imperative that the Commission serve as guardian of the Quadrennial Commission process and actively safeguard these Constitutional requirements."[54]

76. As already mentioned, the Block Commission commented that the issuance of a second response to a Commission report does not conform to the process and has significant constitutional implications. A troubling aspect of the Government's conduct in relation to the Commission process is the Minister of Justice's failure to respect the statutory deadline for the filing of his Response to the Block Report itself.

77. There can be no doubt that the requirement that there be a formal governmental response to a Commission report is a fundamental feature of the constitutional scheme articulated

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[53] Drouin Report (2000) at 10.

[54] Block Report at para. 37.

by the Supreme Court of Canada in the *PEI Reference*. Nor can it be disputed that the Minister is obliged to respond within 6 months after receiving a Commission report. The language of s. 26(7) of the *Judges Act* could hardly be clearer:

> The Minister of Justice shall respond to a report of the Commission within six months after receiving it.
>
> Le ministre donne suite au rapport de la Commission au plus tard six mois après l'avoir reçu.

78. The Minister did not respond to the Block Commission within the time limit set out in the *Judges Act*. He did not provide an explanation, within the time limit set out in the *Act*, for his failure to discharge this statutory duty in a timely manner. It is only subsequently, within his untimely Response of February 11, 2009 itself, that the Minister stated that "the Government's Response has been delayed to allow the Government to consider the [Block] Commission's Report in light of significant changes to a key criterion in relation to which the Commission developed its recommendations: *the prevailing economic conditions in Canada, including the cost of living, and the overall economic and financial position of the federal government*".

79. The Association and Council urge this Commission to reiterate the importance of respecting all aspects of the Commission process, as mandated by sections 26 to 26.3 of the *Judges Act*, whether they be substantive or procedural. Respect by both principal parties for all aspects of the Commission process is required to preserve confidence in and maintain the effectiveness of the process.

Recommendation sought:

The Commission reiterates the importance of respecting all aspects of the Commission process in order to preserve confidence in and maintain the effectiveness of the Commission process.

B. SUBSTANTIVE ISSUES

Overview

80. **The Association and Council seek an endorsement, and a recommendation urging immediate implementation on a prospective basis, of each one of the Block Commission's recommendations, *mutatis mutandi*.**

81. The Association and Council acknowledge that for this Commission to endorse the recommendations of the Block Commission and recommend their immediate implementation it has to satisfy itself that they continue to be consistent with the criteria of s. 26(1.1) of the *Judges Act*. The judiciary submits that they are, for the reasons set out in this section.

1. Puisne Judges' Salary

82. Specifically with respect to the salary of puisne judges, the Association and Council seek a recommendation urging immediate implementation of the Block Commission's recommendation on the salary of federally appointed puisne judges.

83. The Association and Council are therefore seeking, over the mandate of this Commission, phased salary increases of 4.9% as of April 1, 2012, inclusive of statutory indexing, and 2% as of each of April 1, 2013, 2014, and 2015, exclusive of statutory indexing. It is submitted that the immediate implementation of the Block Commission's salary recommendation for puisne judges is appropriate to achieve rough equivalence with the primary comparator group, the DM-3s.

a) The *Judges Act* criteria

84. In inquiring about the adequacy of judicial salaries, the Commission must consider a number of criteria set out in s. 26(1.1)(a) to (d) of the *Judges Act*. Each of those criteria is addressed below.

i) The economic conditions in Canada and the financial position of the federal Government

85. The first statutory criterion to be considered pursuant to subsection 26(1.1)(a) of the *Judges Act* is "the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government".

86. Fall 2008 marked the beginning of a significant recessionary period in the world economy. As part of its response to the world economic crisis that began in Fall 2008, Parliament passed in early 2009 the *Expenditure Restraint Act* (the "**Restraint Act**"),[55] which limited the salary increases in the federal public sector until the 2010-2011 fiscal year.[56] The Summary within the *Budget Implementation Act*, of which the Restraint Act was a part, stated that: "The purpose of that Act is to put in place a reasonable and an affordable approach to compensation across the federal public sector in support of responsible fiscal management in a difficult economic environment."

87. The Restraint Act applied broadly within the federal public sector, including members of Parliament, significant segments of federal employees, and appointees of the Governor in Council (which would include deputy ministers). Judges were excluded from the Act.

88. Under the Restraint Act, salary increases were limited to 1.5% annually between 2008 and 2011. However, it is noted that "incremental and merit increases" were excluded[57] from this restriction and that the overall average "performance pay" or "at-risk" pay awarded for DM-3s between the fiscal years 2008-2009 and 2009-2010 went from $64,670 to $66,183, an increase of 2.3%.[58] The average "at risk" pay for DM-3s in the

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[55] Enacted as part of the *Budget Implementation Act*, S.C. 2009, c. 2, s. 393.

[56] *Expenditure Restraint Act*, s. 16.

[57] See s. 10 of the Restraint Act, entitled "Incremental and merit increases" and including "merit or performance increases, in-range increases, performance bonuses or similar forms of compensation."

[58] This increase in performance pay was noted in public debate. See *e.g.* B. Curry, "Performance pay for senior bureaucrats up sharply, even as bonuses are slashed" (13 August 2010) *The Globe and Mail*.

fiscal year 2010-2011 was reduced to $60,371. However, this reduction was almost completely offset by a corresponding increase in base salary.[59]

89. It is generally recognized that Canada weathered the global recession better than most industrialized countries. Among the G-7 countries, the GDP contraction at the bottom of the last recession (2009) was less pronounced in Canada[60] and the recovery in 2010 was one of the most vigorous[61] after Japan and Germany. Furthermore, during this period, Canada's economy was the only one that regained all of the output and the job lost during the recession.[62] This led the Royal Bank of Canada to qualify Canada's economy in June 2011[63] as the "star performer" of four major economies (Canada, United States, United Kingdom, Euro Zone). Similarly, in its "Financial System Review" of June 2011, the Bank of Canada said:

> Despite the challenging international environment, the Canadian financial system remains healthy. For example, asset quality at Canada's major banks has improved further in recent months. Moreover, the aggregate financial position of the domestic non-financial corporate sector is solid, with corporate leverage remaining at low levels.[64]

90. Since July 2011, the global economy has slowed. Financial market volatility has increased particularly with the European sovereign debt crisis and the uneven U.S. recovery. Consequently, in October 2011, the Bank of Canada has diminished its growth outlook for the Canadian economy. As shown in Table 1, the main part of its revision

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[59] See JBD (DM-3 compensation information).

[60] According to OECD Economic Outlook database, the change in real GDP from 2008 to 2009 was -2.5% in Canada, compared to -2.6% in United States, -2.7% in France, -4.7% in Germany, -4.9% in United Kingdom, -5.2% in Italy and -6.3% in Japan.

[61] According to OECD Economic Outlook database, the change in real GDP from 2009 to 2010 was 3.1% in Canada, compared to 4% in Japan, 3.5% in Germany, 2.9% in United States, 1.4% in France, 1.3% in United Kingdom and 1.2% in Italy.

[62] Royal Bank of Canada, Economic and Financial Market Outlook, June 2011.

Department of Finance Canada, "Update of Economic and Fiscal Projections", November 8, 2011.

[63] Royal Bank of Canada, Economic and Financial Market Outlook, June 2011

[64] Bank of Canada, "Financial System Review", June 2011, at 1.

concerns 2011 and 2012, with a slower growth than the one previously projected and a lower inflation rate in 2012.

91. Despite the existence of downside risks[65] affecting the Canadian economy, the Bank of Canada believes that the euro-area crisis will be contained.[66] Moreover, after this period, Canadian growth should rebound at a stronger rate than the one initially anticipated and the Canadian economy is expected to return to full capacity by 2013 with a real GDP growth of 2.9%. Lower growth is also projected for the United States in the near term but likewise with a rebound in 2013.

[table appears on next page]

[65] The three main downside risks identified by the Bank of Canada relate to the failure to contain the crisis in Europe, the potential of a U.S. recession which would have material consequences for exports, growth and inflation in Canada, and a sharper than expected deceleration in household spending. Bank of Canada, "Monetary Policy Report", October 2011, at 33.

[66] Bank of Canada, "Monetary Policy Report", October 2011, at 17.

Table 1
Bank of Canada -Summary of the base-case projection for Canada[67]

	2011	2012	2013
Real GDP Growth (%)			
October 2011	2.1	1.9	2.9
July 2011	2.8	2.6	2.1
April 2011	2.9	2.6	2.1
January 2011	2.4	2.8	-
Consumer Price Index (4 Quarters Average)			
October 2011	2.9	1.4	1.9
July 2011	2.9	2.1	2
April 2011	2.5	2.1	2
January 2011	2.1	1.9	-
US Real GDP Growth (%)			
October 2011	1.7	1.7	3.3
July 2011	2.4	3.2	3.3
April 2011	3	3.2	3.3
January 2011	3.3	3.2	-

Source: Bank of Canada, Monetary Policy Report Summary, October 2001, July 2011, April 2011, January 2011.

[67] A "base-case" scenario or projection is formulated from the assumptions that managers or forecasters deem most likely to occur. The results or projections for a base case are better than those of the most conservative or pessimistic case but worse than those of the most aggressive or optimistic case.

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92. Financial conditions in Canada have tightened slightly since July 2011. Nevertheless, the Bank of Canada believes that the aggregate supply and price of credit to businesses and households continue to have a very stimulating effect, providing important support to economic expansion.[68] Business fixed investment is still expected to grow solidly. Household expenditures will also grow but relatively modestly, hampered by an elevated level of household debt and the weakening of consumer confidence in the uncertain global environment.

93. The outlook for Canada for 2011 and 2012 has also been revised downward by the main private sector forecasters, by a similar magnitude as the forecasts of the Bank of Canada. However, some are more optimistic, believing that the Obama Jobs Plan will be a factor supporting U.S. growth next year,[69] that business investment in Canada should remain robust as commodity prices are expected to remain elevated[70] and that low interest rates will also support business spending.[71]

94. In light of these recent economic projections, the Government has revised its own economic and fiscal projections, increasing the adjustment for risk in the near term. As a result, the deficit is anticipated to shrink gradually by 90% from 2001-2011 to 2015-2016, from $33.4 billion to $3.4 billion (see Table 2). The Government remains on track to eliminate the deficit over the medium term, with a delay in balancing the budget by one year (2016-2017). If the savings targeted by the deficit reduction action plan materialize as expected, the budgetary balance should be reached by 2015-2016,[72] one year ahead.

[table appears on next page]

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[68] Bank of Canada, “Monetary Policy Report”, October 2011, at 24.

[69] Royal Bank of Canada, “Economic and Financial Market Update”, November 2011.
International Monetary Fund, “Regional Economic Outlook – Western Hemisphere” October 11, 2011.
Scotiabank Group, “Global Forecast Update”, November 3, 2011.

[70] Bank of Montreal, “North American Outlook - Modest Growth, Elevated Risks”, November 8, 2011.

[71] Bank of Montreal, “North American Outlook - Modest Growth, Elevated Risks”, November 8, 2011.

[72] Department of Finance Canada, "Update of Economic and Fiscal Projections", November 8, 2011, at 41.

Table 2
Summary of the budgetary balance[1] and of the federal debt as forecasted by the Department of Finance Canada 2010-2011 to 2016-2017

Fiscal years	Budgetary Balance (Billions $)	Federal Debt (Billions $)	In % of GDP	
			Budgetary Balance	Federal Debt
2010-2011	-33.4	550.3	-2.1%	33.9%
2011-2012	-31.0	585.2	-1.8%	34.6%
2012-2013	-27.4	612.7	-1.6%	35.0%
2013-2014	-17.0	629.7	-0.9%	34.2%
2014-2015	-7.5	637.2	-0.4%	32.9%
2015-2016	-3.4	640.6	-0.2%	31.7%
2016-2017	0.5	640.0	0.0%	30.3%

Note: (1) The budgetary balance includes the cost of measures announced in the update of November 8, 2011 and excludes the savings targeted by the deficit reduction action plan.
Source: Department of Finance Canada, "Update of Economic and Fiscal Projections", November 8, 2011, at 41.

95. Expressed in relation to the size of the economy, the budgetary deficit represents 2.1% of the GDP in 2010-2011: this ratio should decrease to 0.4% and 0.2% respectively in 2013-2014 and 2014-2015. The federal debt, also measured in relation to the size of the economy, is also projected to decline steadily from 2012-2013 onward. By 2016-2017, the debt-to-GDP ratio is projected to fall to 30.3%, less than half of its peak of 68.4% in 1995-1996.

96. Canada has an enviable fiscal position[73] with low debt levels, and projected to remain low over the coming years. Over the period of 2011-2016, the IMF projects that Canada will maintain a low and declining debt-to-GDP ratio far below those of other G-7 nations.[74] Furthermore, with Germany, Canada is the only country returning to a balanced budget by 2016.[75]

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[73] Department of Finance Canada, "Quarterly financial report for the Quarter ended June 30,2011", Section 3.

[74] See Table reproduced in Appendix "B".

97. In sum, the economic conditions criterion set out in s. 26(1.1)(a) does not present an obstacle to this Commission recommending an increase in judicial salaries that is otherwise justified, applying the comparators developed to assist in the determination of judicial salaries.

ii) The role of financial security in ensuring judicial independence

98. The second criterion to be considered by the Commission is "the role of financial security of the judiciary in ensuring judicial independence". In relation to this factor, the Drouin Commission stated:

> We strongly affirm the importance of an independent judiciary, and we recognize the role that financial security plays as a fundamental component of independence as set out in the second enumerated factor under subsection 26(1.1).[76]

99. In the *PEI Reference* case, Chief Justice Lamer sought to demonstrate the link between financial security for judges and the concept of the separation of powers. He said:

> What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be depoliticized. [...]
>
> […]
>
> The depoliticized relationships I have been describing create difficult problems when it comes to judicial remuneration. On the one hand, remuneration from the public purse is an inherently political concern, in the sense that it implicates general public policy. [...]
>
> On the other hand, the fact remains that judges, although they must ultimately be paid from public monies, are not civil servants. Civil servants are part of the executive; judges, by definition, are independent of the executive. The three core characteristics of judicial independence - security of tenure, financial security, and administrative independence - are a reflection of that fundamental distinction, because they provide a range of protections to

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[75] See Table reproduced in Appendix "C".

[76] Drouin Report (2000) at 8.

> members of the judiciary to which civil servants are not constitutionally entitled.[77]

100. The role and responsibilities of judges are *sui generis*, as the Government acknowledged in its submissions to the Drouin Commission.[78] Indeed, judges occupy a unique position in our society and that uniqueness in all of its manifestations must be taken into account by the Commission. Those manifestations include the following :

(i) Federally appointed judges are the only persons in Canadian society whose compensation, by constitutional requirement, must be set by Parliament. Once a judge accepts appointment, he or she becomes dependent on Parliament in respect of salaries and benefits.

(ii) Judges are prohibited from negotiating any part of their compensation arrangement with the party who pays their salaries, a restriction that applies to no other person or class of persons in Canada.

(iii) Judges are prohibited by the *Judges Act*[79]- with good reason - from engaging in any other occupation or business beyond their judicial duties. It follows that judges cannot supplement their income by embarking upon other endeavours.

(iv) Judges must divest themselves of any commercial endeavour that may involve litigious rights. This is a significant sacrifice that other members of society are not called upon to make.

(v) Judges' compensation cannot be tied to performance or determined by commonly used incentives such as bonuses, stock options, at-risk pay, etc.

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[77] *PEI Reference Case*, *supra* at paras. 140, 142, 143 [emphasis in original].

[78] As cited in the Drouin Report (2000) at 13.

[79] *Judges Act*, s. 57(1)

(vi) Finally, there is no concept of promotion or merit in the discharge of judicial duties and there is no marketplace by which to measure the performance or compensation of individual judges.

101. In light of the constitutional role of the judiciary as an independent branch of government and the framework applicable to the fixing of judicial compensation, it would be wrong in principle to consider the expenditure on judicial salaries as being simply one of many competing priorities on the public purse, as the Government attempted to cast the issue before the Block Commission.

102. The Block Commission rejected such a characterization and expressed its agreement with the submission made on behalf of the Canadian Bar Association to the effect that judicial independence is not a mere government priority, competing with other government priorities, but rather a constitutional imperative. Were the Commission to consider judicial salaries on the same footing with other government priorities, it would be placed in a highly politicized process. As the Block Commission concluded:

> 57. We agree with the views expressed by the Canadian Bar Association. The Government's contention that the Commission must consider the economic and social priorities of the Government's mandate in recommending judicial compensation would add a constitutionally questionable political dimension to the inquiry, one that would not be acceptable to the Supreme Court, which has warned that commissions must make their recommendations on the basis of "objective criteria, not political expediencies". […]
>
> 58. With regard to the Government's contention that any increases in judicial compensation must be reasonable and justifiable in light of the expenditure priority that the Government has accorded to attracting and retaining professionals of similarly high qualities and capacity within the federal public sector, we find no such requirement in the statutory criteria that the Commission must consider. In fact, were the Commission required to justify compensation increases in this way, it would make the Commission accountable to the Government and allow the Government to set the standard against which increases must be measured. This would be an infringement on the Commission's independence. Since the maintenance of the financial security of the judiciary requires that judicial salaries be modified only following recourse to an independent commission, any measure

> that would have the effect of threatening or diminishing the Commission's independence would conflict with this constitutional requirement. [80]

iii) The need to attract outstanding candidates to the judiciary

103. It is axiomatic that there is a correlation between the ability to attract talented individuals and adequate compensation. The Block Commission recognized this when it stated:

> It is not sufficient to establish judicial compensation only in consideration of what remuneration would be acceptable to many in the legal profession. It is also necessary to take into account the level of remuneration required to ensure that the most senior members of the Bar will not be deterred from seeking a judicial appointment. To do otherwise would be a disservice to Canadians who expect nothing less than excellence from our judicial system - excellence which must continue to be reflected in the calibre of judicial appointments made to our courts.[81]

104. The connection between talent and adequate compensation was the impetus for the Government's decision to strike the first Advisory Committee on Senior Level Retention and Compensation, which reported in 1998 (the "**Strong Committee**"). The Strong Committee had this to say about the correlation between compensation and the calibre of candidates:

> In our view, compensation policy should be designed to attract and retain the appropriate calibre of employees to achieve an organization's objectives. Such compensation policy needs to be internally equitable, to be responsive to the economic and social environment, and to encourage and reward outstanding performance. Salary is usually the major driver of such policy. Salary depends upon responsibility, individual performance and comparability with relevant markets. Typically, standard practices and techniques are used to evaluate each of these objectively and transparently.[82]

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[80] Block Report at paras. 57-58.

[81] Block Report at para. 76.

[82] Advisory Committee on Senior Level Retention and Compensation, *First Report: January 1998* at 7, reproduced in the JBD.

105. While adequate compensation is required to attract outstanding candidates to the Bench, there are particularities in the setting of judicial compensation that the Commission must take into account. In the words of the McLennan Commission:

> 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.[83]

106. The need to attract outstanding candidates to the Bench, coupled with the fact that appointees predominantly come from private practice, explain the importance of self-employed lawyers' income in the determination of judicial salaries. The McLennan Commission made the point succinctly when it said 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."[84]

iv) Other objective criteria

107. Among the "other objective criteria" that past Commissions have considered in their determination of judicial salaries is the evolution of the role and responsibilities of Canadian judges in the past 25 years. The following observations of the Drouin Commission are still apposite today:

> There are increasing, and ever-shifting, demands placed upon the Judiciary. As a result of the introduction of the *Charter*, the growth in litigation in Canada, the complexity of the matters which actually proceed before the courts, and intensified public scrutiny of judicial decisions, the process and requirements of "judging" have become more onerous at both the trial and appellate levels.[85]

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[83] McLennan Report (2004) at 5.

[84] McLennan Report (2004) at 32.

[85] Drouin Report (2000) at 17.

108. Judicial decisions at all levels are becoming increasingly complex and continue to be the focus of attention by the media and the public. Judges are repeatedly called upon to adjudicate on sensitive and contentious matters of a socio-political nature, a trend that has been accentuated by the continued willingness of Parliament and the provincial legislatures to leave many controversial issues for determination by the courts. Vivid illustrations of this phenomenon can be found in the role played by courts in respect of the many difficult social and political issues confronting Canadian society today.

109. Globalization and technological innovations have also contributed to a greater complexity and volume of legal issues confronted by the judiciary, from e-discovery to multi-jurisdictional class actions to criminal trials involving complex evidence of encrypted communications between accused persons.

b) The comparators

110. In considering the adequacy of judicial salaries, including in light of the statutory criteria just reviewed, two principal comparators have traditionally been relied upon by the judiciary and the Government, and by past commissions. They are:

(i) the remuneration of the most senior level of deputy ministers within the federal Government; and

(ii) the incomes of senior lawyers in the private practice of law in Canada.

i) The most senior deputy ministers: DM-3s and DM-4s

111. From at least the advent of the Triennial Commission process to the most recent Quadrennial Commission, judicial salaries have been compared with the remuneration of the most senior level of deputy ministers within the Government.[86]

112. With time, what started as a benchmark matured into the principle that there should be a rough equivalence between the salaries of federally appointed puisne judges and the

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[86] See Lang Report (1983) at 6.

midpoint of the remuneration of DM-3s, until recently the most senior level of deputy ministers within the federal Government.

113. Until the Crawford Commission reported on March 31, 1993, continual reference was made to the 1975 amendments to the *Judges Act* which had made the salary level of puisne judges roughly equivalent with the midpoint salary of the most senior level of deputy ministers. That rough equivalence was then adjusted regularly for inflation. Triennial Commissions prior to the Crawford Commission referred to that exercise as "1975 equivalency", and each of them successively recommended salary increases for judges as a function of the 1975 level, adjusted for inflation.

114. Before the Crawford Commission, in 1993, it was the Government that argued in support of direct equivalency with the most senior level of deputy ministers as opposed to the application of the "1975 equivalency", which entailed going back to the 1975 DM midpoint and adjusting for inflation in the years since that point.[87] Thus, it is the Government itself that submitted as a comparator direct equivalency with the most senior level of deputy ministers.

115. The Crawford Commission accepted that submission and found that the concept of "1975 equivalency" was no longer a particularly helpful benchmark as a determinant of judges' salaries. Instead, the Crawford Commission preferred to refer directly to a rough equivalence with the midpoint of the salary range of the most senior level of federal public servant, the DM-3.[88]

116. As mentioned earlier, it is important to note that the midpoint is the half-way point of a theoretical salary range, not the median figure of the actual salary paid. Given that the upper and lower limits of the salary range for each of the DMs are theoretical limits rather than actual pay levels received, the Association and Council had taken the position that it is more accurate to rely upon the average compensation of senior deputy ministers,

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[87] As cited in the Drouin Report (2000) at 28.

[88] Crawford Report (1993) at 11.

now that such averages are available, since those figures reflect actual remuneration paid on average.

117. However, the Block Commission decided to use the midpoint rather than averages on the ground that the former provided an "objective, consistent measure of year over year changes in DM-3 compensation policy."[89] In the present submission, the Association and Council have used this measure in their comparisons with DM-3 compensation, all the while noting that there is a significant disparity between the midpoint and actual average figures over the years.[90]

118. Past Commissions were of course fully appreciative of the fact that use of the DM-3 comparator for the purpose of setting judges' salaries does not amount to equating judges to public servants.[91] As noted by the Crawford Commission, rough parity of this nature between judges and top level public servants finds support in the comparative salary figures from a number of other common law democracies.[92]

119. While making clear that no one comparator should be determinative, the Drouin Commission endorsed the principle of a relationship between judicial salaries and the remuneration of DM-3s. It stated:

> While we agree that the DM-3 comparator should not be determinative of our recommendations concerning judicial salaries, in our view, it is an appropriate and useful comparator at this time. More particularly, we have concluded that the important aspect of the DM-3 comparator, for the purposes of our inquiry, is the maintenance of a relationship between judges' salaries and the remuneration of those senior federal public servants whose skills, experience and levels of responsibilities most closely parallel those of the Judiciary. We agree with the substance of the observation by

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[89] Block Report at para. 106.

[90] For example, for the 2010-2011 fiscal year, the overall average compensation for DM-3s was $331,557, whereas the midpoint and half eligible at-risk was $297,948. If DM-3 compensation continues to be at the upper end of the salary range and eligible at-risk percentage, future Quadrennial Commissions will likely decide to revisit the Block Commission's use of the midpoint figure rather than the average.

[91] See *e.g.* Crawford Report (1993) at 11.

[92] Crawford Report (1993) at 11.

> both the Courtois and Scott Commissions (1990 and 1996) that the relationship between the remuneration of DM-3s and judges should be maintained, not as a precise measure of "value" but as a reflection of "what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges." [93]

120. In the time period between the report of the Drouin Commission in 2000 and the beginning of the mandate of the McLennan Commission in 2003, the Government created a category above the DM-3. The DM-4 category was created as a consequence of a recommendation of the Strong Committee in its third report, dated December 2000.[94] It is interesting to note that one of the factors behind the recommendation of the Strong Committee was the need to "[send] an important message in terms of the government's willingness to attract and retain qualified and experienced staff."[95]

121. At the time of the McLennan and Block Commissions, it was understood that there were only two DM-4s, the Clerk of the Privy Council and the Deputy Minister of Finance. The Association and Council have been informed by the Government that there are now three incumbents in the DM-4 category, the identity of their respective departments being now confidential on the ground that it would identify the particular individuals. The Government has advised that, in general, DM classification is personal to the incumbent and based on merit, and that it is not linked to particular departments.

122. The Block Commission concluded that there was no justification "at this time" to use DM-4s as a comparator given the use of that level for "exceptional circumstances and positions of particularly large scope."[96] The Association and Council have accordingly put aside the DM-4s in their analysis, even though future developments might warrant revisiting this specific comparator.

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[93] Drouin Report (2000) at 30-31.

[94] Advisory Committee on Senior Level Retention and Compensation, *Third Report: December 2000* at 41, reproduced in the JBD.

[95] *Ibid.*

[96] Block Report at para. 105.

123. Before the Block Commission, the Government argued for a much wider public-sector comparator than DM-3s. The Government's desire to extend the comparator to lower levels of public servants misconceives the nature of the comparator. The cogency of the DM-3 comparator is that it relates judicial salaries to the highest level of salary in the executive branch (leaving aside the DM-4s, discussed above) and creates parity between the branches of Government.

124. Puisne judges do not proceed through a hierarchy of ever greater responsibility. Every judge from the moment he or she is appointed holds the same office and constitutes a manifestation of that office, complete in himself or herself. Contrary to the increasing responsibilities represented by the DM-1 to DM-4 ladder, there is no correlation between seniority and the nature of matters assigned to judges.

125. Judges do not graduate from minor interlocutory procedural motions to complex constitutional challenges over many years. Rather, the same judge might hear both kinds of cases within the first years of appointment. Accordingly, it is important to keep in mind the numerous observations on the *sui generis* nature of the judiciary in past Triennial and Quadrennial Commission reports, and of the symbolic and historical importance of the comparison with senior deputy ministers.

126. The Block Commission was definitive about the need to maintain rough equivalence between the compensation of DM-3s and that of puisne judges, and it went as far as to issue a formal recommendation that the Commission and parties should consider the issue of DM-3 comparison to be settled. Reproduced below are key extracts of the Block Report dealing with the DM-3 comparator:

> 103. The DM-3 level, as can be seen, has been a comparator for nearly every previous commission, and we believe, like the Courtois Commission, that this "reflects what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges". The EX/DM community proposed by the Government as a comparator would be a significant departure from the DM-3 comparator used by previous commissions. The salary increases provided to the EX/DM community may provide an indication of the "priority the Government accords to compensate senior professionals of high ability who have chosen service in the public interest over the

> private sector", but it does not provide the single, consistent benchmark that is provided by the DM-3 level and the remuneration associated with that level.
>
> […]
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> 106. We also used the mid-point of the DM-3 salary range because it is an objective, consistent measure of year over year changes in DM-3 compensation policy. Average salary and performance pay may be used to demonstrate that judges' salaries do retain a relationship to actual compensation of DM-3s. However, average salary and performance pay are not particularly helpful in establishing trends in the relativity of judges' salaries to the cash compensation of DM-3s. They do not provide a consistent reflection of year over year changes in compensation. The DM-3 population is very small, varying between eight and ten people over the past few years, and average salaries and performance pay fluctuate from year to year. A person who has been promoted recently has a lower salary than one who has been in a position for many years. Turnover could cause significant changes in the averages over time. Similarly, a few very high performers or low performers in a year could significantly affect the average performance pay.
>
> […]
>
> 201. A review of the reports of the various Triennial Commissions and of the Drouin and McLennan Commissions shows that there has been considerable variety in the nature of the questions raised before Commissions. Some issues however, have been raised repeatedly. Where consensus has emerged around a particular issue during a previous Commission inquiry, such as the relevance of the DM-3 as a comparator, "in the absence of demonstrated change", we suggest that such a consensus be recognized by subsequent Commissions and arguably reflected in the approach taken to the question in the submissions of the parties.
>
> Recommendation 14
>
> The Commission recommends that:
>
> Where consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of demonstrated change, such consensus be taken into account by the Commission and reflected in the submissions of the parties.

127. As stated above and by many successive compensation commissions, comparison between the remuneration of the most senior deputy ministers and that of judges should

continue, not because it is a precise measure of "value", but as a reflection of what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by senior deputy ministers and judges. Just as the senior deputy ministers are outstanding professionals who must execute with excellence heavy responsibilities regarding the conduct of the affairs of the executive branch, judges are appointed because of their outstanding performance as lawyers and because they must impartially and independently adjudicate disputes that have significant ramifications in the public and private spheres.

128. Another quite distinct reason to rely on this comparator is the fact that it reflects a strong consensus in the reports of compensation commissions for nearly forty years. Consistent with the Block Recommendation 14 cited above, it should for that reason alone be reflected in the submission of the parties and taken into account by this Commission.

- ***At-risk pay of DM-3s and DM-4s***

129. A variable component described as "at-risk pay" or "performance pay" has become a significant component of the remuneration of DMs (and certain other Governor-in-Council appointees). That component arose out of the 1998 recommendations of the Strong Committee, which described "at-risk" pay as "a component of compensation that is …integral to the total package".[97]

130. The Association and Council have consistently taken the position before the Drouin, McLennan, and Block Commissions that at-risk-pay, for the purpose of making comparison with judicial salaries, should be considered an integral part of the compensation of DMs. All three Commissions agreed.

131. The Drouin Commission rejected the notion, put forward by the Government, that when considering the DM-3 comparator regard should be had only to the midpoint of the base salary range of DM-3s, without regard to at-risk awards. The McLennan Commission

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[97] Advisory Committee on Senior Level Retention and Compensation, *First Report: January 1998* at 20, reproduced in the JBD [emphasis added].

also concluded that this component "cannot be ignored" [98] and indeed took it into account in its analysis.[99]

132. Similarly, the Block Commission took at-risk pay into account, referring to performance pay as an "integral component" of the total compensation of deputy ministers, noting that it has been growing over the years, and that DM-3s on average have received more than one-half of the performance pay for which they were eligible.[100] Consonant with its use of the midpoint of the DM-3 salary range, the Block Commission used one-half of the eligible performance pay for DM-3s in its analysis.

133. The inclusion of at-risk pay in the compensation of DMs for the purpose of comparing it to judicial salaries is a question around which a consensus has emerged which should be reflected in the submission of the parties. The judiciary does so in the present submissions.

- ***Current compensation levels of DM-3s***

134. The table below provides compensation information for the DM-3s from 2007 to 2011, along the parameters recommended by the Block Commission as the points of comparison for judicial compensation.

[table appears on next page]

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[98] McLennan Report (2004) at 27.

[99] McLennan Report (2004) at 28-31.

[100] Block Report at para. 108.

Table 3
DM-3 compensation 2007 – 2011

Date	Salary Range	Midpoint Salary	Eligible At Risk Pay as a Percentage of Salary	One-Half Eligible At Risk Pay	Total Midpoint Compensation of DM-3s (as per Block Commission)	Judicial Salary of Puisne Judges	Total Average Compensation of DM-3s
April 1, 2007	$223,600 $263,000	$243,300	27.4%	$33,332.10	**$276,632.10**	**$252,000**	$315,233
April 1, 2008	$228,000 $268,300	$248,150	33.0%	$40,944.75	**$289,094.75**	**$260,000**	$326,580
April 1, 2009	$231,500 $272,400	$251,950	33.0%	$41,571.75	**$293,521.75**	**$267,200**	$331,866
April 1, 2010	$235,000 $276,500	$255,750	33.0%	$42,198.75	**$297,948.75**	**$271,400**	$331,557
April 1, 2011	$239,200 $281,400	$260,300	33.0%	$42,949.50	**$303,249.50**	**$281,100**	n/a

135. The Stephenson Committee in its July 2011 report recommended an increase in total compensation of 1.8% through adjustments to at-risk pay for DM-3s for 2011-12, and an increase of 2.2% for 2012-13. The Government responded by saying that it would be increasing base pay by 1.75% for 2011-12 and 1.5% for 2012-13. The maximum at-risk pay for 2011-12 is 33%.[101]

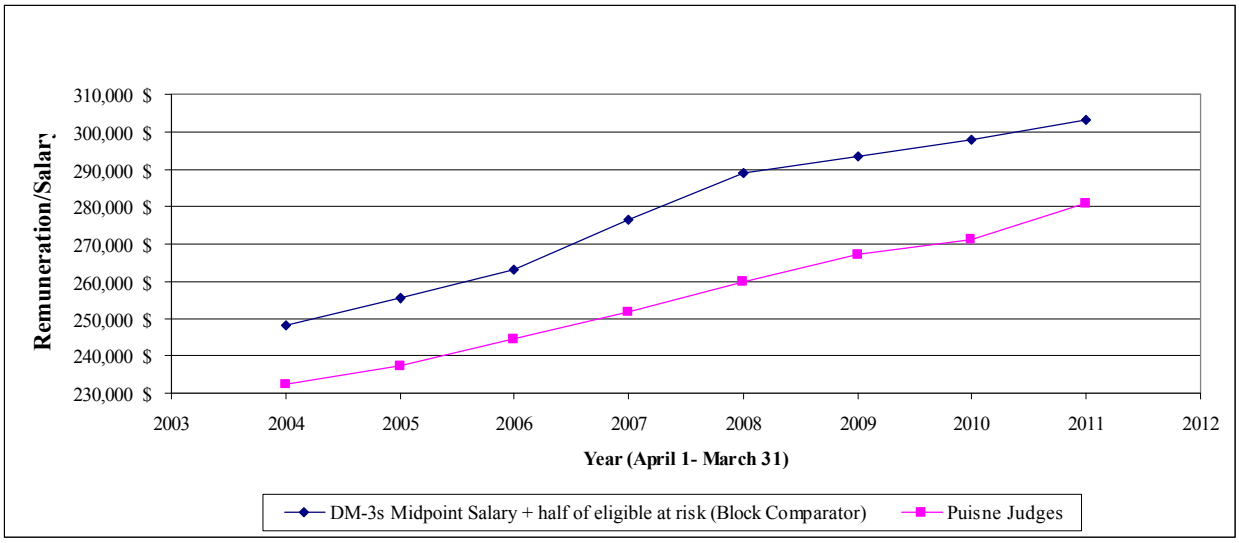
[101] Treasury Board of Canada Secretariat, "Information Notice: Changes to Executive Level Total Compensation" dated July 29, 2011, reproduced in the JBD.

- ***Comparison with judicial salaries***

136. The current salary of a puisne judge, in effect between April 1, 2011 and March 31, 2012, is **$281,100**. The midpoint for the DM-3 salary range for the 2011-2012 fiscal year is $260,300; one-half of eligible at-risk is 16.5%, or $42,949.50; the total of the midpoint and one-half eligible at-risk for the 2011-2012 fiscal year for DM-3s is therefore **$303,249.50**.

137. The graph below shows the gap between the actual salary of puisne judges and the midpoint of DM-3 compensation (including one-half of eligible at-risk).

Graph A
DM-3s midpoint salaries plus half eligible "at risk" pay vs.
Puisne judges (actual salary)

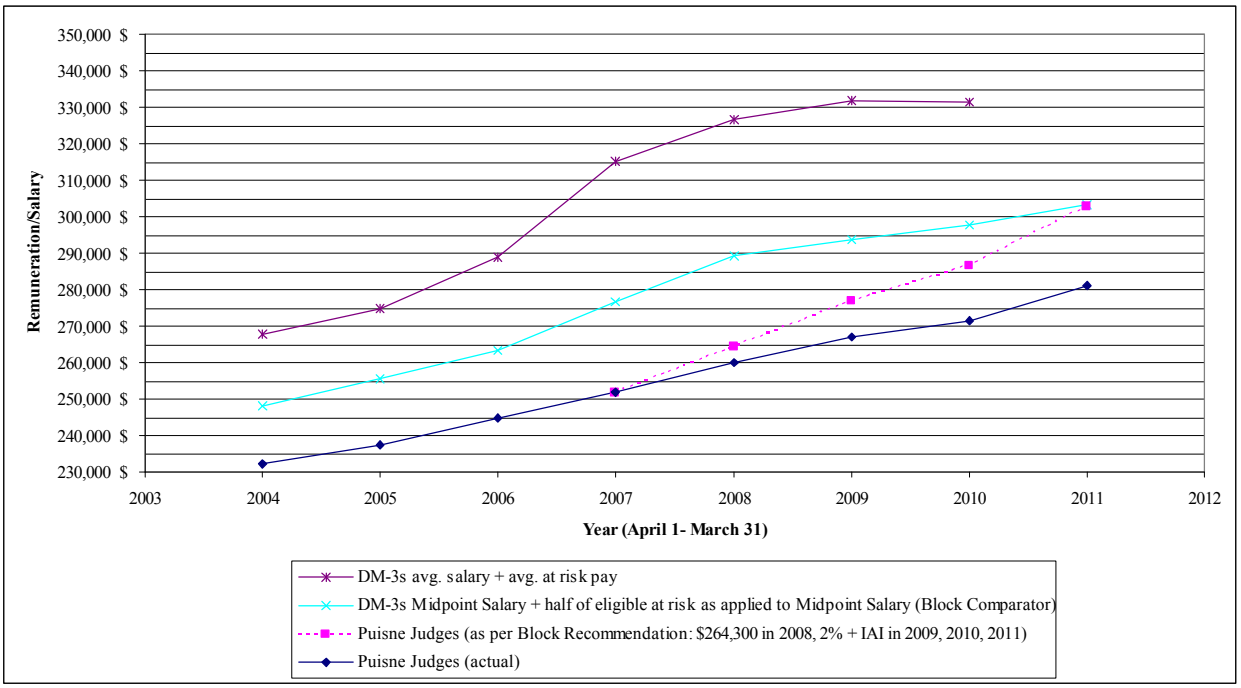


As illustrated above, the gap between judicial remuneration and that of the most senior deputy ministers is persisting. The longer this situation is allowed to persist, the more difficult it will be to narrow the gap.

138. The following graph shows the disparities when average compensation of DM-3s is taken into account:

[graph appears on next page]

Graph B
Comparison of DM-3s salaries with "at risk" pay
vs. Puisne Judges salaries



139. As can be seen in this graph, the salary recommendation of the Block Commission, had it been implemented, would have effectively closed the gap between judicial salaries and the DM-3 comparator, as calculated by the Block Commission, even though judicial salaries would have remained well below the average compensation actually received by DM-3s.

140. The Block Commission considered the issue of the DM-3 comparator to be settled. It should no longer be necessary to explain why the comparison with the DM-3s is a principled one and why the comparison is of central importance. The present Commission should rely on the rationale that led the Block Commission to make its salary recommendation as support for its endorsement of this recommendation.

ii) Self-employed lawyers' income

- Introduction

141. The incomes of private practitioners have been considered by all judicial compensation commissions as an important comparator in the setting of adequate judicial salaries. As

noted earlier in these submissions, this comparator has particular relevance in view of the third criterion provided in subsection 26(1.1) of the *Judges Act*, namely, "the need to attract outstanding candidates to the judiciary".

142. Lawyers in private practice have long been the primary source of candidates to the Bench. The Drouin Commission noted that in the years 1990 to 1999, 73% of those appointed to the Bench came from the private Bar, a proportion that increases to 82% if judges elevated from the provincial or territorial Bench are excluded from the calculation.[102] As the McLennan Commission reported in May 2004, based on information from the Judicial Appointments Secretariat of the Office of the Commissioner for Federal Judicial Affairs ("**OCFJA**"), approximately 73% of appointees during the period from January 1, 1997 to March 30, 2004 came from private practice.[103] For the period April 1, 2004 to March 31, 2007, the period at issue before the Block Commission, a majority of around 78% continued to be appointed from private practice. This proportion increases to 84% if judges elevated from the provincial/territorial Bench and masters are excluded from the pool.[104]

143. Based on the data provided for the period of April 1, 2007 to March 31, 2011 by the OCFJA, around 70% of appointees came from private practice during that period,[105] 80% if judges elevated from the provincial/territorial Bench, masters, and members of administrative tribunals are excluded from the pool.[106] As can be seen, judges have been,

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[102] Drouin Report (2000) at 36-37.

[103] See McLennan Report (2004) at 17, Table 2.

[104] Information provided to Justice Canada and the Association by the OCFJA, Tables 7 and 8: "Appointees in Private Practice, Predominant Area of Practice, April 1, 2004 to March 31, 2007" and "Appointees Not in Private Practice, Predominant Area of Practice, April 1, 2004 to March 31, 2007", reproduced in the JBD.

[105] One appointee was an in-house counsel in the private sector and therefore strictly speaking would not fall within the category of private practice. Another in-house counsel was classified as being in the public sector since that appointee was an in-house lawyer at a Crown corporation..

[106] For the 2007-2011 period, there were 23 provincial/territorial judges, 2 masters, and 3 members of administrative tribunals appointed.

and should continue to be, appointed in the main from the private practice of law in Canada.[107]

144. Among the judges appointed between April 1, 2004 and March 31, 2007, 67% came from the ten largest urban centres,[108] and among those appointed between April 1, 2007 and March 31, 2011, 60% came from the ten largest urban centres.[109] In order to ensure that outstanding candidates from the private Bar will continue to seek judicial appointments, judicial salaries must be fixed taking into account the higher level of earnings that such practitioners enjoy as well as the higher cost of living that prevails in such centres.

145. The McLennan Commission found that the income of self-employed lawyers in the larger Canadian cities exceeded the current level of judicial compensation, even when the value of the judicial annuity is factored in.[110] Observing that many appointees come from higher-income brackets, the McLennan Commission expressed the view that it is important "to establish a salary level that does not discourage members of that group from considering judicial office."[111]

146. The *Judges Act* speaks of the need to attract "outstanding" candidates to the judiciary. Accordingly, it has long been acknowledged that what matters is not to count the numbers of applications for appointment but, rather, to create conditions that will encourage applications from outstanding candidates. The Association and Council

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[107] The Block Commission took note of the shift in the provenance of American appointees when judicial salaries were allowed to lag behind lawyer compensation in the private sector. The majority of appointees in the U.S. now comes from the public sector even though in the 1950s a majority came from the private sector (Block Report at paras 71-72); see also American College of Trial Lawyers, "Judicial Compensation: Our Federal Judges Must Be Fairly Paid", March 2007, at 1. Online:http://www.actl.com

[108] The following are the 10 largest Census Metropolitan Areas, according to the 2006 census: Toronto, Montreal, Vancouver, Ottawa-Gatineau, Calgary, Edmonton, Quebec City, Winnipeg, Hamilton, and London. See Table 4, "Place of Practice/Employment at Time of Appointment, City/Province/Territory, April 1, 2004 to March 31, 2007", provided by the OCFJA, and reproduced in the JBD.

[109] Data received from the OCFJA.

[110] McLennan Report (2004) at 48. The McLennan Commission estimated, based on the advice of its experts, that the value of the government-paid portion of the judicial annuity could be set at 22.5% of salary (see McLennan Report (2004) at 58).

[111] McLennan Report (2004) at 49.

submit that Quadrennial Commissions must be forward-looking in establishing judicial salaries so as to ensure that outstanding candidates will be willing to seek judicial appointment throughout the four-year period covered by a Commission's salary recommendations.

147. Income is of course not the only measure of the quality of candidates from the Bar. It is also clear that the judicial annuity is a substantial benefit to judges which is not enjoyed by private practitioners. In addition, as the Lang Commission noted some twenty-four years ago, there is real value to be placed upon the opportunity for public service which is offered to members of the judiciary.[112] Nevertheless, judicial compensation, including judicial annuities, remains a factor of significant importance in the need to attract outstanding candidates to the judiciary.

148. In sum, the income level of senior lawyers in the private practice of law in Canada should continue to serve as a comparator by this Commission, and judicial salaries must be at a level sufficient to ensure that outstanding practitioners will continue to be prepared to consider judicial appointment.

- ***The 2006-2010 CRA data***

149. As in the past, the Canada Revenue Agency ("**CRA**") was mandated by the Government and the judiciary to assemble a database consisting of the 2006 to 2010 tax returns of self-employed individuals who identified themselves as lawyers on forms T2032, "Statement of Professional Activities", or T2124, "Statement of Business Activities".[113] This database was then used to generate statistics based on specific parameters.

150. CRA was asked by the Association and Council to produce data of net professional income of all self-employed lawyers in Canada for the years 2006 to 2010, according to

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[112] See Lang Report (1983) at 2-3.

[113] According to the methodology used by CRA, filers who incorrectly filed a business income tax return form instead of a professional form were re-assigned to a professional income return form.

parameters that past Commissions[114] have determined should be used in order to capture the relevant comparator group in the private sector. These parameters are:

a) between the ages of 44-56,[115]

b) lawyers with an annual net professional income of or over $60,000 ("low-income exclusion of $60,000");

d) income at the 75th percentile of the income distribution for a given category.

151. It is also important to look at income levels in the Census Metropolitan Areas ("**CMAs**") since that is where the majority of judges come from. Indeed, over the last fourteen years, 60.5%[116] of appointees came from one of the 10 largest CMAs in Canada.

152. The following Table 4 presents the results for both the whole country and the top ten CMAs, using the 75th percentile of income of self-employed lawyers aged between 44 and 56 with an annual net professional income of $60,000 or higher. In 2010, the net professional income for self-employed lawyers at the 75th percentile in the ten largest CMAs reached $468,261. This is 18.5% more than the 75th percentile income for self-employed lawyers in Canada, estimated at $395,274.

[table appears on next page]

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[114] See *e.g.* McLennan Report (2004) at 43.

[115] The 44-56 age group is the one from which the majority of lawyers were appointed as judges during the period from January 1, 1997 to March 31, 2011. According to the data provided by the OCFJA, and calculated by Justice Canada, 74.4% of appointees belonged to this age group at the time of their appointment.

[116] From the data provided by the OCFJA and calculated by Justice Canada, out of 745 appointees between January 1, 1997 to March 31, 2011, 451 or 60.5% were living in one of the ten following CMAs: Calgary, Edmonton, Hamilton, London, Montréal, Ottawa –Gatineau, Québec City, Toronto, Vancouver and Winnipeg.

Table 4
Net professional income of all self-employed lawyers at the 75th percentile
(Net professional income ≥ $60 000, Age group – 44-56)
Canada and top ten CMAs, 2006 to 2010[117]

	Canada	Top ten CMAs
2006	$343,985	$414,078
2007	$368,458	$451,031
2008	$366,577	$446,370
2009	$380,087	$452,906
2010	$395,274	$468,261

153. All CRA data about self-employed lawyers' income must be approached by taking into account the prevalence of income splitting among private practitioners in Canada. As explained in an expert report by Gilles Veillette, CA and Jean-Luc Beauregard, CA from Deloitte which was filed before the Block Commission, as much as $60,000 of a self-employed lawyer's income could be directed to the lawyer's family members using this method.[118]

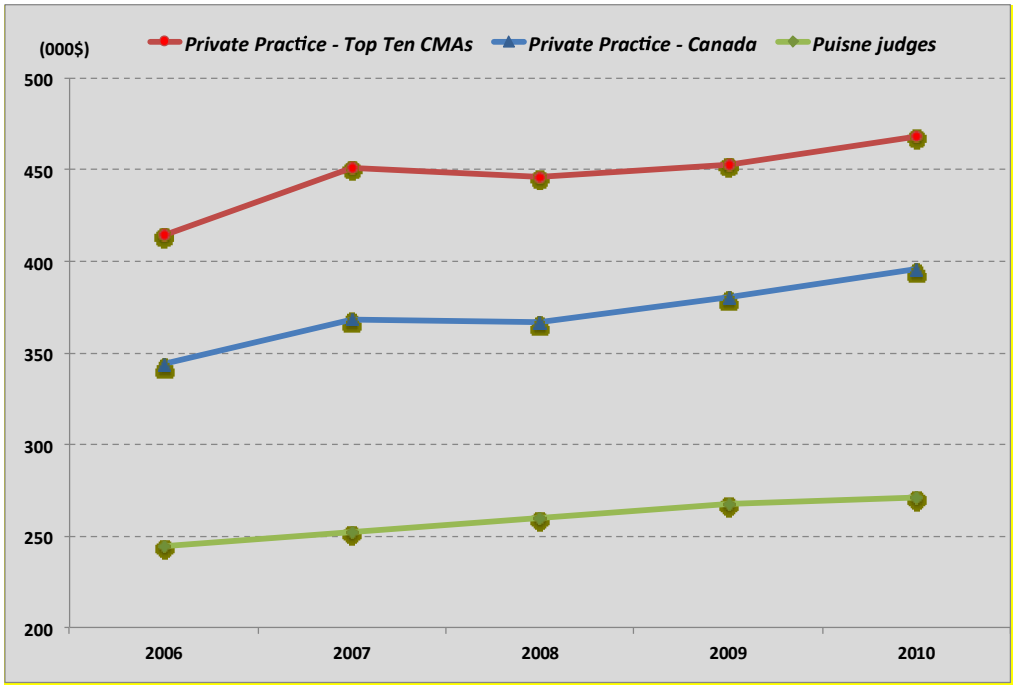
154. The following graph compares the trends of the net professional income of self-employed lawyers at the 75th percentile for Canada and for the top ten CMAs with the trend of salary levels of puisne judges over the period 2006-2010:

[graph appears on next page]

[117] Source: Statistics compiled by CRA, December 2011.

[118] For convenience, this report is reproduced in the JBD.

Graph C
Trends of self-employed lawyers income in Canada and top 10 CMAs vs salary of puisne judges - 2006-2010
(Net professional income at 75th percentile, ≥ $60,000, age group 44-56)



155. As can be seen from the above graph, the salary levels of puisne judges over the years have lagged behind the income of self-employed lawyers across Canada and in the major urban areas, even more significantly than as shown in Graph C if one takes into account the prevalence of income splitting among private practitioners.

156. Table 5 below shows the difference between the salary of puisne judges and the 75th percentile income for self-employed lawyers in private practice. From 2006 to 2010, the gap between the two groups has increased. The gap between the salary of puisne judges and the 75th percentile income of lawyers in private practice in Canada increased from 28.9% in 2006 to 31.3% in 2010. The gap between the salary of pusine judges and the 75th percentile income of lawyers in the top ten CMAs was even greater, increasing from 40.9% in 2006 to 42% in 2010.

[table appears on next page]

Table 5
Comparison of salary of puisne judges
with net professional income of self-employed lawyers at the 75th percentile
(Net professional income ≥ $60 000, Age group – 44-56)
Canada and Top 10 CMAs, 2006 to 2010

	75th Percentile Income		Salary of Puisne Judges		
	Canada	Top ten CMAs	$	% Difference from	
				Canada	Top ten CMAs
2006	$343,985	$414,078	$244,700	-28.9%	-40.9%
2007	$368,458	$451,031	$252,000	-31.6%	-44.1%
2008	$366,577	$446,370	$260,000	-29.1%	-41.8%
2009	$380,087	$452,906	$267,200	-29.7%	-41.0%
2010	$395,274	$468,261	$271,400	-31.3%	-42.0%

157. The above observation is valid even when the value of the judicial annuity is taken into account.[119] Table 6 below shows that even with an annuity value of 22.5%, the compensation of puisne judges is 15.9% less than the 75th percentile income for lawyers in private practice in Canada, and 29% less than lawyers in private practice in the top ten CMAs. Once again, the gap is even greater if income splitting is considered.

[table appears on next page]

[119] The actuarial expert retained by the McLennan Commission concluded that the value of the judicial annuity is 22.5% of salary (McLennan Report at 58). The Block Commission omitted mentioning this in discussing the Government's proposed figure of 24.6 % (Block Report at para 113).

Table 6
Comparison of salary of puisne judges with judicial annuity of 22.5% with net professional income of self-employed lawyers at the 75th percentile
(Net professional income ≥ $60 000, Age group – 44-56)
Canada and Top 10 CMAs, 2006 to 2010

	75th Percentile Income		Salary of Puisne Judges + value of judicial annuity of 22.5%		
	Canada	Top 10 CMAs	$	% Difference from	
				Canada	Top 10 CMAs
2006	$343,985	$414,078	$299,758	-12.9%	-27.6%
2007	$368,458	$451,031	$308,700	-16.2%	-31.6%
2008	$366,577	$446,370	$318,500	-13.1%	-28.6%
2009	$380,087	$452,906	$327,320	-13.9%	-27.7%
2010	$395,274	$468,261	$332,465	-15.9%	-29.0%

158. This remuneration differential can have serious implications for future success in attracting outstanding candidates to the Bench, one of the criteria set out in s. 26(1.1) of the *Judges Act*. As the Block Commission commented,

> there is no certainty that if the income spread between lawyers in private practice and judges were to increase markedly that the Government would continue to be successful in attracting outstanding candidates to the Bench from amongst the senior members of the Bar in Canada.[120]

c) Salary increases sought by the judiciary

159. **For the reasons set out below, the Association and Council seek the adoption by this Commission of the Block Commission's salary recommendation for puisne judges as of April 1, 2012, and urge this Commission to recommend that it be implemented, on a prospective basis, effective April 1, 2012 and thereafter. Accordingly, the**

[120] Block Report at para. 116.

judiciary seeks the following salary increases: 4.9% as of April 1, 2012, inclusive of statutory indexing, and 2.0% as of each of April 1, 2013, 2014, and 2015, the latter three years exclusive of statutory indexing.

160. There has been no increase to the salary of puisne judges since April 1, 2004, exclusive of statutory indexing. The current salary of puisne judges is $281,100. As of April 1, 2012, it is estimated that it will be $287,200 by virtue of statutory indexing currently estimated at 2.2%.[121] If the proposed 4.9% increase is implemented, total remuneration would be $294,800 as of April 1, 2012. As of April 1, 2011, one year earlier, the midpoint of the DM-3 salary range plus half eligible at-risk was $303,249.50. In the 2010-2011 fiscal year, the overall average DM-3 compensation was $331,557. Accordingly, the increases sought by the Association and Council will not eliminate the gap between puisne judges and DM-3s, but will serve to reduce it.

161. The CRA data regarding self-employed lawyers canvassed above amply support the recommendations sought by the Association and Council.

162. The Government, through the Minister's response in 2009 to the Block Report, declined to implement the Block Commission's recommendations at that time on the basis that "significant deterioration of economic conditions in Canada and the financial position of the Government" made it "unreasonable" to implement the recommendations. Importantly, none of the recommendations was otherwise rejected. The Government's response specifically left open the implementation of the Block Commission's recommendations, even before the appointment of the members of the next Commission, should economic circumstances improve.

163. The economic conditions in Canada have improved and the outlook is better now than what it was in February 2009, the time of the Minister's response. Aside from invoking economic circumstances, the Government presented no substantive objection to the Block Commission's recommendations.

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[121] This figure is based on current IAI projections by the Office of the Superintendent of Financial Institutions.

164. Since economic conditions have improved in comparison with the situation at the time of the Government's response, the Association and Council ask that the Block Commission's recommendations be adopted by this Commission as its own recommendations. As stated above, the prevailing economic conditions in Canada do not present an obstacle to the implementation of the recommendations of the Block Commission.

165. The compensation of DM-3s has continued to increase despite the legislative restraints in force since 2009. Both the Government and the Stephenson Committee considered it appropriate to continue to increase the compensation level of these senior members of the federal public service through performance pay, in spite of the challenging economic circumstances that Canada was facing.

166. In 2009-2010, the overall average at-risk pay for DM-3s was $66,183, up from $64,670 the previous year. In 2010-2011 overall average at-risk pay went down to $60,371 but was almost completely offset by an increase in the average base salary for DM-3s, from $265,683 in 2009-2010 to $271,186 in 2010-2011.[122]

167. Regarding self-employed lawyers, as seen above, there remains a significant gap with the salary of puisne judges. For the Bench to continue to be attractive for outstanding candidates, the gap between the income of self-employed lawyers and puisne judges should not be allowed to persist.

168. The following table illustrates the impact on federally appointed judges of the non-implementation of the Block Commission's salary recommendation as of April 2008:

[table appears on next page]

[122] $66,183 - $60,371 = $5,812, versus $271,186 - $265,683 = $5,503.

Table 7
Impact of non-implementation of Block Commission salary recommendations as of April 2008

Year	Block Commission recommendation[123]	Actual salaries of puisne judges	Annual difference between Block Commission recommendation and actual salaries
April 1, 2008	$264,300	$260,000	$4,300
April 1, 2009	$276,900	$267,200	$9,700
April 1, 2010	$286,800	$271,400	$15,400
April 1, 2011	$302,800	$281,100	$21,700
Total loss 2008-2011			$51,100 per judge

169. The Association and Council submit that the criteria under s. 26(1.1) of the *Judges Act* justify an implementation, albeit delayed for four years, of the Block Commission's salary recommendation as of April 1, 2012. The analysis, conclusions, and recommendations of the Block Commission are as valid now as when they were made. Accordingly, the salary for a puisne judge as of April 1, 2012 should be $294,800.

Recommendation sought:

The salary of puisne judges should be increased by 4.9% (inclusive of statutory indexing) as of April 1, 2012, resulting in a salary of $294,800. Thereafter, the salary of puisne judges should be increased by 2.0% (exclusive of statutory indexing) as of each of April 1, 2013, 2014, and 2015.

[123] The calculation does not take into account the appellate differential.

2. Salary differentials among judges

170. The Block Commission recommended salary differentials between puisne judges, chief justices and associate chief justices, puisne judges of the Supreme Court of Canada, and the Chief Justice of Canada, as well as between puisne appellate judges and puisne trial judges. Consistent with the principled approach set out in these submissions, the Association and the Council submit that this Commission should adopt and call for prompt implementation of the following recommendations of the Block Commission:

Recommendations sought

A salary differential should be paid to puisne judges appointed to provincial courts of appeal and to the Federal Court of Appeal, and the salary of puisne judges appointed to these courts should be set at 3% more than the salary of puisne judges of provincial superior courts and the Federal Court effective April 1, 2012.

Salary differentials should continue to be paid to the Chief Justice of Canada, the puisne judges of the Supreme Court of Canada, the chief justices and associate chief justices of the trial courts and courts of appeal. The salary differential for the chief justices and associate chief justices of the trial courts should be established in relation to the salary of the puisne judges appointed to the trial courts. The salary differential for the chief justices and associate chief justices of the courts of appeal should be established in relation to the salary of the puisne judges appointed to the courts of appeal. The salary differential of the Chief Justice of Canada and the puisne judges of the Supreme Court of Canada should be established in relation to the salaries of puisne judges appointed to the courts of appeal.

3. Other substantive recommendations

171. Appendix "A" sets out all of the recommendations made by the Block Commission, including those unrelated to salary.

172. All of these recommendations were carefully considered by the Block Commission, are supported by compelling reasons, remain appropriate, and are consistent with the criteria of s. 26(1.1) of the *Judges Act*. None was specifically rejected by the Government in its response. For the same reasons as set out above, the Association and Council submit that

those recommendations should be endorsed by this Commission, and recommended for prompt implementation.

Recommendations sought

The *Judges Act* be amended so that senior judges of the territorial courts who elect supernumerary status receive the same treatment with regard to their retirement annuities as do chief justices who elect supernumerary status.

Should measures be taken by the territorial governments to allow a senior judge, not yet entitled to elect supernumerary status, to elect to cease to perform his or her duties as a senior judge and to perform only the duties of a puisne judge and receive the salary of a puisne judge, the *Judges Act* be amended so that the retirement annuity of a former senior judge is based on the salary of a senior judge.

The *Judges Act* be amended so that a judge appointed to a court of appeal who subsequently accepts appointment to a trial court, and receives the salary of a trial court judge, receives a retirement annuity based on the salary of his or her former position as a judge of a court of appeal.

Effective April 1, 2012, representational allowances be increased to $22,500 for the Chief Justice of Canada, $15,000 for the Chief Justice of the Federal Court of Appeal and the chief justices of the provinces, $12,000 for puisne judges of the Supreme Court of Canada, $12,000 for other chief justices and associate chief justices and senior judges, and $6,000 for Ontario regional senior judges.

The senior family law judge in Ontario be paid the same representational allowance as the other regional senior judges in the province.

The Commission endorses and urges the parties to take account of Recommendations 12 to 15 of the Block Commission.

C. COSTS

173. Under s. 26.3(2) of the *Judges Act*, the judiciary is entitled to reimbursement of two-thirds of the costs arising from its participation in the Commission's inquiry. The Block Commission recommended that this remain unchanged. Accordingly, the Association and Council does not at this time seek to change this provision.

Recommendations sought

The provisions in the *Judges Act* relating to the reimbursement of the judiciary's costs for participating in the Quadrennial Commission process remain unchanged.

V. SUMMARY OF RECOMMENDATIONS SOUGHT

174. The following is a summary of the recommendations sought by the judiciary:

1. **The Commission reiterates the importance of respecting all aspects of the Commission process in order to preserve confidence in and maintain the effectiveness of the Commission process.**

2. **The salary of puisne judges should be increased by 4.9% (inclusive of statutory indexing) as of April 1, 2012, resulting in a salary of $294,800. Thereafter, the salary of puisne judges should be increased by 2.0% (exclusive of statutory indexing) as of each of April 1, 2013, 2014, and 2015.**

3. **A salary differential should be paid to puisne judges appointed to provincial courts of appeal and to the Federal Court of Appeal, and the salary of puisne judges appointed to these courts should be set at 3% more than the salary of puisne judges of provincial superior courts and the Federal Court effective April 1, 2012.**

4. **Salary differentials should continue to be paid to the Chief Justice of Canada, the puisne judges of the Supreme Court of Canada, the chief justices and associate chief justices of the trial courts and courts of appeal. The salary differential for the chief justices and associate chief justices of the trial courts should be established in relation to the salary of the puisne judges appointed to the trial courts. The salary differential for the chief justices and associate chief justices of the courts of appeal should be established in relation to the salary of the puisne judges appointed to the courts of appeal. The salary differential of the Chief Justice of Canada and the puisne judges of the Supreme Court of Canada should be established in relation to the salaries of puisne judges appointed to the courts of appeal.**

5. **The *Judges Act* be amended so that senior judges of the territorial courts who elect supernumerary status receive the same treatment with regard to their retirement annuities as do chief justices who elect supernumerary status.**

6. **Should measures be taken by the territorial governments to allow a senior judge, not yet entitled to elect supernumerary status, to elect to cease to perform his or her duties as a senior judge and to perform only the duties of a puisne judge and receive the salary of a puisne judge, the *Judges Act* be amended so that the retirement annuity of a former senior judge is based on the salary of a senior judge.**

7. **The *Judges Act* be amended so that a judge appointed to a court of appeal who subsequently accepts appointment to a trial court, and receives the salary of a trial court judge, receives a retirement annuity based on the salary of his or her former position as a judge of a court of appeal.**

8. **Effective April 1, 2012, representational allowances be increased to $22,500 for the Chief Justice of Canada, $15,000 for the Chief Justice of the Federal Court of Appeal and the chief justices of the provinces, $12,000 for puisne judges of the Supreme Court of Canada, $12,000 for other chief justices and associate chief justices and senior judges, and $6,000 for Ontario regional senior judges.**

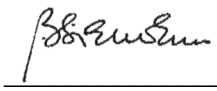
9. **The senior family law judge in Ontario be paid the same representational allowance as the other regional senior judges in the province.**

10. **The Commission endorses and urges the parties to take account of Recommendations 12 to 15 of the Block Commission.**

11. **The provisions in the *Judges Act* relating to the reimbursement of the judiciary's costs for participating in the Quadrennial Commission process remain unchanged.**

The whole respectfully submitted on behalf of the
Canadian Superior Courts Judges Association and the Canadian Judicial Council

Montréal, December 20, 2011



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APPENDIX "A"

Recommendations made by the Block Commission

Recommendation 1

The Commission recommends that:

The salary of *puisne* judges should be set at $264,300 effective April 1, 2008, inclusive of statutory indexing effective that date; and

The salary of *puisne* judges should be increased by statutory indexing effective April 1, 2009, 2010 and 2011 plus an additional 2% effective each of those dates, not compounded (*i.e.*, the previous year's salary should be multiplied by the sum of the statutory indexing and 2%).

Recommendation 2

The Commission recommends that:

Interest should not be paid on retroactive salary adjustments to federally-appointed judges.

Recommendation 3

The Commission recommends that:

A salary differential should be paid to *puisne* judges appointed to provincial courts of appeal and to the Federal Court of Appeal, and that the salary of *puisne* judges appointed to these courts should be set at $272,200 effective April 1, 2008, inclusive of statutory indexing effective that date.

Recommendation 4

The Commission recommends that:

Salary differentials should continue to be paid to the Chief Justice of Canada, the justices of the Supreme Court of Canada, the chief justices and associate chief justices of the trial courts and courts of appeal;

The salary differential for the chief justices and associate chief justices of the trial courts should be established in relation to the salary of the *puisne* judges appointed to the trial courts;

The salary differential for the chief justices and associate chief justices of the courts of appeal should be established in relation to the salary of the *puisne* judges appointed to the courts of appeal;

The salary differential of the Chief Justice of Canada and the justices of the Supreme Court of Canada should be established in relation to the salaries of *puisne* judges appointed to the courts of appeal; and

The salaries should be set as of April 1, 2008 inclusive of statutory indexing, at the following levels:

Supreme Court of Canada

Chief Justice of Canada	$349,800
Justices	$323,800

Federal Court of Appeal and Courts of Appeal

Chief Justices	$298,300
Associate Chief Justices	$298,300

Federal Court, Tax Court and Trial Courts

Chief Justices	$289,700
Associate Chief Justices	$289,700

Recommendation 5

The Commission recommends that:

The *Judges Act* be amended so that senior judges of the territorial courts who elect supernumerary status receive the same treatment with regard to their retirement annuities as do chief justices who elect supernumerary status.

Recommendation 6

The Commission recommends that:

Should measures be taken by the territorial governments to allow a senior judge, not yet entitled to elect supernumerary status, to elect to cease to perform his or her duties as a senior judge and to perform only the duties of a *puisne* judge and receive the salary of a *puisne* judge, that the *Judges Act* be amended so that the retirement annuity of a former senior judge is based on the salary of a senior judge.

Recommendation 7

The Commission recommends that:

The *Judges Act* be amended so that a judge appointed to a court of appeal who subsequently accepts appointment to a trial court, and receives the salary of a trial court

judge, receives a retirement annuity based on the salary of his or her former position as a judge of a court of appeal.

Recommendation 8

The Commission recommends that:

A retirement removal allowance should not be paid to judges of the provincial superior courts and courts of appeal.

Recommendation 9

The Commission recommends that:

Effective April 1, 2008, representational allowances be increased to $22,500 for the Chief Justice of Canada, $15,000 for the Chief Justice of the Federal Court of Appeal and the chief justices of the provinces, $12,000 for *puisne* judges of the Supreme Court of Canada, $12,000 for other chief justices and associate chief justices and senior judges, and $6,000 for Ontario regional senior judges.

Recommendation 10

The Commission recommends that:

The senior family law judge in Ontario be paid the same representational allowance as the other regional senior judges in the province.

Recommendation 11

The Commission recommends that:

The provisions in the *Judges Act* relating to the reimbursement of the judiciary's costs for participating in the Quadrennial Commission process remain unchanged.

Recommendation 12

The Commission recommends that:

Should a future Commission not include a member with experience in the area of compensation, the Commission strongly consider engaging external expert assistance in this area.

Recommendation 13

The Commission recommends that:

While continuity of Commission staffing cannot always be ensured, processes be established to allow for the efficient transfer of institutional knowledge between departing and incoming Commission staff.

Recommendation 14

The Commission recommends that:

Where consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of demonstrated change, such Consensus be taken into account by the Commission and reflected in the submissions of the parties.

Recommendation 15

The Commission recommends that:

The parties consider ways of streamlining the materials produced for future Commissions and, where production of a data set and accompanying analysis is warranted, that such work be undertaken cooperatively.

APPENDIX "B"

General Government Net Debt (% of GDP)

	2010	2011	2012	2013	2014	2015	2016
Canada	32.2%	35.1%	36.3%	36.3%	35.5%	34.4%	33.0 %
France	76.0%	79.2%	81.1%	81.8%	81.3%	80.1%	78.3 %
Germany	53.8%	54.7%	54.7%	53.9%	52.6%	52.6%	52.6 %
Italy	99.6%	100.6 %	100.4 %	100.2 %	100.0 %	99.5%	98.9 %
Japan	117.5 %	127.8 %	135.1 %	142.4 %	149.6 %	156.8%	163.9 %
United Kingdom	69.4%	75.1%	78.6%	79.5%	78.7%	76.5%	73.5 %
United States	64.8%	72.4%	76.7%	79.3%	81.3%	83.4%	85.7 %

Source: IMF, "Fiscal Monitor April 2011", p128.

APPENDIX "C"

General Government Balance (% of GDP)

	2010	2011	2012	2013	2014	2015	2016
Canada	-5.5%	-4.6%	-2.8%	-1.6%	-0.7%	-0.2%	0.0%
France	-7.0%	-5.8%	-4.9%	-4.0%	-3.0%	-2.2%	-1.5%
Germany	-3.3%	-2.3%	-1.5%	-1.0%	-0.4%	-0.1%	0.0%
Italy	-4.5%	-4.3%	-3.5%	-3.3%	-3.2%	-3.1%	-2.9%
Japan	-9.5%	-10.0%	-8.4%	-7.8%	-7.4%	-7.4%	-7.4%
United Kingdom	-10.4%	-8.6%	-6.9%	-5.0%	-3.4%	-2.3%	-1.3%
United States	-10.6%	-10.8%	-7.5%	-5.7%	-5.2%	-5.5%	-6.0%

Source: IMF, "Fiscal Monitor April 2011", p121.

TAB 7

IN THE MATTER OF THE *JUDGES ACT*, R.S.C. 1985, c. J-1, as amended

2011 JUDICIAL COMPENSATION AND BENEFITS COMMISSION

SUBMISSION OF THE GOVERNMENT OF CANADA

BLAKE, CASSELS & GRAYDON LLP
199 Bay Street
Suite 4000, Commerce Court West
Toronto, ON M5L 1A9

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Counsel for the Government of Canada

a perception that judges were not shouldering their share of the burden in difficult economic times."[9]

6. The global economy has recently experienced the deepest and most synchronized recession since the Great Depression. That recession has had a seriously detrimental effect on Canada's finances. Global recovery from the recession has been slow. Recently, the global economic situation has deteriorated, particularly as a result of the sovereign debt and banking crisis in Europe and concerns over the sustainability of the U.S. fiscal situation.

7. In 2009, the Government exempted judges from wage restraint measures that were applied generally to the public sector due to the recession. However, the effects of the recession have been deeper and more protracted than expected at that time. The Government is of the view that continued exemption of the judiciary from the fiscal measures applying to others who are paid from the public purse is not sustainable or fair, and would be inconsistent with the guidance provided in the *PEI Judges Reference*.

8. Accordingly, to maintain public confidence in the judiciary and ensure that increases in judicial salaries reflect the constraint on public sector spending, the Government proposes that salary increases as a result of statutory indexation in s. 25 of the *Judges Act* be capped at a maximum of 1.5% annually for the quadrennial period.[10] The Government notes that the adequacy of the resulting salary will be reviewed again by the 2015 Quadrennial Commission.

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[9] *Ibid.* at para. 196.

[10] Indexation under the *Judges Act* is based on the "Industrial Aggregate" index ("IAI") published by Statistics Canada: *Judges Act*, s. 25. The IAI is the percentage change in average weekly earnings ("AWE") across all industries, including overtime, as calculated by Statistics Canada on the basis of monthly labour income surveys of employers. IAI is applied to judicial salaries on a fiscal-year basis, so it is the change in AWE over the most recently available 12-month period, which is the previous calendar year. That is, the IAI increase applied on April 1, 2012 will be the increase in the AWE over the course of 2011.

The IAI projections of Canada's Chief Actuary that would be applied to judicial salaries for 2012-16 are 2.2%; 2.6%; 2.8% and 2.9% respectively: Letter from M. Mercier, Office of the Chief Actuary, Office of the Superintendant of Financial Institutions, dated December 8, 2011 (to be included in the Joint Book of Documents to be submitted by the parties).

The most recent projections of IAI by the Department of Finance are 2.4% for 2011 (applied to judges in 2012) and 1.3% for 2012 (applied to judges in 2013): Letter from B. Robidoux, Assistant Deputy Minister, Economic and Fiscal Policy Branch, Department of Finance, dated December 16, 2011 ("Department of Finance Letter"), Annex D to this submission.

TAB 8

Annex B – Report of Robert Levasseur and Larry Moate (January 27, 2012)

MCDOWALL ASSOCIATES

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January 27th 2012

Mr. Azim Hussain
c/o Norton Rose Canada LLP
Suite 2500
1 Place Ville Marie
Montréal, Quebec H3B 1R1
CANADA

Dear Mr.Hussain,

RE: Submission to the Judicial Compensation and Benefits Commission

McDowall Associates ("McDowall") has been retained by Norton Rose Canada LLP acting on behalf of the Association and Council in McDowall's capacity as a Canadian compensation consulting expert firm and specifically compensation benchmarking. Please find below McDowall's responses to compensation issues raised by the reading of the 2011 Government of Canada Submission and the expert report submitted by Mr. Pannu forming Appendix E of that submission.

65th percentile vs.75th percentile

Mr. Pannu states in his report that using the 75th percentile is inappropriate but provides no justification for his stance. The Government of Canada Submission argues that factors which had previously rendered the data of lawyers conservative have been removed. We will be arguing below that the data set selected is still conservative.

We suspect the "lawyers" data set, even with all the filters, contains many part-timers. Without casting value judgments on lower income lawyers, we are not convinced these individuals are working at their profession with the intensity required to qualify them as candidates for the judiciary. In compensation terms, these part-timers would not be considered a position match for inclusion in a data set used to determine the percentile rankings. In our consulting work, when we survey the base salary levels of lawyers employed by government and corporations, the median value is approximately $127,000 (sources: Towers Watson Canadian 2011 Survey and Toronto Board of Trade 2011 Survey). This number is twice the minimum value used once the self employed exclusion has been applied. It is our contention that any lawyer committed to his/her practice on a full-time basis would be aware, albeit informally, of this compensation magnitude and would consider career re-orientation in the direction of corporate or government employment if earning much less than $60,000.

The Government's Submission also asserts that the 65th percentile is appropriate due to current economic conditions (para. 68). Our view is the data itself serves as a bellwether for economic conditions and adjusting percentile placement to account for economic conditions effectively distorts the integrity of the results. In his chapter entitled Compensation Surveys (The Compensation Handbook – 4th Edition) D Terence Lichty states with respect to percentile positioning:

> Regardless of the [survey] format, above average does not equal "over paid"; "below average" does not equal "under paid." "Average" does not equal proper pay posture for your organization versus your market. [...] Remember the pay environment in which you operate; performance, internal organizational values, job family, and other issues come to bear on what's right for you. If your compensation policy is to pay the 75th percentile, you may consider someone at the market average to be underpaid.

Moreover the 1999 Drouin Commission Report states on pages 39 and 40 that Hay Group, as the Government's expert, recommended that the use of the 75th percentile would be appropriate when analyzing CRA data.

The 2008 Navigant Consulting supplementary report also supports the use of the 75th percentile. Its author points out in paragraph 16 that using the 75th percentile allows for a greater group of potential lawyers willing to apply for the judiciary. At the 65th percentile, this pool would be smaller. The report states: "...setting the salary of the judiciary equal to the 75th percentile of private sector lawyers would not ensure that the judiciary would be comprised of the top 25% of lawyers in Canada." In fact, the author argues: "...setting judicial pay at the 75th percentile will result in a distribution of judges that comes predominately from the ranks of the lawyers below the cut-off point."

Indeed, use of a compensation percentile position in excess of the median (i.e.: values above the 50th percentile) is usually the result of a policy decision by an organization and is dictated by one or more of the following strategic imperatives:

- Attraction and retention due to sparse or highly specialized employment market.
- Recognition of technical complexity or breadth associated with certain positions
- Recognition of business challenges the organization may face.
- How the organization wishes to portray itself. For example, if an organization sells a premium product, it may wish to compensate its employees with premium pay.

Point 1: While the Government's Submission argues (para. 68) that there is an ample supply of lawyers applying for judicial appointment, the real issue is whether the Government wishes to ensure its pool of applicants is not eroded by uncompetitive compensation.

Point 2: The group used as a comparator is made up of self employed lawyers. Bearing in mind that the data set used by CRA in its analysis is based on self employed individuals identifying themselves as lawyers in Forms T2032 or T2124 we can safely presume that a number of these observations would include lawyers who are working on a part-time basis or are semi-retired. We understand this low income bias was mitigated by the data set being filtered by an age bracket of 44 to 56 years of age and a minimum annual income of $60,000. Notwithstanding these filters we suspect it is weighted downward by lower income self employed lawyers. This impression is borne out when the difference in the number of CRA self employed lawyer observations by "All of Canada" and "All of Canada excluding those earning less than $60,000" is tabulated. We have found that 25.9% of the total group is comprised of lawyers earning less than $60,000. The distribution of the CRA data set by age group is as follows:

Percentage of filers earning less than $60,000

Age	35-43	44-47	48-51	52-55	56-59	60-63	64-69
%	22.8	22.6	23.3	24.2	26.8	29.8	34.2

As will be discussed further below, we believe that the data is diluted and that using the 75th Percentile is necessary to provide a true representation of the market for lawyers.

Point 3: While the use of the 75th percentile has decreased somewhat in prevalence in the private sector in recent years, this is primarily in senior positions where a significant proportion of their compensation is delivered through variable compensation. Organizations with lower levels of variable compensation continue to monitor market position very closely. We have found that companies with lower variable compensation tend to espouse above-median market positioning in an effort to remain competitive. This state of affairs is significant to judges because they earn a base salary alone and the year-to-year variance available to senior executives (and to lawyers, for that matter) is not available to them. As "fixed-income" earners the base salary position of judges is a critical factor.

Age range

By increasing the age selection from 44-56 years to 35-69 years the Government's Submission is increasing the number of low earners, especially at the higher end of the age scale. (See table above.) The Pannu report mentions on the top of page 3 that CRA suspects that self employed lawyers are retiring at a greater rate than younger lawyers are joining their ranks. We therefore infer by this behavior which is supported by the data that there are likely to be a large number of higher aged lawyers working part-time and pulling down the median.

We disagree with the data weighting approach proposed by the Government's Submission. Age has been used in both submissions to filter out poor matches from the CRA data set and we believe that this use is appropriate if the correct filters are in place. The explicit purpose for selecting an age bracket is to capture lawyers who are most likely to be appointed as judges. Implicitly, age bracketing also contributes to filtering out part-timers and semi-retired lawyers.

Adding age weighting to the determination adds a foreign factor to the percentile distribution, which detracts from the integrity of the selected data set. Age implies step progressions and there is likely to be little correlation between the compensation of seasoned lawyers and their age over such a broad time span. Age cannot be used as a proxy for years at the Bar. Lawyers do not all begin practicing law at the same age. Some in fact join the profession later in life.

In our work we are reluctant to use age or seniority for senior positions. Compensation professionals as a general rule avoid using any type of data weighting. Weighting takes away from the integrity of the data set and the percentile being selected. This is particularly important when market data is reviewed annually. Weighting blurs the data by introducing other criteria to the analysis thereby potentially distorting the year-over-year results.

In our view selecting an age bracket that captures lawyers who are most likely to be appointed as judges suggests that that this age group is when lawyers are most likely to be committed to their profession and "at the top of their game" in terms of ability. A graduated scale, as proposed by the weightings Mr. Pannu suggests, creates unnecessary differentiations.

Low-income exclusion

We believe that including low-income lawyers adds considerable "noise" to the data, given the inordinate number of part-time practitioners included in the data-set. The impact this inclusion has on the median is significant and as the exclusion selection criteria implies, lawyers who are not really committed to their profession or are not successful should not be candidates to join the judiciary. It should be noted that Mr. Pannu acknowledges that it is important to filter out lawyers who are not full-time self employed lawyers by excluding individuals who receive C/QPP amounts exceeding the sum of

their professional income and individuals whose employment income exceeds the sum of their professional/business income. (page 2, bullets 4 and 5.) The selection criteria, however, are not sensitive enough to capture most of them. For example, a 40 year old lawyer working from his/her home and processing a few real estate transactions in a tax year would remain in the data-set.

We disagree with Mr. Pannu's assertion that the $60,000 exclusion is inappropriate and uncommon in benchmarking salaries for comparative purposes. From the perspective of compensation professionals the use of such a broad sample as he suggests is unusual. There are two fundamental factors to consider when conducting a compensation market review: the comparator group of organizations used and the matched positions. While the judges' review is based on the specific universe of self employed lawyers we assume the survey group is valid. On the other hand, we cannot be certain that we are matching the surveyed individuals to judiciary eligible positions. Mr. Pannu illustrates this very point in his analysis table that shows the difference between the 5th and 95th percentiles. Using the 2010 numbers as an example, no compensation professional would accept a sample starting at $12,007 for a specific position which has a current salary of $281,100. Entry level file clerks earn at least twice as much as $12,000. By including all these low earners Mr. Pannu is effectively pulling down the median. We believe that such a broad data-set as that provided by CRA creates an imperfect universe of lawyers suitable to be appointed as judges. It is therefore in our view essential to retain the $60,000 exclusion because it eliminates observations that are nothing more than statistical "noise."

Census metropolitan areas

We understand that most judges originate from the 10 Canadian largest metropolitan centers (CMAs). Generally speaking, higher compensation levels are paid in CMAs for major two reasons:

- Cost of living is higher in these centers, and
- Lawyers practicing in these centers are typically involved in legal matters of higher complexity.

Therefore, it should come as no surprise that the lawyers working in larger urban centers are more likely to earn more than those in smaller urban centers or rural areas. Examining these differentials individually is irrelevant given that most appointees come from the top 10 CMAs and Mr. Pannu fails to mention this fact in his report.

Assertions about DM tenure

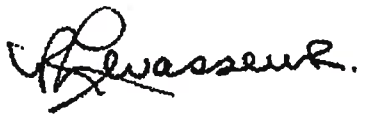
Before commenting on the Government Submission's assertions about tenure, we are unsure about the accuracy of the spreadsheet that was provided. It lists all deputy ministers since 1960 (DM2s and above.) There are 15 DMs listed as active employees in the spreadsheet. The Parliament of Canada's web site lists 28 DM's. Unless the remaining DMs are paid under the DM 1 or EX scale, their list is incomplete. Confirmation of this list would be useful.

Upon further examination of the DM data spreadsheet, few retirements are given as a reason for termination. We question the validity of the data set. Please note that "Promo/Transfer" is given as the most frequent reason for termination from the DM positions listed. While twelve DM-4 observations were noted (the most senior level of the DM rank) seven were tagged with "Promo/Transfer" as the reason for the termination. Where did these DM-4s go next in the Federal Public Service? The same can be said for DM-3 employees as well. 247 DM-3s were reported. 154 (62%) of these entries were tagged "Promo/Transfer." This proportion appears large for such senior functionaries.

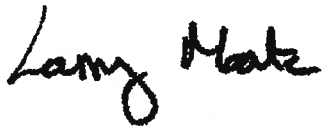
The Government's Submission in paragraphs 114-120 shows that the tenure of DM-3s is lower than that of judges. In fact, low tenure as DM-3s is understood given this position is typically the culmination

of a long career with the public service and incumbents are usually appointed in the latter part of their careers when they are approaching eligibility for a full unreduced pension. Conversely, newly appointed judges are beginning a new career with the judiciary. As compensation experts, it is obvious that comparing the respective average tenure of these two positions does not contribute to the analysis.

Yours sincerely,



Robert Levasseur
Senior Consultant and Principal



Larry Moate
Senior Consultant and Principal

MCDOWALL ASSOCIATES

Robert Levasseur

Background
Robert Levasseur is a Senior Consultant and Principal with McDowall Associates specializing in Executive Compensation. Prior to purchasing this firm with two partners, Robert practiced for 12 years as a senior executive-compensation consultant with Towers Watson and Hay Group. Before 1998, he held positions as a senior compensation and labour practitioner with a number of prominent Canadian corporations including Rothmans International, Canada Post Corporation, Sherritt International and Steinberg Inc.

Executive Compensation Expert
Robert's experience covers all aspects of executive compensation. He has assisted various clients in developing both equity and cash-based performance management and incentive plans and has provided pay-for-performance reviews including the valuation of equity based and non-monetary compensation. Most recently he has advised both compensation committees and management regarding executive compensation governance and executive compensation strategy. His client group spans the private and public sectors and he has consulted to a wide range of organizations from small private companies to large multi-nationals.

Roberts's private sector assignments have hailed from many industry sectors, including pharmaceuticals, financial services, technology and manufacturing. Within the public sector, Robert has extensive experience with government, Crown corporations, not-for-profits, the health and regulatory sectors. Notably, He advised the Stephenson Commission between 2001 and 2006.

Credentials and Public Profile
Robert holds a Bachelor of Arts (Honors) from McGill University and is on the faculty of The Directors College and Humber College's CEB program. He has been quoted in various daily and monthly publications and speaks regularly on executive compensation matters. Most recently Robert has spoken at the 2010 World at Work Conference, the HRPA 2011 Compensation Conference, a CGA development course, was quoted in Canadian Business magazine, the Globe & Mail, has been published in the Canadian Compensation and Benefits Reporter and the August 2011 edition of Work Span magazine.

MCDOWALL ASSOCIATES

Larry Moate

Background

Larry has been consulting in the Human Resources field for over 25 years. Prior to joining McDowall Associates, Larry was a Senior Consultant in Compensation with Watson Wyatt Canada ULC.

Market Analysis, Program Design and Compensation Expert

Larry has over 15 years' experience assisting clients with their compensation strategy, compensation program design and administration needs. Larry's areas of expertise include the management and co-ordination of complex competitive market compensation reviews for Executive, Board Director and Non-Executive positions, as well as the management and co-ordination of custom compensation survey projects for a wide range of industry sectors including the financial, education, food and consumer products, logistics, and auto-parts sectors.

Larry has assisted clients with the design and calibration of variable pay programs, as well as salary structure design projects including complex Pay Equity analysis.

Larry's expertise also includes the development of job measurement methodologies and the facilitation of job measurement sessions.

Prior to assisting clients with their compensation program needs, Larry accumulated over 10 years of experience in the retirement benefits field, where he specialized in pension plan administration, and assisted clients with a complete range of administrative activities.

Education and Public Profile

Larry graduated with an Honors BA in English and History from the University of Toronto.

Larry has spoken at HRPA conferences and numerous industry groups on a variety of compensation related topics, and has contributed to Canadian HR Reporter Magazine.

TAB 9

REPLY SUBMISSION

of the

CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

to the

JUDICIAL COMPENSATION AND BENEFITS COMMISSION

January 30, 2012

Pierre Bienvenu, Ad. E.
Azim Hussain
Norton Rose Canada LLP

28. In sum, there are compelling reasons for this Commission not only to decline to recommend the Government's proposed cap on the statutory indexation mechanism in s. 25 of the *Judges Act*, but indeed to urge the Government not to take any measure that would in any way dilute the protection against the erosion of the value of judicial salaries through inflation set out in s. 25 of the *Judges Act*.

B. Impact on judicial salaries of the non-implementation of past Commission recommendations

29. The Government argues that the judiciary should be subject to the same fiscal measures that have been applied to others who are paid from the public purse. This position ignores the fact that the Government has already significantly limited salary increases for the judiciary over the last two quadrennial periods through the Government's non-implementation of past salary recommendations of the Quadrennial Commission.

30. The Government has not increased judicial salaries since April 1, 2004, exclusive of statutory indexing. The Government, in its Second Response of May 29, 2006, refused to implement the McLennan Commission's salary recommendation. The impact for every judge was $31,900 through the term of that Commission. With 1056 judges at the start of the McLennan Commission, the Government's refusal to implement that recommendation represents $33,686,400 over four years, as set out in the following table:

Year	McLennan Commission recommendation	Actual salaries of puisne judges	Annual difference between McLennan Commission recommendation and actual salaries
April 1, 2004	$240,000	$232,300	$7,700
April 1, 2005	$245,200	$237,400	$7,800
April 1, 2006	$252,800	$244,700	$8,100
April 1, 2007	$260,300	$252,000	$8,300
Total 2004-2007			$31,900 per judge

31. The Government also refused to implement the Block Commission's salary recommendation. The impact for every judge was $51,100 through the term of that Commission. With around 1050 judges at the start of the Block Commission, the Government's refusal to implement that recommendation represents $53,655,000 over four years, as set out in the following table:[10]

Year	Block Commission recommendation	Actual salaries of puisne judges	Annual difference between Block Commission recommendation and actual salaries
April 1, 2008	$264,300	$260,000	$4,300
April 1, 2009	$276,900	$267,200	$9,700
April 1, 2010	$286,800	$271,400	$15,400
April 1, 2011	$302,800	$281,100	$21,700
Total 2008-2011			$51,100 per judge

32. Far from being shielded from the financial burdens visited upon Canadians generally, federally appointed judges actually started shouldering their share of that burden well before the economic crisis even started and have continued to shoulder it through the crisis.

33. The Commission's recommendation regarding judicial salaries will be applicable for the next four years. The Government Submission itself does not refer to anything beyond 2014 for the salary restrictions it invokes in respect of others, which is an implicit acknowledgment that imposing restrictions beyond the next two years would not be justifiable. Yet, the measures it is proposing for the judiciary would be applicable for four years, thereby extending into 2015 the restrictive position that the Government has

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[10] The calculation does not take into account the appellate differential.

TAB 10

JUDICIAL COMPENSATION AND BENEFITS COMMISSION

SUBMISSION

of the

CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

February 29, 2016

Pierre Bienvenu, Ad. E.
Azim Hussain
Norton Rose Fulbright Canada LLP
Counsel for the Canadian Superior Courts Judges Association and the Canadian Judicial Council

TABLE OF CONTENTS

OVERVIEW

1. Judicial independence is a fundamental principle of our democracy and legal tradition.

2. Judicial independence and judicial compensation are inextricably linked. As the Supreme Court of Canada confirmed, financial security, both in its individual and institutional dimensions, is, with security of tenure and administrative independence, one of the three core characteristics of judicial independence.

3. The Constitution of Canada requires the existence of a body that is interposed between the judiciary and the other branches of the state, whose constitutional function is to depoliticize the process of determining changes in judicial compensation. For Canada's 1,138 federally-appointed judges, and for the five Federal Court prothonotaries who were recently added to this process, the Judicial Compensation and Benefits Commission (the "**Commission**") is that body.

4. This submission to the Commission is made on behalf of the Canadian Superior Courts Judges Association (the "**Association**") and the Canadian Judicial Council (the "**Council**"). After addressing issues relating to the Commission process itself – a process of which the Commission is the guardian – the Association and the Council demonstrate in this submission the reasons why this Commission should recommend staged, annual increases to judicial salaries in order to bridge part of the gap that exists between the judicial salary of puisne judges and the key comparator for the establishment of judicial salaries, namely the remuneration of DM-3s, those senior public servants whose skills, experience and levels of responsibilities most closely parallel those of the judiciary.

5. Consistent with Recommendation 11 of the Levitt Commission, the Association and the Council are embarking upon the Commission's current inquiry determined to promote, and to contribute in establishing, a collaborative, non-adversarial relationship with the Government in relation to the Commission process.

I. INTRODUCTION

6. The submission of the Association and the Council is organized as follows. In the first section of this submission, the respective objects of the Association and the Council are described, notably in connection with the process for the determination of judicial compensation and benefits. In the Background section, which is complemented by an Appendix, a brief history of the Commission is recounted. The following section, entitled "The Commission's Mandate", is self-explanatory. In the Issues section, the Association and the Council address both process and substantive issues.

II. THE ASSOCIATION AND COUNCIL

7. The Association is successor to the Canadian Judges Conference, which was founded in 1979 and incorporated in 1986. Its objects include:

   (i) the advancement and maintenance of the judiciary as a separate and independent branch of government;

   (ii) liaison with the Council to improve the administration of justice and to complement its functions through conferences and various educational programs;

   (iii) taking such actions and making such representations as may be appropriate in order to assure that the salaries and other benefits guaranteed by s. 100 of the *Constitution Act, 1867*,[1] and provided by the *Judges Act*[2] are maintained at levels and in a manner which is fair and reasonable and which reflect the importance of a competent and dedicated judiciary;

   (iv) seeking to achieve a better public understanding of the role of the judiciary in the administration of justice;

   (v) monitoring and, where appropriate, seeking to enhance the level of support services made available to the judiciary in cooperation with the Council; and

   (vi) addressing the needs and concerns of supernumerary and retired judges.

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1 Reproduced in the Joint Book of Documents ("**JBD**") prepared with the Government.

2 *Judges Act*, R.S.C. 1985, c. J-1, as amended [JBD at tab 24].

8. As of February 1, 2016, 92% of Canada's approximately 1,138 federally appointed judges are members of the Association.

9. In furtherance of the Association's objects that relate to judicial salaries and other benefits, a Compensation Committee was established to study and make recommendations to the Association's Executive Committee and Board of Directors in respect of issues regarding judicial compensation.

10. The Council was established by Parliament in 1971. It consists of the Chief Justice of Canada and the Chief Justices and Associate Chief Justices of the provincial and territorial superior courts, the Federal Court of Appeal, the Federal Court, the Tax Court of Canada and the Court Martial Appeal Court of Canada.

11. The objects of the Council are to promote and improve efficiency, uniformity and quality of judicial service in superior courts.[3] As part of its mandate, the Council has established a Judicial Salaries and Benefits Committee.

12. The Council and the Association have made joint submissions, written and oral, to each of the five Triennial Commissions (1982-1996) and to the four Quadrennial Judicial Compensation and Benefits Commissions (the "**Drouin Commission**", the "**McLennan Commission**", the "**Block Commission**", and the "**Levitt Commission**"). The Drouin Commission issued its report (the "**Drouin Report**") on May 31, 2000. The McLennan Commission issued its report (the "**McLennan Report**") on May 31, 2004. The Block Commission issued its report (the "**Block Report**") on May 30, 2008. The Levitt Commission issued its report (the "**Levitt Report**") on May 15, 2012.

13. The Association and the Council have worked closely together in preparing this submission on behalf of federally appointed judges. The recommendations sought from this Commission by the federal judiciary have been approved by the Association and the Council.

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[3] The objects of the Council are set out in s. 60 of the *Judges Act* [JBD at tab 24].

III. BACKGROUND

A. Judicial Independence and Judicial Compensation

14. Judicial independence is a fundamental principle of our democracy and legal tradition. This principle, whose historical origins can be traced back to the *Act of Settlement, 1701*,[4] is incorporated in the Constitution of Canada through the preamble and the judicature sections of the *Constitution Act, 1867* and s. 11(d) of the *Canadian Charter of Rights and Freedoms*.[5]

15. Judicial independence and judicial compensation are inextricably bound to each other. In *Valente v. The Queen*,[6] *Reference Re Provincial Court Judges*[7] ("***PEI Reference***"), and more recently in *Bodner v. Alberta*[8] ("***Bodner***"), the Supreme Court of Canada confirmed that financial security, both in its individual and institutional dimensions, is, with security of tenure and administrative independence, one of the three core characteristics of judicial independence.[9]

16. It is important to keep in mind that financial security through adequate judicial compensation ultimately benefits the public, as emphasized by Chief Justice Lamer in the *PEI Reference*:

> I want to make it very clear that the guarantee of a minimum salary is not meant for the benefit of the judiciary. Rather, financial security is a means to the end of judicial independence, and is therefore for the benefit of the public.[10]

17. Under s. 100 of the *Constitution Act, 1867*, the Parliament of Canada has the duty to fix the compensation of federally appointed judges. Section 100 provides as follows:

> The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the

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4 *Act of Settlement, 1701*, (U.K.), 12-13. Will. III, c. 2.

5 For ease of reference, these provisions of the Constitution of Canada are reproduced in the JBD at tabs 22 and 23.

6 *Valente v. The Queen*, [1985] 2 S.C.R. 673 [Book of Exhibits and Documents of the Association and the Council ("**BED**") at tab 1].

7 *Reference Re Provincial Court Judges*, [1997] 3 S.C.R. 3 [JBD at tab 25].

8 *Bodner v. Alberta*, [2005] 2 S.C.R. 286 [JBD at tab 26].

9 *Valente*, *supra* at para. 40 [BED at tab 1]; *PEI Reference*, *supra* at paras. 115-122 [JBD at tab 25]; *Bodner*, *ibid.* at paras. 7-8 [JBD at tab 26].

10 *PEI Reference*, *supra* at para. 193 [JBD at tab 25].

> Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

18. The Triennial Commission chaired by David W. Scott, Q.C. (the "**Scott Commission**") observed in its 1996 report that judges are in a unique position in that their remuneration is the subject of an obligation imposed on Parliament by the Constitution. The Scott Commission explained the value of this responsibility:

> Western democracies rooted in English constitutional tradition have been at pains to ensure that judicial independence, which ensures accountability on the part of the executive branch of Government, is uncontaminated by uncertainty (and thus preoccupation) on the part of the judges with their economic security. Under our Constitution the obligation is upon Parliament to "fix and provide" the salaries and benefits of judges. It is implicit in this constitutional imperative that the process be undertaken in an environment in which judicial independence is enhanced and the consequences of dependency eliminated.[11]

19. The process for determining judicial compensation, which is now provided in the *Judges Act*, has changed over time. The Association and Council have prepared for the Commission's information a summary of the history of this process in Appendix A.

B. The establishment of the current Commission

20. Under s. 26 of the *Judges Act*, as amended, this Commission was required to commence its inquiry on October 1, 2015. This was not possible, however, as the Orders in Council appointing the Chair and Members of this Commission were not issued until December 15, 2015.

21. The reasons for the delay in the commencement of this Commission's inquiry are discussed in the section of this submission devoted to process issues.

IV. THE COMMISSION'S MANDATE

22. The mandate of the Commission is set out in s. 26 of the *Judges Act*, which reads, in part, as follows:

> Commission
>
> 26(1) The Judicial Compensation and Benefits Commission is hereby established to inquire into the adequacy of the salaries and other

[11] Scott Report (1996) at 6 [BED at tab 28].

> 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.

23. The *Judges Act* does not equate "adequacy" of judicial salaries and benefits with the minimum necessary to guarantee the financial security of judges. Rather, the Commission must inquire into the adequacy of salaries and benefits with the dual purpose of ensuring public confidence in the independence of the judiciary and attracting outstanding candidates to the Bench.

24. In 2000, the Drouin Commission said the following about the relationship between judicial compensation and the role of the judiciary in modern Canadian society:

> In response to the *Charter of Rights and Freedoms* (the "*Charter*"), and the growing complexity of our social and economic relationships, the Judiciary is playing an increasingly public role in key decisions that affect us all. Moreover, the characteristics of the Judiciary have changed and continue to shift: judges are being appointed at a younger age, and more females are being appointed to the Bench. The caseload of judges has grown, as more cases move to the higher courts for determination. Many of these cases are high profile and controversial. They capture the public interest and become the focus of media attention. Judicial decisions often generate considerable political debate. The reality of these trends must be recognized when considering the salary and benefits that are adequate to secure judicial independence and attract outstanding candidates to the Bench.[12]

25. This remains true today. Some seven years after the Drouin Commission, the Chief Justice of Canada highlighted some of the serious challenges facing the judiciary and

[12] Drouin Report (2000) at 10 [JBD at tab 28].

the justice system, including the increasing number of unrepresented litigants, the problem of long trials both in civil and criminal litigation, and the challenge presented by intractable, endemic social problems such as drug addiction and mental illness. The Chief Justice observed:

> […] Nothing is more important than justice and the just society. It is essential to flourishing of men, women and children and to maintaining social stability and security. You need only open your newspaper to the international section to read about countries where the rule of law does not prevail, where the justice system is failing or non-existent.
>
> In this country, we realize that without justice, we have no rights, no peace, no prosperity. We realize that, once lost, justice is difficult to reinstate. We in Canada are the inheritors of a good justice system, one that is the envy of the world. Let us face our challenges squarely and thus ensure that our justice system remains strong and effective.[13]

V. ISSUES

26. The Association and the Council set out below the issues that they submit for this Commission's consideration. The recommendations sought by the judiciary are provided at the end of the relevant discussion.

A. Process Issues

1. Introduction

27. Nearly all Triennial and Quadrennial Commissions made observations and suggestions relating to the process before the Commission. Some Commissions even made specific recommendations relating to process.

28. Nevertheless, before the Block Commission, the Government raised the question of the appropriateness of the Commission addressing process issues:

> 33. The Government has suggested that process concerns should be addressed by one of two means: direct discussions between the judiciary and Government or, in certain instances, review by the courts. In our view, the former is inadvisable; the latter is an option that must be carefully weighed.
>
> […]

[13] Chief Justice McLachlin, *The Challenges We Face*, Remarks presented to the Empire Club of Canada, Toronto, Ontario, March 8, 2007 [BED at tab 23].

> 37. The parties nevertheless require access to a forum where concerns related to process can legitimately be raised. It is our view that Quadrennial Commissions, by virtue of their independence and objectivity, are well-placed to serve as that forum and to offer constructive comments on process issues as they arise. While the structure and mandate of the Commission are outlined in statute, any question of process that affects the independence, objectivity or effectiveness of the Commission is properly within its mandate. It is entirely appropriate and arguably imperative that the Commission serve as guardian of the Quadrennial Commission process and actively safeguard these Constitutional requirements.[14] [emphasis added]

29. The Government reiterated its position on process issues before the Levitt Commission, going as far as to question the Commission's "jurisdiction" to address process issues, but the submission was rejected:

> 87. At the public hearings, the Government spoke to the question of the Commission's jurisdiction to address procedural issues. The Government took the position, in effect, that the Commission's mandate is limited to a black-letter reading of section 26 of the *Judges Act* and, accordingly, that any matter falling outside such a reading should be regarded as being beyond the jurisdiction of the Commission.
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> 88. This position is at variance with the conclusion of all prior Commissions and with the view of this Commission. Each Quadrennial Commission has an important role to play in overseeing the evolution of the Quadrennial Commission process and, in so doing, actively safeguarding the constitutional requirements. […][15]

30. The Levitt Commission was very concerned about the fate of the Quadrennial Commission process, stating that it was "in grave danger of ending up where the Triennial process did."[16] By this, the Levitt Commission meant to refer to a process that had lost credibility and had been shown to be ineffective in achieving the goal of preserving judicial independence through a non-politicized compensation commission process. The Levitt Commission therefore made a number of process recommendations, including to address what it described as the "troubling" adversarial nature of the Commission process:[17]

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14 Block Report (2008) at paras. 33 and 37 [JBD at tab 30].

15 Levitt Report (2012) at paras. 87-88 (citations omitted) [JBD at tab 31].

16 Levitt Report (2012) at paras. 92-93 [JBD at tab 31].

17 Levitt Report (2012) at para. 112 [JBD at tab 31].

Recommendation 8

The Commission recommends that: In formulating its response to this Report, the Government give weight to the importance of the perspective of reasonable, informed members of both the public and the judiciary.

Recommendation 9

The Commission recommends that: The Government give careful consideration to the third stage for assessing the rationality of a government response introduced by the Supreme Court of Canada's decision in *Bodner*: —Viewed globally, has the commission process been respected and have the purposes of the commission – preserving judicial independence and depoliticizing the setting of judicial remuneration – been achieved?

Recommendation 10

The Commission recommends that: Where consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of demonstrated change, such consensus should be taken into account by the Commission, and reflected in the submissions of the parties.

Recommendation 11

The Commission recommends that: The Government and the judiciary examine methods whereby the Commission process can be made less adversarial and more effective.

31. In its Response to the Levitt Report, the Government agreed to work with the judiciary to improve the Commission process. The Government also stated that "a less adversarial and more efficient process can be achieved by seeking and building upon genuine consensus, and the Government agrees with the Commission that the parties should explore additional methods for doing so".[18]

32. The Government indicated in its Response to the Levitt Report that it would propose amendments to the *Judges Act* to reduce the time for the Government's response from six months to four months, and to establish an express obligation to introduce implementing legislation in a timely manner. These amendments were adopted in 2012, and the judiciary considers that they have, indeed, contributed to improving the Quadrennial Commission process.

[18] Response of the Government of Canada to the Report of the 2011 Judicial Compensation and Benefits Commission, May 15, 2012 [BED at tab 10].

33. With respect to Recommendation 10, and its equivalent in the Block Report, Recommendation 14 – both of which plainly call upon the parties to respect and build upon the findings of previous Commissions on recurrent issues – the Government took the position, in its response to the Levitt Report, that there is "only a 'consensus' on an issue if all parties before the Commission have agreed on that issue."

2. Follow-up on the Levitt Commission's process recommendations

34. On December 23, 2015, at the preliminary conference call with this Commission, the parties were asked to describe in their respective submissions the follow-up that has been given to the Levitt Commission's process recommendations, namely Recommendations 8 to 11.

35. The Association and the Council appreciate that the Commission would want to be informed of the parties' follow-up to the Levitt Commission's process recommendations, and respond to the Commission's request in this section. However, in order to preserve the parties' future ability to address process issues with candour in discussions *inter partes*, the judiciary limits itself to describing in broad terms the subject-matter of the discussions, without giving details of the content of these discussions or disclosing the relevant correspondence.

36. On January 24, 2014, representatives from the Association met with the federal Deputy Minister of Justice to discuss ways in which the judiciary and the Government could work together to improve the Commission process, consistent with the Levitt Commission's Recommendation 11.

37. In these discussions with the Government, the Association took the position that a major source of tension between the parties, contributing to the adversarial nature of the Commission process, was the Government's persistent attempts to re-litigate recurrent issues in regard to which a consensus had emerged from past Commission inquiries. The Association accordingly suggested that in order to respond to Recommendation 11 – and consistent with Recommendation 10 – the parties should attempt to identify these areas of consensus. The Government agreed to undertake this exercise.

38. In subsequent correspondence, the Association set out four areas around which the judiciary believed that a consensus had emerged from past Commission inquiries. The Association reiterated its belief that adopting a consensus position on these issues in the

future would be responsive to the Levitt Commission's recommendation that the parties work together to make the process less adversarial and more effective.

39. The Government did not accept the judiciary's main proposed area of consensus. In its initial response, it did not directly address the other three proposed areas of consensus, nor did it propose any alternative area of consensus. Instead, the Government reiterated the position it had taken before the Levitt Commission that each Commission is statutorily and constitutionally required to make its own assessment of the evidence and submissions received during its inquiry.

40. The Association pressed the Government to respond to the other proposed areas of consensus set out in the Association's correspondence. In a subsequent letter, the Government rejected these proposed areas of consensus and again reiterated the view that it is not open for a Commission to follow a previous Commission's findings.

41. The idea that each Quadrennial Commission should build on the work of previous Commissions is so unassailable, rooted as it is in common sense, that it should no longer detain the parties or the Commission. As noted by the Levitt Commission, this approach is also consistent with the Supreme Court of Canada's decision in *Bodner*. In light of this precedent, and the observations of the Block and Levitt Commissions in this regard, the judiciary hopes that the Government will not seek to re-litigate before this Commission issues around which a consensus emerges from previous inquiries, such as the relevance of the DM-3 comparator, the filters to be applied to generate relevant data on self-employed lawyers' income, or indeed the legitimacy for either party to raise process issues before the Commission.

3. Issues in relation to the present Commission process

42. Two issues have arisen in the course of the constitution of the present Commission that require mention. The first relates to the impact of a fixed election date on the statutory deadlines provided in the *Judges Act*; the second, to the required qualifications of the parties' nominees to serve on the Commission. A third issue, broader in scope, concerns the need for prior consultation with the judiciary prior to making amendments to the provisions of the *Judges Act* relating to the Commission process.

a) The need to respect statutory deadlines

43. Under the *Judges Act*, this Commission was required to begin its inquiry on October 1, 2015. Yet, the Orders-in-Council appointing the members of the Commission were only issued on December 15, 2015.

44. As reflected in the exchange of correspondence filed with this submission as **Exhibit A**, a difference has arisen between the parties on the impact of a forthcoming election on the Commission process, including on the need for the Government to proceed with the appointment of the members of the Commission in time for the inquiry to begin on the date mandated by the statute. Given the current confluence between the statutory start date of the Commission set out in the *Judges Act* and the fixed-date election period in the *Canada Elections Act*, this problem is likely to arise again in October 2019. It therefore seems relevant to invite consideration of the issue by this Commission.

45. As set out in their correspondence on the subject, the Association and the Council's position is that even if the statutory start of the Quadrennial Commission's inquiry occurs in the run-up to, or during an election period, the Government is required to comply with the *Judges Act* and move to constitute the Commission in time for the Commission to begin its inquiry on October 1.

b) Independence and impartiality of nominees

46. In June 2015, the Government advised the Association and the Council that its nomination to the Commission was a retired Deputy Minister of Justice. The Association and the Council's understanding is that this Deputy Minister had been directly involved as part of the Government's representation before the Levitt Commission, in addition to having participated, on behalf of the Government, in discussions with the judiciary concerning possible reforms to the Commission process between April 2010 and November 2012.

47. The Association and the Council respect the Government's right under the *Judges Act* to select its nominee to the Commission, a right that the judiciary also enjoys under the *Judges Act*. However, the right to select a nominee is necessarily constrained by basic principles. The Association and the Council are firmly of the view that these basic principles preclude the parties from nominating any person who has represented a party or acted as counsel for a party in relation to the current or previous Commissions.

48. The Association and the Council communicated this view to the Government and invited reconsideration of its nomination and the selection of another nominee. While the Government reasserted the view that its initial nomination was appropriate, the Government's nominee himself decided to withdraw his name.

49. The Association and the Council are not seeking any recommendation from the Commission on this question. However, the judiciary considers it essential that the position it adopted as to the requirements of independence and impartiality on the part of Commission members be made public, so as to inform future nominations. Accordingly, the Association and the Council file as **Exhibit B** to this submission their exchange of correspondence with the Government on this very important question.

c) The need for consultation with the judiciary prior to introducing amendments to the *Judges Act* relating to the Commission process

50. In the February 27, 2014 Government's Response to the Report of the Special Advisor on Federal Court Prothonotaries' Compensation, the Government indicated that in the future, this Commission would inquire into the adequacy of the compensation of Federal Court prothonotaries. The Government's Response did not provide any particulars as to what this would entail.[19]

51. On May 23, 2014, the Association wrote to the Minister of Justice to express its concern about the Government's proposal.[20] The Association asked for particulars in order to assess whether the constitutionality of the Quadrennial Commission process was engaged, and requested that the Government actively consult with the judiciary before any amendments were made to the *Judges Act* to implement this proposal.

52. On October 23, 2014, the Government introduced amendments to the *Judges Act* (and a minor related amendment to the *Federal Courts Act*) that proposed to include prothonotaries in the Commission process; this was done as part of the Government's omnibus budget bill, Bill C-43. The Government did not give any notice to the

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19 Government's Response to the Report of the Special Advisor on Federal Court Prothonotaries' Compensation, February 27, 2014 [JBD at tab 33(a)].

20 Letter from Justice Jacques to Minister MacKay, May 23, 2014, **Exhibit C**.

Association or the Council of the proposed amendments, either before or after it tabled the amendments. Bill C-43 received Royal Assent on December 16, 2014.[21]

53. Considering the constitutional status of judges appointed under s. 96 or s. 101 of the *Constitution Act, 1867* and the fact that the Commission process is responsive to the Government's obligations under s. 100 of the *Constitution Act, 1867*, the Association and the Council take issue with the Government's unilateral alteration of that process. Moreover, it is regrettable that the Government denied itself the opportunity to hear the judiciary's constructive suggestions and to work with the Association to find an appropriate way to attain the efficiency objective it was pursuing.

54. At a practical level, the inclusion of the prothonotaries in the Commission process introduces unnecessary procedural complications into the process. As counsel for the prothonotaries has noted in his submission in support of the prothonotaries' funding request,[22] the Government elected to include the prothonotaries in the Quadrennial Commission process and they "are now required to participate in a process that is significantly more complex and elaborate than the previous processes".

55. The Commission is a constitutional body, not a mere statutory advisory committee. Although the Government has the responsibility to legislate the Commission into existence, and has done so through the *Judges Act*, any unilateral steps by the Government to alter the Commission engages the constitutional legitimacy of the process. That being so, the judiciary considers it not only appropriate, but also in keeping with the Levitt Commission's recommendation that the "Government and the judiciary examine methods whereby the Commission process can be made less adversarial and more effective",[23] that no changes be made to the provisions of the *Judges Act* relating to the Commission process without prior consultation with the judiciary.

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21 The full exchange of correspondence between the Association and the Government concerning the implementation of the Government's proposal is filed herewith as **Exhibit C**.

22 Letter from Paliare Roland addressed to the Commission, dated January 19, 2016 at 2 [BED at tab 10].

23 Levitt Report (2012) at para. 118 [JBD at tab 31].

d) Concluding remarks on process issues

56. Having canvassed the foregoing process issues, the Association and the Council are embarking upon the Commission's current inquiry determined to promote, and to contribute in establishing, a collaborative, non-adversarial relationship with the Government in relation to the Commission process, consistent with Recommendation 11 of the Levitt Commission.

B. Substantive Issues

57. The Association and the Council raise the issue of judicial salaries among the substantive issues to be addressed by the Commission.

1. Judicial salaries

58. The Association and the Council ask that the Commission recommend phased increases to the salary of puisne judges in order to start bridging the persistent gap that exists between the judicial salary and the remuneration of DM-3s, the most senior level of deputy ministers within the federal Government.[24] The data relating to the private practice comparator also indicate that these increases are necessary to continue to attract to the Bench outstanding candidates from private practice.

a) The *Judges Act* criteria

59. In inquiring about the adequacy of judicial salaries, the Commission must consider a number of criteria set out in s. 26(1.1)(a) to (d) of the *Judges Act*. Each of those criteria is addressed below.

i) The economic conditions in Canada and the financial position of the federal Government

60. The first statutory criterion to be considered pursuant to s. 26(1.1)(a) of the *Judges Act* is the "the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government".

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[24] The DM-4 level is actually the highest. However, following the creation of the DM-4 level, the judiciary agreed for the time being not to consider DM-4s the relevant comparator since the number of people at that level has remained low and, as noted by the Block Commission, it continues to appear to be reserved for positions of particularly large scope.

61. The judiciary is cognizant of this statutory criterion and has shown itself sensitive, in the past, to the Government's ability to implement the Commission's salary recommendations. This is exemplified by the Association's reaction to the Government's response to the Block Report.

62. On February 11, 2009, the Government invoked the economic crisis that began in late 2008 (many months after the issuance of the Block Report) in order to refuse to implement, at that time, the increases to the judicial salary that had been recommended by the Block Commission. On that same day, the Association issued a press release stating that the federally appointed judiciary recognized that the Canadian economy was facing unprecedented challenges that called for various temporary measures, although it emphasized that the applicable constitutional principles would require that the Block Commission's recommendations be reconsidered once the economic situation improved.

63. Fortunately, this Commission is not faced with the kind of economic crisis that struck the global economy in late 2008. Nor is this Commission faced, as the Levitt Commission was, with an environment that included the *Expenditure Restraint Act*, which, even though it did not apply to judges, nevertheless limited the salary increases in the federal public sector until the 2010-2011 fiscal year.[25]

64. As part of the preparations for this Commission, the Department of Finance provided a letter to the Department of Justice dated February 24, 2016 setting out the Government's most recent assessment of the state of the Canadian economy and the Government's current and future financial position.[26] The Department of Finance provided the following assessments:

- "Private-sector economists now expect Canadian real GDP growth to slow to 1.4% in 2016 before picking up to 2.2% in 2017. The economists expect real GDP growth to average 1.9% per year over the 2016 to 2020 period."

- The Consumer Price Index is projected to increase by 1.1% in 2015, and 1.6% in 2016", and 2% in each of 2017, 2018, and 2019.

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25 *Expenditure Restraint Act*, SC 2009, c. 2, s 16.

26 Letter from Assistant Deputy Minister Nick Leswick to Anne Turley, February 24, 2016 [JBD at tab 9].

- The Government reported a budgetary surplus of $1.9 billion for the 2014-2015 fiscal year, and is expected to go into a deficit position in the 2015-2016 fiscal year. The federal debt stood at $612.3 billion as of March 31, 2015, or 31% of GDP.

65. The prospect that the Government will run a deficit in the 2015-2016 fiscal year is not perceived, in and of itself, as the sign of a troubled economy. As the Globe and Mail pointed out in a recent editorial, Canada's "debt-to-GDP ratio, at just over 30%, is far below our G7 peers, and a galaxy removed from any sort of danger zone. And thanks to borrowing costs lower than the rate of inflation, the cost of running a deficit has never been lower."[27]

66. In a report released on February 12, 2016, Douglas Porter, the Chief Economist of BMO Capital Markets, concluded that the Government's proposal for "a moderate dose of stimulus is an entirely appropriate response to current economic realities". Mr. Porter further noted that a moderate fiscal boost would leave Canada's debt-to-GDP ratio relatively unchanged and would not impact Canada's credit rating.[28]

67. More to the point, the federal Government's decision to move into a deficit position results from the Government's intention to spend more to promote economic growth as part of its fiscal stimulus plan.

68. On February 12, 2016, the Minister of Finance met with leading private sector economists as part of pre-budget consultations. The Department of Finance provided the following summary of the Minister's meeting with private sector economists, including an update on the Government's position since the November 2015 economic update:

- "Though recent global economic developments are more negative than expected in last November's *Update of Economic and Fiscal Projections*, the economists noted that Canada's underlying economic and fiscal fundamentals remain sound."

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27 "Yes, Ottawa should run a bigger deficit (but first read the fine print)" Globe and Mail, February 19, 2016 [BED at tab 17].

28 Douglas Porter and Robert Kavcic, "CanadAAA?", BMO Capital Markets, February 12, 2016 [BED at tab 15].

- "On January 1st, the Government cut taxes for an estimated 9 million Canadians through its middle class tax cut. This is a first step in a plan to grow the economy by strengthening the middle class, making historic investments in infrastructure and enhancing child benefits for low- and middle-income Canadians."

- "The Government is committed to investing in the economy and creating conditions for long-term economic growth."[29]

69. On February 22, 2016, the Minister of Finance commented during a "town hall" in Ottawa that deficits will be higher than expected for 2016-17 and 2017-18.[30] Nevertheless, the Minister remained optimistic and spoke of the Government's plan to "grow the economy".

70. It should also be noted that a long-term outlook by the Policy and Economic Analysis Program (PEAP) of the University of Toronto's Rotman School of Management forecasts the following positive trends:[31]

- "the recent drop in the Canadian dollar should translate into stronger net trade over the coming quarters";

- "More of the growth in the Canadian economy in the medium term than in past projections will come from net trade";

- "We anticipate that in the medium term and beyond, on a national accounts basis, the aggregate government sector budget will be roughly balanced";

- "Over the longer term, we see our forecast of the national accounts balances as roughly consistent with balanced public accounts budgets."

71. In sum, Canada has a fiscal position with low debt levels and sound underlying economic and fiscal fundamentals, and the Government is planning to introduce fiscal stimulus to promote economic growth. It follows that the economic conditions criterion set out in s. 26(1.1)(a) does not present an obstacle to this Commission recommending

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29 Department of Finance, Minister Morneau Meets With Private Sector Economists, February 12, 2016, http://www.fin.gc.ca/n16/16-022-eng.asp [BED at tab 16].

30 Susana Mas, "Deficit has soared ahead of March 22 budget, Bill Morneau says", February 22, 2016, www.cbc.ca/news/politics/morneau-fiscal-update-deficit-budget-1.3458207 [BED at tab 18].

31 Policy and Economic Analysis Program, Rotman School of Management, *Long Term Outlook for the Canadian Economy,* February 2016 at I (Summary) [BED at tab 14].

an increase in judicial salaries that is otherwise justified, applying the comparators developed to assist in the determination of judicial salaries.

ii) The role of financial security in ensuring judicial independence

72. The second criterion to be considered by the Commission is "the role of financial security of the judiciary in ensuring judicial independence". In relation to this factor, the Drouin Commission stated:

> We strongly affirm the importance of an independent judiciary, and we recognize the role that financial security plays as a fundamental component of independence as set out in the second enumerated factor under subsection 26(1.1).[32]

73. In the *PEI Reference* case, Chief Justice Lamer sought to demonstrate the link between financial security for judges and the concept of the separation of powers. He said:

> What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be depoliticized. [...]
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> […]
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> The depoliticized relationships I have been describing create difficult problems when it comes to judicial remuneration. On the one hand, remuneration from the public purse is an inherently political concern, in the sense that it implicates general public policy. [...]
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> On the other hand, the fact remains that judges, although they must ultimately be paid from public monies, are not civil servants. Civil servants are part of the executive; judges, by definition, are independent of the executive. The three core characteristics of judicial independence – security of tenure, financial security, and administrative independence – are a reflection of that fundamental distinction, because they provide a range of protections to members of the judiciary to which civil servants are not constitutionally entitled.[33]

74. The role and responsibilities of judges are *sui generis*, as the Government acknowledged in its submissions to the Drouin Commission.[34] Indeed, judges occupy a

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32 Drouin Report (2000) at 8 [JBD at tab 28]

33 *PEI Reference Case*, *supra* at paras. 140 and 142-143 (emphasis in original) [JBD at tab 25].

34 As cited in the Drouin Report (2000) at 13 [JBD at tab 28].

unique position in our society and that uniqueness in all of its manifestations must be taken into account by the Commission. Those manifestations include the following :

(i) Federally appointed judges are the only persons in Canadian society whose compensation, by constitutional requirement, must be set by Parliament. Once a judge accepts a judicial appointment, he or she becomes dependent on Parliament in respect of salaries and benefits.

(ii) Judges are prohibited from negotiating any part of their compensation arrangement with the party who pays their salaries, a restriction that applies to no other person or class of persons in Canada.

(iii) Judges are prohibited by the *Judges Act*[35]- with good reason - from engaging in any other occupation or business beyond their judicial duties. It follows that judges cannot supplement their income by embarking upon other endeavours.

(iv) Judges must divest themselves of any commercial endeavour that may involve litigious rights. This is a significant sacrifice that other members of society are not called upon to make.

(v) Judges' compensation cannot be tied to performance or determined by commonly used incentives such as bonuses, stock options, at-risk pay, etc.

(vi) Finally, there is no concept of promotion or merit in the discharge of judicial duties and there is no marketplace by which to measure the performance or compensation of individual judges.

75. In light of the constitutional role of the judiciary as an independent branch of government and the framework applicable to the fixing of judicial compensation, it would be wrong in principle to consider the expenditure on judicial salaries as being simply one of many competing priorities on the public purse, as the Government attempted to cast the issue before the Block Commission.

76. The Block Commission rejected such a characterization and expressed its agreement with the submission made on behalf of the Canadian Bar Association to the effect that

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[35] *Judges Act*, s. 57(1) [JBD at tab 24]

judicial independence is not a mere government priority, competing with other government priorities, but rather a constitutional imperative. Were the Commission to consider judicial salaries on the same footing with other government priorities, it would be placed in a highly politicized process. As the Block Commission concluded:

> 57. We agree with the views expressed by the Canadian Bar Association. The Government's contention that the Commission must consider the economic and social priorities of the Government's mandate in recommending judicial compensation would add a constitutionally questionable political dimension to the inquiry, one that would not be acceptable to the Supreme Court, which has warned that commissions must make their recommendations on the basis of "objective criteria, not political expediencies". […]
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> 58. With regard to the Government's contention that any increases in judicial compensation must be reasonable and justifiable in light of the expenditure priority that the Government has accorded to attracting and retaining professionals of similarly high qualities and capacity within the federal public sector, we find no such requirement in the statutory criteria that the Commission must consider. In fact, were the Commission required to justify compensation increases in this way, it would make the Commission accountable to the Government and allow the Government to set the standard against which increases must be measured. This would be an infringement on the Commission's independence. Since the maintenance of the financial security of the judiciary requires that judicial salaries be modified only following recourse to an independent commission, any measure that would have the effect of threatening or diminishing the Commission's independence would conflict with this constitutional requirement.[36]

iii) The need to attract outstanding candidates to the judiciary

77. It is axiomatic that there is a correlation between the ability to attract talented individuals and adequate compensation. The Block Commission recognized this when it stated:

> It is not sufficient to establish judicial compensation only in consideration of what remuneration would be acceptable to many in the legal profession. It is also necessary to take into account the level of remuneration required to ensure that the most senior members of the Bar will not be deterred from seeking a judicial appointment. To do otherwise would be a disservice to Canadians who expect nothing less than excellence from our judicial system – excellence which must continue to be reflected in the calibre of judicial appointments made to our courts.[37]

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[36] Block Report (2012) at paras. 57-58 [JBD at tab 30].

[37] Block Report (2012) at para. 76 [JBD at tab 30]

78. The connection between talent and adequate compensation was the impetus for the Government's decision to strike the first Advisory Committee on Senior Level Retention and Compensation, which reported in 1998 (the "**Strong Committee**"). The Strong Committee had this to say about the correlation between compensation and the calibre of candidates:

> In our view, compensation policy should be designed to attract and retain the appropriate calibre of employees to achieve an organization's objectives. Such compensation policy needs to be internally equitable, to be responsive to the economic and social environment, and to encourage and reward outstanding performance. Salary is usually the major driver of such policy. Salary depends upon responsibility, individual performance and comparability with relevant markets. Typically, standard practices and techniques are used to evaluate each of these objectively and transparently.[38]

79. While adequate compensation is required to attract outstanding candidates to the Bench, there are particularities in the setting of judicial compensation that the Commission must take into account. In the words of the McLennan Commission:

> 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.[39]

80. The need to attract outstanding candidates to the Bench, coupled with the fact that appointees predominantly come from private practice, explain the importance of self-employed lawyers' income as a comparator in the determination of judicial salaries. The McLennan Commission made the point succinctly when it said 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."[40]

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38 Advisory Committee on Senior Level Retention and Compensation, *First Report: January 1998* at 7 [BED at tab 12].

39 McLennan Report (2004) at 5 [JBD at tab 29].

40 McLennan Report (2004) at 32 [JBD at tab 29].

iv) Other objective criteria

81. Among the "other objective criteria" that past Commissions have considered in their determination of judicial salaries is the evolution of the role and responsibilities of Canadian judges in the past 25 years. The following observations of the Drouin Commission are still apposite today:

> There are increasing, and ever-shifting, demands placed upon the Judiciary. As a result of the introduction of the *Charter*, the growth in litigation in Canada, the complexity of the matters which actually proceed before the courts, and intensified public scrutiny of judicial decisions, the process and requirements of "judging" have become more onerous at both the trial and appellate levels.[41]

82. Judicial decisions at all levels are becoming increasingly complex and continue to be the focus of attention by the media and the public. Judges are repeatedly called upon to adjudicate on sensitive and contentious matters of a socio-political nature, a trend that has been accentuated by the continued willingness of Parliament and the provincial legislatures to leave many controversial issues for determination by the courts. Vivid illustrations of this phenomenon can be found in the role played by courts in respect of the many difficult social and political issues confronting Canadian society today, such as physician-assisted death.

83. Globalization and technological innovations have also contributed to a greater complexity and volume of legal issues confronted by the judiciary, from e-discovery to multi-jurisdictional class actions to criminal trials involving complex evidence of encrypted communications between accused persons.

b) The comparators

84. In considering the adequacy of judicial salaries in light of the statutory criteria cited above, past Commissions – both Triennial and Quadrennial – have traditionally relied on two principal comparators: (a) the remuneration of DM-3s, and (b) the incomes of senior lawyers in the private practice of law in Canada.

85. While there has been some variation in the treatment of these comparators from Commission to Commission, a clear consensus has emerged to the effect that these are the two key comparators.

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[41] Drouin Report (2000) at 17 [JBD at tab 28].

i) Remuneration of the most senior deputy ministers

86. The use of the remuneration of the most senior deputy ministers, the so-called DM-3 comparator, predates the Triennial and Quadrennial Commissions. In 1975, Parliament amended the *Judges Act* to make the salary level of puisne judges roughly equivalent with the midpoint salary of the most senior level of deputy ministers.

87. The first Triennial Commission, the Lang Commission, noted in its 1983 report that "the historic relationship between the salaries of superior court judges and deputy ministers was restored in 1975".[42] The Lang Commission went on to find that this relationship had deteriorated since the amendments because judicial salaries had failed to keep up with the salaries of senior deputy ministers. In order to restore the "historic relationship", the Lang Commission recommended that judicial salaries be set by starting with the 1975 level and adjusting for inflation, an exercise that became known as the "1975 equivalency".

88. The Guthrie Commission in 1987 and the Courtois Commission in 1990 both applied the "1975 equivalency" when recommending increases to judicial salaries. Apart from recognizing that the application of the "1975 equivalency" restored the "historic relationship" between the salaries of senior deputy ministers and the judiciary, both commissions noted that the salaries of senior deputy ministers provided the best comparator for assessing the adequacy of compensation for puisne judges.

> Guthrie Commission:
>
> As a result of 1975 amendments to the Judges Act, the salary level of superior court puisne judges was made roughly equivalent to the mid-point of the salary range of the most senior level (DM3) of federal deputy minister. This was not intended to suggest equivalence of factors to be considered in the salary determination process, for no other group shares with the judiciary the necessities of maintaining independence and of attracting recruits from among the best qualified individuals in a generally well-paid profession. In 1975, judicial salary equivalence to senior deputy ministers was generally regarded, however, as satisfying all of the criteria to be considered in determining judicial salaries. At that salary level, a sufficient degree of financial security was assured and there were few financial impediments to recruiting well-qualified lawyers for appointment to the bench.[43]

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42 Lang Report (1983) at 5 [BED at tab 24].

43 Guthrie Report (1987) at 8 [BED at tab 25].

Courtois Commission:

> The reasons given by the Lang and Guthrie Commissions for recommending 1975 equivalence are still very much applicable, and we fully subscribe to them. Both previous Triennial Commissions relied in part on the fact that the salary level being recommended for superior court judges would restore the historical relationship of rough equivalence between the salaries of judges and those of senior deputy ministers in the federal Public Service. The salary level established by the 1975 amendments to the Judges Act did not result in a new, historically high, salary level for judges, but simply allowed for inflation that had occurred in the years prior to 1975. The fairness of that level has not been disputed. We note that 1975 equivalence would bring judges to within 2% of the mid-point of the salaries of the most senior level (DM-3) of federal deputy ministers. The DM-3 mid-point, we believe, reflects what the market place expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges. [our emphasis][44]

89. The Government advocated a move away from the "1975 equivalency" and the adoption of the current DM-3 comparator in its submissions before the next Triennial Commission, the Crawford Commission. The Government's submissions supporting the continued use of the DM-3 comparator were as follows:

> 1975 was a long time ago, and much has changed in the meantime, not the least of which has been our economy. There seems to be little point in trying to tie judicial salaries to some arbitrary level set so long ago and in very different circumstances. Therefore, the government thinks it would be better to do away with both the concept and the terminology of 1975 equivalence, and instead deal with judicial salary levels on the basis that there should be a rough equivalence to the DM-3 midpoint.[45]

90. The Crawford Commission in its 1993 report accepted the Government's submission that the "1975 equivalency" was no longer a particularly helpful benchmark as a determinant of judges' salaries. Instead, the Crawford Commission preferred to refer directly to a rough equivalence with the midpoint of the salary range of the most senior level of federal public servant, the DM-3. The Crawford Commission repeated the finding from the Courtois Report that "the DM-3 range and mid-point reflect what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges."[46]

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44 Courtois Report (1990) at 10 [BED at tab 26].

45 Government's submission to the Crawford Commission, cited in the Drouin Report (2000) at 28 [JBD at tab 28].

46 Crawford Report (1993) at 11 [BED at tab 27].

91. The first Quadrennial Commission, the Drouin Commission, endorsed the principle of a relationship between judicial salaries and the remuneration of DM-3s in its 2000 report, although it did not believe that any one comparator should be determinative:

> [W]e have concluded that the important aspect of the DM 3 comparator, for the purposes of our inquiry, is the maintenance of a relationship between judges' salaries and the remuneration of those senior federal public servants whose skills, experience and levels of responsibilities most closely parallel those of the Judiciary.[47]

92. The McLennan Commission in 2004 considered the salaries of DM-3s, although it noted that it believed that it was important "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."[48]

93. The Block Commission for its part rejected the Government's submission that it should consider a much wider public-sector comparator than DM-3s.[49] Instead, the Block Commission was definitive about the need to maintain rough equivalence between the compensation of DM-3s and that of puisne judges, and it went as far as to issue a formal recommendation that the Commission and parties should consider the issue of DM-3 comparison to be settled. Reproduced below are two key passages of the Block Report dealing with the DM-3 comparator:

> 103. The DM-3 level, as can be seen, has been a comparator for nearly every previous commission, and we believe, like the Courtois Commission, that this "reflects what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges".
>
> […]
>
> 201. Where consensus has emerged around a particular issue during a previous Commission inquiry, such as the relevance of the DM-3 as a comparator, "in the absence of demonstrated change", we suggest that such a consensus be recognized by subsequent Commissions and

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47 Drouin Report (2000) at 31 [JBD at tab 28].

48 McLennan Report (2004) at 30 [JBD at tab 29].

49 With respect to the newly created DM-4 level, which included only two individuals, the Block Commission (and the judiciary) saw no justification to use it as a comparator, seeing that it "appears to be reserved for exceptional circumstances and positions of particularly large scope", Block Report (2012) at para. 105 [JBD at tab 30].

> arguably reflected in the approach taken to the question in the submissions of the parties.[50]

94. Most recently, the Levitt Commission, in 2012, similarly rejected the Government's submission that it should consider a much wider public-sector comparator than DM-3s, and instead confirmed the appropriateness of using the DM-3 comparator:

> 27. Like its predecessors, the Commission determined that the scope of the chosen public sector comparator group is a matter of judgment to be made by reference to the objective of the Commission's enquiry as first framed by the Courtois Commission. While the Commission recognizes that the choice of the DM-3 group may not be regarded as ideal due to its small sample size and other comparability issues such as tenure in position this Commission, like the Drouin and Block Commissions, focussed on the purpose of the analysis as articulated above and concluded that the seniority of the group and the functions its members discharge make it the best choice as a public sector comparator group for the judiciary. This choice has the additional advantage of eliminating outliers both above and below the DM-3 category.[51]

95. While the Triennial and Quadrennial Commissions have for the most part endorsed the DM-3 comparator as an accurate reflection of "what the marketplace expects to pay individuals of outstanding character and ability", there has been an evolution over the years as to what figure should be used as the DM-3 comparator.

96. As set out above, the initial Triennial Commissions used the midpoint of the 1975 salary range, adjusted for inflation, as the DM-3 comparator. The Crawford Commission adopted the Government's proposal to abandon the "1975 equivalency" and instead used the midpoint of the salary range as the DM-3 comparator. The Drouin Commission, as well as every Commission thereafter, updated the DM-3 comparator by adding the at-risk pay to the salary component, in recognition of the fact that at-risk pay is an integral part of the total compensation of DM-3s. The Block Commission – as well as the Levitt Commission – set the DM-3 comparator as the midpoint of the salary range plus half of eligible at-risk pay (the "**Block Comparator**").

97. The midpoint is the half-way point of a theoretical range, not the average or median figure of the actual salary paid. It appears that the midpoint, at its origin in 1975, was used as a proxy for the average, since in that era the Government did not publicly

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50 Block Report (2012) at paras. 103 and 201 [JBD at tab 30].

51 Levitt Report (2012) at para. 27 [JBD at, tab 31].

disclose the average compensation of DM-3s. Averages being now available, those figures would better reflect the actual remuneration paid to DM-3s, on average. The Association and the Council therefore submitted before the Block Commission that the relevant figure for the DM-3 comparator should be the total average compensation of DM-3s – that is, the average base salary plus average at-risk pay.

98. The Block Commission agreed that "[a]verage salary and performance pay may be used to demonstrate that judges' salaries do retain a relationship to actual compensation of DM-3s". Nonetheless, the Block Commission declined to adopt the total average compensation at that time because it believed that, due to the small number of DM-3s, any figure based on an average would fluctuate too much from year to year to assist the Commission in establishing any long-term comparison between the compensation of DM-3s and judges:

> 106. We also used the mid-point of the DM-3 salary range because it is an objective, consistent measure of year over year changes in DM-3 compensation policy. Average salary and performance pay may be used to demonstrate that judges' salaries do retain a relationship to actual compensation of DM-3s. However, average salary and performance pay are not particularly helpful in establishing trends in the relativity of judges' salaries to the cash compensation of DM-3s. They do not provide a consistent reflection of year over year changes in compensation. The DM-3 population is very small, varying between eight and ten people over the past few years, and average salaries and performance pay fluctuate from year to year. A person who has been promoted recently has a lower salary than one who has been in a position for many years. Turnover could cause significant changes in the averages over time. Similarly, a few very high performers or low performers in a year could significantly affect the average performance pay.[52]

99. The Association and the Council did not ask the Levitt Commission to use the total average compensation as the DM-3 comparator, their position in principle being that the Levitt Commission should recommend the prospective implementation of all of the Block Commission salary recommendations. However, the judiciary noted that "there is a significant disparity between the midpoint and actual average figures over the years",[53] adding the following proviso:

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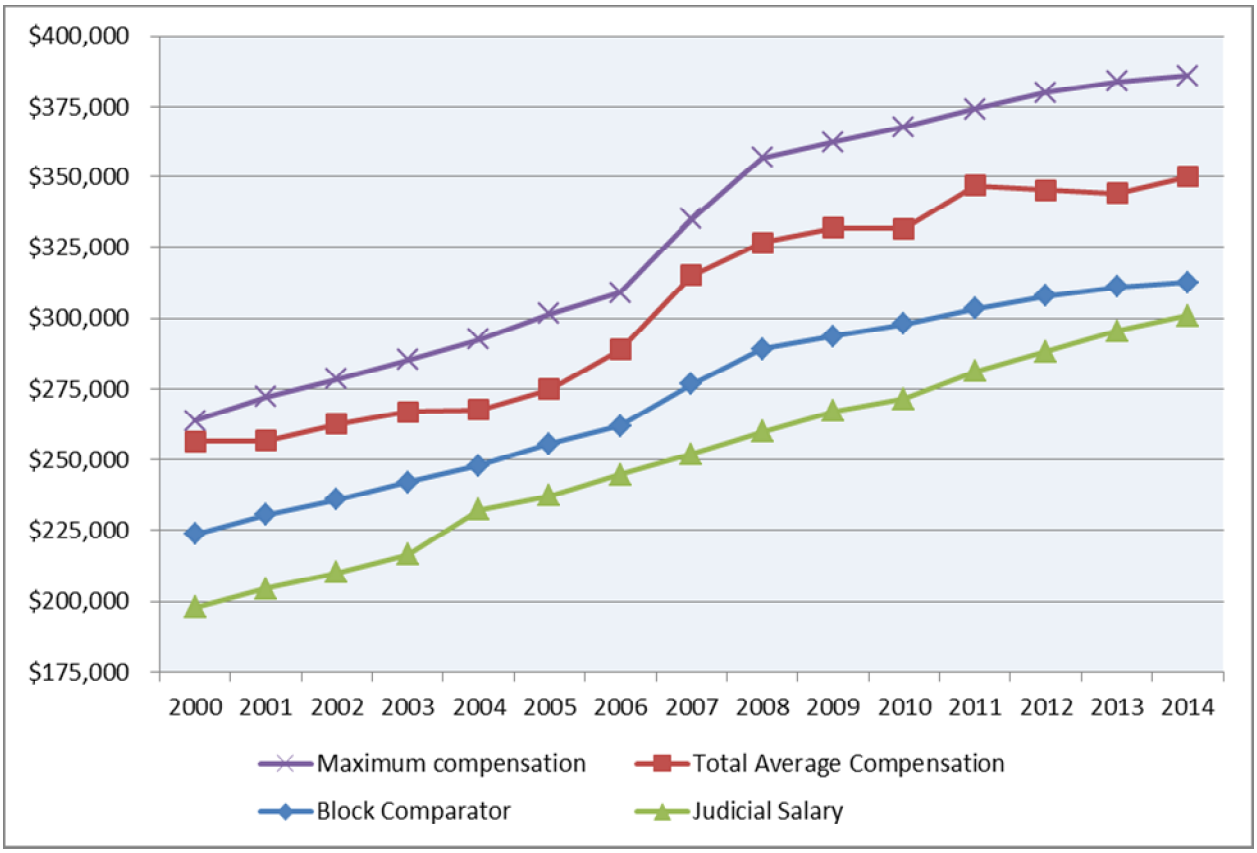
[52] Block Commission (2008) at para. 106 [JBD at tab 30].

[53] Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated December 20, 2011 at para. 117 [BED at tab 7].

> If DM-3 compensation continues to be at the upper end of the salary range and eligible at-risk percentage, future Quadrennial Commissions will likely decide to revisit the Block Commission's use of the midpoint figure rather than the average.[54]

100. As can be seen in the following graph, the disparity between the Block Comparator and the actual average figures has persisted through the past two quadrennial cycles. It is also apparent from this graph that the total average compensation of DM-3s remains consistently at the upper end of the maximum compensation available to DM-3s (maximum salary range plus maximum at-risk pay):

Figure 1
Comparison of DM-3 Maximum Compensation, Total Average Compensation, Block Comparator and Judicial Salary, 2000-2014



101. The third observation to be made from the above graph is that the Block Commission's concern about the reliability of total average compensation as a long-term reference has

[54] *Ibid* at footnote 90.

not been borne out. There have not been any significant yearly variations in the total average compensation. Instead, the total average compensation has followed the general trend line of the Block Comparator, albeit at a consistently higher rate.

102. As can be seen in the table below, since the year 2000 the Block Comparator has been 7% to 12.8% lower than the total average compensation on a yearly basis, with an average yearly difference of 10.3%:

Table 1
Comparison of Block Comparator and Total Average Compensation, 2000-2014

Date	Block Comparator	Total Average Compensation	Difference between Block Comparator and Total Average Compensation	
			Percentage	$
April 1, 2000	$223,630	$256,574	-12.8%	-$32,944
April 1, 2001	$230,615	$256,842	-10.2%	-$26,227
April 1, 2002	$236,060	$262,610	-10.1%	-$26,550
April 1, 2003	$242,000	$267,051	-9.4%	-$25,051
April 1, 2004	$248,050	$267,670	-7.3%	-$19,620
April 1, 2005	$255,585	$274,844	-7.0%	-$19,259
April 1, 2006	$261,965	$288,848	-9.3%	-$26,883
April 1, 2007	$276,632	$315,233	-12.2%	-$38,601
April 1, 2008	$289,095	$326,580	-11.5%	-$37,485
April 1, 2009	$293,522	$331,866	-11.6%	-$38,344
April 1, 2010	$297,949	$331,557	-10.1%	-$33,608
April 1, 2011	$303,250	$346,866	-12.6%	-$43,617
April 1, 2012	$307,910	$345,269	-10.8%	-$37,360
April 1, 2013	$311,055	$343,993	-9.6%	-$32,938
April 1, 2014	$312,628	$349,890	-10.6%	-$37,262

103. In respect of every year except two over the past 15 years, the Block Comparator produces a figure that is at least roughly 10% below the actual compensation, on average, of the individuals in the DM-3 category. It is therefore apparent that the total average compensation provides a more accurate reflection of the actual compensation of DM-3s than the Block Comparator. What the Commission can learn from the Block

Comparator is the midpoint of the range of compensation the Government is prepared to pay any one individual in the DM-3 category. By contrast, the total average compensation tells the Commission what the Government is actually paying individuals in the DM-3 category, an amount which, year after year, is significantly higher than the midpoint.

104. The table below shows that since the year 2000, the judicial salary of puisne judges has been 13.2% to 22.8% lower than the total average compensation on a yearly basis, with an average yearly difference of 17.7%:

Table 2
Comparison of Judicial Salary and Total Average DM-3 Compensation, 2000-2014

Date	Judicial Salary	Total Average DM-3 Compensation	Difference between Judicial Salary and Total Average Compensation	
			Percentage	$
April 1, 2000	$198,000	$256,574	-22.8%	-$58,574
April 1, 2001	$204,600	$256,842	-20.3%	-$52,242
April 1, 2002	$210,200	$262,610	-20.0%	-$52,410
April 1, 2003	$216,600	$267,051	-18.9%	-$50,451
April 1, 2004	$232,300	$267,670	-13.2%	-$35,370
April 1, 2005	$237,400	$274,844	-13.6%	-$37,444
April 1, 2006	$244,700	$288,848	-15.3%	-$44,148
April 1, 2007	$252,000	$315,233	-20.1%	-$63,233
April 1, 2008	$260,000	$326,580	-20.4%	-$66,580
April 1, 2009	$267,200	$331,866	-19.5%	-$64,666
April 1, 2010	$271,400	$331,557	-18.1%	-$60,157
April 1, 2011	$281,100	$346,866	-19.0%	-$65,766
April 1, 2012	$288,100	$345,269	-16.6%	-$57,169
April 1, 2013	$295,500	$343,993	-14.1%	-$48,493
April 1, 2014	$300,800	$349,890	-14.0%	-$49,090

105. Based on a review of the data that the judiciary has now gathered over the past two quadrennial cycles, it seems clear that when assessing the adequacy of judicial salaries,

this Commission should look to the total average compensation of DM-3s for a reflection of "what the marketplace expects to pay individuals of outstanding character and ability".

106. As of April 1, 2015:

(i) the salary of a puisne judge is $308,600;

(ii) the Block Comparator is $314,259; and

(iii) while the total average DM-3 compensation for 2015-2016 is not yet available, since the Government has not yet allocated at-risk pay, it is known that the total average DM-3 compensation for the previous year, namely 2014-2015, was $349,890.

Thus, the total average DM-3 compensation is already significantly above both the salary of puisne judges and the Block Comparator. This gap will only increase to the end of the current quadrennial cycle in 2019 if the status quo is maintained.

107. The table below shows:

(i) the projected salaries for puisne judges from 2016 to 2019, indexed according to the Industrial Aggregated Index ("**IAI**") projections provided by the Office of the Chief Actuary;[55] and

(ii) the projected total average compensation for DM-3s from 2015 to 2019, applying an annual increase of 1.9%, based on the average annual growth of the average salary DM-3s without at-risk pay from 2000 to 2014.[56]

[Table appears on next page]

[55] The Office of the Chief Actuary has forecasted IAI as follows: 2016, 1.8%; 2017, 2.2%; 2018, 2.4%; 2019, 2.6%, Letter from L. Frappier, Office of the Chief Actuary, Office of the Superintendent of Financial Institutions, dated February 25, 2016 [JBD at tab 7].

[56] The rate of increase is calculated from the 2000-2001 fiscal year because that was the year that the Government fully implemented the Strong Committee's recommended increases to at-risk pay for DM-3s.

Table 3
Comparison of Judicial Salary and Total Average Compensation
2015-2019 (Projected)

Date	Judicial Salary	Total Average Compensation	Difference between Judicial Salary and Total Average Compensation	
			Percentage	$
April 1, 2015	$308,600	$356,538	-13.4%	-$47,938
April 1, 2016	$314,100	$363,312	-13.5%	-$49,212
April 1, 2017	$321,000	$370,215	-13.3%	-$49,215
April 1, 2018	$328,700	$377,249	-12.9%	-$48,549
April 1, 2019	$337,200	$384,417	-12.3%	-$47,217

108. As set out above, as of 2019:

- the projected salary for puisne judges will be $337,200; and
- the projected total average compensation for DM-3s will be $384,417.

This means that the status quo would leave judicial salaries at the end of the current quadrennial cycle, in 2019, at $47,217, or 12.3%, less than the total average compensation of DM-3s.

109. The Association and the Council submit that the statutory criteria require an increase of the judicial salary to bridge the very significant gap that exists between the judicial salary and the DM-3 comparator, consisting of the remuneration of those senior public servants whose skills, experience and levels of responsibilities most closely parallel those of the judiciary.

110. The Association and the Council are conscious of the fact that the gap is significant and cannot be filled instantly. The judiciary therefore invites the Commission to recommend that at least half of the $47,217 gap, that is, an amount of approximately $23,600, be gradually reduced over the next four years.

111. In order to reduce this gap, the salary of puisne judges should be increased by 2% as of April 1, 2016, 2% as of April 1, 2017, 1.5% as of April 1, 2018 and 1.5% as of April 1, 2019, all exclusive of statutory indexing based on the IAI. As can be seen in the following table, this would increase judicial salaries in 2019 by $23,700 more than what

they would be with IAI adjustments alone. This would leave judicial salaries at $23,517, or 6.1%, less than the projected total average compensation of DM-3s by the end of the current quadrennial cycle.

Table 4
Comparison of Judicial Salary with proposed increases and Total Average Compensation, 2015-2019 (Projected)

Date	Judicial Salary	Total Average Compensation	Difference between Judicial Salary and Total Average Compensation	
			Percentage	$
April 1, 2015	$308,600	$356,538	-13.4%	-$47,938
April 1, 2016	$320,300	$363,312	-11.8%	-$43,012
April 1, 2017	$333,700	$370,215	-9.9%	-$36,515
April 1, 2018	$346,700	$377,249	-8.1%	-$30,549
April 1, 2019	$360,900	$384,417	-6.1%	-$23,517

112. The above projections assume that the statutory indexation based on IAI as provided for in s. 25 of the *Judges Act* will remain unchanged through the present quadrennial cycle. The IAI adjustment in the *Judges Act* is, along with the judicial annuity, one of the cornerstones of judicial financial security and an integral part of the "social contract"[57] that the Government and lawyers appointed to the Bench have entered into. In view of the constant risk of the politicization of the setting of judicial compensation, IAI adjustments have long been recognized as an essential tool to preserve judicial independence through financial security for the judiciary.

113. Before the Levitt Commission, the Government submitted that the annual IAI adjustments should be capped at 1.5% (a percentage below the expected IAI figures for that quadrennial cycle). The Levitt Commission rejected the Government's submission as inconsistent with the history and purpose of the IAI adjustment:

> The Government submissions characterized the IAI Adjustment as inflation protection without making any mention of its legislative history. In light of this history, the Drouin Commission made it clear that the IAI "is intended to, and in many years does, encompass more than changes in

[57] This is the expression used in the Scott Report (1996) at 14 to describe the expectations arising from the salary indexation provided by the *Judges Act* [BED at tab 28].

> the cost of living as reflected in the consumer price index". In the Commission's view the legislative history indicates that the IAI Adjustment was intended to be a key element in the architecture of the legislative scheme for fixing judicial remuneration without compromising the independence of the judiciary and, as such, should not lightly be tampered with.[58]

114. Despite the Levitt Commission's urging that the IAI adjustment "should not lightly be tampered with", the Government has now advised that it intends to ask the Commission to recommend that the statutory indexation in the *Judges Act* be changed from IAI to the Consumer Price Index ("**CPI**"). The Association and the Council are surprised by this position and will submit that changing the statutory indexation in the *Judges Act* to the CPI would be inconsistent with the history and purpose of the IAI adjustment. The Association and the Council reserve their right to respond to any such proposal in their Reply Submission.

ii) Self-employed lawyers' income

115. The incomes of self-employed private practitioners have been considered by nearly all judicial compensation commissions as an important comparator in the setting of adequate judicial salaries. This comparator has particular relevance in view of the third criterion provided in s. 26(1.1) of the *Judges Act*, namely, "the need to attract outstanding candidates to the judiciary", since lawyers in private practice have long been the primary source of candidates to the Bench.[59]

116. As in the past, the Canada Revenue Agency ("**CRA**") was mandated by the Government and the judiciary to assemble a database consisting of the 2010 to 2014 tax returns of individuals identified by CRA as self-employed lawyers. This database was then used to generate statistics based on specific parameters.

117. The table below shows the relevant data for the 44-56 age group (52 remains the average age of appointment[60]), at the 75th percentile, with a low-income exclusion of

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58 Levitt Report (2012) at para. 46 (citation omitted) [JBD at tab 31].

59 Between 2011 and 2015, 36% of the 226 judicial appointees were from the public sector, which includes government, academia, legal aid clinics, in-house counsel for corporations or other organizations and provincial courts, based on data compiled from information provided by the Commissioner for Federal Judicial Affairs to the principal parties for 2007 to 2011, and 2011 to 2015 [JBD at tab 5].

60 Based on data found in the Appointees Age at Date of Appointment – April 1, 2011 to March 30, 2015 [JBD at tab 5(a)].

$60,000, for Canada as a whole and the top 10 CMAs, where the majority of judges reside. The table compares this data with the salary of puisne judges:

Table 5
Comparison of salary of puisne judges with net professional income of self-employed lawyers at 75th percentile
(Net professional income ≥ $60,000, Age group – 44-56)
Canada and top ten CMAs, 2010 to 2014

Year	75th Percentile Income		Salary of Puisne Judges		
				% Difference from	
	Canada	Top ten CMAs	$	Canada	Top ten CMAs
2010	$372,005	$471,330	$271,400	-27.0%	-42.4%
2011	$361,610	$450,845	$281,100	-22.3%	-37.7%
2012	$365,305	$457,880	$288,100	-21.1%	-37.1%
2013	$364,340	$437,055	$295,500	-18.9%	-32.4%
2014	$373,290	$454,915	$300,800	-19.4%	-33.9%

118. The parameters set out in this table, namely 44-56 age band, 75th percentile, low-income exclusion, top 10 CMAs, have all been endorsed by previous Commissions.[61]

119. The rationale behind the low-income exclusion is that lawyers in private practice who earn below a certain threshold are not suitable candidates for the judiciary since that low income reflects a lack of success or time commitment that is incommensurate with the demands of a judicial appointment.[62]

120. While the amount of $60,000 has been the traditional low-income cut-off since 2000, it appears that after fifteen years, an adjustment for inflation is now required. The Association and the Council are advised that it would be appropriate that this figure be adjusted to $80,000, to account for inflation since the year 2000, the year in the data when the level of $60,000 was first applied.

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61 Drouin Report (2000) at 38-40 [JBD, tab 28]; McLennan Report (2004) at 40 [JBD, tab 29]; Levitt Report (2012) at para. 43 [JBD at tab 31].

62 See *e.g.* Annex B to the Reply Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council before the Levitt Commission entitled "Report of Robert Levasseur and Larry Moate" dated January 27, 2012 at 3: "[…] as the exclusion selection criteria implies, lawyers who are not really committed to their profession or are not successful should not be candidates to join the judiciary" [BED at tab 9].

121. When the low-income exclusion figure is adjusted to account for inflation, the data is the following:

Table 6
Comparison of salary of puisne judges with net professional income of self-employed lawyers at 75th percentile
(Net professional income ≥ $80,000, Age group – 44-56)
Canada and top ten CMAs, 2010 to 2014

Year	75th Percentile Income		Salary of Puisne Judges		
				% Difference from	
	Canada	Top ten CMAs	$	Canada	Top ten CMAs
2010	$402,330	$501,590	$271,400	-32.5%	-45.9%
2011	$396,065	$484,310	$281,100	-29.0%	-42.0%
2012	$395,690	$491,575	$288,100	-27.2%	-41.4%
2013	$392,230	$465,230	$295,500	-24.7%	-36.5%
2014	$405,585	$482,380	$300,800	-25.8%	-37.6%

122. As can be seen from the above tables, there is a considerable discrepancy between the judicial salary and the income of self-employed lawyers. Moreover, it must be borne in mind that the income of many self-employed lawyers is greater than what is captured in the CRA data given the prevalence of income-splitting vehicles such as family trusts, and the use of professional corporations by high-income earners to defer income for distribution in the future, neither of which are reflected in the CRA data.

123. Even when the judicial salary is grossed up by a percentage representing the value of the judicial annuity, as was done by the Levitt Commission,[63] there remains a gap between the resulting grossed up amount of judicial salary and the income of self-employed lawyers, particularly in the top ten CMAs, as shown in the table below.

[Table appears on next page]

[63] Levitt Report (2012) at paras. 41-43 [JBD at tab 31]. The Commission's expert, Mr. Sauvé, arrived at the value of 24.7%, as explained in his letter of February 14, 2012.

Table 7
Comparison of salary plus annuity of puisne judges with net professional income of self-employed lawyers at 75th percentile (Net professional income ≥ $80,000, Age group – 44-56) Canada and top ten CMAs, 2010 to 2014

Year	75th Percentile Income		Salary of Puisne Judges		
			$ Includes Annuity valuation of 24.7%	% Difference from	
	Canada	Top ten CMAs		Canada	Top ten CMAs
2010	$402,330	$501,590	$338,436	-15.9%	-32.5%
2011	$396,065	$484,310	$350,532	-11.5%	-27.6%
2012	$395,690	$491,575	$359,261	-9.2%	-26.9%
2013	$392,230	$465,230	$368,489	-6.1%	-20.8%
2014	$405,585	$482,380	$375,098	-7.5%	-22.2%

c) Conclusion

124. Except for statutory indexing, there has been no increase to the salary of puisne judges since April 1, 2004. As the Association and the Council observed in their Reply Submission to the Levitt Commission dated January 27, 2012,[64] the Government's refusal to implement the salary recommendation of the McLennan Commission resulted in a loss of $31,900 per judge in the 2004-2007 period, while the refusal to implement the recommendation of the Block Commission represented a loss of $51,100 per judge in the 2008-2011 period.

125. The Association and the Council submit that the criteria under s. 26(1.1) of the *Judges Act*, and the data relevant to the two key comparators for the establishment of the judicial salary for puisne judges, justify that this Commission make the following salary recommendation:

Recommendation: That the salary of puisne judges be increased by 2% as of April 1, 2016, by 2% as of April 1, 2017, by 1.5% as of April 1, 2018, and by 1.5% as of April 1, 2019, all exclusive of statutory indexing based on the IAI.

64 Reply Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated January 30, 2012 at 9-10 [BED at tab 8].

2. Salary differentials between chief justices and associate chief justices, puisne judges of the Supreme Court of Canada and the Chief Justice of Canada

126. For many years, there have been relatively constant salary differentials between puisne judges, chief justices and associate chief justices, puisne judges of the Supreme Court of Canada, and the Chief Justice of Canada. It is submitted by the Association and the Council that these differentials ought to remain unchanged.

Recommendation: That the salary differentials between puisne judges, chief justices and associate chief justices, puisne judges of the Supreme Court of Canada and the Chief Justice of Canada be maintained in the same proportion as currently exists.

VI. COSTS

127. Under s. 26.3(2) of the *Judges Act*, the judiciary is entitled to reimbursement of two-thirds of the costs arising from its participation in the Commission's inquiry. The Block Commission recommended that this remain unchanged while the Levitt Commission did not make any recommendation concerning costs.

128. The Association and the Council do not at this stage seek to change this provision. However, the Association and the Council reserve the right to seek a larger portion of their representational costs in the event that the Government's unilateral addition of Federal Court prothonotaries in the Commission process, or other factors, result in an increase in the judiciary's overall representational costs.

VII. SUMMARY OF RECOMMENDATIONS SOUGHT

129. The following is a summary of the recommendations sought by the judiciary:

Recommendation: That the salary of puisne judges be increased by 2% as of April 1, 2016, by 2% as of April 1, 2017, by 1.5% as of April 1, 2018, and by 1.5% as of April 1, 2019, all exclusive of statutory indexing based on the IAI.

Recommendation: That the salary differentials between puisne judges, chief justices and associate chief justices, puisne judges of the Supreme Court of Canada and the Chief Justice of Canada be maintained in the same proportion as currently exists.

The whole respectfully submitted on behalf of the Canadian Superior Courts Judges Association and the Canadian Judicial Council.

Montréal, February 29, 2016

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APPENDIX A:
Summary of the history of the Triennial and Quadrennial Commission processes

1. Prior to 1981, advisory committees reviewed judges' compensation and made recommendations to the Government.[65] As noted by the Drouin Commission, this process was unsatisfactory because the advisory committee recommendations "generally were unimplemented or ignored", and "the process merely amounted to petitioning the government to fulfill its constitutional obligations."[66]

2. In 1982, the Triennial Commission process was established. Under s. 19.3 of the *Judges Act* as it read at the time, the Triennial Commission was required to inquire into the adequacy of judicial compensation and to make recommendations to the Minister of Justice. The objective of the Triennial Commission process was to depoliticize the determination of judicial salaries and benefits in order to preserve judicial independence.

3. There was no obligation on the part of the Government under the Tribunal Commission process to respond or act upon the recommendations made by Triennial Commissions.

4. This proved to be a fundamental shortcoming, and no one disputes that the Triennial Commission process was a failure. The salary recommendations of the five Triennial Commissions were generally ignored, left unimplemented and often became the subject of a politicized debate.[67]

5. It is relevant to cite what the Scott Commission said, in 1996, in the twilight of the Triennial Commission process:

> The purpose of the Commission was to ensure that, through the creation of a body which would be independent both of the judiciary and Government, Parliament would be presented with an objective and fair set of recommendations dictated by the public interest, having the effect of maintaining the independence of the judiciary while at the same time attracting those pre-eminently suited for judicial office. The theory was that, by way of such recommendations, emanating from regularly

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65 Two advisory committees were chaired by Irwin Dorfman, Q.C. (report issued on November 22, 1978) and Jean de Grandpré (report issued on December 21, 1981) respectively.

66 Drouin Report (2000) at 2 [JBD at tab 28].

67 The reports of the Triennial Commissions were as follows: Lang Report (1983), Guthrie Report (1987), Courtois Report (1990), Crawford Report (1993), and Scott Report (1996) [BED at tabs 24-28].

> convened independent commissions, the process would be de-politicized and judicial independence would be thus maintained.
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> While the idea was sound, the underlying assumptions appear to have been naïve. The result has been a failure in practice to meet the desired objectives. Since the first Triennial, there have been four Commissions (Lang (1983), Guthrie (1986), Courtois (1989) and Crawford (1992)). In spite of extensive inquiries and exhaustive research in each case, recommendations as to the establishment of judicial salaries and other benefits have fallen almost totally upon deaf ears. The reasons for this state of affairs have been largely political.[68]

6. Previously, the Crawford Commission in 1993 had lamented Government delays in acting upon recommendations made by the Commission:

> The respect shown for the concept of judicial independence in the design of the Triennial Commission process has been tainted by the business-as-usual attitude of successive Governments once the Commission reports have been presented to Ministers of Justice and tabled in Parliament. This failure to act with reasonable promptness cannot but lead to the entire review process losing credibility. This Commission notes, for example, that the legislation (Bill C-50) comprising the Government's response to the 1989 Commission on Judges' Salaries and Benefits (the Courtois Commission), was not introduced in Parliament until December 1991, and that by the end of the mandate of the current Commission, this relatively uncomplicated legislation had not yet been enacted.[69]

7. The regrettable state of affairs of this important process was commented upon by former Chief Justice Lamer in 1994, in an address to the Council of the Canadian Bar Association, when he said that the Triennial Commission "looks good on paper, but it has one problem. It doesn't work. Why? Because the Executive and Parliament have never given it a fair chance."[70]

A. The *PEI Reference*

8. In 1997, the Supreme Court of Canada in the *PEI Reference* explained that the Constitution requires the existence of a body such as a commission that is interposed between the judiciary and the other branches of the state. The constitutional function of

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68 Scott Report (1996) at 7 [BED at tab 28].

69 Crawford Report (1993) at 7 [BED at tab 27].

70 The Honourable Chief Justice Lamer, "Remarks by the Rt. Honourable Antonio Lamer, P.C., Chief Justice of Canada, to the Council of the Canadian Bar Association Annual Meeting" (20 August 1994) at 9 [unpublished] [BED at tab 22].

this body is to depoliticize the process of determining changes to or freezes in judicial compensation.

9. This objective is achieved by entrusting that body with the specific task, at regular intervals, of issuing a report on the salaries and benefits of judges to the executive and the legislature. The Court said that the body must be independent, objective, and effective in order to be constitutional.[71] Any changes to judicial salaries without prior recourse to this body would be unconstitutional.[72]

10. The existence of this body also ensures that the judiciary does not find itself in a position of having to negotiate its salary directly with the government, something that is fundamentally at odds with judicial independence.[73]

11. A necessary component of the effectiveness of this body is the timely implementation of its recommendations, or a prompt response from the government in question providing legitimate reasons for a refusal to implement.[74]

B. The Quadrennial Commission Process and the First Quadrennial Commission

12. Acting upon the constitutional imperative enunciated by the Supreme Court of Canada in the *PEI Reference*, Parliament amended the *Judges Act* in 1998 and established the Quadrennial Commission. A key aspect of these amendments was the requirement that the Minister of Justice respond to the recommendations of the Quadrennial Commission within six (6) months of receiving them. Since the mandate of the Commission began on September 1, and since it was required to issue its report within nine (9) months from the start of its mandate, the deadline for the issuance of the Minister's response was the end of November of the subsequent year.[75]

13. The first Quadrennial Commission was chaired by Mr. Richard Drouin, QC, in 1999. The other members were Ms. Eleanore Cronk (now of the Ontario Court of Appeal) and Mr. Fred Gorbet. The Drouin Report was issued on May 31, 2000. It was an impressive,

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71 *PEI Reference*, *supra* at paras. 169-175 [JBD at tab 25]; see also *Bodner*, *supra* at para. 16 [JBD at tab 28].

72 *PEI Reference*, *supra* at para. 147 [JBD at tab 25].

73 *PEI Reference*, *supra* at para. 186 [JBD at tab 25].

74 *PEI Reference*, *supra* at paras. 179-180 [JBD at tab 25].

75 As discussed below, Parliament amended the *Judges Act* in 2012 following the Levitt Report to change the start of the Commission's mandate to October 1, and to reduce the time in which the Minister of Justice must respond to the recommendations of the Quadrennial Commission to within four (4) months.

well-reasoned report by any standard. The Drouin Commission took note that the Triennial Commissions had failed despite the goal of depoliticizing the process.[76]

14. The Government's response to the Drouin Report marked an improvement as compared to previous Government responses to Triennial Commission reports. On December 13, 2000, the Government responded to the Drouin Report pursuant to s. 26(7) of the *Judges Act*. The Government accepted all but two of the Drouin Commission's recommendations,[77] and amendments to the *Judges Act* implementing the Government's Response were adopted expeditiously, in June 2001.

C. The McLennan Commission

15. The second Quadrennial Commission, the McLennan Commission, was established in September 2003. It was chaired by Roderick McLennan, Q.C., and its two members were Gretta Chambers, C.C. and Earl Cherniak, Q.C. As required by the *Judges Act*, the Commission issued its report on May 31, 2004.

16. The principal issue of contention between the judiciary and the Government before the McLennan Commission was the determination of the amount of judicial salary. When the McLennan Commission began its inquiry, the salary of a puisne judge was $216,600.

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[76] Drouin Report (2000) at 2 [JBD at tab 28].

[77] The two exceptions were eligibility for supernumerary status and reimbursement of costs of the judiciary before the Quadrennial Commission. Supernumerary judges are judges who are eligible to retire but choose instead to continue sitting. Their workload is determined in consultation with their respective chief justices. Sometimes the workload is full-time, and often is nearly so. In no event is it less than 50% of a full-time workload. The Drouin Commission had recommended that, effective April 1, 2000, judges have the right to elect supernumerary status for a period not exceeding ten years upon attaining eligibility for a full pension (Recommendation 8). In her response to the Drouin Report, the Minister indicated that the Government was not prepared to accept Recommendation 8 at that time. The reasons given included the need to consult the provinces and territories, the fact that the Supreme Court of Canada would soon consider, in *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405, important constitutional issues relating to the status of supernumerary judges, and, more generally, the need for better information concerning the contribution of supernumerary judges. The judgment of the Supreme Court of Canada in *Mackin* was released on February 14, 2002. As for the intended consultations with the provincial and territorial governments, it was expected that they would be carried out in a timely fashion. In the event, it was only on August 19, 2003, that the judiciary was advised that the Government had decided to accept Recommendation 8. Moreover, the Government took the position that the necessary amendments to the *Judges Act* would only be made as part of the overall package of amendments that would follow the Government's response to the report of the subsequent commission, the McLennan Commission. Those amendments were only made in December 2006, six and a half (6½) years after the Drouin Commission's recommendation. In the meantime, judges who were eligible for this recommendation were deprived of its benefit. It is worth noting that, unlike a delay in the implementation of a salary recommendation, the delay in implementing Recommendation 8 could not be, and was not, remedied retroactively.

17. The Association and the Council submitted to the Commission, based on the level of remuneration of traditional comparators, as applied in the Drouin Report, that the salary of a puisne judge should be increased to $253,880 as of April 1, 2004, plus annual salary increments of $3,000 in 2005, 2006 and 2007, in addition to indexation according to the Industrial Aggregate Index ("**IAI**") provided in the *Judges Act*. For its part, the Government proposed an increase to $226,300 as of April 1, 2004, inclusive of IAI for 2004, plus annual salary increments of $2,000 in 2005, 2006 and 2007, in addition to IAI for 2005, 2006 and 2007. As the McLennan Commission observed, when the $2,000 annual salary increments contemplated by the Government are taken into account, the Government's proposal represented an increase of 7.25% over those years, in addition to IAI in 2005, 2006 and 2007.[78]

18. The McLennan Commission recommended an increase for the salary of puisne judges to $240,000 as of April 1, 2004, inclusive of IAI in that year, plus IAI effective April 1 in each of the next three years, as already provided for in the *Judges Act*. The Commission did not recommend annual salary increments, as proposed by the Government and supported by the Association and the Council, in addition to IAI.

19. The Commission's recommendation represented a one-time 10.8% increase for the four-year period commencing April 1, 2004, in addition to IAI in the years 2005, 2006 and 2007, as compared to the 7.25% increase proposed by the Government.

1. The Government's response to the McLennan Report

20. The Government's response to, and delayed partial implementation of, the McLennan Report was a source of grave concern for the judiciary. As elaborated below, the Association and the Council observed that politicization was creeping into the process yet again, and was undermining the nascent and still fragile Quadrennial Commission process, much as the Triennial Commission process was undermined and ultimately came to fail.

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78 McLennan Report (2004) at 23 [JBD at tab 29].

21. On November 20, 2004, the Minister of Justice issued the Government's response (the "**First Response**") to the McLennan Report, as required by s. 26(7) of the *Judges Act*.[79] The First Response accepted all but one[80] of the recommendations of the McLennan Commission.

22. With respect to judicial salary, the Minister stated in the First Response that the McLennan Commission had "engaged in a careful balancing of all the [statutory] factors"[81] and provided "thorough and thoughtful"[82] explanations for its conclusions. The Minister noted that the salary increase recommended by the McLennan Commission "appears reasonable".[83]

23. On May 20, 2005, the Government introduced Bill C-51 to implement its acceptance of the McLennan Commission's recommendations, notably its salary recommendation. The Bill passed first reading and was supposed to be referred to committee after second reading. However, the Bill died on the order paper when Parliament was dissolved on November 29, 2005.

2. The newly elected Government's second response to the McLennan Report

24. A new Government was elected on January 23, 2006. Shortly after the new Government came to power, the then Minister of Justice purported to issue a second response to the McLennan Report on May 29, 2006 (the "**Second Response**").[84] On May 31, 2006, the Government tabled Bill C-17 in the House of Commons, which would implement the recommendations of the McLennan Report only to the extent that they were accepted in the Second Response.

25. The Second Response contradicted the First Response. The Government no longer accepted the salary recommendation set out in the McLennan Report. In its Second Response, the Government proposed an increase to judicial salaries of 7.25% as of

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79 Response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission (November 20, 2004) [BED at tab 2].

80 The Government refused to accept the McLennan Commission's recommendation that the judiciary be reimbursed for 100% of its disbursements and 66% of its legal fees. Instead, the Government's First Response proposed that the reimbursement be a total of 66% for all costs.

81 First Response at 3 [BED at tab 2].

82 First Response at 2 [BED at tab 2].

83 First Response at 4 [BED at tab 2].

84 Response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission (May 29, 2006) [BED at tab 3].

April 1, 2004.[85] There was no mention of the fact that this increase was the exact percentage increase that the Government had proposed in its submission to the McLennan Commission in 2003-2004. In effect, the Government's Second Response unilaterally imposed what the Government had proposed in the first place, as if the Commission process had been of no consequence.

26. The Second Response stated that the McLennan Commission's recommendations must be analyzed in light of the mandate and priorities upon which the Government had recently been elected.[86] A summary list of the new Government's budget priorities and measures of "fiscal responsibility" was given in the Second Response.[87] It further stated that Canadians expect that expenditures from the public purse should be reasonable and generally proportional to these economic pressures and priorities, and that the McLennan Commission's salary recommendation did not pay heed to this reality.[88]

27. Significantly, the Government did not attempt to argue that the economic conditions in Canada were not as strong as when the First Response had been made. In fact, the Second Response was delivered at a time when economic conditions in Canada were very strong, with a real economic growth of 2.8% for 2006[89] and the Government having a budgetary surplus of $4.7 billion[90] in the first quarter of 2006 and of $13.2 billion for the fiscal year 2005-2006.[91]

28. On June 2, 2006, counsel for the Association wrote to the Minister of Justice to protest the issuance of the Second Response and to invite the Government to reconsider the position adopted in the Second Response. The Association also expressed the hope that Bill C-17 would be amended in the committee stage.

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85 Second Response at 2 [BED at tab 3].

86 Second Response at 4, 6 [BED at tab 3].

87 Second Response at 6 [BED at tab 3].

88 Second Response at 7 [BED at tab 3].

89 Statistics Canada, Catalogue #13-016-X, Economic accounts key indicators, Canada, at 22. The indicator is the real gross domestic product (GDP) [BED at tab 19].

90 Department of Finance Canada, "The Fiscal Monitor", January to March 2006. The budgetary surplus was $1.7 billion in January 2006 and $4.1 billion in February 2006. In March 2006, there was a budgetary deficit of $1.1 billion [BED at tab 20].

91 Department of Finance Canada, "Fiscal Reference Tables", October 2011 [BED at tab 21].

29. The Association's letter also made the point that the so-called reasons put forward in the Second Response were not "legitimate reasons" for departing from the Commission's salary recommendation, as required by the relevant constitutional jurisprudence.[92]

30. On July 31, 2006, the Minister of Justice responded by simply stating that the Government had regard for the principles set out in the *PEI Reference* and *Bodner* in developing its Second Response.[93] The Minister omitted to respond to the Association's point that the Second Response was statutorily and constitutionally invalid as a question of process, and constitutionally invalid as a question of substance.

31. The Second Response was implemented through Bill C-17,[94] which received Royal Assent on December 14, 2006.[95] Puisne judges' salary was fixed retroactively at $232,300 as of April 1, 2004, rather than at $240,000 had the McLennan Commission's recommendation and the First Response been implemented. At the beginning of the following Quadrennial Commission cycle, the salary for puisne judges, statutorily adjusted by the IAI, was $252,000 as of April 1, 2007, rather than $262,240 had the McLennan Commission's recommendation and the First Response been implemented.

3. The inconsistency of the Second Response with applicable constitutional principles

32. The *Judges Act* does not contemplate multiple government responses. The Association and the Council are firmly of the view that multiple responses undermine the cardinal constitutional requirement of effectiveness and are inconsistent with the Supreme

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92 The Supreme Court in the *PEI Reference*, *supra* at para. 183 spoke of the need for the government to provide a "legitimate reason" for refusing to accept commission recommendations [JBD at tab 25]. The Supreme Court had occasion to elaborate on that requirement in *Bodner*, *supra* at paras. 23-27 [JBD at tab 28].

93 The statement in *Bodner, supra* that the process appears to be working satisfactorily at the federal level (para. 12), requires context. *Bodner* addressed the nascent commissions in four provinces, set up in response to the *PEI Reference*, *supra*. It was decided at a point in time (July 2005) after the Government's First Response to the McLennan Report had been given, and before the Second Response (May 2006). Accordingly, it was possible at that time for the Supreme Court to point to the Quadrennial Commission process for federally appointed judges as appearing to be working satisfactorily. Subsequent events proved otherwise.

94 *An Act to amend the Judges Act and certain other Acts in relation to courts*, S.C. 2006, c. 11.

95 The fact that the majority opposition parties did not amend Bill C-17 cannot be taken as Parliamentary acceptance of the way in which the Government conducted itself. Opposing Bill C-17 or proposing to amend it with the risk of defeating it carried with it the probability of the proverbial Pyrrhic victory: the Bill would have been defeated, thereby communicating Parliament's displeasure with the conduct of the Government, but the judiciary would be left with the status quo, which was even less than what the newly elected Government was prepared to accept in its Second Response. This would have been particularly unfair to judges eligible to elect supernumerary status pursuant to a recommendation from the Drouin Report in 2000 that had yet to be implemented. The dilemma was set out in Senator Jaffer's speeches in the Senate on December 6 and December 13, 2006 [BED tab tab 5].

Court's rationale for requiring of government that it formally respond, with diligence, to a Commission report. While the First Response was issued under, in accordance with, and within the time-limit set out in the *Judges Act*, the Second Response has no status whatsoever under the *Judges Act*[96] or the constitutional process expounded in the *PEI Reference*.

33. The Second Response, by a newly elected government, also served to politicize the Quadrennial Commission process since such a response was sought to be justified on the basis of the new Government's priorities. The Association and the Council submit that the Second Response was, in essence, the expression of a newly elected Government's disagreement, for political reasons, with a previous government's formal response to the McLennan Report.[97]

34. The Association and the Council further submit that the inordinate delay of 2½ years between the issuance of the McLennan Report and the implementation of the flawed Second Response undermined the effectiveness of the process, in addition to depriving members of the judiciary of the time value of the salary increase that the Government finally accepted and the actual time lost for those judges who would have been able to elect supernumerary status earlier had the Government implemented that recommendation more promptly.

35. The Association and the Council submitted these concerns to the Block Commission, which agreed that they were well-placed. The Block Report stated in this regard:

> 42. Without commenting on the substance of the second Government response, we wish to express our concern with the issuance of more than one response in principle. As the Association and the Council note, such a practice is not provided for under the current process. Not only does the issuance of a second response not conform to the current process, it also has significant Constitutional implications.

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96 Section 26(7) of the *Judges Act* provides: "The Minister of Justice shall respond to a report of the Commission within six months after receiving it." The statute makes no allowance for a further report. The Block Commission expressed serious concern about the issuance of more than one response, see Block Report (2008) at paras. 42-45 [JBD at tab 30].

97 The Block Commission correctly observed that judicial independence cannot be seen as just another government priority, and that there was no statutory justification for increases in judicial compensation to be measured against the "expenditure priority that the Government has accorded to attracting and retaining professionals of similarly high qualities and capacity within the federal public sector", Block Report (2008) at para. 58 [JBD at tab 30].

> 43. Apart from concerns about whether a second response may have the effect, real or perceived, of threatening the apolitical nature of the Commission process, it also has the very real effect of introducing an additional step and therefore additional delay in a process that imposes strict timelines on all parties involved. In this case, the second response was issued 18 months after the first response, and 18 months after the expiry of the legislative deadline for responding to a Commission report under the *Judges Act*. Although the Government tabled draft legislation almost immediately after issuing the second response, this still resulted in an additional four-month delay which could have been avoided had the new Government moved to re-introduce legislation reflecting the first response upon being elected.
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> 44. The Commission acknowledges the potential challenges of advancing a legislative agenda faced by a minority government. This does increase the possibility that legislation tabled to enact the Government responses to Commission recommendations could die on the order table, as occurred in November 2005. Should this occur again in the future, we submit that the integrity of the Commission process is only maintained if the newly elected Government proceeds with the process of implementation, even where the election has resulted in a change of Government. Any deviation from the process as currently outlined raises questions about whether a Commission's recommendations have had a meaningful effect on the legislative outcome and risks undermining the integrity of the Commission process.
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> 45. While the Commission's effectiveness is most important in the context of the preservation of judicial independence, on a related note, the perceived effectiveness of the Commission is likely to influence the ability of the parties to convince nominees to accept appointment to future Commissions. Advisory committees, Triennial Commissions and Quadrennial Commissions have been populated by individuals who considered it an honour to serve the public interest in this capacity; the current Commission is no exception. However, continuing to attract suitable members for future Commissions will depend to a large extent on the ability to assure them that they will be participating in a process that is independent, objective and effective.[98]

D. The Block Commission

36. The third Quadrennial Commission, the Block Commission, was established in October 2007. It was chaired by Sheila Block, and its two members were Paul Tellier, C.C., Q.C. and Wayne McCutcheon. The Commission issued its report on May 30, 2008.

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[98] Block Report (2008) at paras. 42-45 [JBD at tab 30]. See also the evidence of Mr. E. Cherniak, QC to the House of Commons Standing Committee on Justice and Human Rights (Meeting No. 24, October 24, 2006), 39th Parliament, 1st Session [BED at tab 4].

37. Apart from process issues related to the serious concerns expressed by the judiciary with the Government's lack of solicitude for the Quadrennial Commission process, as exemplified by its tabling of the Second Response, the principal issue before the Block Commission was the determination of the judicial salary for the puisne judges. The Commission also made a number of other substantive recommendations.

1. Salary and other substantive recommendations

38. When the Block Commission began its inquiry, the salary of a puisne judge was $252,000. The Association and the Council proposed a salary increase of 3.5% as of April 1, 2008, and 2% for 2009, 2010, and 2011, in addition to IAI. Under this proposal, the salary of puisne judges at the end of the Block Commission's mandate, *i.e.* as of April 1, 2011, would have been $302,800. The actual salary of puisne judges as at April 1, 2011, was $281,100.

39. The Government proposed a salary increase of 4.9% as of April 1, 2008, inclusive of IAI, which was 3.2% on that date, for a proposed net increase of 1.7%. For the subsequent years, it proposed nothing except to leave IAI in place. IAI was 2.8% on April 1, 2009, 1.6% on April 1, 2010, and 3.6% on April 1, 2011. Under the Government's proposal, the salary of puisne judges would thus have been $286,000 as of April 1, 2011.

40. The Government's proposed increase as of April 1, 2008, of 4.9% inclusive of IAI, necessarily meant that the Government was of the view that, as of April 1, 2008, some kind of increase was indeed appropriate, even though it was not of the same order of magnitude as that proposed by the Association and the Council.

41. The Block Commission reviewed the various comparators proposed by the parties, ultimately deciding that DM-3s and lawyers in private practice were the appropriate comparator groups to arrive at recommendations on judicial salaries. The Block Commission rejected the Government's position that the most relevant comparator group was all of the strata among the most senior federal public servants, namely EX 1-5, DM 1-4, and Senior LA (lawyer cadre).

42. The Block Commission also rejected as unhelpful the Government's attempt to use the pre-appointment income data of judges as support for the argument that current judicial salaries are not a disincentive to attracting significant numbers of judges who enjoyed high pre-appointment incomes. The judiciary had objected to the collection and use of

this data because of concerns for individual privacy, the unreliability of the data and its lack of relevance.

43. The Block Commission came to the conclusion that the appropriate comparator among senior deputy ministers, namely DM-3s and DM-4s, was the midpoint of the DM-3 salary range plus one-half of the maximum performance pay[99] for which DM-3s are eligible. As for lawyers in private practice, the Block Commission noted that there was no certainty that the Government would continue to be successful in attracting outstanding judicial candidates from the senior Bar in Canada if the income spread between lawyers in private practice and judges were to increase markedly.

44. Using the comparator of the midpoint of the DM-3 salary range[100] plus one-half of eligible performance pay, the Block Commission noted that the resulting figure for DM-3s was $276,632 for the 2007-2008 fiscal year. The salary of puisne judges was $252,000 in that year, or 91% of the DM-3 comparator.[101]

45. To achieve "rough equivalence" with the DM-3 salary range midpoint plus one-half eligible performance pay, the Block Commission recommended an increase of 4.9%, inclusive of IAI, for a salary of $264,300 effective April 1, 2008, and an increase of 2% for each of 2009, 2010, and 2011, in addition to IAI.

46. If the Block Commission's recommendation had been implemented, the salary for puisne judges in the 2011-2012 fiscal year would have been $302,800, a figure roughly equivalent to the figure of $303,249.50, which was the midpoint of the DM-3 salary range plus one-half of eligible performance pay for 2011-2012. The actual salary of puisne judges for 2011-2012 was $281,100. For comparison purposes, the overall *average* DM-3 compensation for the 2010-2011 fiscal year was $331,557.

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99 In the July 2011 report of the Advisory Committee on Senior Level Retention and Compensation, the Committee used the expression "performance pay" as a synonym for at-risk pay, although the Government continues to refer to the variable part of the compensation paid to DMs, including bonuses, as "at-risk pay" [BED at tab 13].

100 "Midpoint" should not be confused with median. The midpoint figure is simply the halfway point of the theoretical salary range, whereas the median figure would be the actual salary of the person falling in the middle of the range of persons arranged from lowest to highest. The average salary is a different concept from both the midpoint and the median in that it reflects the relative weight of the range of salaries given that it takes into account the combination of the salary figures and the number of people earning them.

101 Block Report (2008) at para. 119 [JBD at tab 30].

47. In addition to its salary recommendation, the Block Commission made recommendations regarding the retirement annuity of senior judges of the territorial courts, representational allowances, and an appellate differential.

2. Observations and recommendations as to process

48. The Block Commission made a number of important observations relating to process, an overriding one being that Quadrennial Commissions should serve as the guardian of the Quadrennial Commission process. The Block Commission expressed the view that process-related issues should be the subject neither of direct discussions between the Government and the judiciary, which are inadvisable, nor of litigation before the courts, if at all possible, the latter being an option that must be "carefully weighed".[102] The Block Commission added:

> 37. The parties nevertheless require access to a forum where concerns related to process can legitimately be raised. It is our view that Quadrennial Commissions, by virtue of their independence and objectivity, are well-placed to serve as that forum and to offer constructive comments on process issues as they arise. While the structure and mandate of the Commission are outlined in statute, any question of process that affects the independence, objectivity or effectiveness of the Commission is properly within its mandate. It is entirely appropriate and arguably imperative that the Commission serve as guardian of the Quadrennial Commission process and actively safeguard these Constitutional requirements.

49. In addition to its concerns with the issuance of the Second Response, another important observation contained in the Block Report relates to the need to respect, and reflect in the future submissions of the parties, the consensus that has emerged around particular issues during a previous Commission inquiry.[103] The Block Commission gave as an example of such an issue the relevance of DM-3 as a comparator.

3. The Government's response to the Block Report

50. Under the *Judges Act*, the Minister of Justice was required to respond to the Block Report by November 30, 2008, six months after receiving it. This statutory deadline came and went without a response being made by the Minister, as required by the Act.[104]

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[102] Block Report (2008) at paras. 33ff [JBD at tab 30].

[103] Block Report (2008) at paras. 21 and 201 [JBD at tab 30]

[104] *Judges Act*, s. 26(7) [JBD at tab 24].

51. On February 11, 2009, well beyond the strict statutory deadline, the Minister of Justice issued a response declining to implement, at that time, any of the recommendations made by the Block Commission. Importantly, the Minister's response did not reject any of the Commission's recommendations. Rather, the Minister invoked the economic crisis that began in late 2008 as the reason for the Government's decision.

52. The Association issued a press release on February 11, 2009, stating that federally appointed judges recognized that the Canadian economy was facing unprecedented challenges calling for various temporary measures. However, it emphasized that the applicable constitutional principles would require that the Block Commission's recommendations be reconsidered once the economic situation improved. The Association also expressed its deep concern about the Minister of Justice's failure to respect the statutory deadline for issuing his response to the Block Report.

E. The Levitt Commission

53. The fourth Quadrennial Commission, the Levitt Commission, was established in December 2011. It was chaired by Brian Levitt, and its two members were Paul Tellier, C.C., Q.C., and Mark Siegel. The Commission issued its report on May 15, 2011.

54. As with the Block Commission, the principal issue before the Levitt Commission was the determination of the judicial salary for puisne judges. Integral to the Commission's consideration of this issue, however, was the Government's unexpected request that the Commission recommend that the annual adjustments to judicial salaries based on the IAI be capped at 1.5%. The Levitt Commission also articulated a number of concerns with the future of the Commission process itself.

1. Salary and other substantive recommendations

55. The salary of a puisne judge was $281,100 when the Levitt Commission began its inquiry. The Association and the Council proposed that the Levitt Commission adopt, prospectively commencing in the first year of the quadrennial period, the Block Commission's recommendations. This would have resulted in a 4.9% increase as of April 1, 2012 inclusive of IAI, and increases of 2% for each of 2013, 2014 and 2015, in addition to IAI.

56. The Government proposed that judicial salaries be maintained at their current level, and that salary adjustments based on the IAI be limited to an annual increase of 1.5% for the quadrennial period. The Government admitted that it expected that this proposal would result in a reduction in individual judicial salaries in real terms.[105]

57. The Levitt Commission rejected the Government's proposed cap on IAI. The Levitt Commission found that the legislative history of IAI "clearly indicates that it was intended to be a key element of the architecture of the process for determining judicial remuneration without affecting judicial independence and, as such, not to be lightly tampered with."[106] The Levitt Commission further found that the cost of retaining the existing statutory indexation as opposed to imposing a 1.5% cap would have only a marginal incremental cost to the public purse.

58. The Levitt Commission then considered the parties' arguments on the appropriate comparator groups and concluded that a "rough equivalence" with the DM-3 salary range midpoint plus one-half eligible performance pay was a "useful tool in arriving at a judgment as to the adequacy of judicial remuneration, because this concept reflects the judgmental (rather than mathematical) and multi-faceted nature of the enquiry."[107]

59. The Levitt Commission rejected the Government's argument that it should depart from the practices of previous Quadrennial Commissions and consider all persons paid from the public purse, or at least consider the average salary of deputy ministers without variable pay, if it felt the need to use a public sector comparator group. Aside from questioning the merits of the Government's argument, the Levitt Commission found that adopting a comparator group that was consistent with comparator groups used by previous Quadrennial Commissions furthered the goals of the *Judges Act*:

> 30. The Government took exception to the Commission's position with respect to recommendation 14 of the Block Commission as applied to the selection of the public sector comparator group. Recommendation 14 stated that:
>
> > [w]here consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of

[105] Submission of the Government of Canada to the Levitt Commission, December 23, 2011, footnote 10 [BED at tab 6].

[106] Levitt Report (2012) at para. 51 [JBD at tab 31].

[107] Levitt Report (2012) at para. 48 [JBD at tab 31].

> demonstrated change, such consensus be taken into account by the Commission and reflected in the submissions of the parties.
>
> While the Commission reached its conclusion based on its own work, it also concluded that the Government's position in this regard is counterproductive to the attainment of one of the objectives for judicial compensation mandated by the Judges Act, namely the attraction of outstanding candidates to the judiciary. The more certainty about the conditions of employment that can be provided to a candidate contemplating a mid-life career change to the judiciary, the lower will be the barriers to attracting the most successful candidates. By introducing an unnecessary degree of uncertainty about future remuneration, the Government's position that the comparator group is to be re-litigated anew every four years sacrifices efficacy on the altar of process.
>
> 31. It is the Commission's position that, while the appropriate public sector comparator group is a proper subject for submissions to a Quadrennial Commission, the onus of establishing the need for change lies with the party seeking it. The Commission believes that this approach strikes an appropriate balance between certainty, on the one hand, and flexibility to respond to changing circumstances, on the other. In this instance, the Government has failed to discharge that onus in regards to its argument that the DM-3 comparator be displaced by a broader comparator group, or no comparator at all.

60. Using the comparator of the midpoint of the DM-3 salary range plus one-half of eligible performance pay, the Levitt Commission noted that the resulting figure for DM-3s was $303,249.50 for the 2011-2012 fiscal year. The salary of puisne judges was $281,100 in that year, or 7.3% less than the DM-3 comparator.

61. The Levitt Commission noted that while the 7.3% gap between the DM-3 comparator and the salary of puisne judges "tests the limits of rough equivalence", the salary of puisne judges did not require any further adjustments as long as IAI was maintained in its current form for the quadrennial period.

62. In addition to its salary recommendation, the Levitt Commission recommended, as had the Block Commission, that puisne judges sitting on provincial and federal appellate courts receive a salary differential of 3% above puisne judges sitting on provincial and federal trial courts and made further recommendations concerning supernumerary status, representational allowances and annuities for certain categories of the judiciary.

2. Observations and recommendations as to process

63. Along with making recommendations on substantive matters, the Levitt Commission addressed a number of procedural issues that it believed "go to the very heart of the effectiveness of the mechanisms contemplated by the Supreme Court of Canada" in *Bodner* and the *PEI Reference*. [108]

64. The Levitt Commission rejected the Government's position that it did not have any jurisdiction to deal with process issues, finding that each Quadrennial Commission has an important role to play in overseeing the evolution of the process and "actively safeguarding the constitutional requirements."[109]

65. The Levitt Commission stated that it was evident there was "growing concern that the Commission process is losing credibility with a key stakeholder group, namely the judiciary, and, accordingly, that the Quadrennial process is in grave danger of ending up where the Triennial process did."[110] The Levitt Commission was so concerned about the fate of the Quadrennial Commission process that it specifically asked the Government and the judiciary to file post-hearing submissions addressing the question "[w]hat should be done to avoid that the Quadrennial Commission process suffer the same fate as the Triennial Commission [...]?"

66. The Levitt Commission made four recommendations that it hoped would help strengthen the process. First, the Levitt Commission recommended that the Government, when drafting its response, take into account not just the perspective of reasonable, informed members of the public but the judiciary as well. The Levitt Commission was concerned that any response that ignored the judiciary's perspective would only further exacerbate the existing credibility issues:

> The Commission does not believe that the constitutional objectives of this process can be met if the Government does not feel a need to be concerned that a reasonable, informed judge be satisfied that throughout the process the Government participated in good faith and in a respectful and non-adversarial manner that reflects the public interest nature of the proceedings. The judiciary constitutes a stakeholder in this process with a weighty interest. This process can be successful only if both the

[108] Levitt Report (2012) at para. 85 [JBD at tab 31].
[109] Levitt Report (2012) at para. 88 [JBD at tab 31].
[110] Levitt Report (2012) at para. 92 [JBD at tab 31].

> Government and the judiciary, acting reasonably, believe it is effective. Additionally, in omitting any focus on the judiciary, the Government's submission betrays what the Commission believes is at the root of the judiciary's growing dissatisfaction with the process.[111]

67. Second, the Levitt Commission emphasized the importance of the Government's response complying with the Supreme Court of Canada's decision in *Bodner*, and warned that failure to do so could lead to litigation.

68. Third, the Levitt Commission recommended that when consensus has emerged around a particular issue during a previous Commission inquiry, that, in the absence of demonstrated change, the Commission should take this consensus into account and it should be reflected in the parties' submissions. The Levitt Commission found that this position was entirely consistent with the Supreme Court of Canada's decision in *Bodner*. The Levitt Commission rejected the Government's position that a Commission could only adopt a previous Commission's recommendations if it reviewed the transcript of evidence before that Commission.

69. Finally, the Levitt Commission commented on what it saw as the "troubling" adversarial nature of the Quadrennial Commission process. The Levitt Commission accordingly recommended that the Government and the judiciary examine methods whereby the Commission process can be made less adversarial and more effective.

70. The Levitt Commission concluded its report by reiterating its concern about the future of the Quadrennial process:

> In closing, the Commission wishes to reiterate its concern for the current health and future of the Quadrennial process. The Commission believes that a robust and timely response by the Government to this Report is essential to maintain the confidence of the judiciary in the process. The Commission also believes that a joint "lessons learned" exercise based on the four Commission processes which have taken place over the past twelve years would be both timely and legal. The Commission hopes and expects that such an exercise would result in both the Government and the judiciary "recommitting" to the Quadrennial process, and believes it likely that the exercise would result in a more efficient process and a greater satisfaction of all stakeholders with the outcome of future Quadrennial Commission processes.[112]

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111 Levitt Report (2012) at para. 99 [JBD at tab 31].

112 Levitt Report (2012) at para. 121 [JBD at tab 31].

3. The Government's response to the Levitt Report

71. On October 12, 2012, the Minister of Justice issued the Government's response to the Levitt Report.

72. The Government accepted the Levitt Commission's recommendations that judicial salaries should continue to be automatically indexed every April 1 based on IAI, that all retirement benefits currently enjoyed by chief and associate chief justices should be extended to the three senior northern judges, and that the senior family law judge in Ontario should receive the same representational allowance as all Ontario senior regional judges.

73. The Government rejected the Commission's recommendation that judges of appellate courts receive a salary differential.

74. The Government did not respond in detail to the Levitt Commission's process recommendations. The Government reiterated its position that each Quadrennial Commission must consider the parties' arguments anew and not simply adopt the recommendations of previous Commissions. With respect to the recommendation calling for respect of the consensus around particular issues that may have emerged during a previous Commission inquiry, – which quite plainly meant to refer to a consensus arising out of the report(s) of previous Quadrennial Commission(s) –, the Government's response made the surprising observation that no consensus could arise on any issue unless the *main parties* were in agreement.

75. The Government's response stated that it would amend the *Judges Act* to improve the timeliness of the Commission process by reducing the time for the Government's response from six months to four months and establishing an express obligation on the Government to introduce implementing legislation in a timely manner. Finally, the Government stated that it was "open to exploring with the judiciary approaches that would make the process less adversarial and thereby improve its overall effectiveness."

4. Amendments to the *Judges Act*

76. The Government made the above-mentioned amendments to the *Judges Act* through the omnibus *Jobs and Growth Act, 2012*. The amendments to the *Judges Act* changed the Quadrennial Commission's start date from September 1 to October 1, reduced the

Minister of Justice's time to respond to the Quadrennial Commission's report from six (6) months to four (4) months, and specified that the Minister had to introduce a bill to implement the response "within a reasonable period."

77. In 2014, through the *Economic Action Plan 2014 Act, No. 2*, the Government amended the *Judges Act* and the *Federal Courts Act* to include Federal Court prothonotaries within the scope of the Quadrennial Commission's statutory mandate.

TAB 11

JUDICIAL COMPENSATION AND BENEFITS COMMISSION

REPLY SUBMISSION

of the

CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

March 29, 2016

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TABLE OF CONTENTS

OVERVIEW

1. This Reply Submission of the Canadian Superior Courts Judges Association ("**Association**") and the Canadian Judicial Council ("**Council**") addresses the main arguments made by the Government of Canada in its submission dated February 29, 2016 ("**Government's Submission**"). The Reply Submission will be complemented by counsel's oral argument at the public hearings.

2. The thrust of this Reply Submission is that

   (i) the Government has failed to justify its proposed recommendation that the statutory annual adjustments of judicial salaries be based on the CPI rather than the IAI;

   (ii) the Commission must continue to use the DM-3 comparator to assess the adequacy of judicial salaries;

   (iii) the judiciary's proposed increase in judicial salaries articulated in the main Submission filed on February 29, 2016 ("**Judiciary's Submission**") is justified in light of the factors set out in s. 26(1.1), the total compensation of DM-3s and the prevailing income of self-employed lawyers.

3. The mandate of the Commission under s. 26 of the *Judges Act* is to inquire into the adequacy of judicial compensation and benefits. The Government's Submission provides little assistance to the Commission to accomplish that mandate. Instead, the Government has chosen to devote a significant part of its Submission to re-litigate issues that were resolved sixteen years ago, going back to the Drouin Commission of 1999-2000. This approach undermines the constitutional requirements of the Quadrennial Commission and regrettably contributes to creating an adversarial climate to the process before the Commission.

4. The Judiciary's Submission and the present Reply Submission seek to be responsive to the Commission's needs in order to carry out its mandate under s. 26 of the *Judges Act*. To address some of the issues raised in the Government's Submission, namely the proposal to substitute the CPI for the IAI, the appropriate filters in the analysis of CRA data, and the value of the judicial annuity, the Association and the Council have included

expert reports from Ms. Sandra Haydon (filters in analysis of CRA data), Mr. Dean Newell (value of the judicial annuity), and Prof. Doug Hyatt (IAI vs. CPI).

I. THE GOVERNMENT'S ATTEMPT AT RE-LITIGATING ISSUES

5. Many of the issues raised in the Government's Submission in connection with judicial salaries and benefits have been addressed by past Commissions. The Government's attempt at re-litigating these issues is disrespectful of both the constitutional process and this Commission. The implicit message to this Commission is that whatever it decides on the various analytical issues leading to its substantive recommendations, the Government will, if those decisions are not to its liking, re-litigate them in the next quadrennial cycle.

6. As argued in the Judiciary's Submission, it is an affront to the Commission process, to the reports and recommendations of past Commissions and to common sense, to act as if none of the determinations of past Commissions had any value whatsoever.

7. The Association and the Council reject in the strongest possible terms the Government's attempt, in the absence of demonstrated change, at re-litigating issues that are the subject of consensus among past Commissions. This entails wasted time and resources for all concerned. As the Block Commission and the Levitt Commission recommended in Recommendation 14 and Recommendation 10 respectively:

> The Commission recommends that: Where consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of demonstrated change, such consensus should be taken into account by the Commission, and reflected in the submissions of the parties.

8. Moreover, such attempts at re-litigation strain the relationship between the judiciary and the Government, which explains Recommendation 11 of the Levitt Commission:

> The Commission recommends that: The Government and the judiciary examine methods whereby the Commission process can be made less adversarial and more effective.

9. The Association and the Council refer the Commission to paragraphs 34-41 the Judiciary's Submission, where they summarize their attempt at identifying areas of consensus in connection with the objective of making the process less adversarial and more effective.

10. Unfortunately, the Government has chosen to ignore the principal reason why the Commission process at the federal level has become adversarial, at the same time ignoring the obvious and most important way to make it less adversarial and more effective, which is to build on the consensus arrived at by past Commissions.

11. The Government refers frequently in its Submission to certain conclusions of the McLennan Commission to justify its attempt at re-litigating various issues.[1] For example, it relies on the McLennan Commission's comments on the DM-3 comparator to seek to justify a departure from this traditional comparator.[2] What the Government fails to mention, still less to reconcile with its reliance on the McLennan Report, is the fact that the salary recommendation of the McLennan Commission was rejected by the Government, through its unconstitutional Second Response.[3]

12. In its Second Response, the Government said that it had "concerns about the validity of the methodology and assumptions on which the McLennan Commission has relied."[4] It criticized the McLennan Commission for its inclusion of at-risk pay when considering the income of Deputy Ministers, and for its exclusion of income in the CRA data below $60,000. Before this Commission, safe from the McLennan Commission's actual recommendations, the Government extolls the virtues of the McLennan Commission's reasoning.

13. There is simply no credibility to the Government's expedient and selective references to the conclusions of the McLennan Commission. It would be one thing if the Government had actually accepted the salary recommendation that resulted from that Commission's application of the various comparative factors. The fact that it did not accept it highlights the reality that the Government is simply cherry-picking from the McLennan Commission's analysis those elements that are convenient for it, all the while ignoring the larger picture drawn by the McLennan Commission using those elements; and all the while contradicting the clear consensus emerging from the reports of past Commissions.

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1 See e.g. the Government's Submission at paras. 53, 100, 111, 117, 126 and 140.

2 Government's Submission at para. 100.

3 Response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission (May 29, 2006) [Book of Exhibits and Documents of the Association and the Council ("**BED**") at tab 3].

4 Second Response at 9 [BED at tab 3].

14. The Government's attempt to re-litigate points that previous Commissions have rejected is illustrated by the Government's decision to rely yet again on the expert evidence of Mr. Haripaul Pannu. Mr. Pannu has filed expert reports before three past Commissions over a twelve-year period.[5] Not only has the Government relied on the same expert for four inquiries to date, that expert has produced reports that are nearly identical to each other both in form and in content.

15. In Mr. Pannu's report before this Commission, he proposes, among others, the following filters or non-filters for the analysis of the CRA data on self-employed lawyers:

- the application of the 66th percentile and then the 65th percentile;
- an age-weighted approach utilizing all ages rather than the 44-56 age bracket which, as reported by Mr. Pannu, accounts for over two-thirds of all appointments;
- including low income below $60,000.

16. Past Commissions have declined to adopt this approach. For example, the McLennan Commission, on which the Government chooses selectively to place reliance, considered that the 75th percentile, calculated with a low-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."[6] Before the McLennan Commission, Mr. Pannu had proposed the 66th percentile. He subsequently changed to the 65th percentile, which he proposed before both the Block Commission and the Levitt Commission.

17. Before the Levitt Commission, Mr. Pannu posited that the 65th percentile is the appropriate standard for "exceptional individuals" while the 75th percentile is for "truly

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5 H. Pannu, "Report on the Earnings of Self-Employed Lawyers for the Department of Justice Canada for the 2003 Judicial Compensation and Benefits Commission" (January 2004) [Reply Book of Exhibits and Documents of the Association and the Council ("**Reply BED**") at tab 1]; H. Pannu, "Report on the Earnings of Self-Employed Lawyers for the Department of Justice Canada in preparation for the 2007 Judicial Compensation and Benefits Commission" (December 2007) [Reply BED at tab 2]; H. Pannu, "Report on the Earnings of Self-Employed Lawyers for the Department of Justice Canada in preparation for the 2011 Judicial Compensation and Benefits Commission" (December 13, 2011) [Reply BED at tab 3].

6 McLennan Report (2004) at 43 [JBD at tab 29].

exceptional individuals".[7] The Levitt Commission concluded that there was no evidence "indicating on what basis such a distinction might be made or that it is practical to do so."[8] Mr. Pannu's current report provides no specific justification for using the 65th percentile instead of the 75th percentile, yet it still presents data in connection with the 65th percentile.

18. On the issue of the appropriate percentile, it is important for this Commission to know that in 1999-2000, the Government's own experts, Hay Management Consultants, had proposed the 75th percentile before the Drouin Commission. This was at a time when the judiciary was proposing the 83rd or 87th percentile. The Drouin Commission's expert accepted the Government's position:

> Hay Management Consultants Limited, on behalf of the Government, expressed reservations about targeting an income range with a mid-point at the 83rd percentile, among other matters, indicating that in the private sector "an aggressive tie in to comparable market data for executives would be the 75th percentile." The experts engaged by the Commission agreed with this observation.[9]

19. Following this finding by the Drouin Commission, the judiciary has adhered to the 75th percentile. Despite the fact that the Government had prevailed in the debate before the Drouin Commission as to the appropriate percentile, it has since then tried to take the percentile level even lower by relying on the opinion of Mr. Pannu. This is an unacceptable attempt to re-litigate an issue, contrary to the process recommendations of the Block Commission and the Levitt Commission quoted above, and made all the worse by the fact that the Government has been seeking since 2004 to undermine a figure that it proposed in the first place in 2000.

20. A final note concerning the report of the Government's expert: it is nothing short of astonishing that Mr. Pannu, who is put forward as an independent expert, would defend positions rejected by past Commissions without even engaging with their findings, or the reasoning supporting these findings. Indeed, Mr. Pannu's most recent report reads as if these previous contrary findings did not exist.

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7 H. Pannu, "Report on the Earnings of Self-Employed Lawyers for the Department of Justice Canada in preparation for the 2011 Judicial Compensation and Benefits Commission" (December 13, 2011) at 5 [Reply BED at tab 3].

8 Levitt Report (2012) at para. 38 [JBD at tab 31].

9 Drouin Report (2000) at 40 [JBD at tab 28].

21. As for the DM-3 comparator, the Government has been making the same points about its alleged weaknesses since the 1999-2000 Drouin Commission, as shown by the following excerpts from the Government's submission to the Drouin Commission:

- "In adding s. 26(1.1) of the *Judges Act*, Parliament did not direct the Commission to consider such a comparison."[10]

- "Furthermore, deputy ministers are a poor comparator. Unlike judges, their salaries are not indexed. A significant portion of deputy ministers' earnings depends upon an annual evaluation of their performance and is at risk. Unlike judges, deputy ministers are a very small cadre, with only 10 individuals who have risen to the DM-3 level."[11]

22. The Drouin Commission rejected the Government's arguments:

- "This concept of rough equivalence expressly recognizes that while DM-3s and judges do not perform the same work, there is a basis for approximate remuneration parity."[12]

- "More particularly, we have concluded that the important aspect of the DM-3 comparator, for the purposes of our inquiry, is the maintenance of a relationship between judges' salaries and the remuneration of those senior federal public servants whose skills, experience and levels of responsibilities most closely parallel those of the Judiciary. We agree with the substance of the observation by both the Courtois and Scott Commissions (1990 and 1996) that the relationship between the remuneration of DM-3s and judges should be maintained, not as a precise measure of 'value' but as a reflection of '*what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges.*'"[13]

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10 Submission of the Government of Canada to the Judicial Compensation and Benefits Commission (December 20, 1999) at para. 32 [Reply BED at tab 4].

11 *Ibid.* at para. 33 [Reply BED at tab 4].

12 Drouin Report (2000) at 29 [JBD at tab 28].

13 Drouin Report (2000) at 31 [italics in original, JBD at tab 28]. See Appendix A for the Government's submission on the issue of DM-3 to the Block Commission and the Levitt Commission, and their respective responses.

23. Other Quadrennial Commissions have since rejected the Government's arguments and applied the DM-3 comparator, which had also been applied previously by Triennial Commissions. The DM-3 comparator is appropriate because there is a principled and historical basis for it, and the comparator has withstood the test of time. This is discussed further below.

II. REPLY TO THE GOVERNMENT'S POINTS ON RE-LITIGATED ISSUES

24. The Association and the Council address below each of the points that the Government seeks to re-litigate: the DM-3 comparator, inclusion of DM performance pay, filters to analyze CRA self-employed lawyers data, supernumerary status as incentive, other benefits to the judiciary, and IAI as basis for statutory indexation.

A. DM-3 comparator

25. The Government argues that the DM-3 comparator "is not an objective, relevant and justified consideration under s. 26(1.1)(d) of the *Judges Act*."[14] It calls for an approach "to consider trends in public sector compensation generally,"[15] a position it took before past Commissions, going back to the 1999-2000 Drouin Commission.[16]

26. As the Association and the Council observed in the Judiciary's Submission, it is the Government itself that proposed to the Crawford Commission (whose report was released in 1993) that there should be rough equivalence to the DM-3 midpoint.[17] The Block Report recounts[18] the subsequent application of this comparator which, from at least the advent of the Triennial Commission right up to the Levitt Commission (with the possible exception of the McLennan Commission), has been used to ascertain the adequacy of judicial salaries. Hence, with time, what started as a benchmark matured into the principle that there should be rough equivalence between the salaries of federally appointed *puisne* judges and the midpoint of the remuneration of the DM-3s.

27. The Government has not provided any justification for departing from the comparator that it had itself proposed during the time of the Triennial Commission, and that has

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14 Government's Submission at para. 98.

15 *Ibid.*

16 Submission of the Government of Canada to the Judicial Compensation and Benefits Commission (December 20, 1999) at para. 36 [Reply BED at tab 4].

17 See Judiciary's Submission at paras. 88-90.

18 Block Report (2012) at paras. 94-111 [JBD at tab 30].

systematically been applied since. The onus of establishing the need for change lies on the party seeking it.[19] The Government has not discharged that onus. The Association and the Council reiterate the points made in the Judiciary's Submission about the importance of the DM-3 comparator.[20]

28. The Government refers to the following points to seek to undermine the DM-3 comparator: 1) the small size of the DM-3 group; 2) differences in tenure of the respective positions; and 3) differences in considerations informing DM-3 compensation.[21] Each one of these issues was unsuccessfully raised by the Government before past Commissions.

1. DM-3 size

29. The Government refers to the disparity between the size of the DM-3 group and the number of federally appointed judges. However, that disparity has always existed, including when the Government proposed the rough equivalence with DM-3s.

30. DM-3s are senior public servants in the executive branch. Their number is irrelevant to the rationale behind the use of the DM-3s as a comparator, namely that judicial independence requires that the executive branch not be seen as superior to the judicial branch. Rough equivalence between the salary of federally appointed judges and the compensation of DM-3s, regardless of their number, serves to reinforce judicial independence.[22]

2. Tenure

31. The Government states that deputy ministers do not have the kind of security of tenure accorded to judges. The argument is of no consequence since none of the other groups from the public sector proposed by the Government, nor self-employed lawyers, enjoy the kind of security of tenure that is constitutionally required for judges.

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19 Levitt Report (2012) at para. 31 [JBD at tab 31]. See discussion in Judiciary's Submission at para. 59.

20 Judiciary's Submission at paras. 86-95.

21 Government's Submission at para. 116.

22 The Levitt Commission rejected the idea that the small number of DM-3s made them an inappropriate comparator group; see Levitt Report (2012) at para. 27 ("While the Commission recognizes that the choice of the DM-3 group may not be regarded as ideal due to its small sample size and other comparability issues such as tenure in position, this Commission, like the Drouin and Block Commissions, focused on the purpose of the analysis as articulated above and concluded that the seniority of the group and the functions its members discharge make it the best choice as a public sector comparator group for the judiciary.") [JBD at tab 31].

32. The nature of the security of tenure of judges, and the reasons for it, are *sui generis*. It is inappropriate that the Government should submit that security of tenure, a core constitutional principle that goes to the very heart of judicial independence in a liberal democracy, defeats the application of the key comparator to determine judicial salaries. The Block Commission explicitly rejected this argument.[23]

3. Compensation measures

33. The Government refers to differences in compensation measures to argue against comparisons between judges and DM-3s. More specifically, the Government states that the individualized nature of the compensation for deputy ministers and the availability of performance pay are two reasons militating against the comparison with DM-3s.

34. Compensation is individualized for almost every group being proposed by the Government. Therefore, this is yet another factor that is of no consequence in the Government's arguments.

35. As for performance pay, if the Government's arguments about compensation measures militating against the DM-3 comparison were accepted, it would mean that the only comparison from the examples it gives would be the GCQ-9 category, which is attached to specific posts and does not involve performance pay.[24] This would be a completely novel approach, and a radical break with the past. The Government itself does not propose it, yet the logical application of its argument is to that effect. Moreover, the GCQ-9 category, at present comprising four individuals, would itself be vulnerable to the Government's argument based on the small size of the group. The issue of performance pay is discussed further in section B below.[25]

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23 Block Report (2008) at para. 109 [JBD at Tab 30].

24 Government's Submission at paras. 145-147.

25 Far from rejecting DM-3s as a comparator group because of variable compensation, past Commissions have held that variable compensation should be considered as part of the appropriate public sector comparator group. See e.g. Levitt Report (2012) at para. 25 ("The Government took the position that, because variable compensation is not a tool which can be used in a judicial compensation scheme, when comparing the compensation of judges and public servants the Commission should ignore the variable portion of senior public sector compensation. […]The Commission found this position to be inconsistent with the approach adopted by past Commissions, with customary compensation practice, and with common sense.") [JBD at tab 31]; Block Report (2008) at para. 109 ("We are not persuaded that performance pay should be excluded from our considerations because deputy ministers do not enjoy the same security of tenure as judges or because performance pay must be earned each year. Performance pay is an integral component of deputy ministers' cash compensation…. The Government, itself, recognizes the importance of including performance pay in its calculations when determining the salaries of other federal office holders such as members of the GCQ group

4. Evidence regarding income of lawyers

36. The Government argues that the growing availability of reliable evidence on incomes of the senior Bar in both the private and public sectors militates against relying on the DM-3 group as a comparator. The Government further states that undue weight was given to the DM-3 comparator because there was a lack of evidence on lawyers' income.

37. The Government is attempting to make a connection between two distinct things. The justification for relying on DM-3s had nothing whatsoever to do with problems in the evidence on lawyers' income in the private and public sectors. There is one logic supporting the DM-3 comparison, and there is a distinct logic supporting the comparison with self-employed lawyers (lawyers in the public sector were never a comparator group).

38. On the issue of the reliability of the evidence on the incomes of self-employed lawyers, it must be noted that the picture drawn by the CRA data remains far from perfect, as the Government itself argued in its PAI study submission.[26] It suffices to observe, by way of example, the data concerning a non-contentious issue such as the number of lawyers from private practice whose income data is captured by the CRA data placed before the Commission. According to the CRA data, from 2010 to 2014, the number of self-employed lawyers has declined by over 16% (from 22,110 to 18,550); yet, according to the 2013 membership report from the Federation of Law Societies,[27] the number of practising lawyers and the number of professional corporations have been increasing.

39. On the issue of the DM-3 comparator, the Government refers to the testimony of David Scott before the Standing Senate Committee on Legal and Constitutional Affairs[28] as well as the Scott Report (1996) where it was stated that "a strong case can be made for the proposition that the comparison between DM-3's and judges' compensation is both imprecise and inappropriate."[29]

(which includes heads and members of administrative tribunals), for whom, like judges, performance pay would be inappropriate.") [JBD at tab 30].

26 Submissions of the Government of Canada on the Proposal for a Pre-Appointment Income Study at paras. 20-29.

27 Federation of Law Societies of Canada, 2013 Statistical Report, *ibid.* at tab 4.

28 Government's Submission at paras. 14-19.

29 *Ibid.* at para. 109; Scott Report (1996) at 14 [BED at tab 28].

40. What the Government omits to mention is that the Scott Commission made the above statement without actually taking a position against the comparison with DM-3s. To the contrary, the Scott Commission deplored the failure of successive governments to implement the 1975 equivalency with DM-3s.[30] It made the above statement quoted by the Government in a context where it expressed serious concern about the freezing of statutory indexation, concluding that "[i]n terms of the clear intent to establish a relationship between Bench and Bar, or even a relationship with DM-3's, the judiciary is in an accelerating backward slide."[31] The Scott Commission went on to say the following:

> Accordingly, your Commission, rather than engaging in an elaborate analysis of DM-3's and their comparability with judges, or indeed the available statistics with respect to earnings of candidates in the private sector at the Bar, chooses to focus on the most significant factor, the withdrawal of indexing. It is this government initiative which has been, and if not checked will continue to be, the most significant contributor to distancing judicial salaries from those of the practising Bar.[32]

41. As can be seen from the above, the Scott Commission was not concerned with questioning the DM-3 comparator, but rather was concerned that the gap between judicial salaries and self-employed lawyers had become so significant due to a combination of the failure to implement the 1975 equivalency with DM-3s and a general wage freeze in the federal public service, that suitable candidates from private practice were not being attracted to the Bench.

5. Consideration of general trends

42. The Government argues that it would be more objective and justified to consider senior public servants' salaries generally. The problem with this argument is that all of the arguments for dispensing with the DM-3 comparator, except for group size, also apply to dispense with a comparison with public servants generally: lack of security of tenure, individualized compensation, and performance pay.

43. More importantly, the size of the group that the Government is proposing is so unwieldy and devoid of a guiding principle that the proposal is unhelpful to the Commission. If a comparison is to be made to senior public servants' salaries generally, as the

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30 Scott Report (1996) at 15 [BED at tab 28].

31 *Ibid.* at 15-16 [BED at tab 28].

32 *Ibid.* at 16 [BED at tab 28].

Government calls for,[33] how is the Commission to decide what groups to look at and what groups to ignore in the public sector generally? For example, the salary range for the Governor of the Bank of Canada is $436,100 – $513,000, and the range for the Senior Deputy Governor is $305,400 – $359,200.[34] On what basis has the Government decided to exclude positions such as these in the comparative exercise?

44. As the Association and the Council explained before the Levitt Commission, there are serious problems if a comparison is to be made with the entire range of DMs.[35] The DM-2 level is attained automatically after one year of service as a DM-1.[36] Where promotion from one level to another is automatic after a certain amount of time, it makes no sense to have either of those levels as comparators for judges, who do not get appointed automatically after a certain number of years as lawyers. The reality is to the contrary: regardless of the fact that a segment of the lawyer population falls into the category of senior jurists by virtue of the number of years since their call to the Bar, only some of them will fall within the category of "outstanding" candidates contemplated by s. 26(1.1)(c) of the *Judges Act*.

45. It would therefore be wholly inappropriate to compare judicial salaries with the DM-2 level or with the whole DM class. There is no uniformity of qualities and skills across the class and it would be untenable to compare superior court judges with a variegated class of public servants, some of whom have risen through the ranks because of their superior capabilities, while others have been held back because of their limitations.

46. GCs and GCQs occupy apex leadership positions in various federal institutions like the Canadian Institute of Health Research and the National Research Council, and quasi-judicial bodies like the Canadian Radio and Telecommunications Commission and the Canadian Transportation Agency.

47. Comparison with positions in the federal administrative sphere, and with theoretical levels like GCQ-10 for which there is no actual position, is not consistent with the

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33 Government's Submission at para. 139.

34 See http://www.bankofcanada.ca/about/board-of-directors/

35 Reply Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council (January 30, 2012) at paras. 64-71 [Reply BED at tab 5].

36 J. Bourgault & S. Dion, "How Should the Performance of Senior Officials be Appraised? The Response from Federal Deputy Ministers-Summary" (Canadian Centre for Management Development, 1993) at 1 [Reply BED at tab 6].

principled comparison with DM-3s. The Association and Council have set out at paragraphs 86-114 of the Judiciary's Submission the principled and historical basis for the DM-3 comparison. To compare judges with the heads of administrative bodies, even if those bodies are quasi-judicial, puts judges at a level lower than the senior members of the executive branch, the DM-3s (as well as DM-4s). This is not in keeping with the rationale behind the comparison between the executive and judicial branches, namely that judicial independence requires that the executive branch not be seen as superior to the judicial branch.[37]

B. Inclusion of DM performance pay

48. The Government emphasizes the variable and individualized nature of performance pay.[38] This issue has been dealt with by past Commissions. For example, the Block Commission said that performance pay was an integral part of DM-3 compensation: "Performance pay is an integral component of deputy ministers' cash compensation, and it has been growing in recent years as a percentage of their cash compensation."[39] Going back to the Drouin Commission, its report referred to the First Report of the Advisory Committee on Senior Level Retention and Compensation, and observed that the variable pay component of DM compensation was an "integral part" of the total compensation.[40]

49. The Levitt Commission used the following strong language to reject the Government's submission that it would be appropriate to compare the salary of a judge with the salary of a deputy minister to the exclusion of the latter's performance pay:

> The Commission found this position to be inconsistent with the approach adopted by past Commissions, with customary compensation practice, and with common sense.[41]

It is indeed nonsensical – and would be a comparison lacking in credibility – to compare the compensation of a group of individuals with a <u>portion</u> only of the compensation of the comparator group.

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37 Previous Commissions have rejected the Government's attempt to broaden the public sector comparator, see e.g. Levitt Report (2012) at para. 27 [JBD at tab 31]; Block Report (2008) at para. 103 [JBD at tab 30].

38 Government's Submission at paras. 124-134.

39 Block Report (2012) at para. 108 [JBD at tab 30].

40 Drouin Report (2000) at 25 [JBD at tab 28].

41 Levitt Report (2012) at para. 25 [JBD at tab 31].

50. The variable and individualized nature of performance pay is further tempered by the fact that the Block Commission concluded that half of eligible performance pay should be included in the comparator. Moreover, as mentioned above, compensation is individualized for almost every group being proposed by the Government, and it is individualized generally in both the public and private sectors. Therefore, it is unavailing to point to this aspect of performance pay as a reason to exclude this form of compensation.

C. Filters to analyze CRA self-employed lawyers data

51. The issue of the filters to be applied to the analysis of the CRA data on self-employed lawyers has been addressed before past Commissions. The Association and the Council address each in turn below.

1. 65th vs. 75th percentile

52. As mentioned above, the Government itself proposed the 75th percentile before the Drouin Commission. The judiciary at that time was proposing the 83rd or 87th percentile. The Drouin Commission accepted the Government's number, and the judiciary accepted the Commission's decision. Notwithstanding the Commission's acceptance of its submission 15 years ago, the Government since that time has attempted to reduce that percentile. This Commission is presented with Mr. Pannu's fourth report in which he proposes a percentile lower than the 75th percentile.

53. As observed by the compensation specialist retained by the Association and the Council, Sandra Haydon, in her response to the report of Mr. Pannu,[42] a "mechanical view" should not be adopted in compensation analysis.[43] Her experience is that the 75th percentile tends to be the "bottom target where the goal is the attraction of exceptional or outstanding individuals."[44] Indeed, she considers that use of a higher percentile would be justified.[45] Different experts retained by the Association and the Council in the past have

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42 S. Haydon, "Commentary on the Report on the Earnings of Self-Employed Lawyers for the Department of Justice Canada in Preparation for the 2015 Judicial Compensation Benefits Commission (Pannu Report)" (March 29, 2016) (the "**Haydon Report**") [Appendix B].

43 *Ibid.* at 7 [Appendix B].

44 *Ibid.* at 7 [Appendix B].

45 *Ibid.* at 7 [Appendix B].

similarly opined that compensation principles support the application of the 75th percentile in this case.[46]

54. Moreover, contrary to Mr. Pannu's assertion that arriving at the right percentile depends on supply/demand issues,[47] Ms. Haydon points out that "setting a desired target percentile is not simply an exercise in supply and demand. Rather, questions as to the inherent value of each individual judge and the judiciary overall must be considered."[48] For all of these reasons, the Commission should give no weight to Mr. Pannu's canvassing of the 65th percentile.

2. Age-weighting

55. Mr. Pannu applies an age-weighted approach using the entire range of ages of appointees between 1997 and 2015. In contrast, the Association and the Council propose the age range of 44-56, being the age range of the majority of appointees. This proposal accords with the findings of the Drouin Commission and the McLennan Commission.[49]

56. Further, Ms. Haydon's view is that a weighted model "serves to distort the data" in a compensation context where the better approach is to look at where the "vast majority of the appointments pool",[50] especially in the present case where the 44-56 age range has been applied by past Commissions, thereby facilitating comparability of data. She states that while a weighted approach may be a common practice in actuarial exercises, compensation exercises do not usually apply such an approach.[51] A blended approach canvassed by Ms. Haydon is to apply the age-weighted approach within the 44-56 age range. She notes that the 75th percentile rises from $267,041 under Mr. Pannu's calculation across the entire appointments age range, to $329,761 under her blended approach.[52]

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46 See Reply Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council to the Judicial Compensation and Benefits Commission (January 30, 2012) at paras. 77-78 [Reply BED at tab 5].

47 Pannu Report at 3 [Government's Book of Documents at tab 10].

48 Haydon Report at 8 [Appendix B].

49 Neither the Block Commission nor the Levitt Commission made a pronouncement on this point.

50 Haydon Report at 12 [Appendix B].

51 *Ibid.* at 12 [Appendix B].

52 *Ibid.* at 13 [Appendix B].

3. Low-income exclusion

57. Mr. Pannu again calls for the inclusion of all incomes, as opposed to the exclusion of low incomes applied by past Commissions. The McLennan Commission raised the low-income exclusion from $50,000 applied by the Drouin Commission to $60,000 when analyzing CRA data from 2000.[53] The Association and the Council have been applying that $60,000 cut-off ever since. They now propose an adjusted cut-off of $80,000 to account for inflation since 2004.

58. Ms. Haydon's reasoning in supporting the application of the $80,000 cut-off, and even calling for a $100,000 cut-off, is based on the observation that typical benchmarking removes outliers. In this case, where $237,015 is the figure at the 75th percentile under Mr. Pannu's analysis, it would be reasonable to consider as outliers those figures that are less than 50% of that amount.[54] She would consider the reliability of data to be "highly questionable" where there is an inclusion of rates of pay that are less than half of the target percentile.[55]

4. Top 10 CMAs

59. Mr. Pannu proposes an approach where weighting is applied to the data to reflect the 60/40 split in appointments as between the top 10 CMAs and other regions. Ms. Haydon considers this to be a "blunt model".[56] Her view is that there should be a "common sense" approach where the model is neither at the top end, nor at the bottom end of the scale.[57] She observes that the current judicial salary is "well below a competitive market."[58]

D. Supernumerary status as incentive

60. The Government points to the option to elect supernumerary status as being an "important incentive" according to Mr. Pannu.[59] Mr. Pannu made the point about the

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53 McLennan Report (2004) at 43 [JBD at tab 29].
54 Haydon Report at 16 [Appendix B].
55 *Ibid.* at 16 [Appendix B].
56 *Ibid.* at 17 [Appendix B].
57 *Ibid.* at 17 [Appendix B].
58 *Ibid.* at 18 [Appendix B].
59 Government Submission at paras. 89-93; Pannu Report at 16 [Government's Book of Documents at tab 10].

supernumerary option in each of his past three reports, and has done so again.[60] Ms. Haydon observes that supernumerary status can be seen as mitigating certain restrictions that apply to judges post-retirement.[61] Again, the analysis that must be done is a holistic one, as opposed to cherry-picking discrete features of judicial compensation and benefits.

E. Other benefits to the judiciary

61. The Government argues that comparison between self-employed lawyers and judges requires consideration of the "generous" benefits package provided to the judiciary.[62] Mr. Pannu has made the point about other benefits in each of his past three reports, and has done so again.[63] Ms. Haydon's view is that "health and dental plans typically are not significant drivers of a person's decision to accept or decline an employment opportunity."[64]

F. IAI as basis for statutory indexation

62. The Government asked the Levitt Commission to recommend a cap of 1.5% on IAI. The Association and the Council vigorously opposed such a recommendation, going as far as to invite the Levitt Commission not only to decline to recommend a cap on IAI but also positively to recommend <u>against</u> the imposition of such a cap and in favour of maintaining the IAI adjustment as an essential mechanism to ensure financial security and preserve judicial independence.

63. The Levitt Commission declined to recommend a cap on IAI. It also noted the special status of the IAI as "a key element in the architecture of the legislative scheme for fixing judicial remuneration", and added that it "should not lightly be tampered with".[65]

64. The Government is now attacking this key element in the architecture of the scheme for fixing judicial remuneration not by introducing a cap on IAI, but by seeking to replace it with the CPI, the latter being a generally lower index than the former. The flaw underlying the CPI proposal is set out in the section below.

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60 Pannu Report at 16 [Government's Book of Documents at tab 10].
61 Haydon Report at 20 [Appendix B].
62 Government's Submission at paras. 94-95.
63 Pannu Report at 16 [Government's Book of Documents at tab 10].
64 Haydon Report at 19 [Appendix B].
65 Levitt Report (2012) at para. 46 [JBD at tab 31].

G. Objectivity as overarching reason to reject attempts to re-litigate

65. In the *PEI Reference*, the Supreme Court of Canada held that judicial compensation commissions must be independent, objective and effective.[66] That the Government's repeated attempts at re-litigating settled issues undermines the effectiveness of the Commission process is self-evident: it suffices to observe the resources deployed by the parties and their experts before this Commission simply to address issues long-settled by past Commissions.

66. The greater danger in being distracted by the reconsideration of settled issues is to miss out on the more pernicious threat to objectivity that is inherent to the Government's approach to the Commission process. In the *PEI Reference*, Lamer C.J. explained that the objectivity requirement means that compensation commissions "must make recommendations on judges' remuneration by reference to objective criteria, not political expediencies."[67] He went on to explain that in order to ensure objectivity, the enabling legislation should list relevant factors to guide the Commission's deliberations. In sum, objectivity is about the task of compensation commissions being approached within a known and predictable framework, in order to guard against arbitrariness and politicization.

67. Allowing a party to disregard the work of past Commissions is to open the door to moving the goal posts every four years, when it suits one's purpose. This necessarily opens the door to arbitrariness and politicization, the very ill that the Commission process is meant to guard against.

III. REPLY TO OTHER ISSUES RAISED BY THE GOVERNMENT

68. The Association and the Council address below the other points raised in the Government's Submission.

A. Economic conditions

69. The Government's description of Canada's economic situation focuses too narrowly on Canada's current economic situation, ignoring Canada's positive longer-term forecast.

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66 *Reference Re Provincial Court Judges*, [1997] 3 S.C.R. 3 ("***PEI Reference***") at para. 69 [JBD at tab 25].

67 *PEI Reference* at para. 73 [JBD at tab 25].

70. The Government's description of Canada's current economic situation is broadly consistent with the description set out at paragraphs 60 to 71 of the Judiciary's Submission. However, the Government does not provide projections for any key economic or fiscal indicators over the entire quadrennial period, with the exception of the projected CPI inflation at paragraph 27 of its submission.

71. For instance, at paragraph 26 of its submission, the Government states that economists have projected a "modest" GDP growth rate of 1.7 for 2016. The Government does not cite the letter prepared by the Department of Finance at tab 9 of the Joint Book of Documents which predicts a GDP growth rate of 2.2% in 2017 and an average 1.9% yearly growth rate over the 2016 to 2020 period. The Department of Finance's optimistic projections are consistent with the projections prepared by the Policy and Economic Analysis Program at the University of Toronto's Rotman School of Management, as set out at tab 14 of the judiciary's Book of Evidence and Documents.

72. Likewise, the Government states at paragraph 30 that "[r]ecent economic developments, however, are expected to push the Government back into a deficit, reducing the projected budgetary balance". Again, the Government only provides projected deficits to the 2017-2018 fiscal year. The projections the Government provided already show an expected decrease in the deficit from 2016-2017 to 2017-2018. It is reasonable to expect that the projected decline in the deficit over this period will continue to the end of the quadrennial period.

73. More to the point, the Government does mention that the Government's own decision to make significant investments in order to promote economic growth as part of its fiscal stimulus plan is to a large extent fueling the projected growth in deficit to the 2016-2017 fiscal year. As the judiciary points out in its main submission at paragraphs 65 to 66, this deficit spending will not seriously impact Canada's debt-to-GDP ratio. The Government's budget, released on March 22, 2016, does not alter the points made above. It confirms that the projected growth in deficit is to a large extent a function of the decision to promote economic growth.

74. In sum, while the judiciary agrees that there are challenges in Canada's current economic situation, it does not agree with the Government's statement at paragraph 23 of its submission that "[t]he Canadian economy remains fragile." Canada's underlying

economic and fiscal fundamentals are strong and do not present an obstacle to this Commission recommending an increase in judicial salaries.

B. Attracting outstanding candidates

75. As part of its arguments to the effect that there is no difficulty attracting outstanding candidates, the Government states that it is relevant to consider the income levels of lawyers from outside the private sector, pointing to the statistic of 36% of appointees coming from outside of private practice.[68]

76. The Commission should be extremely cautious about such an argument. While it is important that appointees be drawn from both private practice and the public sector, the traditional pool for the majority of appointees has been private practice. It is therefore crucial that the Commission make salary recommendations that will ensure that outstanding candidates from private practice continue to be attracted to the Bench. The Commission should also consider that it is conducive to the health of a strong independent judiciary for the majority of appointees to the Bench to come from private practice, a sector where appointees were not in an employee-employer relationship with a public-sector entity.

C. Value of the annuity

77. Past Commissions have determined that it is appropriate to consider the value of the judicial annuity when comparing the income of self-employed lawyers with the salary of judges. The independent actuarial expert retained by the judiciary shares that view.

78. The Levitt Commission's expert, Mr. Sauvé, came to the conclusion that the value of the judicial annuity was 24.7% of the salary of *puisne* judges, and that is the value the Association and the Council relied on in the Judiciary's Submission.

79. Mr. Pannu in his report to this Commission takes the view that the value of the annuity is 36.5%, this figure being composed of the value of the retirement benefit at 32% and the disability benefit at 4.5%.[69]

80. However, in arriving at the figure of 36.5%, Mr. Pannu applies a methodology that was accepted neither by Mr. Sauvé nor by the judiciary's expert before the Levitt

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[68] Government's Submission at paras. 41-42.

[69] Pannu Report at 13 [Government's Book of Documents at tab 10].

Commission, Mr. FitzGerald, in 2012. That methodology consists in including the disability benefit in the valuation of the annuity. Mr. Sauvé said the following about that methodology: "we agree with the comment made by Mr. FitzGerald to the effect that the valuation of the disability benefits should be made as part of a broader benchmarking exercise including group insurance benefits."[70]

81. The actuarial expert retained by the Association and the Council in relation to the present commission cycle, Mr. Newell, agrees with Mr. FitzGerald and Mr. Sauvé.[71] The disability benefit should be considered separately.

82. Mr. Newell's methodology involves valuing the judicial annuity without consideration of the disability benefit. With that methodology, he arrives at the figure of 30.6% as the value of the judicial annuity.[72] It should be noted that before being entitled to an annuity, judges need to meet certain criteria. Therefore, the value of the annuity varies — potentially very significantly — depending on when these criteria are satisfied.

83. Mr. Newell explains the reasons for the change from the figure of 24.7% arrived at in 2012.[73] One of the main reasons is the new mortality table applied by actuaries since the time of the Levitt Commission.

84. If Mr. Newell applied Mr. Pannu's methodology of including the disability benefit in the calculations, he arrives at 32.4% in contrast to the figure of 36.5% of Mr. Pannu.[74] It is important to note that the retirement benefit of 28.5% included in the total figure of 32.4% cannot be compared with the figure of 30.6% arrived at using Mr. Newell's methodology. Since the latter does not take the disability benefit into account, the retirement-benefit figures resulting from the two different methodologies are like comparing apples and oranges.[75] The judiciary submits that if a figure is to be used to represent the value of the judicial annuity it should be 30.6% at most.

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70 Letter of Mr. Sauvé to the Levitt Commission (February 14, 2014) at 3 [Reply BED at tab 7].

71 D. Newell, "Report on the Value of the Judicial Annuity" (March 29, 2016) ("**Newell Report**") [Appendix C].

72 *Ibid.* at para. 14 [Appendix C].

73 *Ibid.* at paras. 41-46 [Appendix C].

74 The figure of 32.4% changes to 32.7% when a further adjustment is made in order to potentially replicate Mr. Pannu's methodology.

75 Newell Report at para. 50 [Appendix C].

85. The figure of 30.6% has been taken into account in the revised tables of the Association and the Council comparing the judicial salary with the income of self-employed lawyers, produced below in section G. It is useful to keep in mind certain observations made by Ms. Haydon about the comparative exercise in compensation analysis. She says that "[w]hile total compensation both monetary and non-monetary must be considered, it must be done more holistically rather than as a series of single observations."[76] In that vein, it would be misguided to focus on the annuity as a form of judicial compensation or benefit without considering certain means at the disposal of self-employed lawyers such as professional corporations and income splitting. Mr. Pannu acknowledges that the decrease in the number of self-employed lawyers from 2010 to 2014 is a result of self-employed lawyers who have structured their practice as professional corporations.[77]

86. It is noted in conclusion that while it is appropriate for the Commission to consider the benefit conferred upon judges by the judicial annuity, and to seek to ascribe a "value" to it, it would be wrong simply to gross-up judicial salaries and focus on the grossed-up amount when considering the adequacy of judicial salaries in comparison with the incomes of self-employed lawyers. That is so because the actual value of the judicial annuity to any particular judge is unknown. Moreover, the "value" of that potential benefit is highly subjective, and depends on a host of factors.

D. CPI as alternative to IAI as basis for statutory indexation

87. The Government has proposed that judicial salaries be adjusted annually based on CPI rather than IAI.[78] As set out above, this is the Government's second attempt in as many Commission cycles to disturb the statutory indexation that has been in place since 1981. The Association and the Council strenuously object to any proposals that would undermine the existing statutory indexation of judicial salaries.

88. The IAI adjustment in s. 25 of the *Judges Act* is, along with the judicial annuity, one of the cornerstones of judicial financial security and, as described by the Scott Commission in the below excerpt, an integral part of the "social contract" entered into between the Government and the lawyers appointed to the Bench:

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76 Haydon Report at 20 [Appendix B].

77 Pannu Report at 3 [Government's Book of Documents at tab 10].

78 Government's Submission at paras. 152-160.

> The provisions of s. 25 of the *Judges Act* are reflective of much more than a mere indexing of judges' salaries. They are, more specifically, a statutory mechanism for ensuring that there will be, to the extent possible, a constant relationship, in terms of degree, between judges' salaries and the incomes of those members of the Bar most suited in experience and ability for appointment to the Bench. The importance of the maintenance of this constant cannot be overstated. It represents, in effect, a social contract between the state and the judiciary. By its statutory terms, the judges, who by acceptance of judicial office close the door, on a permanent basis, to any real prospect of a return to their previous lives at the Bar, can at least be certain that their commitment in accepting a judicial appointment will not result over the years in a less favourable financial situation as between judicial service and practice at the Bar than that which prevailed at the moment of their appointment. [79]

89. The Government proposes that this Commission recommend a change to this "social contract" on the ground, as stated at paragraph 152 of its Submission, that "CPI is a more modern and relevant measure of changes to the cost of living that will continue to ensure that judicial salaries are protected from erosion through inflation."[80]

90. It is unclear what the Government means when it states that CPI is "more modern". Prof. Hyatt points out in his report that CPI has been measured in Canada since at least 1914.[81]

91. As regards the "relevance" of IAI as compared to CPI as an index to adjust judicial salaries, it is altogether clear that the more "relevant" – and hence appropriate – index is the IAI. As Prof. Hyatt sets out in his report, "[c]hanges in the IAI reflect changes in weekly wages, including changes in both the cost of living and the real wage (the standard of living)" whereas "CPI measures only changes in the prices of a given basket of goods and services." This means that adjusting judicial salaries by IAI results in "annual earnings of Judges keeping pace with the annual earnings of the average Canadian":

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79 Scott Report (1996) at 14-15 [BED at tab 28].

80 Government's Submission at para. 152 [emphasis added].

81 Letter from Doug Hyatt dated March 23, 2016 ("**Hyatt Report**") at 3 [Appendix D].

> The IAI reflects the average weekly earnings of employed Canadians. Changes in these earnings over time are due to two primary factors: changes in weekly hours of work; and changes in the wage rate per unit of time (for example, the hourly wage).
>
> Changes in the wage rate, in turn, reflect changes in general price inflation and changes in productivity. Productivity increases when workers produce more in the same amount of time. Wage changes due to changes in productivity are generally referred to as real wage changes, as distinct from nominal wage changes, which are due to price inflation. Real wage increases, for example, reflect the extent to which workers are able to increase their purchases and, consequently, real wage increases are often interpreted as a measure of advances in the standard of living.
>
> If periodic wage adjustments were restricted to price inflation only, then real wage changes experienced, on average, by all other workers would be ignored. Wage adjustments based upon the CPI alone would be expected to result in lower total (nominal plus real) wage increases over time.[82]

92. Put another way, if judicial salaries were indexed according to CPI, judges would not be able to share in the general increases in productivity that the average Canadian worker experiences. This is particularly important for judges, given that they are subject to a statutory prohibition on engaging in any supplementary employment, pursuant to s. 55 of the *Judges Act*. Unlike the average Canadian worker, judges cannot enter into business and professional ventures to take advantage of Canada's economic progress.

93. The Government further questions the relevancy of IAI at paragraph 156 of its Submission by stating that "IAI is based on average weekly wages and salaries of typical 'wage-earners' with whom judges share few if any characteristics." As Prof. Hyatt points out, the IAI does include the wages of those employed in the "Legal Services" industry.[83] Further, the same complaint that the Government levels against IAI can be applied to CPI, in that "the basket of goods and services that go into measuring the CPI for all Canadians may not be relevant to the consumption patterns of Judges".[84]

94. It is worth noting that switching from IAI to CPI would most certainly reduce judicial salaries comparatively, which is likely the true motive behind the Government's proposal. As Prof. Hyatt notes, "between the period 2004 and 2015, the IAI increased by 34.1

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82 *Ibid.* at 1-2, [Appendix D].

83 *Ibid.* at 2 [Appendix D].

84 *Ibid.* at 2 [Appendix D].

percent" while "CPI advanced by 20.9 percent over the same period."[85] Similarly, the Office of the Chief Actuary has forecasted that IAI will be 1.8% in 2016, 2.2% in 2017, 2.4% in 2018 and 2.6% in 2019.[86] By contrast, CPI is only expected to be 1.6% in 2016, and 2.0% in 2017, 2018 and 2019.[87]

95. As noted by Prof. Hyatt, the choice of the IAI rather than the CPI as the index for the annual adjustment of judicial salaries is perfectly logical, just as it is logical that the judicial annuity is adjusted based on the CPI. As Prof. Hyatt explains:

> I note that the Government makes no mention of the fact that its proposal would do away with the distinction that the legislation currently makes, for logical reasons, between the IAI and the CPI to adjust benefits payable under the *Judges Act*. The rationale for indexing earnings to the IAI (s. 25(2)), but retirement benefits to the CPI (s. 42(1)), as supplemented by the *Supplementary Retirement Benefits Act*), is that employment earnings changes over time are comprised of both inflation and increases in the productivity of workers (i.e., workers produce more per unit of time than before). It is logical that judicial salaries be adjusted by an index reflecting increases in both prices and productivity. Because they are not working, retired workers do not contribute to increased productivity. Consequently, it is logical that increases in retirement income should reflect changes in prices only and not include increases in productivity. [88]

96. The annual application of the IAI statutory adjustment plays an important role in safeguarding financial security. For those lawyers who accept a judicial appointment and enter into the "social contract" mentioned by the Scott Commission, the IAI adjustment provides some protection against inflationary tendencies. For those lawyers considering a judicial appointment, the adjustment, because it helps judicial salaries keep pace with salary increases generally, ensures that an appointment to the Bench remains attractive to outstanding candidates. The Government has not put forward sufficient reasons for this Commission to recommend such a major change to the makeup of judicial compensation, especially in light of the Levitt Commission's very recent refusal to impose a cap on the IAI, and its cautionary observation that the IAI is an element in the architecture of judicial compensation that should not lightly be tampered with.

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85 *Ibid.* at 2 [Appendix D].

86 Letter from L. Frappier, Office of the Chief Actuary, Office of the Superintendent of Financial Institutions, dated February 25, 2016 [JBD at tab 7].

87 Letter from Assistant Deputy Minister Nick Leswick to Anne Turley, February 24, 2016 [JBD at tab 9].

88 Hyatt Report at 2-3 [Appendix D].

E. Pre-appointment income study

97. The Government has reiterated its request for a PAI study. The Association and the Council continue to oppose it for lack of usefulness, and specifically because of the irrelevant, self-serving, and incomplete nature of the study and data that would be generated by it, the whole as set out in their submission of January 29, 2016 on this issue. Nothing in the submissions of the parties since then provides a basis to justify a PAI study, or for this Commission to depart from the conclusions of the Block Commission in this regard.

98. Ms. Haydon was asked for her opinion as to the usefulness of PAI data to the mandate of the Commission. Her view is that "neither a PAI study nor a quality-of-life study will produce data that are reliable or needed to assist the Commission with its mandate".[89] As regards PAI, she explains that the determination of compensation is a forward-looking exercise, while the income of a particular individual appointee is highly contextual and not a fair or reasonable predictor of future income. She adds:

> [T]he determination of a compensation level for the judiciary is not intended to serve as recognition of a promotion, as might be typical in either the public or private sectors, but is, rather, a single value that accommodates both new appointments as well as highly experienced judges. As such, the level of income prior to the appointment is not relevant to the question before the Commission.[90]

F. Quality-of-life study

99. The Government has proposed that the Commission undertake a study "that would examine the intangible aspects of judicial life that factor into applying for judicial appointment – a quality of life study". The Government's stated reason for proposing a quality-of-life study is to give the Commission "a more complete picture of judicial life" by getting the judiciary's views on the non-monetary considerations that may inform a lawyers' decision to apply to the bench.

100. The Government has not provided any particulars on the proposed study other than to state that the proposed study would "identify, describe and perhaps even quantify the intangible advantages and disadvantages associated with judicial office".

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89 Haydon Report at 5 [Appendix B].

90 *Ibid.* at 5 [Appendix B].

101. While the Government does refer to two studies that were commissioned in the United Kingdom in 2005 and 2010 as studies that are similar to the proposed quality-of-life study, neither of these studies involved a comprehensive examination of the non-monetary aspects of judicial life. The researchers in the 2005 and 2010 studies (found at tabs 47 and 48 of the Government's Book of Documents) simply asked judges what the main reasons were that had led them to taking up a judicial post, and barristers and advocates the main reasons why they would or would not consider taking up a judicial post. Both surveys included salary considerations.

102. The Association and the Council question whether there is any value to a quality-of-life study, or whether it would produce any useful information.

103. To the extent the Government is proposing something other than what was done in the United Kingdom in 2005 and 2010, it is not clear that a survey into judges' current view on the non-monetary aspects of their position is relevant to the Commission's inquiry into the adequacy of judicial salaries. This Commission is not tasked with inquiring into the judicial quality of life, but rather inquiring into salary and benefits that will guarantee judicial independence and continue to attract outstanding candidates. The Government needs to explain how the proposed quality-of-life study would provide the Commission with reliable and useful data that would assist it to fulfil its mandate.

104. Ms. Haydon characterizes such a study as "unheard of", and observes:

> Quality of life is a highly personal experience, and as the Government notes, intangible, and as such should not be a consideration in compensation determination.[91]

G. Methodological issue in the CRA self-employed lawyers data

105. One of the tables that CRA provided to the parties in advance of the Commission process shows the net professional income of self-employed lawyers in all of Canada split into 20 percentile rows (from 5% to 100%).

106. In the tables that CRA produced during previous quadrennial cycles, the income shown on any specific percentile row showed the actual percentile income. That is, the income on the x^{th} percentile row showed the x^{th} percentile income. CRA changed the way it

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91 *Ibid.* at 5 [Appendix B].

presented the data in the tables it provided for this quadrennial cycle in response to new confidentiality standards. Whereas the x^{th} percentile row previously showed the actual x^{th} percentile income (i.e. the 75^{th} percentile row showed the actual 75^{th} percentile income), the x^{th} percentile row now shows the mean of the incomes falling between the $(x-5)^{th}$ and the x^{th} percentiles (i.e. the 75^{th} percentile row now shows the mean of all incomes between the 70^{th} and 75^{th} percentile).

107. The Association and the Council continued to rely on the income shown in the x^{th} percentile row to show the x^{th} percentile income when they prepared the tables in their main Submission. In light of CRA's different presentation of its data, a calculation must be done to arrive at the income at a certain percentile. Instead of using the x^{th} percentile row as a substitute for the actual x^{th} percentile income, one arrives at the actual x^{th} percentile income by taking the average of the x^{th} percentile row and the $(x+5)^{th}$ percentile row. That is, in order to provide an estimate for the 75^{th} percentile income, one takes the average of the 75^{th} percentile row (the mean of the incomes falling between the 70^{th} and 75^{th} percentile) and the 80^{th} percentile row (the mean of the incomes falling between the 75^{th} and the 80^{th} percentiles).

108. Counsel for the Government brought the difference in the methodology of CRA to the attention of counsel for the Association and the Council. A discussion was then had with a representative of CRA to obtain some clarification on this point. The Association and the Council have now revised Tables 5 and 6 to show the percentile incomes for Canada as calculated according to the new methodology:

[Tables on next page]

Table 5 - REVISED
Comparison of salary of *puisne* judges with net professional income of self-employed lawyers at 75th percentile
(Net professional income ≥ $60,000, Age group – 44-56)
Canada and top ten CMAs, 2010 to 2014

Year	75th Percentile Income		Salary of *Puisne* Judges		
				% Difference from	
	Canada	Top ten CMAs	$	Canada	Top ten CMAs
2010	$403,953	$471,330	$271,400	-32.8%	-42.4%
2011	$392,188	$450,845	$281,100	-28.3%	-37.7%
2012	$395,660	$457,880	$288,100	-27.2%	-37.1%
2013	$390,983	$437,055	$295,500	-24.4%	-32.4%
2014	$404,025	$454,915	$300,800	-25.5%	-33.9%

Table 6 - REVISED
Comparison of salary of *puisne* judges with net professional income of self-employed lawyers at 75th percentile
(Net professional income ≥ $80,000, Age group – 44-56)
Canada and top ten CMAs, 2010 to 2014

Year	75th Percentile Income		Salary of *Puisne* Judges		
				% Difference from	
	Canada	Top ten CMAs	$	Canada	Top ten CMAs
2010	$438,378	$501,590	$271,400	-38.1%	-45.9%
2011	$428,035	$484,310	$281,100	-34.3%	-42.0%
2012	$430,363	$491,575	$288,100	-33.1%	-41.4%
2013	$419,010	$465,230	$295,500	-29.5%	-36.5%
2014	$435,450	$482,380	$300,800	-30.9%	-37.6%

109. As can be seen from the above revised tables, there is in fact a greater discrepancy between the judicial salary and the income of self-employed lawyers than initially set out in the Judiciary's Submission.[92] Specifically, in revised Table 6 there is a 30.9% difference between the 2014 judicial salary and the income of self-employed lawyers at the 75th percentile across Canada. The figure in the original Table 6 was 25.8%.

92 Judiciary's Submission at para. 121.

110. Finally, the Association and the Council have prepared a revised version of Table 7, showing the percentile incomes for Canada as calculated according to the new methodology as well as the value of judicial salaries including the annuity valuation of 30.6%, as set out in Mr. Newell's report attached to these Reply Submissions at Appendix D:

Table 7 - REVISED
Comparison of salary plus annuity of *puisne* judges
with net professional income of
self-employed lawyers at 75th percentile
(Net professional income ≥ $80,000, Age group – 44-56)
Canada and top ten CMAs, 2010 to 2014

Year	75th Percentile Income		Salary of *Puisne* Judges		
			$ Includes Annuity valuation of 30.6%	% Difference from	
	Canada	Top ten CMAs		Canada	Top ten CMAs
2010	$438,378	$501,590	$354,448	-19.1%	-29.3%
2011	$428,035	$484,310	$367,117	-14.2%	-24.2%
2012	$430,363	$491,575	$376,259	-12.6%	-23.5%
2013	$419,010	$465,230	$385,923	-7.9%	-17.0%
2014	$435,450	$482,380	$392,845	-9.8%	-18.6%

111. As is apparent in revised Table 7, the adjustment to the annuity valuation is more than offset by the increase in the relevant all-Canada percentile incomes resulting from the revised CRA methodology. Whereas in the original Table 7, the gap between all-Canada income and the judicial salary including the annuity was 7.5%, it is now 9.8%. In the case of the top ten CMAs, the gap is now 18.6%, whereas it was 22.2% in the original Table 7.

112. As mentioned in the section on the judicial annuity above, when comparing the judicial salary with the incomes of self-employed lawyers, certain financial means available to self-employed lawyers, such as professional corporations and income splitting, must be taken into account. In light of those vehicles, used to reduce the taxable income of self-employed lawyers, the figures in the CRA data should be approached with some caution since those figures would no doubt increase in the absence of such vehicles. Therefore,

the gap between the income of self-employed lawyers and the salary of *puisne* judges is actually greater than is reflected in the tables.

113. In light of the above, the request for a salary increase as articulated in the Judiciary's Submission is supported by the CRA data.

IV. CONCLUSION

114. The Association and the Council reiterate the arguments set out in the Judiciary's Submission filed on February 29, 2016. They request that the salary of *puisne* judges be increased by 2% as of April 1, 2016, by 2% as of April 1, 2017, by 1.5% as of April 1, 2018, and by 1.5% as of April 1, 2019, all exclusive of statutory indexing based on the IAI. The Government has presented no convincing argument in support in the measures it has proposed. The IAI should not be replaced by the CPI, and the DM-3 comparator should not be dispensed with.

The whole respectfully submitted on behalf of the Canadian Superior Courts Judges Association and the Canadian Judicial Council.

Montréal, March 29, 2016

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A P P E N D I X A: Past Government submissions and Commission conclusions regarding the DM-3 comparator

Government submission	Commission report
Block Commission	
47. In the Government's view, the most relevant public sector comparator group is that of the most senior federal public servants (EX I-5; DM 1-4; Senior LA [lawyer cadre]). While the 1999 Drouin Commission and earlier Triennial Commissions had historically relied on the DM-3 salary midpoint as a comparator, the 2003 Commission noted that many officials in this broad spectrum of senior government officials, and not just those at the DM-3 level, potentially have a level of experience and capacity comparable to that of candidates for appointment to the Bench. 48. The Government agrees that comparability to this broader spectrum of senior officials is merited because these executives share capacity, skills and abilities comparable to judges, as well as a commitment to making a contribution to public life. Of equal force, reference to the senior executive cadre is merited because the financial position of the Government is reflected in part in the salaries it is prepared to pay its most senior employees.	103. The DM-3 level, as can be seen, has been a comparator for nearly every previous commission, and we believe, like the Courtois Commission, that this "reflects what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges". The EX/DM community proposed by the Government as a comparator would be a significant departure from the DM-3 comparator used by previous commissions. The salary increases provided to the EX/DM community may provide an indication of the "priority the Government accords to compensate senior professionals of high ability who have chosen service in the public interest over the private sector", but it does not provide the single, consistent benchmark that is provided by the DM-3 level and the remuneration associated with that level.
Levitt Commission	
121. The Government submits that in light of the small number of DM-3s (13 compared to 1,117 judges), their short tenure (4.4 compared to 21.6 years), and the fact that the entire deputy minister population has a level of experience comparable to judges, if this Commission considers a public sector comparator, it should consider all deputy ministers and not only DM-3s. The judicial salary is consistent with both judges and deputy ministers being paid as "individuals of outstanding character and ability."	24. The Government submitted that, if the Commission felt the need to have a public sector comparator group, it should not be the highly-ranked deputy minister ("DM-3") group but rather all persons paid from the public purse or, if that submission was not accepted, all deputy ministers. 25. The Government also took the position that, because variable compensation is not a tool which can be used in a judicial compensation scheme, when comparing the compensation of judges and public servants the Commission should ignore the variable portion of senior public service compensation. In other words, the Government took the position that it would be appropriate to compare the salary of a judge with the salary of a deputy minister and yet ignore the substantial performance and merit pay opportunity afforded to deputy ministers as part of their total cash compensation. The Commission found this position to be inconsistent with the approach adopted by past Commissions, with customary compensation practice,

	and with common sense. 26. The Government also made submissions that focussed on job content – a form of task analysis. This type of analysis may be of some use in pay equity or other similar contexts but it was of no assistance to the Commission in arriving at a view as to "what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges" -- words first penned by the Courtois Triennial Commission, which have been cited with approval by all preceding Quadrennial Commissions. The Commission took the view that the Government's analysis failed to give sufficient weight to the constitutional status and role of the judiciary and also the importance of its appearance and image to the effective performance of that role. The Commission found this submission to be a semantic exercise completely detached from workplace reality and, accordingly, of no relevance to the Commission's enquiry 27. Like its predecessors, the Commission determined that the scope of the chosen public sector comparator group is a matter of judgment to be made by reference to the objective of the Commission's enquiry as first framed by the Courtois Commission. While the Commission recognizes that the choice of the DM-3 group may not be regarded as ideal due to its small sample size and other comparability issues such as tenure in position, this Commission, like the Drouin and Block Commissions, focussed on the purpose of the analysis as articulated above and concluded that the seniority of the group and the functions its members discharge make it the best choice as a public sector comparator group for the judiciary. This choice has the additional advantage of eliminating outliers both above and below the DM-3 category.

Judicial Compensation and Benefits Commission

Commentary on the *Report on the Earnings of Self-Employed Lawyers for the Department of Justice Canada in Preparation for the 2015 Judicial Compensation Benefits Commission (Pannu Report)*

March 29, 2016

Table of Contents

1.0 Introduction

Sandra Haydon & Associates Inc. (SH&A)[1] was retained by Norton Rose Fulbright Canada LLP on behalf of the Canadian Superior Courts Judges Association and the Canadian Judicial Council to provide a commentary on the report authored by Mr. Haripaul Pannu, *Report on the Earnings of Self-Employed Lawyers for the Department of Justice Canada in Preparation for the 2015 Judicial Compensation and Benefits Commission*, February 25, 2016. More specifically, SH&A was asked to comment on Mr. Pannu's conclusions regarding the "filters" applied to analyze CRA data on self-employed lawyers:

- 65th vs. 75th percentile
- age-weighting vs. age range
- low-income exclusion
- top 10 census metropolitan areas ("CMAs") vs. all of Canada

Based on my experience, the use of filters is not only a normal component of compensation benchmarking, but a much needed element to ensure data integrity and a selection of data that reflects and supports broader compensation philosophy. Each of percentile, sector (self-employed lawyers) and geography are common filters, or "data cuts" as they are refered to in compensation benchmarking. While the use of age and income exclusion as specific filters is atypical, in the context of judicial compensation it is reasonable and necessary.

I am of the view that both age and income exclusions serve as a suitable proxy for what is absent in this undertaking, that is, the ability to compare like or similar jobs. Ensuring that the two jobs that are being compared are generally the same is foundational to compensation benchmarking. Given that the role of a judge is unique, it is not possible to find a perfect comparator. However, recognizing that experienced lawyers are the core pool from which appointments are made, each of age and income can serve as a proxy to ensure that the comparisons being made are fair and reasonable.

Mr. Pannu's report was prepared for the Government of Canada to provide an analysis on the net income of self-employed lawyers for purposes of comparison to the income level of federally appointed judges. Data were drawn from 2010 – 2014 taxation information provided by the

[1] My curriculum vitae is included as Appendix A

Canada Revenue Agency ("CRA"). Mr. Pannu reported that based on his testing, he is confident of the reliability of the data. I have not undertaken any reliability testing, and have relied on the data made available in his report. This is of note given that I have relied on his data to reframe a number of his conclusions. It may be that had I worked with the raw data from the CRA, I would have arrived at a different starting point than Mr. Pannu.

As my report makes clear, I have reservations about the manner in which Mr. Pannu has used the data to arrive at his overall conclusion, that being, "[t]he judicial salary of $300,800 per annum [in 2014] would place it in the 75th to 80th percentile nationally…and at least the 75th percentile in all major urban centres in Canada except Toronto and Calgary (70th percentiles). That would mean the judicial salary is greater than the net incomes of 75% of self-employed lawyers" (page 15). Not only do I strongly disagree with Mr. Pannu's conclusion, but as my report makes clear, I have concerns about the analytic methods he has used.

My report provides comments on Mr. Pannu's report in relation to each of:

- Process (page 3 of Mr. Pannu's report)
- Analysis (page 4)
- Salary Exclusion Impact (page 7)
- Major Metropolitan Centres (CMAs) (page 9)
- Judicial Annuity Scheme - Calculation of Total Compensation (page 11)

While Mr. Pannu provides data for a number of "filters" for purposes of comparison, I have summarized the data in Table 1 (see following). In his report, Mr. Pannu applied an age-weighted salary computation only to the 2014 data. As the table makes clear, there are a number of available conclusions, each dependent on the data model considered.

The form of presentation in Mr. Pannu's report poses some challenges in interpreting his data analysis and conclusion. In the practice of compensation analysis, the presentation of data should adhere to a standard of transparency, consistency and ease of understanding which is suitable for non-compensation professionals. Mr. Pannu's report gives rise to some concern about a lack of clarity both in definition and underlying assumptions. I have tried to reframe some of his observations and enhance their transparency. In providing this additional data, I have consistently used the 75th percentile, for reasons set out below. Mr. Pannu, however, has

used mathematical calculations which consistently result in the lowest possible number, rather than, in my opinion, the right number.

Norton Rose Fulbright has also asked me to comment on the usefulness to the Commission of the Government-proposed pre-appointment income (PAI) study and quality-of-life study. While I understand the arguments the Government has put forward, I am of the view that neither a PAI or quality-of-life study will produce data that are reliable or needed to assist the Commission with its mandate.

Determination of compensation is a forward looking practice answering the question as to what is the value of a job given agreed-to principles, such as those articulated in the *Judges Act,* and in light of relevant compensation market practices and levels. The income of a particular individual appointee is itself highly contextual and not a fair or reasonable predictor of future income based on a substantially different occupation. Moreover, the determination of a compensation level for the judiciary is not intended to serve as recognition of a promotion, as might be typical in either the public or private sectors, but is, rather, a single value that accommodates both new appointments as well as highly experienced judges. As such, the level of income prior to appointment is not relevant to the question before the Commission. The question remains the value of the judiciary in its entirety.

A quality-of-life study is an unheard of practice for purposes of compensation benchmarking for a number of reasons not the least of which would be coming to agreement on what elements are to be included, and then how to objectively cost and account for the value of quality-of-life indicators. Through both the CRA data as well the salary level for DM-3, the Commission has before it what is arguably the best data for benchmarking the judiciary and based on that, there is no need to introduce extraneous and unreliable data. Quality of life is a highly personal experience, and as the Government notes, intangible, and as such should not be a consideration in compensation determination.

Lastly, by way of an overall observation, I would like to emphasize that compensation benchmarking is not a pure science of averages, weightings and percentiles. Rather, it is a blend of each of math, context and judgment. In order for the data to have meaning, it is essential that a full qualitative accounting of purpose and context be brought to bear. In my opinion, these are clearly absent from the Pannu report.

Table 1 – Summary of Data, Pannu Report

Baseline Data			65th Percentile				75th Percentile			
Year	Number of Observations	Judicial Salary	All Data	Age Adjusted	With Exclusion 60K	With Exclusion 80K	All Data	Age Adjusted	With Exclusion 60K	With Exclusion 80K
2010	22,110	$271,400	$198,030		$269,948	$299,088	$274,058		$357,463	$387,830
2011	19,310	$281,100	$189,995		$265,795	$295,658	$266,843		$350,713	$380,4445
2012	19,190	$288,100	$192,658		$265,093	$294,458	$267,223		$351,043	$384,465
2013	19,360	$295,500	$187,833		$263,688	$289,758	$260,088		$344,423	$373,273
2014	**18,550**	**$300,800**	**$188,138**	**$208,306**	**$265,018**	**$293,615**	**$261,363**	**$267,041**	**$352,513**	**$383,840**

The 2015-2016 judicial salary is $308,600. I understand that this will be increased by statutory indexation on April 1, 2016.

2.0 Process

Mr. Pannu begins his report by stating that he has relied on the entire range of available data and that doing so will allow for the determination as to which statistical value will be an appropriate benchmark for setting judicial salaries. While it is true that compensation practice demands that a range of statistical values be considered, I think Mr. Pannu is putting the cart before the horse. In the work I have done, particularly with organizations that clearly articulate a talent management strategy of being able to attract outstanding talent,[2] the target market placement comes first. Testing the validity of the current compensation level against that target then becomes the task at hand. This is particularly true in working with public sector organizations where they face a more complex foundational compensation philosophy having to blend public and private sector compensation data. For private sector organizations, it is normal practice to focus on other private sector organizations, most often based on a common geography, a similar industry, and with clarity in desired target percentile. By contrast, public sector organizations often operate in multiple geographies, draw talent from both the public and private sectors (and multiple industries within both) and as such, are confronted with a more complex challenge in setting the foundation for building a compensation philosophy or strategy.

I disagree with Mr. Pannu's perspective that each of the 50th, 65th and 75th percentiles are used when the goal is the attraction of "exceptional individuals" and that it is about supply and demand (page 3). This is an overly mechanical view. Moreover, based on my experience, the 75th percentile tends to be the bottom target where the goal is the attraction of exceptional or outstanding individuals. I note that the Government itself, through its experts before the Drouin Commission, proposed the 75th percentile. It is not uncommon that organizations focus on higher target percentiles, including up to the 90th percentile. While use of the 90th percentile is the exception, in my recent experience, a number of client organizations, in the broader public sector, have elected to use the 90th percentile for a number of specialized cases, primarily in both the medical sphere as well as in what is known as complex business analytics.

That said, I would also caution in simply taking compensation principles and practices that were designed for a very different workforce model than is found in Canada's judiciary. The judiciary is unlike any of the talent pools from which appointees are drawn – academic, government /

[2] I have been referred to s. 26(1.1) (c) of the *Judges Act*, which refers to "the need to attract outstanding candidates to the judiciary".

public sector, or the private sector. Each of these, in different ways, has a series of other compensation levers as well as broader talent management practices that work in conjunction with compensation practices. Compensation practices and principles that were designed to fit each of these markets do not easily translate to the judiciary and given that, some caution in application is warranted.

In this particular context – consideration of percentile -- I am of the view that setting a desired target percentile is not simply an exercise in supply and demand. Rather, questions as to the inherent value of each individual judge and the judiciary overall must be considered. One measure of communicating the importance of the judiciary is setting compensation levels that convey the importance of the institution.

Mr. Pannu's analysis and related conclusions lack this important context, and in doing so, miss the mark. Overall, I find that Mr. Pannu's analysis retreats to the lowest common denominator, which seems inappropriate to the task at hand.

3.0 Analysis

The first data set offered in the Pannu report is a five year profile of the low and high net income percentiles (5th and 95th) combined with a chart that shows, not surprisingly, that the higher the percentile, the higher the net income (page 4). Table 2 of my report provides a summary of Mr. Pannu's data for the year 2014.

Table 2 – Self Employed Lawyer, All Net Income Data, 2014

Percentile	5th	95th
$	$ -1,773	$882,565

I do not understand why Mr. Pannu starts at this point. Neither the 5th percentile nor the 95th percentile has been considered by any previous Commission, nor does Mr. Pannu ever return to these data. More importantly, though, it provides a misleading summary of the actual data. In Appendix D of his report, Pannu provides a more fulsome summary of the data, albeit one that is based on "all data".

In compensation analysis, one would never present such a blunt picture of data, particularly where it is of no continuing value. As noted earlier, while "income exclusion" is both unique and appropriate to the design of judiciary compensation levels, compensation professionals would not simply accept, for example, 18,500 data points for 2014. Prior to relying on the data, experience, judgement and math would be used to refine the data model and ensure suitability and integrity. Offering a summary based on 18,550 data points simply distracts from the question to be resolved. The task at hand is not to present all data, but to provide data that assist the Commission in determining specific compensation levels for the judiciary. While later sections of my report will address the appropriateness and necessity of refining the data through various "filters" or "cuts" – age, geography, income exclusions – Table 3 provides a summary of data from the Pannu report that includes data where income exclusion has been used.

Table 3 – Self Employed Lawyer, 2014, with salary exclusion (Appendix D, Pannu)

Percentile	All Data	Excludes <$60k	Excludes <$80K
5th	-15,275	$64,555	$84,555
50th	$110,145	$17,7575	$201,265
65th	$173,320	$247,340	$275,740
75th	$237,015	$325,020	$356,020
95th	$615,145	$740,860	$781,855
100th	$1,149,985	$1,296,265	$1,345,040

As Table 3, above, makes clear, and is a much better starting point for deliberation and discussion, when income data is presented that considers exclusion of low income levels, the picture is dramatically different. Across Canada, for lawyers of all age groups and all geographies, income levels are much higher than Mr. Pannu presented through his initial data.

Mr. Pannu suggests that a more "appropriate" view of the data is required via use of the median of $118,993 for 2014. My view is that this data point is not of assistance to the Commission in its deliberations. Mr. Pannu acknowledges as much, saying that the 50th percentile, or $118,993 in this case, is likely not the right target, but the 65th or 75th percentile is more appropriate for consideration for the judiciary (page 5). Based on this conclusion – that is offered without clear rationale – he provides the following table as an illustration that, on base salary alone (that is absent the value of the annuity), the 2014 judicial salary of $300,800 approximates the 78th percentile.

Table 4 - 2014 Net Professional Income (Pannu, page 5)
(without salary exclusion)

Year	65th P	75th P	Judiciary Salary	Approximate Percentile
2014	$188,138	$261,363	$300,800	78th

I find this to be misleading; it is simply too blunt to provide guidance to the Commission. While I will return to each of age, geography and salary exclusions as reasonable and much needed "filters" or "cuts" to the data, using only salary exclusion, I arrive at a conclusion that is very different from Pannu's conclusion above. While the judicial salary exceeds the 65th P, although far less than suggested by Mr. Pannu, it is well below the 75th P, whether a $60,000 or $80,000 exclusion is relied on (Table 5).

Table 5 – Income Exclusions, 2014, Net Professional Income

Percentile	Excludes <$60k	Excludes <$80K	Judiciary
65th	$247,340	$275,740	$300,800
75th	$325,020	$356,020	

As noted in the introduction, the presentation of data must be transparent. The conclusion that the current judicial salary sits somewhere between the 75th – 80th percentile is true only when the data used is so blunt, so rough, as to distort more thoughtful consideration of the question at hand.

Based on Mr. Pannu's analysis, the challenge appears to be how can it be justified to pay the judiciary in excess of the 75th percentile. Where much-needed nuancing of the analysis is offered, the question becomes the exact opposite – how can it be justified paying the judiciary below the 75th percentile?

3.0 Considerations of Age Adjusted Salaries

Mr. Pannu's report next turns to a consideration of age as a potential filter for the CRA raw data and while he acknowledges the appropriateness of using such a filter, his use of a weighted average is not a defensible model, nor is it typical. In my more than 20 years of undertaking compensation studies that focus on the determination of a base salary, I have relied on the use of weighted average very rarely, and can, in fact, point to only one specific example where a weighted model was required. In that particular instance, the client organization had significant internal equity problems that stretched back decades. As a means to create a greater degree of internal equity and provide a stronger foundation for establishing and maintaining both internal and gender-based wage parity, a weighted model was used. This approach was used to ensure that the mistakes of the past were not repeated. While the use of weighting is very atypical in compensation benchmarking, it is my understanding that in actuarial studies, the use of weighting is a more common practice.

While it is true that appointments occur at a wide range of ages, as is typical in most data sets, those points at the far ends of the spectrum are more the exceptions than the rule. Compensation design, however, is founded on building for the rule rather than the exceptions.

It is my understanding that appointments to the judiciary can occur at any time after 10 years, and that while appointments occur under the age of 44 and over the age of 60, the average age of appointment is 52 and a majority of candidates are selected from the ages between 44 – 56. It is also my understanding that past Commissions have focused on the age bracket 44 - 56. The combination of past practice and erring on the side of what is more typical is far and away a better model than a weighted model that skews that data in a manner that is an inaccurate profile of the vast majority of the appointment pool. A weighted model, in this context, simply serves to distort the data. As reported by Mr. Pannu, this age bracket, 44 – 56, accounts for over two-thirds of all appointments.

If an age-weighted approach is to be applied, common sense suggests that narrowing the field of data to reflect the predominant age categories is a more accurate profile for purposes of determining judicial salaries. The goal of market analysis is to provide the best representation, not the lowest, or the highest. Table 6 provides a comparison of Mr. Pannu's data, and a more selective data model that accounts for two-thirds of appointments – those appointments between ages 44 - 56.

As can be seen in Table 6, where under 44 and 56 or above age categories are excluded, the 75th percentile rises dramatically – from $267,041 (Pannu report) to $329,761. The number of $329,761 is based on a weighted average approach within the 44-56 range to allow for comparison Mr. Pannu's figure. However, where a non-weighted average is used for the data, the outcome is not materially different.

Table 6 – Age Adjusted Salary for Judiciary, 2014 Income

Age at Appointment	Number of Appointments	Percentage of Appointments (entire age range)	75th Percentile Pannu Data	Number (%) of Appointments (ages 44 to 56)	Exclude < 44 and > 56 @ 75th percentile	Age Weighted Income
Under 44	34	5%	$247,125			
44 to under 48	128	19%	$340,830	128 (28%)	$340,830	$96,732
48 to under 52	153	22.7%	$338,490	153 (34%)	$338,490	$114,831
52 to under 56	170	25.2%	$313,570	170 (38%)	$313,570	$118,197
56 to under 60	121	19.9%	$304,785			
60 to under 64	53	7.9%	$257,260			
64 and above	16	2.4%	$191,915			
Total Observations	**675**	**100%**		**451 (100%)**		
Age Adjusted Income			$267,041			$329,761

Similar to the consideration of income exclusions, when appropriate and reasonable age categories are considered, the conclusion is not that the judiciary is paid above the 75th percentile of self-employed lawyers, but that, in fact, the judiciary is below that market. A

balanced analysis and report would provide the Commission with each of these data points and the corresponding rationale for selecting one or the other. Data absent context is simply data. What is required for decision-making is information and context. I am of the view that Mr. Pannu's report avoids context and discussion. Once judgement is applied to the analysis of data, very different conclusions from those offered in the Pannu report are arrived at.

4.0 Salary Exclusions

Mr. Pannu opens his section on salary exclusions noting that such a practice is an atypical practice and "distorts the results of the salary information" (page 7). I totally disagree. In any data collection exercise, a number of filters are used to ensure data integrity. The market, as one might expect, is not comprised of well-organized data, and compensation professionals must bring their professional judgement to bear in offering reasoned and transparent cases for exclusions and refinements. While it is true that a pure salary exclusion is not used in the typical case, this is not a typical case. It is very uncommon to have such a large data population (18,550 for 2014) that is representative of so many dissimilar positions. While it is true that all data are derived from self-employed lawyers, there can be no doubt that there is a wide range in the nature of the legal practices included in the data. Simply being a self-employed lawyer does not make these data equal, or even necessarily similar.

There is good reason to exclude select age cohorts from the analysis to better reflect the core talent pool from which appointments are made. Equally, there are compelling arguments to exclude lower levels of income. A basic principle of compensation analysis is, as much as possible, to ensure that comparisons being offered are on like jobs. Given the unique model of the judiciary, this is not a simple task. In fact, this may be an impossible task, reminding us of the importance of context and use of judgement. It is reasonable to conclude that given the responsibilities assumed by all judges immediately upon appointment, comparison with seasoned legal practitioners is appropriate. While a straight line cannot be drawn between experience, excellence and income levels, there can be no doubt that there is a strong correlation.

Mr. Pannu concludes that "[a] more standard approach is to use a fair percentile benchmark without salary exclusion" (page 8). I would argue that most compensation professionals consider that data requires vetting and cleansing to arrive at a quality database. Typically, a filter such as quality of job match is used; a tool not available in this context. Given the talent pool that the Government should appoint from in light of the need to attract "outstanding" candidates, a focus on salary levels in excess of $80,000 seems, if anything, a very conservative baseline. The data provided by Mr. Pannu with regard to salary exclusion, at the 75th percentile, is summarized in Table 7.

Table 7 – 75th Percentile <60k and <80k Salary Excluded, 2014, Net Income

Excludes <$60k	Excludes <$80K
$293,615	$383,840

As each reasonable filter is applied to the data, the conclusion offered by Mr. Pannu ("the judicial salary of $300,800 per annum would place it in the 75th to 80th percentile nationally") simply does not hold. If we use a conservative cut-off point of $80,000 to refine the database, the judiciary is below the 75th percentile. I am of the view that additional modeling that considers a $100,000 cut-off would be more appropriate. To use a cut-off of $100,000 would be more reflective of typical benchmarking where "outliers" are removed from the database. Given that the "all data" profile provided by Mr. Pannu provides for a figure of $237,015 at the 75th percentile, removing data that is less than 50% of that amount would meet a test of reasonableness as a definition of an "outlier." While judgement is used to determine what constitutes an outlier in any particular data model, certainly in compensation where rates of pay are less than half of the target percentile, the reliability of the data would be viewed as highly questionable. Where truly "like" positions are being compared, there is a typically limited differential in the data.

Again, the task here is to neither elevate nor lower the comparator, but to identify a set of parameters that is reasonable, and then the data will be what it will be. Principles and philosophy should ground the data modelling rather than a data model that seeks to support a conclusion.

5.0 Geography

Mr. Pannu provides data for Canada's largest cities (top 10 CMAs) which provide the largest number /percentage of appointments to the judiciary, and on that basis alone, this filter becomes important for determining compensation levels.

Where Canada on the whole is used as the baseline (= 0), the calculations result in substantial differences where the 75th percentile varies significantly from city to city. 675 private-practice lawyers were appointed to the bench for the period January 1, 1997 - March 31, 2015, and 60% of those appointments came from the top 10 CMAs.

Table 8 Summary of CMA-specific Income for Self-Employed Lawyers

CMA	75th Percentile Income 2014	Compared with Canada
Canada	$261,363	100%
1 – Quebec City	$212,890	81%
2 – Ottawa / Gatineau	$240,315	92%
3 – Montreal	$261,955	100%
4 – Vancouver	$266,470	102%
5 – Edmonton	$301,140	115%
6 – Calgary	$333,815	128%
7 – Hamilton and London	$372,595	143%
9 – Toronto	$388,020	148%
All CMAs	$306,810	117%
All other regions	$160,363	61%

Based on an approximate 60 / 40 split of appointments, Mr. Pannu calculates a weighted average at the 75th percentile of $249,317. While offering a weighted model of 60/40 is one method, my view is that most compensation professionals would reject such a blunt model. This model does not reflect a common sense approach to determining compensation levels. The particularity in this context is that compensation for judges does not vary based on geography.

This is, of course, a common practice in many sectors of the Canadian labour market. However, absent this lever, the challenge becomes determining a model that, again, neither runs to the top end of the scale nor the bottom end of the scale.

Under Mr. Pannu's model, his figure of $237,015 would be below the majority of CMAs, and significantly above all other geographies. My own view is that based on the data available through salary exclusion and age cohort modelling, the Commission has adequate input for a determination of compensation, particularly with the additional data provided by the second major comparator, DM-3. Geography should serve as a guide, but given the desire to have a flat Canadian judicial salary, this data should be of less import. That is not to say it should not be considered given the predominance of where the judiciary is located. What is clear is that for each of the available filters, when applied in a reasonable manner, they lead to a common conclusion that the current judicial salary of $308,600 is below a competitive market. The consistency of these filter-based findings highlight the overall reliability of the use of filters.

6.0 Judicial Annuity Model – Calculating Total Compensation

While in principle I am in full agreement with Mr. Pannu that a fair comparison between self-employed lawyers and the judiciary requires consideration of total compensation, I cannot agree with either his math or the related conclusion. In calculating total compensation for the judiciary, his method provides for the highest possible number, while in calculating total income for self-employed lawyers, he does not give adequate consideration to favourable tax vehicles and he relies on a data model that results in continuing to lower the outcome. The gap that is created between the two is neither accurate nor defensible as the comparison being made does not start from a common baseline nor use common parameters.

The Pannu report also makes reference to other compensation vehicles such as the value of benefit packages. While the value of health and dental benefits is sometimes included in total compensation, in my experience, health and dental plans typically are not significant drivers of a person's decision to accept or decline an employment opportunity. Moreover, in my experience in working with private sector partnership business models, one cannot assume the absence of any such benefits.

Finally, in terms of creating a baseline that reflects total compensation, there are other vehicles available that have an impact on net income within the private sector, such as income splitting and professional corporations. Such vehicles have not been referenced or costed, again resulting in a less than fulsome profile of net income.

As such, Mr. Pannu's conclusion of the judicial salary of $410,592 as the comparator with net income of self-employed lawyers is not a comparison with data that have been calculated on the same basis. Mr. Pannu's report makes clear that the application of any one filter results in a figure substantially different than either $188,138 (all data, 65th) or $261,363 (all data, 75th percentile). The next step in calculating the appropriate comparator number would be to ensure that all the filters are working in tandem. In compensation benchmarking, the determination of an appropriate comparator weaves all data together. Given that Mr. Pannu has reported his data as stand-alone findings, it is not possible to determine what that final data point, or data range, should be.

Lastly, regarding the option to elect supernumerary status, Mr. Pannu has not provided any particular model for consideration of this. Knowing little about the particular use of this, I would caution against any overly simplistic costing (half time work for full time pay).

Given that a fully retired member of the judiciary receives 66% of final earnings as an annuity, the ability to acquire 50% work contribution for a premium of 33%, while generous, is not unreasonable and serves both parties well. The monetary benefit to the Government is significant: the Government obtains an additional 50% of a judge's services at an additional cost of 33%, compared with full retirement.

In the government's submission to the Commission, the availability of this model is described as an important incentive with clear economic benefit and is part of the total value proposition. The caution I would offer is a consideration of the totality of arrangement, and what corollary arrangements occur in the private sector. It is my understanding that retired judges have certain restrictions in their post-retirement professional activities. The supernumerary model offers them an opportunity to continue service to the public without compromise. Perhaps the better way to understand the supernumerary model is that it constitutes an incentive as well as a vehicle to mitigate the real restrictions that exist for judges post-retirement.

In contrast, seasoned and well-respected self-employed lawyers, often required to retire much earlier than judges, have no restrictions on what they may do and how they may continue to earn income – recognizing that they may have some residual obligations to their previous partners and the firm more broadly. The challenge then continues to be that simple comparisons between the judiciary and self-employed lawyers cannot be made. The broader context and practices of each employment or income model are quite different. While total compensation – both monetary and non-monetary must be considered, it must be done more holistically rather than as a series of single observations.

7.0 Conclusions

Mr. Pannu's report consistently provides data and a related analysis that finds, for self-employed lawyers, the lower end of compensation levels through his math, most notably his use of each of target lower percentile, inclusion of low levels of income and the use of weightings for both age and geography. Moreover, he does not provide a total compensation data point for self-employed lawyer incomes. Conversely, when offering an analysis for the determination of total compensation for judicial salary, the method selected provides for the highest possible outcome. The combination of these two approaches serves to artificially create and then widen the gap between self-employed income and judicial salary levels, with the latter being higher than the former even though under a different model it would be the opposite.

Mr. Pannu's analysis and related conclusions lack important context so critical in any compensation analysis, but particularly true in consideration of such a highly distinctive segment of the Canadian labour market. The determination of the level of compensation appropriate for the judiciary is not a simple supply and demand equation. As the principles enunciated in the *Judges Act* make clear, the setting of judicial compensation is part of the framework that supports judicial independence.

Appendix A - Curriculum Vitae, Sandra Haydon

Profile

Sandra Haydon brings over 20 years of experience in developing compensation strategies including determining governing compensation philosophy, assessing market competitiveness and determining levels of pay for both base salary and incentive pay programs. She works with clients in both the public and private sectors.

In recent years, Ms. Haydon has undertaken compensation research related to lawyers in both the public and private sectors. In working with a number of Ontario's largest crown corporations as well many municipal governments, the challenge of attracting and retaining lawyers has been a key organizational issue.

Ms. Haydon has worked with Boards of Directors on executive compensation with a specific focus on determining the governing compensation philosophy including the definition of the target competitive market – geography, sector/industry and percentile.

She has also served as compensation subject matter expert in both arbitrations and litigation.

Ms. Haydon has served as a faculty member for the Ontario Hospital Association's Centre for Goverance Excellence for the past seven years.

Ms. Haydon was with Deloitte Consulting until 2013 where she served in a number of leadership roles including Human Capital Public Sector Lead (Toronto) and as the National Practice Leader for Compensation Services. Ms. Haydon was with Deloitte for 17 years. She established Sandra Haydon & Associates Inc. in January 2014.

Education and Professional Training

Doctoral studies, Social and Political Theory
York University (1997)

Doctoral studies, Literature
Queen's University (1995)

Master of Arts, Literature
Carleton University (1993)

Bachelor of Arts, Sociology and Literature
Carleton University (1992)

Advanced Program in Human Resources
Rotman School of Management
University of Toronto (2005)

Certificate in Board Governance
Schulich School of Business
York University (2007)

A selection of Ms. Haydon's client work follows.

Select Project Profiles

Arnet Panel on Executive Compensation in Ontario's Crown Sector

The Arnet Panel was commissioned by the Province of Ontario to review executive pay within Ontario's crown corporation energy sector. Given the national and international context of the energy sector, market pricing was undertaken provincially, nationally, and globally. Ms. Haydon worked with the Panel to provide subject matter expertise on public sector executive compensation practices. Input from the review was used by Mr. Arnett to provide advice and guidance to the Ontario Minister of Finance and the Minister of Energy.

Province of Ontario, 10 Year Compensation Strategy

Ms. Haydon led a project on behalf of the Secretary of Cabinet to undertake a comprehensive review of the Province's compensation strategy for its 60,000 employees. The final report provided recommendations focused on balancing fiscal responsibility (constraint) and public scrutiny with a model that would support a performance based culture. This required harmonizing different sector pressures, varying geographies, as well as working across multi union and non-union workforces.

Manitoba Crown Council

Ms. Haydon was the project director for a comprehensive review of the Province's crown corporation executive compensation strategy leading to a series of recommendations for a tiered approach, balancing the unique operating models of each of the crowns with the ability to attract and retain sector-specific leadership. As with all public sector organizations, designing a model that ensured policy transparency was paramount.

Crown Investment Corporation of Saskatchewan (CIC)

Ms. Haydon has worked on a number of projects for CIC, most notably the design of an executive compensation framework for each of the Province's crown corporations. CIC required an outcome that would balance the unique operating environments of each crown organization with the need to have a unified approach. Working with CIC, a tiered model was designed that ensured a balance of sector specific drivers (telecom, energy, financial services) while meeting the need for public transparency.

Canada Pension Plan Investment Board

Ms. Haydon led a review of CPPIB's compensation strategy, models and levels of pay for the organization's 5 year Special Exam under the direction of the Office of the Auditor General. As with many revenue generating public sector organizations, a key challenge was competitive pay, particularly in light of the organization's location in Canada's financial centre, Toronto.

Additional Clients

Additional clients for whom Ms. Haydon has provided compensation-related services include:

- Blackberry
- Conference Board of Canada
- Starwood Hotels
- Grand and Toy
- Johnson & Johnson
- Canadian Olympic Corporation
- Toshiba
- NAV CANADA
- Office of the Children's Lawyer of Ontario
- Ontario Lottery and Gaming Corporation
- Government of Newfoundland and Lbrd
- City of Toronto
- Greater Toronto Airports Authority
- Halifax International Airport Authority
- Export Development Corporation
- Cancer Care Ontario

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March 29, 2016

Mr. Azim Hussain
Partner
Norton Rose Fulbright Canada LLP
Suite 2500, 1 Place Ville Marie
Montréal, QC H3B 1R1

VIA EMAIL

RE: Report on the Value of the Judicial Annuity

Dear Mr. Hussain:

Please find enclosed my report on the above captioned matter.

Yours truly,
Actuarial Solutions Inc.

Dean Newell

Dean Newell, FCIA
Vice President

cc: Jamie Macdonald, Norton Rose Fulbright Canada LLP

REPORT ON THE VALUE OF THE JUDICIAL ANNUITY

PREPARED FOR NORTON ROSE FULBRIGHT CANADA LLP

FOR THEIR REPLY SUBMISSION TO THE 2015 JUDICIAL COMPENSATION AND BENEFITS COMMISSION

MARCH 29, 2016

Actuarial Solutions Inc.
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TABLE OF CONTENTS

SECTION 1 - INTRODUCTION

1.1 INTRODUCTION

[1] I have been retained by the firm of Norton Rose Fulbright Canada LLP, themselves acting on behalf of the Canadian Superior Courts Judges Association and the Canadian Judicial Council, to calculate the value of the annuity for federally appointed judges, and to provide commentary on the parts of the "Report On The Earnings Of Self-Employed Lawyers For The Department Of Justice Canada" (the "February 25, 2016 Pannu Report") which relate to the calculation of the value of the judicial annuity.

[2] The February 25, 2016 Pannu Report was prepared by Mr. Haripaul Pannu and was referenced in the submission of the Government of Canada (the "2015 Government Submission") to the 2015 Judicial Compensation and Benefits Commission (the "Commission").

[3] I understand that this report may form part of the Canadian Superior Courts Judges Association and the Canadian Judicial Council response submission to the 2015 Judicial Compensation and Benefits Commission.

[4] Appendix E provides my CV. I have been a Fellow of the Canadian Institute of Actuaries since 2005. Since that date, I have continuously practiced as an actuary, primarily in the area of pension plans, providing consulting services on the design, administration, and financing of such plans, and providing advice on the requirements for compliance with applicable legislation and the administrative rules of the pension regulators. Since 2005 I have been directly involved with the preparation of pension plan actuarial valuations, usually as the signing actuary.

[5] As will be evident from my CV, I have no legal training. However, in the course of my work I am required to read and understand legal documents relating to pension plans. Nevertheless, when I refer to such documents, it is not with any intent to offer any legal opinion as to their meaning, as I defer to legal counsel for such interpretations.

[6] A summary of my understanding of the provisions of the Judicial Annuity program is included in Appendix A. My understanding of the Judicial Annuity program provisions are based on my interpretation of the plan provisions outlined in the actuarial report on the Pension Plan for Federally Appointed Judges as at March 31, 2013 prepared by the Office of the Chief Actuary of the Office of the Superintendent of Financial Institutions (the "March 31, 2013 OSFI Report"), as well as the relevant provisions of the *Judges Act*.

[7] Appendix D provides a list of the documents that were made available to me for the preparation of this report. While I have relied upon counsel to provide me with the necessary background information in order to prepare my report, the opinions contained in this report are entirely my own. In my opinion, I have been provided with sufficient information to complete this assignment based upon its scope.

1.2 BACKGROUND

[8] When comparing the total compensation of federally appointed judges with the total compensation of lawyers in private practice, it is appropriate to consider the value of the benefits received by the judges from the Judicial Annuity program.

[9] I understand that membership in the program is compulsory for all federally appointed judges. The benefits provided under the program for judges who meet specific eligibility criteria include retirement and disability annuity benefits, and pre-retirement death benefits.

[10] Furthermore, I understand that the program is financed by contributions by the judges, who are required to contribute 1% of salary to the Supplementary Retirement Benefit Account, and if not eligible for an unreduced annuity, 6% of salary to the Consolidated Revenue Fund. The government deemed contributions are the excess of the plan benefits paid from the Consolidated Revenue Fund over the contributions by the judges thereto. For greater clarity, the program is financed through the Consolidated Revenue Fund primarily on a pay-as-you-go basis rather than being financed on a pre-funded basis as are the other major pension plans sponsored by the Federal Government.

1.3 SCOPE

Calculation of Judicial Annuity Value

[11] In this report, I provide a calculation of the "value" of the judicial annuity. In particular, the calculation that I perform expresses the proportion of the Judicial Annuity program that is financed by the Government of Canada as a level percentage of the judge's annual income during their appointment to the bench. This calculation has been performed using:

- my understanding of the applicable Judicial Annuity program provisions (see Appendix A for a detailed summary);
- the methodology described in Section 3.2;
- the long-term "best estimate" assumptions described in Section 3.3 and listed in Appendix B; and
- the judicial appointment age data from January 1, 1997 to March 30, 2015 listed in Appendix C.

Comparison to Other Calculations

[12] This report also outlines the results of my calculations used to reproduce the results of the judicial annuity calculations prepared by Mr. Haripaul Pannu in his report prepared for the Department of Justice Canada (the "February 25, 2016 Pannu Report"). A comparison of my matching results and a brief commentary on the differences are outlined in the section below titled Comparison to Other Calculations.

SECTION 2 - EXECUTIVE SUMMARY

[13] In Section 3 of this report, I provide a calculation of the "value" of the judicial annuity. In particular, the calculation that I perform expresses the proportion of the Judicial Annuity program that is financed by the Government of Canada as a level percentage of the judge's annual income during their appointment to the bench. This calculation has been performed using:

- my understanding of the applicable Judicial Annuity program provisions (see Appendix A for a detailed summary);
- the methodology described in Section 3.2;
- the long-term "best estimate" assumptions described in Section 3.3 and listed in Appendix B; and
- the judicial appointment age data from January 1, 1997 to March 30, 2015 listed in Appendix C.

[14] Using the methodology described in Section 3.2, the provisions of the Judicial Annuity outlined in Appendix A, the assumptions described in Section 3.3 and listed in Appendices B, and the judicial appointment age data from January 1, 1997 to March 30, 2015 listed in Appendix C, **I have calculated the value of the Judicial Annuity program to be 30.6%as expressed as a level percentage of a judge's annual income during their appointment to the bench.**

[15] In my opinion, the methods and assumptions used to determine the value of the Judicial Annuity program provides an appropriate measure of the value of the benefits which are financed by the Government of Canada in providing the Judicial Annuity program. Also, in my opinion, the data on which the calculation is based are sufficient and reliable for the purposes of this calculation.

[16] It should be understood that there are various methods that could be used to value the benefits received by the judges from the Judicial Annuity program, and that any calculation will be sensitive to the underlying methodology and assumptions. Furthermore, any calculation of the value of the Judicial Annuity program may differ greatly from a judge's perceived value of the benefit.

[17] Section 4 of this report provides a comparison of the judicial annuity calculations prepared by Mr. Haripaul Pannu in his report dated February 25, 2016 prepared for the Department of Justice Canada, and my attempt to reproduce his calculations. Mr. Pannu has calculated the total Judicial Annuity value to be 36.5% (32.0% for the retirement value and 4.5% for the disability value), whereas I obtain a result of 32.4% (28.5% for the retirement value and 3.9% for the disability value) using, what I believe to be, the same methods, assumptions, and data. Section 4 of this report provides a commentary on where the differences in our calculations may lie, and provides a commentary on the disability benefit.

SECTION 3 - CALCULATION OF JUDICIAL ANNUITY VALUE

3.1 COMMENTARY

[18] My calculation of the value of the Judicial Annuity program that is financed by the Government of Canada, expressed as a level percentage of the judge's annual income during their appointment to the bench, is performed using the assumptions outlined in Appendix B, my understanding of the provisions of the Judicial Annuity outlined in Appendix A, and the methodology described below.

[19] It is my understanding that the value of the Judicial Annuity program may be taken into account when the Commission makes recommendations on judges' compensation.

[20] The methodology described below does not consider the impact of the Supernumerary Status of judges. My understanding is that judges may elect to become a supernumerary judge if: a) they are eligible to retire with a full annuity (i.e. when they have served 15 years and their age plus service is at least 80), or b) they have served 10 years and attained age 70. Supernumerary judges receive full salary, but are not expected to work full hours (and typically are expected to work 50% of a normal workload). For clarity, the methodology used in this report expresses the value of the benefits provided by the Government of Canada under the Judicial Annuity program as a level percentage of a judge's annual income during their appointment to the bench, regardless of their Supernumerary Status (i.e. regardless of whether they work full-time or part-time).

3.2 METHODOLOGY

[21] While no actual membership data is used in my calculations, I note that the methodology described below considers the actual appointment ages for judges during the period January 1, 1997 to March 31, 2015 (see Appendix C for a summary of this data). Moreover, the methodology described below does not require actual salary data[1].

[22] I have performed my calculations using a method which expresses the value of the benefits provided by the Government of Canada under the Judicial Annuity program as a level percentage of a judge's annual income during their appointment to the bench. Such a method represents the annual cost of providing the benefits under the Judicial Annuity program during the judge's appointment to the bench to annual time periods.

[1] Specifically, for the purposes of calculating the "Benefit Values" at the various appointment ages, the actuarial present value of benefits, contributions, and salaries are all determined in reference to the salary at the date of appointment.

[23] Specifically, I have calculated a "Benefit Value" for appointment ages 40 through 65[2]. The "Benefit Value" for each appointment age has been determined by calculating the total actuarial present value of the benefits provided under the Judicial Annuity program, then reducing this value by the total actuarial present value of benefits which are funded by the judge's contributions, and then dividing the resulting value by the actuarial present value of the judges salary during their appointment to the bench. For greater clarity, the actuarial present value calculations noted above are calculated as at the judge's date of appointment. The "Benefit Value" for appointment ages 40 through 65 expressed as a formula is as follows:

$$\text{Benefit Value}_{\text{Age x}} = \{\text{PVFBen}_{\text{Age x}} - \text{PVFCont}_{\text{Age x}}\} \;/\; \text{PVFSal}_{\text{Age x}}\text{; where}$$

$\text{PVFBen}_{\text{Age x}}$ is the Actuarial Present Value, calculated at the appointment date, of the benefits provided under the Judicial Annuity program for a judge appointed at age x;

$\text{PVFCont}_{\text{Age x}}$ is the Actuarial Present Value, calculated at the appointment date, of the judge's contributions for a judge appointed at age x; and

$\text{PVFSal}_{\text{Age x}}$ is the Actuarial Present Value, calculated at the appointment date, of the judge's salary for a judge appointed at age x.

[24] It should be understood that "Benefit Values" above vary significantly by appointment age. As a result, I have calculated a "Weighted Average Benefit Value" to determine a single value applicable to all judges.

[25] In determining the "Weighted Average Benefit Value", I have used the following formula:

$$\begin{aligned}\text{Weighted Average Benefit Value} = \quad & \{5.0\% \times \text{Average Benefit Value}_{\text{Age 40 to 43}}\} + \\ & \{20.6\% \times \text{Average Benefit Value}_{\text{Age 44 to 47}}\} + \\ & \{23.2\% \times \text{Average Benefit Value}_{\text{Age 48 to 51}}\} + \\ & \{24.4\% \times \text{Average Benefit Value}_{\text{Age 52 to 55}}\} + \\ & \{17.4\% \times \text{Average Benefit Value}_{\text{Age 56 to 59}}\} + \\ & \{7.2\% \times \text{Average Benefit Value}_{\text{Age 60 to 63}}\} + \\ & \{2.2\% \times \text{Average Benefit Value}_{\text{Age 64 to 67}}\}\text{; where}\end{aligned}$$

$\text{Average Benefit Value}_{\text{Age y to z}}$ is the arithmetic average of the "$\text{Benefit Value}_{\text{Age x}}$" from ages y to age z.

[26] As previously noted, the weighting rates applicable to the "Average Benefit Values" in the formula above are representative of the ages of appointment for federal judges for the period January 1, 1997 to March 30, 2015.

[27] Given the nature of the calculation above, a specific calculation date is not required.

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[2] It is noted that approximately 99% of judges are appointed between these ages.

[28] As noted elsewhere in this report, this methodology is consistent with the methodology used by Mr. Brian FitzGerald to calculate the value of the Judicial Annuity program for the 2011 Commission (as discussed in Section 3.5 below), and it has certain similarities with the methodology used by Mr. Haripaul Pannu to calculate the value of the Judicial Annuity program in the 2015 Government Submission (as discussed in Section 4.1 below) [3].

[29] In my opinion, this methodology is appropriate for the purposes of expressing the value of the benefits provided by the Government of Canada under the Judicial Annuity program as a level percentage of a judge's annual income during their appointment to the bench.

3.3 ASSUMPTIONS

[30] Appendix B provides a complete list of the assumptions used in the calculation. For your reference, the key economic assumptions are an interest rate of 5.50% per annum, a salary increase rate of 3.00% per annum, and an inflation rate of 2.00% per annum.

[31] For clarity, the assumptions selected for this calculation are my "best estimate" assumptions. In setting the "best estimate" assumptions, I select assumptions that, in my opinion, are the most appropriate long-term assumption for each separate assumption.

[32] In developing my "best estimate" assumptions, the interest rate assumption was developed in a manner consistent with that which would be used to measure the costs of a pension plan in a going-concern funding valuation[4] – that is, the interest rate assumption is established in reference to the expected investment return on a balanced portfolio of assets held in a pension plan. Such an approach to establish the "best estimate" interest rate assumption is, in my opinion, appropriate for the purposes of this calculation[5].

[33] For clarity, the use of "best estimate" assumptions produces only one set of calculation results. It should be understood that "best estimate" assumptions, by their very nature, are open to judgement. Furthermore, accepted actuarial practice in Canada does not prescribe a specific set of "best estimate" assumptions; and there is no upper or lower bound on the range for each assumption codified. As a result, it should be understood that another set of assumptions – which would lead to a different calculation result – could also be consider appropriate and within accepted actuarial practice in Canada.

[34] In my opinion, the use of "best estimate" assumptions outlined in Appendix B are appropriate for the purposes of expressing the value of the benefits provided by the Government of Canada under the Judicial Annuity program as a level percentage of a judge's annual income during their appointment to the bench.

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[3] It is noted that Mr. Pannu's calculations in the 2015 Government Submission use a different set of assumptions, including a disability assumption, and a different set of percentage appointment weightings.

[4] But without including a margin for adverse deviations as is usually required for funding valuations for registered pension plan, as such a margin would lead to a conservative bias.

[5] As it would reasonably reflect the judges' perceived value of the benefit provided by the Judicial Annuity program.

3.4 CALCULATION RESULTS

[35] Using the methodology outlined above, the provisions of the Judicial Annuity outlined in Appendix A, the assumptions described above and listed in Appendices B, and the judicial appointment age data from January 1, 1997 to March 30, 2015 listed in Appendix C, **I have calculated the "Weighted Average Benefit Value" to be 30.6%.**

[36] The methodology and assumptions used to perform this calculation are appropriate for the purposes of expressing the value of the benefits provided by the Government of Canada under the Judicial Annuity program as a level percentage of a judge's annual income during their appointment to the bench. Likewise, the data on which the calculation is based are sufficient and reliable for the purposes of this calculation. The methodology, assumptions, and data used to perform this calculation may not be suitable for any other purpose – including the purpose of prefunding the benefits under the Judicial Annuity program.

Sample Calculations

[37] Below I have provided some details of the calculations noted above at sample ages. Specifically, I provided the details of "Benefit $\text{Value}_{\text{Age 40}}$" and "Benefit $\text{Value}_{\text{Age 65}}$" calculations.

[38] The results of the calculations for "Benefit $\text{Value}_{\text{Age 40}}$" are as follows[6]:

$$\text{Benefit Value}_{\text{Age 40}} = \{\text{PVFBen}_{\text{Age 40}} - \text{PVFCont}_{\text{Age 40}}\} \;/\; \text{PVFSal}_{\text{Age 40}}$$

$$\text{Benefit Value}_{\text{Age 40}} = \{\$1{,}605{,}400 - \$361{,}300\} \;/\$6{,}503{,}600$$

$$\text{Benefit Value}_{\text{Age 40}} = 19.1\%$$

[39] The results of the calculations for "Benefit $\text{Value}_{\text{Age 65}}$" are as follows[1]:

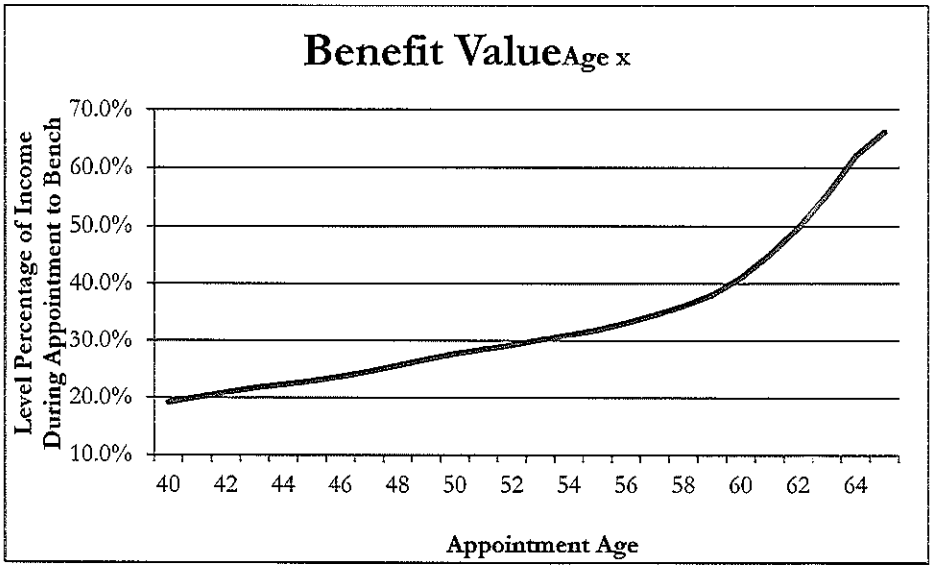
$$\text{Benefit Value}_{\text{Age 65}} = \{\text{PVFBen}_{\text{Age 65}} - \text{PVFCont}_{\text{Age 65}}\} \;/\; \text{PVFSal}_{\text{Age 65}}$$

$$\text{Benefit Value}_{\text{Age 65}} = \{\$1{,}942{,}600 - \$186{,}200\} \;/\$2{,}659{,}900$$

$$\text{Benefit Value}_{\text{Age 65}} = 66.0\%$$

[6] A salary rate of $317,858 (or $308,600 increased by 3.0%) was used as the basis to calculate the actuarial present value of benefits, contributions, and salaries in these examples. While a different salary rate would alter the actuarial present value components in the formula, it would not change the net result of the "Benefit $\text{Value}_{\text{Age x}}$" calculation.

[40] The chart below illustrates the "Benefit Value$_{Age\ x}$" from ages 40 through 65.



3.5 RECONCILIATION OF RESULTS

[41] In January 2012, I assisted Brian FitzGerald of Capital G Consulting Inc. in preparing a similar report regarding the value of the benefits received by the judges from the Judicial Annuity program. Our calculations at that time were performed using similar methods, assumptions which were selected by Mr. FitzGerald, our understanding of the applicable provisions of the Judicial Annuity program at that time, and the actual appointment ages for judges during the period January 1, 1997 to March 31, 2011.

[42] The results of our calculations in January 2012 were a "Weighted Average Benefit Value" of 23.8%. Below I have prepared a reconciliation from the 2012 calculation of 23.8% to my calculation of 30.6% provided in this report.

2012 Calculation of "Weighted Average Benefit Value"	23.8%
Change due to age rounding approach	0.6%
Change due to updated appointment age data	0.4%
Change due to updated mortality table	4.1%
Change due to updated interest rate	1.7%
2016 Calculation of "Weighted Average Benefit Value"	30.6%

Commentary

[43] With respect to the change due to the rounding approach:

- Our previous calculation prepared in 2012 assumed that the judicial appointments at any given age were made at a judge's exact age. When preparing the calculation in this report, I have updated this rounding approach to reflect the expectation that judicial appointments at a given age occur uniformly over the year as opposed to at the judge's exact age. This change effectively results to increase the average age at appointment by 0.5 years. This was the approach of Mr. Sauvé, the Commission's expert.
- By applying this adjustment, my "Weighted Average Benefit Value" has increased by 0.6%.

[44] With respect to the change due to the updated appointment age data:

- Our previous calculation prepared in 2012 was prepared using the actual appointment ages for judges during the period January 1, 1997 to March 31, 2011. I have updated my calculations to consider the actual appointment ages for judges during the period April 1, 2011 to March 30, 2015. For greater clarity, I aggregated this appointment data from April 1, 2011 to March 30, 2015 with the previous data so that I am now considering the actual appointment ages for judges during the period January 1, 1997 to March 30, 2015.
- The impact of reflecting the additional appointment data is that the "Weighted Average Benefit Value" has increased by 0.4%. The main reason for this increase is that the average appointment age for judges appointed between April 1, 2011 and March 30, 2015 is slightly higher than the average appointment ages for judges appointed between January 1, 1997 and March 31, 2011.

[45] With respect to the change due to the updated mortality table:

- Since the previous calculation was prepared in 2012, the Canadian Institute of Actuaries (the "CIA") issued a new report on Canadian Pensioners' Mortality, which introduced a new set of mortality tables and a mortality improvement scale. These mortality tables (named "CPM2014") and the CPM-B mortality improvement scale have become the most widely accepted mortality tables for use by pension actuaries in Canada. Specifically, these new mortality tables reflect what numerous studies have shown over the past few years – that mortality in Canada is improving at a faster pace than previously expected. As a result, I believe that these updated mortality tables are appropriate for the purposes of valuing the Judicial Annuity program.
- Specifically, I have updated my calculations to use the CPM2014 Public Sector mortality table with the CPM-B mortality improvement scale. For your reference, the mortality table used in the 2012 calculations was the UP1994 mortality table projected to 2020 using Scale AA mortality improvement[7].

[7] For clarity, in both the 2012 calculations and my updated calculations, unisex mortality rates were used whereby judges were assumed to be 67% male and their spouses were assumed to be 33% female.

- The impact of reflecting the updated mortality table is that the "Weighted Average Benefit Value" has increased by 4.1%.

[46] With respect to the change due to the updated interest rate:

- Our previous calculation prepared in 2012 was prepared using an interest rate of 5.75% per annum. It is noted that yields on government bonds are lower today than they were back in 2012. In turn, future expectations for pension fund returns are lower today than in 2012. For this reason, I believe that an appropriate "best estimate" long-term interest rate for a 2016 calculation would be 5.50% per annum.
- The impact of decreasing the interest rate from 5.75% per annum to 5.50% per annum is that the "Weighted Average Benefit Value" has increased by 1.7%.

SECTION 4 - COMPARISON TO OTHER CALCULATIONS

4.1 2016 PANNU REPORT

[47] In addition to performing the calculations above, I have attempted to reproduce the results of the judicial annuity calculations prepared by Mr. Haripaul Pannu in his report prepared for the Department of Justice Canada (the "February 25, 2016 Pannu Report") under the section entitled "Judicial Annuity Scheme".

[48] It is my understanding that Mr. Pannu has used a methodology that has certain similarities to the methodology used in my calculations (i.e. in determining a "Weighted Average Benefit Value") - however his calculations use a different set of assumptions, and a slightly different set of percentage appointment weightings. I believe that the key difference in our calculations is rooted in the fact that Mr. Pannu has used a disability assumption and is valuing a disability benefit as part of the Judicial Annuity program, whereas my calculation does not include a disability assumption, and therefore is not directly valuing a disability benefit as part of Judicial Annuity program.

[49] For clarity, I have attempted to reproduce the results calculated by Mr. Pannu using the methodology and the assumptions outlined in the February 25, 2016 Pannu Report. Please see Appendix B of for a summary of the assumptions used by Mr. Pannu.

Comparison of Results

[50] The following table compares the calculations of the value of the judicial annuity prepared by Mr. Pannu in the "February 25, 2016 Pannu Report", and my calculations whereby I attempt to reproduce his calculation results using the same methods and assumptions as outlined in his report. It is important to note that the figure of 28.5% that I arrive at for the retirement value in the table below cannot be compared to my own figure of 30.6% above, they are like apples and oranges. The reason for this is that the figure of 28.5% is part of a methodology that has a disability assumption, and therefore it cannot be dissociated from the total figure of 32.4%, also in the table below.

Comparison of Results

	Mr. Pannu	ASI (Reproduce)	Difference
Weighted Average Retirement Value	32.0%	28.5%	+3.5%
Weighted Average Disability Value	4.5%	3.9%	+0.6%
Total Judicial Annuity Value	36.5%	32.4%	+4.1%

Commentary

[51] It may be possible that Mr. Pannu may have incorrectly calculated the "percentage appointment" weightings used to determine the "Weighted Average Benefits Values". Specifically, the weightings he has used are weighted slightly more heavily towards the older appointment ages than those of my 2016 weightings outlined in Section 3 above[8].

[52] For clarity, the ASI reproduced results above assume the correct 2016 "percentage appointment" weightings (as outlined in Section 3.2 above). However, if I were to reflect Mr. Pannu's weightings, I would obtain a Weighted Average Retirement Value of 28.8% (the Weighted Average Disability Value would remain unchanged at 3.9%), which provides for a Total Judicial Annuity Value of 32.7% - thus reducing the difference to 3.8%.

[53] With respect to the remaining unexplained difference of +3.8%, I have not been provided with an opportunity to discuss this difference with Mr. Pannu. However, I wish to note the following, which may help explain a portion of the difference:

- While the complete set of assumptions for the incidence of disability are not disclosed in the March 31, 2013 OSFI Report or the February 25, 2016 Pannu Report, I have been able to interpolated the incidence of disability rates using the sample ages provided in the March 31, 2013 OSFI Report.

- It is not clear based on Mr. Pannu's report what disability mortality assumption has been used to reflect the probability of death following disability. I note that his report refers to mortality rates which are multiplied by factors as outlined in the March 31, 2013 OSFI Report; however, the March 31, 2013 OSFI Report does not refer to any such factors, and instead references that the disability mortality rates are the same as those used for the pension plan for the Public Service of Canada applicable to plan year 2014. For clarity, my matching results outlined above assume the disability mortality rates outlined for plan year 2012 from the actuarial report on the pension plan for the Public Service of Canada as at March 31, 2011.

- In 2012 I performed a similar comparison on the results from Mr. Pannu's December 13, 2011 report. It is my recollection that, when discussing my differences with Mr. Pannu (and Mr. Sauvé) at that time, it was determined that Mr. Pannu's calculation of the Weighted Average Retirement Value was overvalued since the members assumed to receive disability benefits were not properly offset in his calculation of the retirement benefits. It may be possible that Mr. Pannu made this same miscalculation in his 2016 calculations, and I estimate that his Weighted Average Retirement Value could be overstated by approximately 2.4%.

[8] Appendix C in Mr. Pannu's report outlines the appointment age data used to determine his results, which is the same data used in my calculations in Section 3.

Disability

[54] It is worth noting that, in 2012, Mr. FitzGerald stated that the decision as to whether the disability benefit should be included in the value of the Judicial Annuity program is a matter to be agreed between the parties - and that it is not an actuarial decision. Mr. FitzGerald then noted that other benefits such as group insurance were also excluded from the value.

[55] In 2012, Mr. Sauvé agreed with Mr. FitzGerald in that the valuation of the disability benefits should be made as part of a broader benchmarking exercise including group insurance benefits - and should therefore not be included in the valuation of the Judicial Annuity program.

[56] I agree with the comments made by Mr. FitzGerald in 2012, and thus I would state that the decision as to whether the disability benefit should be included in the value of the Judicial Annuity program is a matter to be agreed between the parties - and that this is not an actuarial decision.

[57] For your reference, when I attempt to reproduce Mr. Pannu's calculations without using his disability assumption, I obtain a Total Judicial Annuity Value of 30.9%[9] (with the Weighted Average Retirement Value being 30.9%, and the Weighted Average Disability Value being nil). I wish to note that this value is greater than the Weighted Average Retirement Value of 28.5% calculated in the table in paragraph 50 above because, with the removal of the disability assumption, all judges are assumed to retire receive an annuity[10].

Alternate Approach Prepared by Mr. Pannu

[58] In the February 25, 2016 Pannu Report, Mr. Pannu outlined an alternate approach to valuing the judicial annuity[11]. Specifically, Mr. Pannu determines the cost to a self-employed lawyer to fund a benefit similar to that of the Judicial Annuity program. Mr. Pannu notes that in order to do this, the lawyer would utilize a tax-sheltered RRSP and other non-tax-sheltered investment accounts.

[59] The results of Mr. Pannu's calculations are an annual contribution rate by age which ranges from 25.9% for ages under 44 to 72.4% for ages between 56 and 60. I note that Mr. Pannu's report does not describe in any detail the methodology used to calculate these rates, nor is it clear to me what ages are represented in his analysis (i.e. age at appointment).

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[9] The difference of 0.3% between this calculation and my calculation of 30.6% in Section 3 is almost entirely due to the differences in the "percentage appointment" weightings, as the differences in the other assumptions have a minimal impact.

[10] In contrast, in the calculation of the Weighted Average Retirement Value of 28.5% in paragraph 50, some judges are assumed to become disabled and receive a disability pension, and thus are not expected to retire and receive a retirement annuity.

[11] Which I believe to be similar to the earnings equivalent approach prepared by Mr. Sauvé in his report dated February 23, 2012.

[60] Unfortunately I am not able to reproduce Mr. Pannu's calculations given the information presented in his report. In order to do so, I would need to have a better understanding of the methodology he used, and I would likely need to have a discussion with Mr. Pannu to understand how he performed his calculations.

4.2 PERCEIVED VALUE AND OTHER APPROACHES

[61] It should be understood that there are various methods that could be used to value the benefits received by the judges from the Judicial Annuity program, and that any calculation will be sensitive to the underlying methodology and assumptions.

[62] For clarity, any such calculation of the value of the Judicial Annuity program may differ greatly from a judge's perceived value of the benefit. As a result, an individual judge may not perceive the value of the Judicial Annuity program to be the same as the result that I have calculated in Section 3 above, or any other alternative calculation approach.

[63] It should be understood that, in addition to the wide range of "Benefit Value" that is attributable to a judge's age at appointment[12], there is a great deal of uncertainty in the ultimate benefit an individual judge (and his or her beneficiaries) may derive from the Judicial Annuity program. This uncertainty exists: in part due to the eligibility criteria attached to the benefits in the Judicial Annuity program, and in part due to the defined benefit nature of the Judicial Annuity program. Specifically, the actual retirement income (or termination/pre-retirement death benefit) a judge receives from the Judicial Annuity program may be significantly different than what they expected to receive at their date of appointment, or what they currently expect to receive as an active judge[13].

[64] In addition, it is worth noting that the Judicial Annuity benefit is not transferable, and thus cannot be converted into cash (i.e. the Judicial Annuity is illiquid). This fact may also weigh into a judge's perceived value of the Judicial Annuity program.

[65] Irrespective of the comments noted in this section, it is my opinion that the methods and assumptions used to determine the value of the Judicial Annuity program outlined in Section 3 provides an appropriate measure of the value of the benefits which are financed by the Government of Canada in providing the Judicial Annuity program.

[12] Which range from 19.1% of payroll for an appointment at age 40, and 66.0% of payroll for an appointment at age 65.

[13] The actual income a judges receives from the Judicial Annuity program depends on a number of factors including their life expectancy, their marital status, their age of retirement, the level of inflation, and retention of office.

SECTION 5 – OPINION

[66] Section 4000 of the Standards of Practice of the Canadian Institute of Actuaries applies to actuarial evidence work. Relevant sections of this Standards include Section 4100 – Scope, Section 4200 – General, 4300 – Actuarial Evidence Calculations, Other than Capitalized Value of Pension Plan Benefits for a Marriage Breakdown and Criminal Rate of Interest, and Section 4700 – Reporting. This report has been prepared in accordance with these Standards.

[67] Section 1640 of the Standards of Practice of the Canadian Institute of Actuaries provides guidance on undertaking a review of another actuary's work. This report has been prepared in accordance with these Standards.

[68] In my opinion, the data on which the calculations are based are sufficient and reliable for the purposes of the calculations.

[69] This report has been prepared, and my opinions given, in accordance with accepted actuarial practice in Canada.

Dean Newell

Dean Newell
Fellow, Canadian Institute of Actuaries

March 29, 2016

Date

APPENDIX A - PLAN PROVISIONS

Summary of Plan Provisions
Judicial Annuity Program

Membership	Compulsory for all judges appointed to federal or provincial courts by the Government of Canada.
Contributions – Judges	Judges appointed after February 16, 1975: 1% of salary to the Supplementary Retirement Benefits Account, and if not eligible for a full annuity, 6% of salary to the Consolidated Revenue Fund.
Contributions – Government	The government deemed contributions are the excess of the plan benefits paid from the Consolidated Revenue Fund over the contributions by judges thereto. The Government also contributes 1% of the salary which is credited to the Supplementary Retirement Benefits Account for judges appointed after February 16, 1975.
Eligibility to Normal Pensionable Retirement	Judicial office held until age 75; or age plus years of service of at least 80 (minimum 15 years of service); or in respect only of a judge of the Supreme Court of Canada, that service may be 10 years.
Normal Pensionable Retirement	2/3 of the judge's annual salary at the time of ceasing to hold office. The annuity is reduced on a pro-rata basis if the judicial office was held for less than 10 years.
Eligibility to Early Retirement	Age 55 with 10 years of Service.
Early Pensionable Retirement	Normal Pensionable Retirement benefit above, adjusted by the following ratio: a) The numerator is the number of years during which the judge has continued in judicial office, and b) The denominator is the total number of years during which the judge would have been required to be in judicial office in order to be eligible for an unreduced annuity. Such annuity is also reduced by 5% for every year that the annuity commences in advance of age 60.
Normal Form	Married judges: Joint life and 50% survivor annuity. Single judges: Lifetime annuity.
Cost of Living Adjustments	Annuities fully indexed to Consumer Price Index each year.
Termination prior to retirement	Refund of contributions with interest.
Disability benefits	Immediate unreduced annuity payable to the judge.
Pre-retirement Death Benefits	A lump-sum benefit equal to 1/6 of salary, plus ➢ If no surviving spouse exists, a refund of contributions; ➢ If a surviving spouse exists, 1/3 of the salary at death is payable as a lifetime annuity; and ➢ If dependent children exist, a annuity equal to 1/5 of the surviving spouses annuity is payable (and is adjusted if there are more than 4 children, or the child is orphaned).

Interpretation of Plan Provisions

With respect to the summary of the Plan provisions outlined in the March 31, 2013 OSFI Report, I note that it is not fully clear what early retirement annuity is provided to judges who retire without qualifying for an unreduced annuity. Specifically, this report indicates that the early retirement annuity is reduced by the fraction of which:

a. The numerator is the number of years during which the judge has continued in judicial office, and
b. The denominator is the number of years during which the judge would have been *required to continue* in judicial office in order to be eligible for an unreduced annuity *(emphasis added)*.

It is my interpretation that this fraction should be determined as follows:

a. The numerator is the number of years during which the judge has continued in judicial office, and
b. The denominator is the total number of years during which the judge would have been required to be in judicial office in order to be eligible for an unreduced annuity.

I wish to note that this understanding does not have a material impact on the calculation results, as the retirement age assumption used for the calculations do not place significant weights to ages where an early retirement reduction is applicable.

APPENDIX B - ASSUMPTIONS

Valuation Assumptions			
	ASI Best Estimate Approach	**ASI Market Value Approach**	**Pannu 2016 Calculation**
Interest Rate	5.50% per annum	2.25% per annum	5.50% per annum
Salary Increase	3.00% per annum	2.25% per annum	3.00% per annum
Consumer Price Index Increase Rate	2.00% per annum	1.25% per annum	2.00% per annum
Post-retirement Indexing	100% of Consumer Price Index	100% of Consumer Price Index	100% of Consumer Price Index
Termination of Employment or Death Prior to Retirement	Nil	Nil	Nil
Incidence of Disability Prior to Retirement	Nil	Nil	Rates specified in the actuarial report on the Pension Plan for Federally Appointed Judges as at 31 March 2013 prepared by the Office of the Chief Actuary of the Office of the Superintendent of Financial Institutions (Unisex 67% male, 33% female)
Retirement Age	Retirement rates specified in the actuarial report on the Pension Plan for Federally Appointed Judges as at 31 March 2013 prepared by the Office of the Chief Actuary of the Office of the Superintendent of Financial Institutions	Retirement rates specified in the actuarial report on the Pension Plan for Federally Appointed Judges as at 31 March 2013 prepared by the Office of the Chief Actuary of the Office of the Superintendent of Financial Institutions	Retirement rates specified in the actuarial report on the Pension Plan for Federally Appointed Judges as at 31 March 2013 prepared by the Office of the Chief Actuary of the Office of the Superintendent of Financial Institutions
Mortality Rates – Post-Retirement	CPM Public Generational Mortality Table (unisex 67% male, 33% female)	CPM Public Generational Mortality Table (unisex 67% male, 33% female)	CPM Public Generational Mortality Table (unisex 67% male, 33% female)

Disability Mortality	N/A	N/A	Mortality after retirement multiplied by factors outlined in the actuarial report on the Pension Plan for Federally Appointed Judges as at 31 March 2013 by the Office of the Chief Actuary of the Office of the Superintendent of Financial Institutions
Marital Status at Retirement	Judges assumed to be 90% married at retirement; Male spouses assumed to be 3 years older than female spouse	Judges assumed to be 90% married at retirement; Male spouses assumed to be 3 years older than female spouse	Conjugal relationship, with spouse of opposite gender and same age as the member

APPENDIX C - APPOINTMENT AGE DATA

Judicial Appointment Ages from January 1, 1997 to March 30, 2015

Appointment Age	Number
40 and under	6
41	9
42	10
43	24
44	37
45	53
46	49
47	61
48	57
49	53
50	55
51	60
52	61
53	61
54	62
55	53
56	49
57	49
58	37
59	34
60	22
61	26
62	10
63	12
64	9
65	8
66	1
67	3
68	0
Total	971

APPENDIX D - DOCUMENTS

In performing my calculations, I have relied upon the following documents and information provided by Norton Rose Fulbright Canada LLP:

- H. Pannu, "Report on the Earnings of Self-Employed Lawyers for the Department of Justice Canada in Preparation for the 2015 Judicial Compensation and Benefits Commission" dated February 25, 2016.
- Table 1 – Appointees Age at Date of Appointment, April 1, 2011 to March 30, 2015

In addition, I have relied upon the following information, which is publicly available:

- The actuarial report on the Pension Plan for Federally Appointed Judges as at 31 March 2013 prepared by the Office of the Chief Actuary of the Office of the Superintendent of Financial Institutions.
- The actuarial report on the Pension Plan for Federally Appointed Judges as at 31 March 2010 prepared by the Office of the Chief Actuary of the Office of the Superintendent of Financial Institutions.
- Letter titled "Valuation of the Judicial Annuity" dated March February 14, 2012, from Mr. André Sauvé, F.S.A., F.C.I.A. to the 2011 Judicial Compensation and Benefits Commission.
- Letter titled "Earnings Equivalent to the Judicial Annuity" dated February 23, 2012, from Mr. André Sauvé, F.S.A., F.C.I.A. to the 2011 Judicial Compensation and Benefits Commission.
- H. Pannu, "Report on the Earnings of Self-Employed Lawyers for the Department of Justice Canada in Preparation for the 2011 Judicial Compensation and Benefits Commission" dated December 13, 2011.

I have also relied upon the following information, which was part our working papers from the work we performed in 2012:

- Letter titled "Valuation of Judicial Annuity" dated January 27, 2012, from Mr. Brian FitzGerald, F.I.A., F.C.I.A.
- Letter titled "Valuation of Judicial Annuity" dated February 19, 2012, from Mr. Brian FitzGerald, F.I.A., F.C.I.A.
- Letter titled "Judicial Annuity" dated March 5, 2012, from Mr. Brian FitzGerald, F.I.A., F.C.I.A.

APPENDIX E - CURRICULUM VITAE

Dean Newell

Dean Newell is a Vice President of Actuarial Solutions Inc. and manages ASI's actuarial practice. A Fellow of the Canadian Institute of Actuaries and the Society of Actuaries, Dean graduated from the University of Waterloo with an Honours Bachelor of Mathematics in 2002. Upon graduation, he joined the international accounting firm PricewaterhouseCoopers in its retirement practice in Toronto. Dean joined Actuarial Solutions Inc. in 2007.

Dean has a breadth of experience in performing valuations for pension and post-retirement benefit plans for funding, accounting, and plan wind-up purposes. In addition, he has experience consulting with plan sponsors on a range of matters affecting pension and post-retirement benefit plans including plan design, plan conversion, benefit improvement costing, legislative compliance, plan documentation, plan administration, and risk management.

Dean has accumulated significant expertise in the various global accounting standards affecting pension and post-retirement benefit plans (i.e. CPA Canada Handbook, US GAAP, IFRS). He has extensive experience in preparing the financial statement accounting disclosures (i.e. balance sheet, income statement, and note disclosures) for the pension and post-retirement benefit plans sponsored by his clients. In addition, Dean has substantial experience in assisting auditors perform their review of the pension and post-retirement benefit plan financial statement accounting disclosures of their clients.

Dean also has experience in assisting clients with mergers and acquisitions. Specifically, he has experience in preparing financial due-diligence analyses on target companies' benefit plans. Upon completion of the transaction, Dean has experience in working with the acquiring firm in implementing the new benefit strategy.

Education

- Graduated from the University of Waterloo in 2002 with a Bachelor of Mathematics
- Fellow of the Society of Actuaries (2005) – member in good standing
- Fellow of the Canadian Institute of Actuaries (2005) – member in good standing

Employment

- 2002-2007 – PricewaterhouseCoopers LLP, in roles of increasing responsibility and ultimately becoming Manager, Human Resource Services
- 2007-present – Actuarial Solutions Inc., in roles of increasing responsibility and ultimately becoming Vice President

Professional Activities

- Member, Canadian Institute of Actuaries, Committee on Pension Plan Financial Reporting – 2010 to 2014
- Member, Actuarial Standards Board, Designated Group Review of Practice-Specific Standards of Practice for Pension Plans – 2011 to 2012
- Member, Canadian Institute of Actuaries, Annual and General Meeting Organization Committee – 2007 to 2010
- Society of Actuaries, Education Committees – Course 5 Grader – 2005

J.E.P. Research Associates Ltd.

183 Wellington Street West, Suite 2402
Toronto, ON M5V 0A1

March 29, 2016

Mr. Azim Hussain
Norton Rose Fullbright Canada LLP
Suite 2500, 1 Place Ville Marie
Montréal, Quebec.
H3B 1R1

Dear Mr. Hussain,

Further to your instructions, I offer my responses to two questions you have posed regarding the Submission of the Government of Canada in the matter of the 2015 Judicial Compensation and Benefits Commission, as follows:

I. <u>What is your response to the argument made in the Submission of the Government of Canada ("Government Submission") at paragraphs 152-160 to the effect that the CPI is a "more appropriate statutory indexation measure" for judges compared to the IAI?</u>

Changes in the IAI reflect changes in weekly wages, including changes in both the cost of living and the real wage (the standard of living). The CPI measures only changes in the prices of a given basket of goods and services. Adjusting judicial salaries by the annual change in the IAI results in annual earnings of judges keeping pace with the annual earnings of the average Canadian.

The IAI reflects the average weekly earnings of employed Canadians. Changes in these earnings over time are due to two primary factors: changes in weekly hours of work; and changes in the wage rate per unit of time (for example, the hourly wage).

Changes in the wage rate, in turn, reflect changes in general price inflation and changes in productivity. Productivity increases when workers produce more in the same amount of time. Wage changes due to changes in productivity are generally referred to as real wage changes, as distinct from nominal wage

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changes, which are due to price inflation. Real wage increases, for example, reflect the extent to which workers are able to increase their purchases and, consequently, real wage increases are often interpreted as a measure of advances in the standard of living.

If periodic wage adjustments were restricted to price inflation only, then real wage changes experienced, on average, by all other workers would be ignored. Wage adjustments based upon the CPI alone would be expected to result in lower total (nominal plus real) wage increases over time.

For perspective, between the period 2004 and 2015, the IAI increased by 34.1 percent. The CPI advanced by 20.9 percent over the same period. The difference reflects, in large part, the real wage increases enjoyed by the average worker over that period (some of the difference may be due to an increase in the average weekly number of hours of work).

At paragraph 156, the Submissions of the Government of Canada state:

> *"IAI is based on average weekly wages and salaries of typical "wage-earners" with whom judges share few if any characteristics. The types of salaries included in the index are forestry, logging and support; utilities; construction; information and cultural industries; finance and insurance and educational industries."*

Wages of those employed in the "Legal Services" industry are also included in the IAI.

It merits emphasis that while the Government's submissions reflect concern that the "IAI is based on average weekly wages and salaries of typical "wage-earners" with whom judges share few if any characteristics", the corresponding concern that the basket of goods and services that go into measuring the CPI for all Canadians may not be relevant to the consumption patterns of Judges, is not expressed in the Government's submissions.

I note that the Government makes no mention of the fact that its proposal would do away with the distinction that the legislation currently makes, for logical reasons, between the IAI and the CPI to adjust benefits payable under the

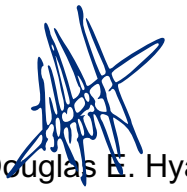
Judges Act. The rationale for indexing earnings to the IAI (s. 25(2)), but retirement benefits to the CPI (s. 42(1)), as supplemented by the *Supplementary Retirement Benefits Act*), is that employment earnings changes over time are comprised of both inflation and increases in the productivity of workers (i.e., workers produce more per unit of time than before). It is logical that judicial salaries be adjusted by an index reflecting increases in both prices and productivity. Because they are not working, retired workers do not contribute to increased productivity. Consequently, it is logical that increases in retirement income should reflect changes in prices only and not include increases in productivity.

II. <u>What is your response to the statement made at paragraph 152 of the Government Submission that the "CPI is a more modern and relevant measure of changes to the cost of living"?</u>

The CPI has been measured in Canada since at least 1914. Accordingly, it is not evident what the Government means by a "more modern" measure.

While the CPI measures changes in the cost of living faced by Canadians, it does not measure changes in wages experienced by Canadians. Changes in wages over time reflect both increases in the cost of living and real wage gains (increases in the standard of living). Consequently, it is my opinion that the IAI is a more relevant basis for salary adjustment than the CPI.

Yours truly,



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CURRICULUM VITAE

March 2016

A. BIOGRAPHICAL INFORMATION

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B. PROFESSIONAL ACTIVITIES

DEGREES:

Ph.D., 1992, University of Toronto, Industrial Relations.
M.A., 1987, University of Toronto, Economics.
B.A., 1984, University of Toronto, Economics.
Ph.D. Thesis: "Issues in the Compensation of Injured Workers: Returns to Risk, Work Incentives and Accommodation."

Ph.D. Supervisor: Dr. Morley Gunderson

PROFESSIONAL EMPLOYMENT

August 2015 to present:	Academic Director, Professional MBA Programs (Morning and Evening MBA, Executive MBA and OMNIUM Global Executive MBA), Rotman School of Management, University of Toronto.
July 2006 to present:	Professor, Rotman School of Management and Centre for Industrial Relations, University of Toronto.
July 2002 to June 2006:	Professor, Rotman School of Management, Centre for Industrial Relations, University of Toronto and Division of Management, University of Toronto at Scarborough.
July 2001 to June 2004:	Associate Chair, Division of Management, University of Toronto at Scarborough.

July 2002:	Visiting Professor, Department of Management, University of Melbourne.
July 1997 to June 2002:	Associate Professor, Division of Management, Scarborough College, Rotman School of Management, and Centre for Industrial Relations, University of Toronto.
July 2000 to June 2001:	Visiting Associate Professor, School of Health Administration and Policy, College of Business, Arizona State University.
September 1997 to June 2000:	Senior Scientist, Institute for Work and Health.
January 1998 to December 1998:	Director of Research, Royal Commission on Workers' Compensation in British Columbia.
September 1995 to September 1997:	Scientist and Coordinator of Networks of Centres of Excellence program (HEAL*Net*), Institute for Work and Health.
September 1995 to June 1997:	Visiting Professor, Centre for Industrial Relations, University of Toronto.
August 1992 to June 1997:	Assistant Professor, Department of Economics and Industrial Relations Program, University of Wisconsin - Milwaukee.
April 1995 to August 1995:	Research Coordinator, Ontario Royal Commission on Workers' Compensation.
July 1994 to June 1995:	Visiting Assistant Professor, Centre for Industrial Relations, University of Toronto.
June 1989 to July 1992:	Economist, Ontario Workers' Compensation Board.
May 1991 to December 1991:	Instructor, Industrial Relations, University of Toronto.
January 1988 to March 1989:	Instructor, Personnel Association of Ontario.
October 1986 to September 1988:	Economist, Ontario Ministry of Treasury and Economics.

ACADEMIC HONOURS

Executive MBA Program, Professor of the Year:	EMBA 20 (2003), EMBA 21 (2004), EMBA 22 (2004), EMBA 23 (2005), EMBA 24 (2005), EMBA 25 (2006), EMBA 26 (2006), EMBA 27 (2007), EMBA 28 (2008), EMBA 29 (2009), EMBA 30 (2010), EMBA 31 (2011), EMBA 32 (2012), EMBA 33 (2013), EMBA 34 (2014), EMBA 35 (2015)
Global Executive MBA Program, Professor of the Year:	OMNIUM 2 (2006),OMNIUM 3 (2007), OMNIUM 4 (2008),

OMNIUM 5 (2010), OMNIUM 8 (2013), OMNIUM 9 (2014), OMNIUM 10 (2015)

Rotman School of Management Excellence in Teaching Award: 2003; 2004; 2005; 2006; 2007; 2008; 2009; 2010; 2011; 2012; 2013; 2014; 2015

2006: Roger Martin and Nancy Lang Award for Excellence in Teaching, Rotman School of Management, University of Toronto.

2001-2002: Plumptre Faculty Research Award
1989-1992: Social Sciences and Humanities Research Council Doctoral Fellowship
1990-1991: Meredith Fellowship in Workers' Compensation
1988-1989: Ontario Graduate Scholarship

PROFESSIONAL AFFILIATIONS AND RELATED ACTIVITIES

Research Associate: Institute for Policy Analysis, University of Toronto

Member of: The American Economic Association
The Canadian Economics Association

RESEARCH GRANTS

Ontario Ministry of Labour. Research Opportunities Program (2014 – 2016). "A Survey of Factors Affecting Safety Performance in the ICI Construction Sector." (With Brenda McCabe).

"Assessment of the human and economic burden of workplace cancer." Multisector Team Grants in Prevention Research, Canadian Cancer Society, 2012-2016, $998,872, co-investigator.

Workplace Safety and Insurance Board Research Advisory Council (2003-2005). "Attitudes and Incident Causal Modeling for Construction." (With Brenda McCabe, Catherine Loughlin, and Susan Tighe). $252,000.

Social Sciences and Humanities Research Council of Canada (2003-2006). "An Analysis of the Production of Quality in Child Care." $45,055.

Department of Health and Human Services (1999). "Work-Related Musculoskeletal Disorders: Evaluating Interventions Among Office Workers." (With Donald Cole, Sheilah Hogg-Johnson and Harry Shannon) $400,000 US.

Child Care Visions, Human Resources Development Canada (1997). "A Policy-Evaluation Model of the Child Care Sector." (With Gordon Cleveland, Morley Gunderson and Michael Krashinsky) $275,000.

Institute for Work and Health (1997). "Administrative Issues in Workers' Compensation." (With Morley Gunderson) $21,800.

Donner Foundation (1996). "New Perspectives on Workers' Compensation Policy in Ontario." (With Morley Gunderson) $125,000.

W.E. Upjohn Institute for Employment Research (1996). "Pay at Risk: Increasing Compensation Risks for Workers in the United States and Canada." (With John Turner, Robert Friedland and Sophie Korczyk) $36,625 US.

Human Resources Development Canada (1995). "Demand and Supply Side Child Care Subsidies." (With Gordon Cleveland) $13,000.

Human Resources Development Canada (1995). "Child Care, Lone Parents, Social Assistance and the Employment Decision." (With Gordon Cleveland) $30,000.

Human Resources Development Canada (1994). "An Assessment of the Impact of Child Care Cost, Availability and Quality on Mothers' Employment." (With Gordon Cleveland) $25,000.

Graduate School Research Committee Award Program, University of Wisconsin - Milwaukee (1993-1994). "Labor Market Outcomes of Vocational Rehabilitation." $8,365 US.

Health and Welfare Canada (Child Care Initiatives Fund) (1992). "Child Care 2000." (With Gordon Cleveland) $325,412.

Statistics Canada (1991). "A Policy Simulation Model of the Child Care Choices of Working Mothers in Ontario." (With Gordon Cleveland) $75,000.

C. PUBLICATIONS AND WORK-IN-PROGRESS

(a) Refereed Journal Publications

"Behavioral Economics, Wearable Devices, and Cooperative Games: Results from a Population-based Intervention to Increase Physical Activity." *Journal of Medical Internet Research: Serious Games*, forthcoming, with T. Van Mierlo, A. Ching, R. Fournier and R. Dembo.

"Mapping Power Distributions in Digital Health Networks: Methods, Interpretations and, Practical Implications." *Journal of Medical Internet Research*, 2015; 17(6):e160, with T. Van Mierlo and A. Ching.

"Wearables, Gamified Group Challenges and Behavioral Incentives: A Preliminary Study of An Engagement Program to Increase Physical Activity." *iProc*, 2015; 1(1):e1, with T. Van Mierlo, A. Ching, R. Fournier and R. Dembo.

"Managing the supply of physicians' services through intelligent incentives." *Canadian Medical Association Journal* 184:E77-E80 (January 10, 2012, published ahead of print November 28, 2011) (with B. Golden and R Hannam).

"Consequences of the Performance Appraisal Experience." *Personnel Review*, 39, No. 3 (2010), 375-396 (with M. Brown).

"Workplace Violence and the Duration of Workers' Compensation Claims." *Relations Industrielles/ Industrial Relations*, 63, No. 1 (2008), 57-84 (with M. Campolieti and J. Goldenberg).

"Determinants of Stress in Medical Practice: Evidence from Ontario." *Relations Industrielles/ Industrial Relations*, 62, No. 2 (2007), 226-257 (with M. Campolieti and B. Kralj).

"Experience Rating, Work Injuries and Benefit Costs: Some New Evidence." *Relations Industrielles/ Industrial Relations*, 61, No. 1 (2006), 118-145 (with M. Campolieti and T. Thomason).

"Further Evidence for Interpreting the "Monday Effect" in Workers' Compensation." *Industrial and Labor Relations Review*, 59, No. 3 (2006), 438-450 (with M. Campolieti).

"Strike Incidence and Strike Duration: Some New Evidence from Ontario." *Industrial and Labor Relations Review*, 58, No. 4 (2005), 610-630, (with M. Campolieti and R. Hebdon).

"Child Care Subsidies, Welfare Reforms and Lone Mothers." *Industrial Relations*, 42, No. 2, (2003), 251-269, (with G. Cleveland).

"Symposium: The Effect of Work-Family Policies on Employees and Employers." *Industrial Relations*, 42, No. 2, (2003), 139-144, (with R. Drago).

"Union Impacts in Low-Wage Services: Evidence From Canadian Child Care." *Industrial and Labor Relations Review*, 56, No. 2 (2003), 295-305, (with G. Cleveland and M. Gunderson).

"Child Care Workers' Wages: New Evidence on Returns to Education, Experience, Job Tenure and Auspice." *Journal of Population Economics*, 15, No. 3 (2002), 575-597, (with G. Cleveland).

"Workplace Risks and Wages: Canadian Evidence from Alternative Models." *Canadian Journal of Economics*, 34, No. 2 (2001), 377-395, (with M. Gunderson).

"The Impact of Representation (and Other Factors) on Employee-Initiated Workers' Compensation Appeals." *Industrial and Labor Relations Review*, 53, No. 4 (July 2000), 665-683, (with B. Kralj).

"Privatization of Workers' Compensation: Will the Cure Kill the Patient?" *International Journal of Law and Psychiatry*, 22, No. 5-6 (1999), 547-565, (with M. Gunderson).

"Implications of Small Bargaining Units and Independent Unions for Bargaining Disputes: A Look into the Future?" *Relations industrielles/Industrial Relations*, 54, No. 3 (Summer 1999), 503-526, (with R. Hebdon and M. Mazerolle).

"Free Trade, Global Markets, and Alternative Work Arrangements." *Proceedings of the 51st Annual Meetings of the Industrial Relations Research Association (refereed papers in labor economics)*, 1999, 152-160, (with K. Roberts).

"The Effects of Industrial Relations Factors on Health and Safety Conflict." *Industrial and Labor Relations Review*, 51, No. 4 (July 1998), 579-593, (with R. Hebdon).

"Do Employees Actually Bear the Risk in Defined Benefit Pension Plans?" *Canadian Labour and Employment Law Journal*, 5, No. 1, (1997), 125-138, (with J.E. Pesando).

"Do Injured Workers Pay for Reasonable Accommodation?" *Industrial and Labor Relations Review*, 50, No. 1, (October 1996), 92-104, (with M. Gunderson).

"Work Disincentives of Workers' Compensation Permanent Partial Disability Benefits: Evidence for Canada." *Canadian Journal of Economics*, 29, No. 2 (May 1996), 289-308.

"Collective Bargaining in the Public Sector: Comment." *American Economic Review*, 86, No. 1 (March 1996), 315-326 (with M. Gunderson and R. Hebdon).

"The Distribution of Investment Risk in Defined Benefit Pension Plans: A Reconsideration." *Relations industrielles/Industrial Relations*, 51, No. 1 (Winter 1996), 136-157 (with J. Pesando).

"Child Care Costs and the Employment Decision of Women: Evidence for Canada." *Canadian Journal of Economics*, 29, No. 1 (February 1996), 132-151 (with G. Cleveland and M. Gunderson).

"On the Edge: Single Mothers' Employment and Child Care Arrangements for Young Children." *Canadian Journal of Research in Early Childhood Education. Special Issue on Child Care*, 5, No. 1, (February 1996), 13-25 (with G. Cleveland).

"Workplace Innovation in the Public Sector: The Case of the Office of the Ontario Registrar General." *Journal of Collective Negotiations in the Public Sector*, 25, No. 1 (1996), 63-81 (with R. Hebdon).

"Reasonable Accommodation Requirements Under Workers' Compensation in Ontario." *Relations industrielles/Industrial Relations*, 50, No. 2, (Spring 1995), 341-360 (with M. Gunderson and D. Law).

"The Impact of Workers' Compensation Experience Rating on Employer Appeals Activity." *Industrial Relations*, 34, No. 1, (January 1995), 95-106 (with B. Kralj).

"Determinants of Child Care Choice: A Comparison of Results for Ontario and Quebec*." Canadian Journal of Regional Science*, 16, No. 1 (1993), 53-67 (with G. Cleveland).

"Determinants of Fertility in Urban and Rural Kenya: Estimates and a Simulation of the Impact of Education Policy." *Environment and Planning A*, 25 (1993), 371-382 (with W. Milne).
"Re-Employment and Accommodation of Injured Workers under Ontario's Workers' Compensation Act." *Journal of Individual Employment Rights*, 1, No. 3 (1992), 253-262.

"Early Retirement Pensions and Employee Turnover: An Application of the Option Value Approach." *Research in Labor Economics*, 13 (1992), 321-337 (with J. Pesando and M. Gunderson).

"Wage-Pension Trade-Offs in Collective Agreements." *Industrial and Labor Relations Review*, 46, No. 1 (October 1992), 146-160 (with M. Gunderson and J. Pesando).

"Countercyclical Fertility in Canada: Some Empirical Results." *Canadian Studies in Population*, 18, No. 1 (1991), 1-16 (with W. Milne).

"Can Public Policy Affect Fertility?" *Canadian Public Policy*, 17, No. 1 (March 1991), 77-85 (with W. Milne).

(b) Refereed Monographs

"New Evidence about Child Care in Canada: Use Patterns, Affordability and Quality." Choices, Institute for Research on Public Policy (IRPP), 4, No. 12 (October 2008), (with G. Cleveland, B. Forer, C. Japel and M. Krashinsky).

"Pay Differences between the Government and Private Sectors: Labour Force Survey and Census

Estimates." CPRN Discussion Paper No. W|10, February 2000, (with Morley Gunderson and Craig Riddell).

"Subsidizing Child Care for Low-Income Families: A Good Bargain for Canadian Governments?" Choices, Institute for Research on Public Policy (IRPP), 4, No. 2 (May 1998), (with Gordon Cleveland).

"Using the NLSCY to Study the Effects of Child Care on Child Development." Research Paper T-97-6E, Applied Research Branch, Strategic Policy, Human Resources Development Canada, September 1997 (with G. Cleveland). Also available in French as Research Paper T-97-6F.

"Subsidies to Consumers or Subsidies to Providers: How Should Governments Provide Child Care Assistance?" Research Paper R-97-7E, Applied Research Branch, Strategic Policy, Human Resources Development Canada, May 1997 (with G. Cleveland). Also available in French as Research Paper R-97-7F.

"Child Care, Social Assistance and Work: Lone Mothers with Preschool Children." Working Paper W-96-2E, Applied Research Branch, Strategic Policy, Human Resources Development Canada, March 1996 (with G. Cleveland).

(c) Edited Volumes and Special Journal Issues

Symposium: The Effect of Work-Family Policies on Employees and Employers. *Industrial Relations*, Volume 42, No. 2 (April 2003).

Workers' Compensation: Foundations for Reform. (Toronto, Ont.: University of Toronto Press), 2000 (with M. Gunderson).

New Approaches to Disability in the Workplace. Industrial Relations Research Association, (Ithaca, NY: Cornell University Press for the IRRA), 1998 (with J.F. Burton Jr. and T. Thomason).

Public Sector Employment in a Time of Transition. Industrial Relations Research Association, (Ithaca, NY: Cornell University Press for the IRRA), 1996, (with D. Belman and M. Gunderson).

(d) Chapters in Books

"Consequences of the Performance Appraisal Experience." In New Perspectives in Employee Engagement in Human Resources. (Bingley, United Kingdom: Emerald Gems Series, Emerald Group Publishing Limited) 2015, (with M. Brown).

"Does Vocational Rehabilitation Have Much Impact on Helping People Return to Work." In D. Taras and K. Williams-Whitt (eds.) Perspectives on Disability and Accommodation. (Victoria, B.C.: National Institute of Disability Management and Research), 2011, 225-244, (with M. Campolieti).

"Strikes and Dispute Resolution." In M. Gunderson, A. Ponak and D. Taras (eds.), Union-Management Relations in Canada, sixth edition. (Don Mills, Ontario: Addison-Wesley Publishers Limited), 2009, 322-360, (with M. Gunderson, and R. Hebdon).

"Union Impact on Compensation, Productivity, and Management of the Organization." In M. Gunderson, A. Ponak and D. Taras (eds.), Union-Management Relations in Canada, sixth edition. (Don Mills, Ontario: Addison-Wesley Publishers Limited), 2009, 383-402, (with M. Gunderson).

"Employer-Based Health Insurance: A Way for the Future?" In C. Flood, M. Stabile and C. Tuohy (eds.), Exploring Social Insurance: Can a Dose of Europe Cure Canadian Health Care Finance. (Montreal, Que.: McGill-Queen's University Press) 2008, 91-113, (with M. Gunderson).

"The Comparison of Private Insurers and Public Insurers in Workers' compensation Systems." In M. Shinada (ed.), Workers' compensation and Moral Hazard. Law and Economic Analysis of Workers' Compensation Insurance in North America. Kyoto: Horitsu Bunkasha Publishers, 2006. (with M. Gunderson)

"Workers' Compensation and Return-to-Work." In M. Shinada (ed.), Workers' compensation and Moral Hazard. Law and Economic Analysis of Workers' Compensation Insurance in North America. Kyoto: Horitsu Bunkasha Publishers, 2006. (with M. Gunderson)

"Mandatory Retirement: Not as Simple as it Seems." In C.T. Gillin, D. MacGregor and T. Klassen (eds.), Time's Up! Mandatory Retirement in Canada. (Toronto: James Lorimer and Company Ltd. for the Canadian Association of University Teachers), chapter 8, 2005. (with M. Gunderson).

"Issues in Workers' Compensation Appeals System Reform." In K. Roberts, J.F. Burton, Jr. and M. Bodah (eds.), Workplace Injuries and Diseases: Prevention and Compensation – Essays in Honor of Terry Thomason. (Kalamazoo: W.E. Upjohn Institute for Employment Research), 2005, 117-140.

"Strikes and Dispute Resolution." In M. Gunderson, A. Ponak and D. Taras (eds.), Union-Management Relations in Canada, fifth edition. (Don Mills, Ontario: Addison-Wesley Publishers Limited), 2004, 332-370, (with M. Gunderson, R. Hebdon and A. Ponak).

"Union Impact on Compensation, Productivity, and Management of the Organization." In M. Gunderson, A. Ponak and D. Taras (eds.), Union-Management Relations in Canada, fifth edition. (Don Mills, Ontario: Addison-Wesley Publishers Limited), 2004, 394-413, (with M. Gunderson).

"Health and Coverage at Risk." In J. Turner (ed.), Pay at Risk: Compensation and Employment Risk in the United States and Canada. (Kalamazoo: W.E. Upjohn Institute for Employment Research), 2001, 83-114, (with R. Friedland, L. Summer and S. Korczyk).

"Risk Shifting in Workers' Compensation." In J. Turner (ed.), Pay at Risk: Compensation and Employment Risk in the United States and Canada. (Kalamazoo: W.E. Upjohn Institute for Employment Research), 2001, 161-190.

"Issues in the Professionalization of Child Care." In G. Cleveland and M. Krashinsky (eds.), Our Children's Future: Child Care Policy in Canada. (Toronto: University of Toronto Press), 2001, 394-396.

"Public Pension Plans in the United States and Canada." In W. Alpert and S. Woodbury (eds.), Employee Benefits and Labor Markets in Canada and the United States. (Kalamazoo, MI: The Upjohn Institute), 2000, 381-411, (with M. Gunderson and J.E. Pesando).

"Strikes and Dispute Resolution." In M. Gunderson, A. Ponak and D. Taras (eds.), Union-Management Relations in Canada, fourth edition. (Don Mills, Ontario: Addison-Wesley Publishers Limited), 2000, 314-358, (with M. Gunderson and A. Ponak).

"Union Impact on Compensation, Productivity, and Management of the Organization." In M. Gunderson, A. Ponak and D. Taras (eds.), Union-Management Relations in Canada, fourth edition. (Don Mills,

Ontario: Addison-Wesley Publishers Limited), 2000, 385-413, (with M. Gunderson).

"Foundations for Workers' Compensation Reform: Overview and Summary." In M. Gunderson and D. Hyatt (eds.), Workers' Compensation: Foundations for Reform. (Toronto, Ont.: University of Toronto Press), 2000, 3-26, (with M. Gunderson).

"Unfunded Liabilities Under Workers' Compensation." In M. Gunderson and D. Hyatt (eds.), Workers' Compensation: Foundations for Reform. (Toronto, Ont.: University of Toronto Press), 2000, 162-186, (with M. Gunderson).

"Should Work Injury Compensation Continue to Imbibe at the Tort Bar?" In M. Gunderson and D. Hyatt (eds.), Workers' Compensation: Foundations for Reform. (Toronto, Ont.: University of Toronto Press), 2000, 327-360, (with D. Law).

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"Workforce and Workplace Changes: Implications for Injuries and Compensation." In T. Sullivan (ed.), Injury and the New World of Work. (Vancouver, B.C.: UBC Press), 2000, 46-68, (with M. Gunderson).

"Disability in the Workplace." (With Terry Thomason and John F. Burton Jr.). In T. Thomason, D. Hyatt and J. Burton Jr. (eds.), New Approaches to Disability in the Workplace. Industrial Relations Research Association, (Ithaca, NY: Cornell University Press for the IRRA), 1998, 1-37, (with T. Thomason and K. Roberts).

"Disputes and Dispute Resolution in Workers' Compensation." (With Terry Thomason and Karen Roberts). In T. Thomason, D. Hyatt and J. Burton Jr. (eds.), New Approaches to Disability in the Workplace. Industrial Relations Research Association, (Ithaca, NY: Cornell University Press for the IRRA), 1998, 269-297, (with T. Thomason and K. Roberts).

"Labour Adjustment Policy and Health: Considerations for a Changing World." In Determinants of Health: Settings and Issues. (St.-Foy, Que.: Les Editions MultiMondes for the National Forum on Health), 1998 (with T. Sullivan, O. Uneke, J. Lavis, and J. O'Grady). Also available in French.

"Intergenerational Considerations of Workers' Compensation Unfunded Liabilities." In Miles Corak (ed.), Government Finances and Generational Equity. Statistics Canada Catalogue no. 68-513-XPB. (Ottawa: Minister of Industry), 1998 (with M. Gunderson). Also available in French.

"Workers' Compensation Costs in Canada: 1961-1993." In M. Abbott, C. Beach and R. Chaykowski (eds.), Transition and Structural Change in the North American Labour Market. (Kingston: Industrial Relations Centre and John Deutch Institute, Queen's University distributed by IRC Press), 1997, 235-255, (with T. Thomason).

"Public Sector Employment Relations in Transition." In D. Belman, M. Gunderson and D. Hyatt (eds.), Public Sector Employment in a Time of Transition. Industrial Relations Research Association, (Ithaca, NY: Cornell University Press for the IRRA), 1996, (with D. Belman and M. Gunderson).

"Canadian Public Sector Employment Relations in Transition." In D. Belman, M. Gunderson and D. Hyatt (eds.), Public Sector Employment Relations in a Time of Transition. Industrial Relations Research Association, (Ithaca, NY: Cornell University Press for the IRRA), 1996, (with M. Gunderson).

"The Effect of Free Trade on Contingent Work in Michigan." In Karen Roberts and Mark I. Wilson (eds.), Policy Choices: Free Trade Among NAFTA Nations. (East Lansing, MI: Michigan State University

Press), 1996, 235-260, (with K. Roberts and P. Dorman).

"The Evolution of Workers' Compensation Costs in Canada." In John F. Burton, Jr. (ed.), 1996 Workers' Compensation Yearbook. (Horsham, PA: LRP Publications), 1995, I-39 to I-48, (with T. Thomason).

"Alternative Methods for Modeling Regional Industrial Activity: Short Run Versus Long Run." In M. Popov (ed.), The Issues of Elaboration and Implementation of Regional Development Programs under the Transition to a Market Economy. (Donetsk, Ukraine: Donetsk Polytechnical Institute), 1995, 48-52. (Text in Russian).

"Union Impact on Compensation, Productivity, and Management of the Organization." In M. Gunderson and A. Ponak (eds.), Union-Management Relations in Canada, third edition. (Don Mills, Ontario: Addison-Wesley Publishers Limited), 1995, 311-337, (with M. Gunderson).

"Strikes and Dispute Resolution." In M. Gunderson and A. Ponak (eds.), Union-Management Relations in Canada, third edition. (Don Mills, Ontario: Addison-Wesley Publishers Limited), 1995, 373-411, (with M. Gunderson and A. Ponak).

"Re-Employment and Accommodation Requirements under Workers' Compensation." In T. Thomason and R. Chaykowski (eds.), Research in Canadian Workers' Compensation. (Kingston: Queen's University IRC Press), 1995, 141-157, (with M. Gunderson and D. Law).

"Measuring the Impact of Vocational Rehabilitation on the Probability of Post-Injury Return to Work." In T. Thomason and R. Chaykowski (eds.), Research in Canadian Workers' Compensation. (Kingston: Queen's University IRC Press), 1995, 158-180, (with R. Allingham).

(e) Conference Proceedings

"Employment Equity in Canada and the United States." *Proceedings of the 54th Annual Meeting of the Industrial Relations Research Association*, 2002, 146-153 (with M. Gunderson and S. Slinn).

"Contingent Work: The Role of the Market, Collective Bargaining and Legislation." *Proceedings of the 53rd Annual Meeting of the Industrial Relations Research Association*, 2001, 99-107 (with M. Gunderson).

"Child Care Choice for Pre-School Children of Employed Mothers in Ontario, Quebec and Alberta in 1988." *Proceedings of the 29th Conference of the Canadian Industrial Relations Association*, 1993, 355-366 (with G. Cleveland).

"Projections of the Effect of Government Child Care Policy on Parents Choice of Child Care Arrangements." *Proceedings From the Child Care Policy Research Symposium*, (Toronto: Child Care Resource and Research Unit), 1993 (with G. Cleveland).

"Workers' Compensation Costs and Competitiveness: Issues and Inter-Jurisdictional Comparisons." *Proceedings of the 28th Conference of the Canadian Industrial Relations Association*, 1992, 421-429 (with B. Kralj).

"Employer Appeals of Workers' Compensation Board Decisions: The Impact of Experience Rating." *Proceedings of the 27th Conference of the Canadian Industrial Relations Association*, 1991, 329-337 (with B. Kralj).

(f) Book Reviews

Labour Relations and Health Reform. A Comparative Study of Five Jurisdictions. Edited by Kurt Wetzel. *Relations Industrielles/ Industrial Relations*, 62, No. 4, 2007), 781-783.

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TAB 12

Advisory Committee

on Senior Level Retention *and* Compensation

First Report: January 1998

Prepared for the President of the Treasury Board,
the Honourable Marcel Massé

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First Report of the Advisory Committee on Senior Level Retention and Compensation

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Table of Contents

Illustrations

Preface

As Chairman of the Advisory Committee on Senior Level Retention and Compensation, I am very pleased, on behalf of the Committee members, to submit our first report to the President of the Treasury Board. The Committee has learned much about the federal Public Service in the past nine months. In the process, we have received excellent input from central agencies, as well as current and past public sector executives and leaders in the business community.

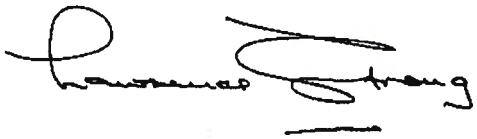
This first report contains our analysis of the current situation and highlights what we believe are the critical issues and opportunities as Canada enters the new millennium. It is evident that, to remain competitive as a country, we will require continued exceptional leadership, creative thinking and new operating skills and competencies from the public sector. However, if current trends persist, we clearly see a potential human resource deficit within the senior ranks of the Public Service. If left unaltered, this situation would represent a major challenge to the quality of the Public Service and, inevitably, to Canada's economic well-being.

As the Committee has been asked to serve for three years, the recommendations contained in this first report address the concerns we consider most pressing or requiring urgent attention. I refer specifically to the Public Service vision for the future, the need for cultural and human resource renewal, and compensation. We feel strongly that these recommendations represent an essential investment in the future excellence of the federal Public Service and that there will be a tremendous cost if no corrective action is taken.

With respect to compensation in particular, our recommendations focus on three different levels, namely, principles, structure and implementation. In doing so, we have tried to present solutions that are both fiscally responsible and equitable.

I look forward to discussing both our findings and the specific recommendations we have identified. My Committee colleagues and I are prepared to deliver the key messages to the public and will endeavour to seek out opportunities to do so.

Yours sincerely,



Lawrence F. Strong

The Future of the Public Service

Canadians and their elected representatives have long enjoyed an ethical, non-partisan and professional Public Service — a Public Service respected as one of the best in the world. We believe that these core values need to form the foundation for the Public Service in the next millennium.

The context in which government is operating has changed fundamentally in the past decade. Citizens are demanding greater accountability, improved service, greater openness, enhanced accomplishment and, above all, results. In a world of greater economic insecurity and scarce resources, citizens require more effective social programmes that pool risk while creating opportunities for them to work and to be self-reliant. The corporate sector requires a competitive framework of laws and skilful representation abroad if it is to succeed in global markets. And all of this needs to be accomplished in an efficient way. These challenges will require exceptional leadership, creative thinking, and new operating skills and competencies — whether Public Service employees are negotiating global trade agreements, managing new service delivery mechanisms, or responding to the needs of citizens.

While we do not wish to sound overly dramatic, it is our view that the government has reached a watershed with respect to the quality of the Public Service leadership group. To continue the current approach to human resources will lead to an inevitable weakening of this cadre. Not only will departures accelerate over the short term, but the Public Service will not be able to attract and retain the people it needs to replace the very high proportion of managers expected to retire in the next decade. This, in turn, diminishes the country's economic potential and could even pose a risk to the government's credibility. On the other hand, an opportunity exists today to articulate a new vision for the Public Service

The government has reached a watershed with respect to the quality of the Public Service leadership group. To continue the current approach to human resources will lead to an inevitable weakening of this cadre.

A "high performance" Public Service will not only serve all Canadians better but will also contribute to Canada's economic well being and global competitiveness.

entering the next millennium. This vision should set high standards of performance and restore a sense of pride and hope for all employees, especially the cadre responsible for leading and managing the system. Supporting this vision should be a revitalized human resource strategy, modernized structures and a new Public Service culture. Such a 'high performance' Public Service will not only serve all Canadians better but will also contribute to Canada's economic well-being and global competitiveness.

Necessarily, our initial priority has been to understand today's environment and identify immediate human resource issues that need to be addressed. Since the Advisory Committee has been asked to serve for three years, this first report provides recommendations for dealing with only the most pressing concerns, namely the Public Service vision going forward, the current low morale and in particular cash compensation, and the issue of renewal.

Where does the Public Service Stand Today?

During the nineties, the federal government has undertaken a comprehensive renewal initiative, 'Getting Government Right.' *Many of the outcomes are well-known publicly, particularly the improved fiscal health of the country, the downsizing of the Public Service and new service delivery models. What is less well recognized is the considerable human resource challenge of managing this unprecedented change in the public sector.*

There is an urgent need for a compelling, widely understood vision of where the Public Service is going. An effective programme for managing the extensive change that has occurred requires such a vision. This vision can best emerge through a meaningful debate on the role of the Public Service in Canada. Such a debate could also help reduce uncertainty about the future and address poor morale, which some argue is at an all-time low.

As the government has moved to deal with the country's financial crisis, concern for the senior people in the public sector does not appear to have received adequate attention. The extended pay freeze has not only affected their standard of living but has served to undermine their sense of the importance of the jobs they perform. Senior managers perceive themselves as unappreciated by the public they serve and undervalued by the government that employs them. This, coupled with the loss of 30 per cent of their colleagues through downsizing, more limited job opportunities and promotion prospects, and the increasing demands on their time, has further contributed to the poor morale. As a result, good people are leaving at a time when government needs the best and the brightest. In short, the Public Service is no longer able to retain the people it needs and frustration among those who stay could eventually impact productivity negatively.

The Public Service is no longer able to retain the people it needs.

The Public Service leadership has begun the difficult challenge of reinventing human resource strategies and much has been accomplished. The major initiatives fall under the umbrella of *La Relève.* In fact, there is considerable convergence between the work being done by the team of deputy ministers and our own Advisory Committee. However, there are three important differences. Firstly, our Committee is looking at senior management only and not at the entire Public Service. Secondly, our perspective is from the outside looking in. Thirdly, as an independent group, we will make specific recommendations about compensation, which is, without question, the most important factor in restoring morale in the short term. In the Committee's opinion, work must continue to ensure there is an integrated set of actions and clear priorities for managing human resources. Since, in the past, several human resource initiatives have fallen well short of expectation, it is also critical that current efforts be translated collectively into tangible results.

The Public Service leadership has begun the difficult challenge of reinventing human resource strategies and much has been accomplished.

As we have gone about our work, we have been exposed to many examples of the Public Service culture as it relates to human resources. While there are very good arguments for treating the executive group as distinct, the impression given is that this has not really been the case in the past. Negotiated benefits are 'passed along'; salary awards tend to be 'across the board'; performance management systems are not discriminating; past practice is a major determinant of behaviour. From a private sector perspective, responsibilities for managing human resources appear to be organized in a way that is unnecessarily complex and administration seems to be overly burdensome. We suspect that one of the reasons behind this lies in the patchwork quilt of historical regulation that impacts human resource management in the Public Service. This is a topic we will review in the future.

Against this background, we wish to focus in this report on the two most critical problem areas in human resource strategy — compensation and future quality of the Public Service. However, we have also been exposed to a comprehensive list of other workplace issues and human resource challenges. Their absence from this report does not necessarily reflect a Committee view that change is not required. It merely reflects our decision to focus on immediate priorities in this first report.

Compensation – Deputy Ministers (DMs) and Executive (EX) Community

In our view, compensation policy should be designed to attract and retain the appropriate calibre of employees to achieve an organization's objectives. Such compensation policy needs to be internally equitable, to be responsive to the economic and social environment, and to encourage and reward outstanding performance. Salary is usually the major driver of such policy. Salary depends upon responsibility, individual performance and comparability with relevant markets. Typically, standard practices and techniques are used to evaluate each of these objectively and transparently.

Compensation policy needs to be internally equitable, to be responsive to the economic and social environment, and to encourage and reward outstanding performance.

Measuring Responsibility

The Public Service historically has used a job evaluation system based upon the Hay management methodology. Consistently applied, this forms a good basis for measuring relative responsibility. However, since the salary freeze and despite high levels of reorganization, there has been a decline in the proportion of jobs being evaluated. For example, on January 1, 1992, two levels of Public Service management (the former SM and EX1) were regrouped into a single pay band and classification level, the new EX1. At that same time, and in an ongoing way since, there were other significant changes — delayering, downsizing, and reorganizations. The impact of these changes on individual job responsibilities is, in many cases, unknown today. Furthermore, the most senior positions, deputy ministers, have not been evaluated using Hay.

Comparing Compensation Externally

Prior to the salary freeze of 1991, the Burns Committee had established clear principles for external compensation comparisons: first level managers should receive total compensation on a par with the private sector and compensation at higher levels should be derived from internal relativities. External measures were routinely made through surveys and those were used to recommend changes to salary structure as well as actual salaries. The freeze of both ranges and salaries has created a significant discontinuity and external comparisons have not been rigorously made for some time. As a result, the Committee has, through William M. Mercer

Senior federal public servants have total compensation that is less than the broader public sector, and significantly less than the private sector.

Limited, benchmarked today's compensation against various groups, namely the provincial public services, a 'third' sector comprising municipalities, utilities, hospitals, universities and other not-for-profit associations, and then the private sector. In this report we will refer to this 'third' sector as the broader public sector. It should be stressed that we have chosen to use as our key measure *total* compensation, which includes salary, variable or incentive pay, pensions, other fringe benefits, perquisites and conditions of work.

The survey results are summarized in Figure 1 and the major conclusions are:

- For jobs of similar content, scope and responsibility, senior federal public servants have total compensation that is:
  - ahead of the provinces in most instances,
  - less than the broader public sector, and
  - significantly less than the private sector.
- The shortfalls compared to the private sector increase markedly for the higher level positions.
- The major differences lie in base salary and incentives (variable pay).
- Pension arrangements are generous in the Public Service. However, since employee contributions are relatively high, the cost to the government is not broadly out of line with the comparator groups. The only exception is the plan for deputy ministers which, in percentage terms relative to salary, is more costly than in the private sector.
- Differences between sectors tend to even out in other fringe benefits, conditions of work and perquisites.

Estimated Median Value Total Compensation

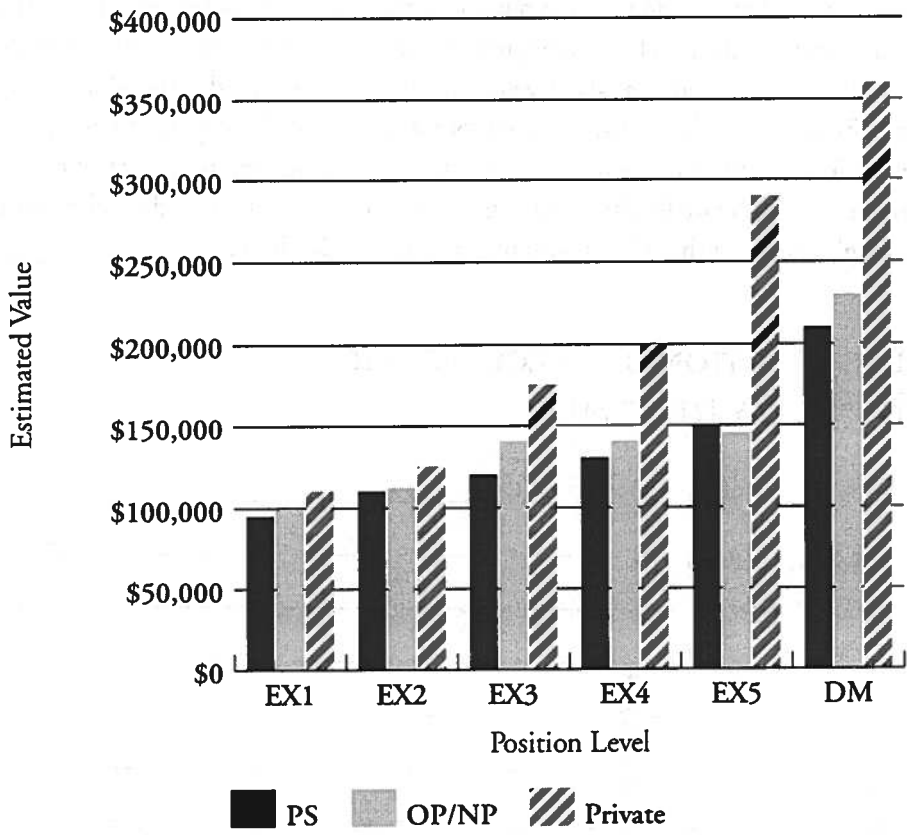


Fig.1. Comparisons of Total Compensation

A number of academic and private sector studies indicate that, below the executive level, federal Public Service employees receive salaries comparable to or higher than those in the private sector. Since this is beyond our mandate, we have not sought to verify this result rigorously. However, the studies have fostered public resentment of the job security and pay arrangements for the bargained groups in the federal Public Service which has also carried over to the senior ranks. That resentment appears, in turn, to have discouraged the federal government from compensating the executive group appropriately, even when evidence has been solid that their compensation falls well short of comparator groups.

Internal Equity

One of the most undesirable side effects of the salary freeze is that many managers are no longer being paid in relationship to their current performance. This is a fundamental flaw. The problem is most acute at the EX1 level, where over two-thirds are being paid at a salary well below the job rate, i.e., the rate of pay merited by sustained, fully satisfactory performance in a job. Managers who were low in their range at the start of the freeze have been denied performance-justified movement to the job rate for five years. The extent of this problem tends to diminish at higher levels, although it is still material at the EX2 level.

One of the most undesirable side effects of the salary freeze is that many managers are no longer being paid in relationship to their current performance.

Distribution of Executive Group By Salary Intervals

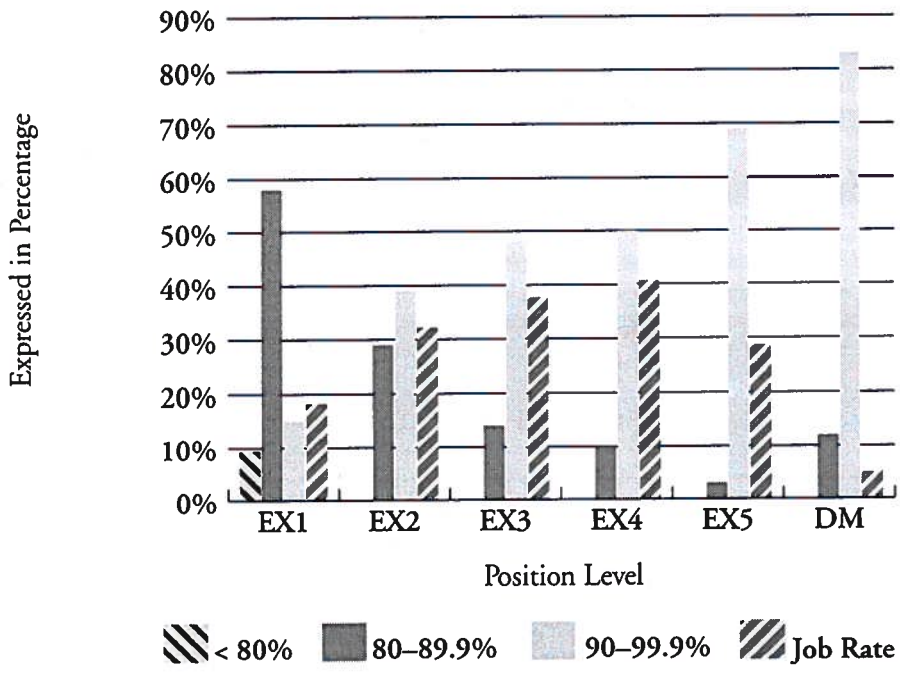


Fig. 2. Internal Equity: Distribution in Salary Ranges

A second problem is that the freeze has severely restricted management's ability to correct known inequities. For example, numerous managers at the EX1 level have subordinates who are being paid more than they are. While the lack of an integrated human resource management information system has denied us a complete picture, a sampling of five departments has established that the problem is real. Layer on top of this situation a high incidence of compression (salaries for different levels of responsibility which are very close) and the fact that a manager's unionized subordinates receive overtime whereas the manager does not, and there is a severe problem of equity.

There are also examples of compression between management levels. For example, despite the fact that they are performing higher rated jobs, the lowest paid 25 per cent of EX2 managers are being paid in the same salary band as the highest paid 25 per cent of EX1 managers.

These significant problems notwithstanding, our greatest concern is that the differentials between job rates are inadequate. The current spreads simply do not reflect the far greater responsibilities of the most senior managers.

And finally, there has been a reluctance to deal with pay for individuals who assume temporary assignments at a higher level. As the length of time of these assignments has extended during the intense period of organizational change this has become a source of great irritation, and has further undermined the integrity of the entire salary infrastructure.

The current spreads in job rates simply do not reflect the far greater responsibilities of the most senior managers.

Performance Pay

A review of actual salary administration practices over the past years indicates numerous inconsistencies in approach to what today is called performance pay. Where unionized workers move through their salary ranges in automatic annual increments, executives were expected to earn such movement through performance. The system was established in 1981, when the government moved away from traditional job ranges consisting of a minimum, a job rate and a maximum. That portion of the range between job rate and maximum (approximately 15 per cent of job rate) was eliminated, thus capping salaries at job rate. In its place a system of performance pay was introduced. This performance pay which, in any year,

could be up to 10 per cent of job rate for an individual, has assumed various guises but can best be described as a form of re-earnable merit pay for those managers at job rate. For those below job rate, it constituted a means to move to the job rate.

However, performance pay has been implemented in only 7 of the 17 years since 1981. For executives, this has meant no movement through the range in 10 of the last 17 years. And even when performance pay has been implemented, it has been done in a way that is far from ideal (see Appendix D for complete history). As a result, the concept of performance pay has been totally discredited, despite its merit in principle. Performance pay is seen as neither linked to achievement of business plans, nor as transparent and fair. Further, its rather checkered history has created an alarming lack of trust between senior levels of the Public Service management and the government.

DM and EX compensation schemes today exhibit significant internal inequities as well as major gaps or inequities when measured against comparable external groups.

Performance Management

While some excellent experiments on performance management have begun, there is still discomfort in setting quantified goals against which performance can be evaluated. We should add that, for some positions, this is not easy and, for certain Governor in Council appointees, not even desirable. No doubt influenced by the highly constraining salary programmes in the recent past, as well as by an apparent reluctance to really reward outstanding performance, the culture appears to be one of 'averaging out' — almost sharing around whatever funds are available.

The introduction of disciplined planning processes into the way the government carries out its business is an important recent development. This initiative needs to be continued and refinements made as further experience is gained. It is the creation of business plans with quantified goals, together with a clarified understanding of how the different departments and agencies interact horizontally, that will permit a more effective regimen for evaluating the performance of senior managers.

Summary

For reasons of history, past salary administration practices and the politics of compensation, the DM and EX compensation schemes today exhibit significant internal inequities as well as major gaps or inequities when measured against

comparable external groups. However, no single solution is appropriate to all DM or EX members. When measuring total compensation, the most significant inequity is found at the more senior executive levels and among deputy ministers. At these levels, the job rate is significantly lower than not only the private sector but also the broader public sector. A different problem exists among EX1s and, to a lesser extent, EX2s. If executives were being paid at the job rate, they would be close in comparability to the broader public sector. However, many are paid far below the job rate and, in many cases, are paid less than their subordinates. It is therefore clear that immediate attention should be given to the gap between actual pay and job rate at the EX1 and EX2 levels. For more senior executives, the solution resides in a change of compensation structure, to be implemented over time.

Compensation – Other Governor-in-Council (GIC) Appointments

While deputy ministers and the EX community form a logical continuum as far as scope of responsibility and hence compensation is concerned, the same cannot be said of the remaining GIC community. This latter community is very diverse. In total, it comprises approximately 500 full-time individuals who can broadly be grouped as follows:

- chief executive officers (CEOs) of Crown corporations (such as the presidents of Via Rail Canada and the Farm Credit Corporation);
- heads of agencies, advisory councils and other organizations, including some senior officers (such as the National Librarian, the presidents of the Canadian Space Agency and National Research Council Canada); and finally
- heads and members of administrative tribunals and regulatory agencies (such as the chairmen and members of the National Parole Board and the National Energy Board).

The Governor in Council is responsible for appointing these leaders and for setting their remuneration. Typically, these appointees are selected from outside the Public Service and are appointed for relatively short terms of office. Their remuneration is generally based on the level of responsibility of the job as measured by the Hay system.

The first grouping, CEOs of Crown corporations, have responsibilities and accountabilities that are generally much closer to the private than to the public sector. Most are accountable to an independent board of directors appointed by the government. Chief executive officers of Crown corporations are not a homogeneous group, however. Some corporations clearly operate in a more private sector-like environment, are not dependent on government financial support and must compete with the private sector for their senior resources below the CEO level. Other corporations have a strong public policy mandate and depend on government funding.

The public sector compensation freeze, which also applied to CEOs of Crown corporations, has had a perverse effect on internal relativities within the senior management cadre of these organizations and, in many cases among the larger corporations, has led to retention and recruitment difficulties.

The Hay evaluation of the CEO positions does allow for a quantitative measurement of the difference in responsibilities between the smaller and the larger corporations. There have, however, been significant changes in the mandates and scope of several Crown corporations since the compensation structures were last reviewed in 1990. Furthermore, each corporation has in place its own compensation structure for executives below the president. These structures, reviewed and approved by the independent boards referenced above, are not only beyond our mandate but are unavailable to us even to test for internal consistency with the president's compensation. However, we believe that the public sector compensation freeze, which also applied to CEOs of Crown corporations, has had a perverse effect on internal relativities within the senior management cadre of these organizations and, in many cases among the larger corporations, has led to retention and recruitment difficulties. Clearly, a comprehensive review is needed for this grouping.

The second grouping, the heads of agencies, advisory councils and other organizations (including some senior officers), are responsible for the management of their organizations and the direction of their officers and staff. The mandate of each organization is set in legislation and, although they are part of government portfolios and accountable through ministers, they enjoy a certain degree of autonomy from the government. Because these individuals occupy positions that are at comparable levels of responsibility to those of Public Service executives and deputy ministers, their salaries and terms and conditions have traditionally been similar. The Committee believes that this practice should continue. Furthermore, because of the significant managerial responsibilities attached to these positions, performance management and 'at risk' pay should also be applied.

The third grouping, heads and members of administrative tribunals and regulatory agencies, numbers more than 300 and consists of the majority of Governor-in-Council appointees.

The appointment of members of these organizations is very specific: they are appointed 'during good behaviour' and enjoy tenure similar to that of judges. This statutory requirement is imposed to ensure independence from government influence in the decision-making process. These positions are evaluated using Hay, which allows for proper determination of relativity among the various organizations. Like judges, all members of a given organization are generally paid the same salary. This practice, although sound, has raised questions in the past, particularly from heads and members of administrative tribunals and regulatory agencies. The requirement to maintain the independence of these organizations clearly supports the current practice of not providing performance pay. Nonetheless, there needs to be a mechanism to ensure these individuals progress to the job rate. The Committee would be pleased to review this particular issue in a subsequent report and provide the government with recommendations on a compensation system best adapted to the specific needs of these organizations.

The heads of these organizations provide a somewhat different challenge. Appointed as members 'during good behaviour', they are designated to serve as the head 'during pleasure'. As head, they exercise full CEO responsibilities in addition to quasi-judicial functions they may be required to perform. As we are talking about individuals at the pinnacle of their respective organizations, measuring their performance and appropriate compensation poses some interesting challenges. The main one is to ensure equity among the various individuals of this community while protecting their independence from government influence in decision making.

Future Quality of the Public Service

We have very serious concerns that the quality of the Public Service management could erode in the future. Four factors are at play:

(1) the downsizing has already resulted in the loss of personnel with many years of experience;

(2) today's low morale and uncompetitive compensation create a significant short-term risk of further departures, which could be influenced positively or negatively by government actions flowing from this report;

The loss of experience and know-how implicit in this potential exodus is staggering and is likely the most significant long term Public Service issue facing the government.

(3) the demographics of today's senior managers suggest that retirements will create a significant resource gap in the next 5 to 10 years;

(4) the Public Service is no longer able to attract the highest calibre of people because compensation is inadequate and these careers have a negative image in the eye of the public.

Consider first the demographics of today's senior Public Service executives. Thirty per cent of the EX1 to EX3 group will be able to retire by the year 2000 and 70 per cent by 2005. When analyzing the EX4 and EX5 groups (the DMs of tomorrow) these percentages rise to an incredible 50 per cent by 2000 and 90 per cent by the year 2005. To exacerbate matters, the group from which management candidates are selected internally has broadly similar demographics although not quite as extreme. The loss of experience and know-how implicit in this potential exodus is staggering and is likely the most significant long-term Public Service issue facing the government.

Retirement Potential
1995-2005

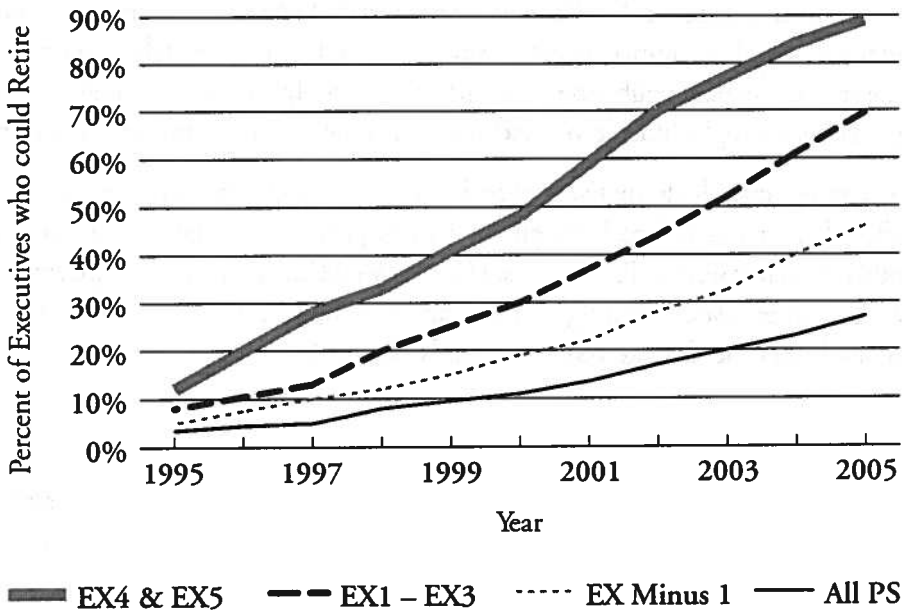


Fig. 3. Potential Retirements by the year 2005

However, there are other shortcomings in human resource practices that are constraining the quality of management. The most significant has been the lack of movement of managers across departments. This reflects both the lack of an effective mechanism for creating horizontal movement and the insecurity felt by public servants. As a result, there are serious deficits in experience among the executives who should be candidates for promotion to more senior responsibilities. This is a major weakness from the viewpoint of human resource development.

La Relève has already identified these issues and programmes like the Accelerated Executive Development Programme, the Assistant Deputy Minister Pre-Qualified Pool and the collective management regime for ADMs have been initiated. These and more are required if the Public Service is to achieve a smooth transition into

La Relève *is an important first step in putting human resource management and planning issues "on the front burner." However, all senior managers need to recognize, endorse and be held accountable for effective human resource management.*

the next millennium. *La Relève* is an important first step in putting human resource management and planning issues "on the front burner." However, all senior managers need to recognize, endorse and be held accountable for effective human resource management. Similarly, it seems highly likely that a concerted and highly targeted recruitment effort is required. With the continual public and political criticism of senior public servants, and their relatively poor compensation, it has grown increasingly difficult to attract high performers into the government sector.

The trend towards alternative service delivery, outsourcing and privatization has altered the relationships between the federal government and its partners in other economic sectors. This has created a need for different skills and competencies at the senior levels. Training and management development programmes for senior leaders need to address these trends effectively.

Recommendations

Our recommendations are made in the belief that the federal Public Service has a critical contribution to make to the well-being of our country as we enter the new millennium. While the role of government is changing, the need for high calibre leaders in the public sector is more critical than ever. The government has taken many difficult decisions in its recent efforts to deal with the financial deficit. We believe that the government needs to be similarly decisive today if it is to avoid a serious human resource deficit in the Public Service.

1. Vision and Culture of the Public Service

The government has been engaging public servants, elected officials and interested Canadians in setting the path for Canada's Public Service into the new millennium. The Committee recommends that this initiative be expanded and formalized.

The ensuing discussion should validate and refine Public Service values as a foundation for renewal, give direction for enhancing policy capacity, and establish a credible and meaningful programme for setting targets and measuring results. A shared understanding of core values and changing roles and responsibilities, a sense of common purpose and a performance regime that helps to define and measure success should also help to inspire and challenge the Canadian Public Service and strengthen its relationship with those it serves.

The process of developing a performance management regime based upon Public Service values would itself contribute to the renewal of pride, the pursuit of excellence, and the continued evolution of the culture of the Public Service. It is important that the core values and beliefs be explicit since we believe that there is a need for both change and greater consistency.

A shared understanding of core values and changing roles and responsibilities, a sense of common purpose and a performance regime that helps to define and measure success should also help to inspire and challenge the Canadian Public Service and strengthen its relationship with those it serves.

2. Compensation

As observed in the previous section of this report, the senior levels of the Public Service do not form a homogeneous group when it comes to recommending appropriate changes to compensation. The Committee has therefore divided executives into two groupings. The first consists of EXs and deputy ministers and the second consists of all remaining GIC appointees. Within each of these two groupings, we have then addressed the principles on which compensation should be based. These principles have in turn led us to recommend certain compensation structures. And then finally, we have made recommendations for moving from today's regime to the proposed one. While our recommendations may need to be revisited once the visioning exercise is complete, there is a critical short-term requirement for new directions if the government is going to stem the rate of departure of key human resources.

The competencies required to create a world-class executive group demand a human resources and compensation approach that is entirely different from that used in traditional collective bargaining systems.

A. Deputy Ministers and EX Community

Compensation Principles

Firstly, we recommend that the total compensation package for this management group be made quite distinct from that offered to unionized employees. This will recognize executives' very different responsibilities and will also be an important contributor to the cultural change that is needed. The competencies required to create a world-class executive group demand a human resources and compensation approach that is entirely different from that used in traditional collective bargaining systems.

Secondly, we are proposing a compensation system where the job rate, the fixed component of compensation that is paid for fully satisfactory performance, is adjusted at intervals using market comparisons of total compensation in appropriate comparator groups. The proposed compensation system would have no overtime payments or automatic annual increments. It would, however, include a considerable amount of pay 'at risk' – a variable component of compensation that is tied to corporate and individual achievement against targets, but that is integral to the total package.

Thirdly, we would like to see processes put in place which, to the greatest extent possible, remove the year-to-year administration of Public Service compensation

from the political arena. Endorsement of the principles and proposed structure would go a long way toward achieving this. We would then recommend that, at least every two years, the Treasury Board conduct an independent compensation survey amongst relevant comparator groups and implement the appropriate changes to salary scales. This intention to facilitate administration should not be confused with a lessening control of overall budgets and spending, nor the right of the government of the day to review principles and structures.

We would like to see processes put in place which, to the greatest extent possible, remove the year-to-year administration of Public Service compensation from the political arena.

Fourthly, with respect to the appropriate external comparison for total compensation, the Committee believes that, at least until the performance management regime and visioning are complete, the Burns Committee yardstick — EX1 comparable to the private sector with higher management levels based upon internal relativities — is still appropriate. We would add as a caveat that the structure also needs, at the very least, to be competitive with broader public sector compensation. This is a new consideration. However, due to the importance and complexity of the federal positions, we believe they should be compensated somewhat above the median of the broader public sector. This is especially the case for the most senior deputy minister levels where the scope of responsibilities is far greater than in the vast majority of the broader public sector organizations used in the comparator group.

Fifthly, we do believe that the relationship between compensation of various management levels needs to be a proper reflection of the differences in responsibility. The Burns Committee consistently identified this as an issue with the current structure but it has remained unresolved. We are recommending new differentials in job rates and new salary minima.

Compensation Structure

Salary Ranges

The proposed new structure is driven by two of the principles enunciated earlier:

- External comparability at EX1: the proposed structure is comparable to the medians for both the private and the broader public sectors, which are very close: $87,400 for the private sector and $87,200 for the broader public sector. These numbers are based upon the 1997 Mercer survey results cited earlier in this report, plus the 2.1 per cent increase that Mercer's national compensation survey has projected for 1998.

We are recommending a new salary structure that is driven by two principles: external comparability at the EX1 level and internal relativity at the higher level.

- Internal relativities between executive levels: a 12 per cent differential between levels of responsibility would address some of the severe compression between successive levels. There are two significant career break points which deserve a more significant step. These occur between EX3 and EX4 and between DM1 and DM2, where the increase in responsibilities merits a 15 per cent differential.

These two proposals give rise to the salary job rates shown in Figure 4.

Job Rates

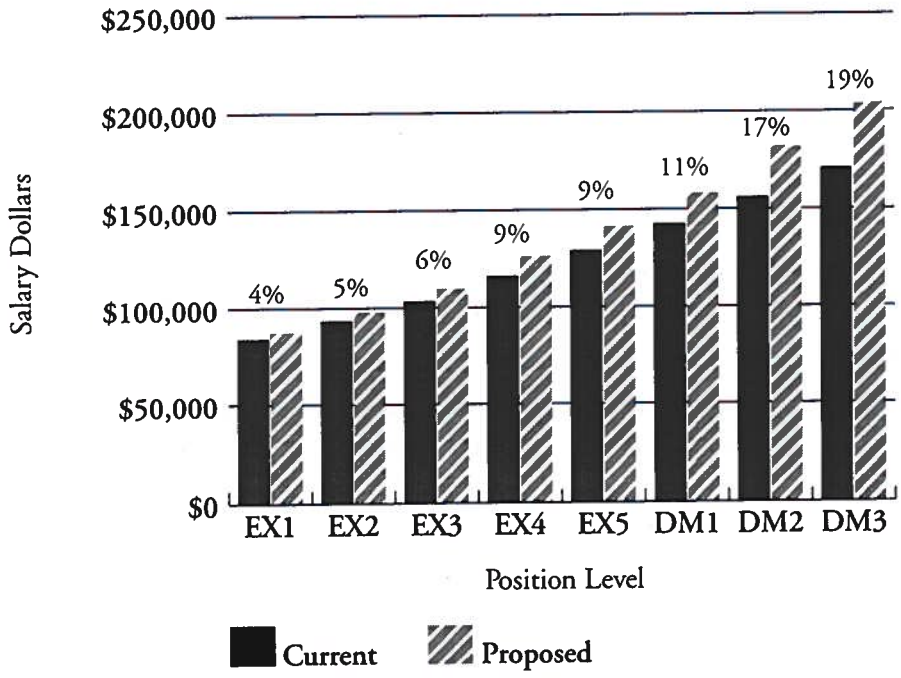


Fig. 4. Proposed Salary Structure – EXs and DMs

*The percentages above the columns represent the increases in the proposed job rates compared to the current.

Given that the current structure dates back to 1991-92, the increases at the lower levels are relatively modest. However, as would be expected from the earlier analysis, the percentage increases do rise with responsibility.

The minimum salaries for each level of responsibility are proposed at job rate less 15 per cent. Movement through the salary ranges to the job rate will be based on fully satisfactory performance over two to three years.

Compensation "At Risk"

We are recommending a new scheme of variable, 'at-risk' compensation that will be paid on the basis of performance measured against agreed targets and the achievement of business plans. This would replace the existing performance pay scheme. Targets would be individual, team-related, and corporate, and would encompass a range of elements including effective management of resources, leadership linked to quality service, policy advice, innovations and, most importantly, results and exemplification of core values.

We are recommending a new scheme of variable, 'at-risk' compensation that will be paid on the basis of performance measured against agreed targets and the achievement of business plans.

Such a variable pay plan must be rooted in sound principles of performance management and must be designed to reflect the values of a Public Service focussed on the public interest. The performance management framework will have to ensure a proper balance between long- and short-term results, and between softer measures of values and rigorous measures of achievement. It would also have to incorporate feedback from diverse clients.

A variable pay plan must be rooted in sound principles of performance management and must be designed to reflect the values of a Public Service focussed on the public interest.

While the details need to be worked through, it is important that:

- a small number of targets are agreed upon before the start of each measurement period following a process which ensures client input;
- there is a mechanism for reviewing significant changes during a measurement period;
- performance is evaluated continually and annual evaluations are completed within 60 days of the end of the measurement period;
- payments are made within 60 days of the end of the measurement period; and
- the proportion of pay 'at risk' will increase with the level of responsibility.

Given this last point, we propose an approach that would provide opportunities to earn variable pay of 10 per cent for levels EX1 to EX3; 15 per cent for EX4, EX5 and DM1 levels; and 20 per cent for DM2 and DM3 levels.

This variable pay scheme is an integral part of total compensation. It is not paid or withheld as part of an annual review of salaries. It is paid or not paid on the basis of actual performance compared to agreed targets.

The Committee will review whether or not this 'at risk' compensation should be pensionable prior to its implementation and following a detailed review of the total pension arrangements.

External Comparability of Total Compensation Recommendations

The graph below compares the proposed total compensation for EX1 to EX5 and DM2 (our survey did not find sufficient job matches at the DM1 and DM3 levels) with comparable jobs in the broader public sector and the private sector.

Proposed Total Compensation

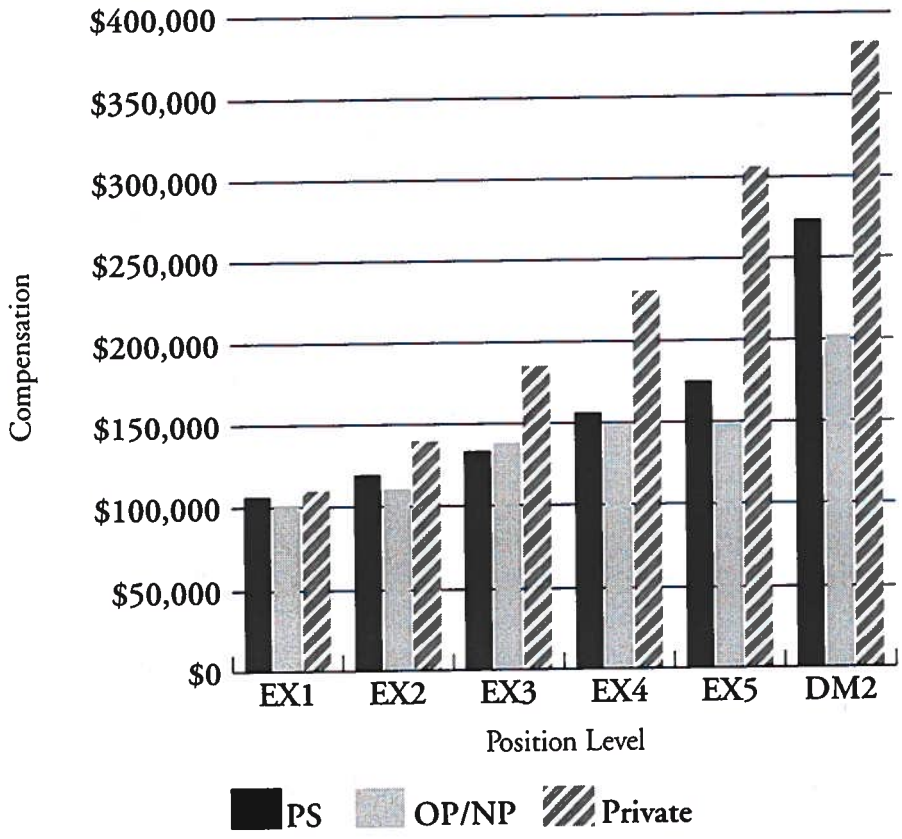


Fig. 5. Proposed Total Compensation – External Comparability with Broader Public Sector and Private Sector

The proposed structure matches the broader public sector quite closely at the lower management levels, but is above at the most senior positions. The proposed structure matches the private sector at the EX1 level, but thereafter lags by an amount that tends to increase with responsibility.

Implementation

As a starting point, we assume that in fiscal year 1997/98, managers will receive performance pay in respect of the 1996/97 year (not addressed in this report). We assume also that a start is made on addressing the significant internal inequities that exist, particularly at the EX1 level, where there is a high incidence of compression and inversion. The issue of EX1 and EX2 incumbents being paid below job rate must be addressed. Subject, of course, to satisfactory performance, EX and DM salaries should therefore reach at least 90 per cent of the current job rate.

We believe that the new salary structure should be adopted in 1998, with the variable pay component to be implemented over time. Advantages of this way of proceeding are:

- immediate adoption would send a clear message to the EX and DM communities and
- gradual implementation would ensure a fiscally responsible and equitable approach.

We therefore propose the following principles be used to guide implementation of the new structure:

- Urgent attention should be given to addressing the inequities created by compression and inversion for those well below the job rate.
- Position relative to job rate should be maintained for good performers, that is the introduction of the new compensation structure should not exacerbate the gap between salary and job rate.

We believe that the new salary structure should be adopted in 1998, with the variable pay component to be implemented over time. Advantages of this way of proceeding are:
- *immediate adoption would send a clear message to the EX and DM communities and*
- *gradual implementation would ensure a fiscally responsible and equitable approach.*

- Movement to job rate should basically occur within three years of introducing the new structure, providing performance is fully satisfactory. Progress could be faster for outstanding performers and slower for those less satisfactory.
- The new performance management programme should be designed and appropriate training provided to all managers before launching the 'at-risk' pay component.
- The new 'at-risk' system should be introduced gradually, to be fully implemented by fiscal year 2000-01, following two years of access to 50 per cent of the maximum potential.
- Movement to job rate and phase-in of the 'at-risk' compensation which is in addition to base salary will be accommodated by setting a maximum increase on the overall cash compensation budget. This will ensure good fiscal discipline.

This implementation would be as follows:

Fiscal 1997-1998

Using the old system of performance pay, make payments under the old rules and set the funds aside in the payroll budget. Attempt to move fully satisfactory performers to 90 per cent of the job rate to the extent possible within the allocated budget.

Fiscal 1998-1999

Adopt the new salary structure and maintain the position of employees relative to the job rate. Where warranted, move fully satisfactory performers towards the job rate and be prepared to make lump sum payments above the job rate as a transition between the old performance pay system and the new pay 'at risk' programme.

Fiscal 1999-2000

Continue to move those who perform fully satisfactorily towards the job rate. Introduce the new performance management programme effective April 1, 1999 and establish objectives for 'at-risk' pay. Make payouts at 50 per cent of potential at the end of May 2000.

Fiscal 2000-2001

Continue movement to the job rate for those who are below it and who perform fully satisfactorily, and expand the payouts under the new performance pay scheme to 100 per cent of potential.

April, 2001

By this time, full integrity should be restored to the salary structure, i.e., the vast majority of managers should be at their proper position within the salary structure as merited by their performance.

Assuming that the period from the time of publishing this report to 2001 will continue with low inflation, it will in all likelihood be appropriate at this time to revisit the underlying salary structure.

By 2001, full integrity should be restored to the salary structure, i.e., the vast majority of managers should be at their proper position within the salary structure as merited by their performance.

Other Steps for Restoring Integrity

Acting Pay

We recommend that acting pay be introduced immediately for federal executives in the EX1 to EX3 categories who temporarily take on a more senior position. Acting pay would automatically apply after a person has been in such a position for three months, and it should involve a minimum five per cent increase. An acting assignment should extend beyond 12 months only with the approval of officials of Treasury Board of Canada, Secretariat.

Job Evaluation

All outdated executive job evaluations need to be completed by July 1, 1998, with priority given to reviewing outstanding EX1 positions, which anchor the compensation strategy.

The Committee also believes that a strong argument exists to create a new, very senior level of deputy minister. It is our judgment that certain DM3 jobs are clearly at a higher level of responsibility than others but this needs to be confirmed by objective analysis. We recommend that the Privy Council Office conduct an evaluation of a significant and relevant sample of the two types of deputy minister positions, operational and policy. This project should also include the most senior deputy minister positions and should provide comparison with outside counterparts.

Finally, as part of the development of a revitalized human resources strategy in support of the new vision for the Public Service, we recommend that the process for evaluation of senior level positions be reviewed. The objective would be to determine whether the current method is optimal or whether it would be preferable to select a different approach.

Performance Management

In parallel with the work to develop a new scheme of variable pay, special programmes should be developed to assist in the two vital components of implementing the variable compensation plan — target setting and performance assessment. This recommendation is critical if the desired cultural change is to be effected and the scheme successfully implemented.

The existing performance management process has received a substantial amount of criticism. It is perceived to be subjective and inequitable and restricted by arbitrary quotas regarding the number of higher level ratings. A new performance management programme will require the use of clear objectives and accountabilities that contribute to achieving an organization's specific priorities and goals as articulated in its business plan, and to advancing the corporate goals of the Public Service. Measurements must clearly establish an individual's level of performance against agreed targets.

The Treasury Board of Canada, Secretariat would outline key elements of the performance management framework. Departments would be responsible for annually preparing plans that describe how they would administer their performance management programme, including the criteria for payouts under the variable pay plan. These plans would be reviewed by the Treasury Board.

The Privy Council Office should consider improvements to the performance management framework for deputy ministers, and should consolidate the necessary central review mechanisms to ensure equity and consistency of treatment.

Flexible Benefits

With respect to fringe benefits, consistent with our belief that the leadership community should be treated as distinct, we recommend that a study of flexible benefits be undertaken. This study would review the feasibility of adopting a 'cafeteria' style approach to non-cash portions of the compensation package for executives, deputy ministers and GIC appointees. Typically, the cost to the employer of such flexibility is not great, whereas the value to the employee is significant.

In parallel with the work to develop a new scheme of variable pay, special programmes should be developed to assist in the two vital components of implementing the variable compensation plan — target setting and performance assessment.

B. Other GIC Appointees

Compensation Principles

Unless dealt with specifically in this section, the principles referred to in the previous section apply broadly to other GIC appointees. There are, nonetheless, some specific issues that are different.

Heads of Crown Corporations

There are material differences in principle that should apply to many of the Crown corporation CEOs given the unique situation of their corporations. The Committee therefore recommends that the Privy Council Office undertake a full review of how CEO compensation structures are established and actual compensation is managed. This review would consider the scope and responsibilities of the positions and should address compensation relativities and policies within each corporation. This study should also cover compensation practices in the economic sector the corporation operates in and the relative balance between the public sector and commercial nature of the corporation. The Advisory Committee would review these findings and then make recommendations as to appropriate remuneration structures and policies, including performance measurement and related 'at-risk' compensation.

The Committee therefore recommends that the Privy Council Office undertake a full review of how CEO compensation structures are established and actual compensation is managed.

Regulatory Agencies and Administrative Tribunals

'At risk' compensation is judged to be inappropriate for the members of these organizations. Therefore the job rates would constitute the maximum remuneration available for this group of GIC appointees.

Salary Structure

The compensation structures for Governor-in-Council appointees whose job responsibilities are comparable to executives and deputy ministers should parallel these groups. For the lower GIC levels (GIC1 to GIC5), we recommend that the new job rates be based on the job rate adjustment proposed for the EX1 level.

On this basis, we recommend the following salary structure:

GOVERNOR-IN-COUNCIL GROUP JOB RATES

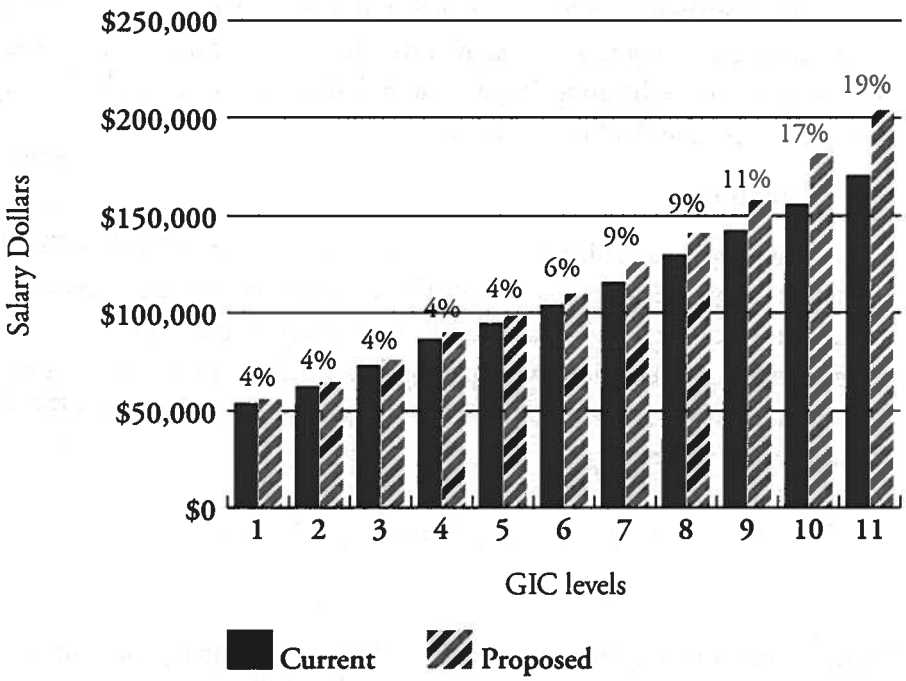


FIG. 6. PROPOSED SALARY STRUCTURE – GIC APPOINTEES

*The percentages above the columns represent the increases in the proposed job rates compared to the current.

Compensation "At Risk"

The new scheme of 'at risk' compensation described earlier would make sense for Governor-in-Council appointees who have managerial responsibilities. The Committee recommends therefore that work be initiated to develop the necessary supporting elements for an effective performance management system for heads of agencies, heads of advisory councils and appointees other than members in regulatory agencies or in administrative tribunals. The maximum variable pay for this group should be up to 10 per cent for levels GIC1 to GIC6 inclusively and up to 15 per cent for higher GIC levels.

Creating a new vision for the Public Service and ensuring an appropriate total compensation policy are important precursors to the challenge of Public Service renewal.

Implementation

Implementation would follow the same steps used for the EX and DM communities. The salary scales for heads of major Crown corporations would be increased by the same percentage as DM2s pending further study by the Committee of the comprehensive compensation review proposed earlier. As these corporation heads are presently equal to or above the DM2 level, the appropriate future adjustment would likely be higher.

3. The Quality of the Public Service Longer Term

Creating a new vision for the Public Service and ensuring an appropriate total compensation policy are important precursors to the challenge of Public Service renewal. However, additional actions are required if the quality of our Public Service leadership is to be maintained and strengthened. We recommend, as a start, giving one person clear responsibility for corporately managing the most senior executives, i.e., EX4s and EX5s. An analysis needs to be done of succession needs over the next decade, including DMs. Then, a programme of training and development must be put in place, supplemented if necessary with a programme of outside hiring, to ensure the availability of suitably experienced candidates for advancement. It is also important to establish a corporate database with information on executives' experience, skills and competencies, and to review the executive appointment process.

The *La Relève* programmes for personal development need to be supported, expanded and fully integrated into the human resource management process. Also, while self-identification is a very important component, it must be supplemented by a more proactive role of management in the identification of high potential managers as part of overall performance evaluation; this is in keeping with management's responsibility for managing its human resources. This, together with personal development, should be institutionalized into the performance evaluation system.

The demographics of today's federal Public Service suggest an immense turnover during the first decade of the new millennium. While this provides an opportunity to 'manage' the resource base, it will, without doubt, create an experience deficit. This needs to be analyzed so that, with the new vision helping to define the required skills and competencies, the government can identify critical hiring needs – both at the entry and mid-career levels. We view this as a necessary investment in the future excellence of the Public Service.

Summary

To summarize, then, our Committee believes that while the financial deficit has been the main challenge of the past decade, addressing the potential human resource deficit in the Public Service is a major challenge of the next decade. We propose dealing with this by:

(1) creating a new vision and Public Service culture;

(2) revising the salary structure;

(3) introducing a new concept of pay 'at risk' which is soundly based in a new performance management culture; and

(4) reviewing human resource needs over the next decade with a view to upgrading training and development and identifying hiring needs.

Furthermore, all of our recommendations need to be integrated into *La Relève*, with proper priorities and accountabilities agreed upon.

Our Committee views our recommendations as an essential investment in the future excellence of the federal Public Service. We believe that there will be a tremendous cost if no action is taken — a cost that will have a negative impact on Canada and Canadians. On the other hand, the opportunity exists to build a strong base for a highly competitive Canada in the next millennium.

All of our recommendations need to be integrated into La Relève, *with proper priorities and accountabilities agreed upon.*

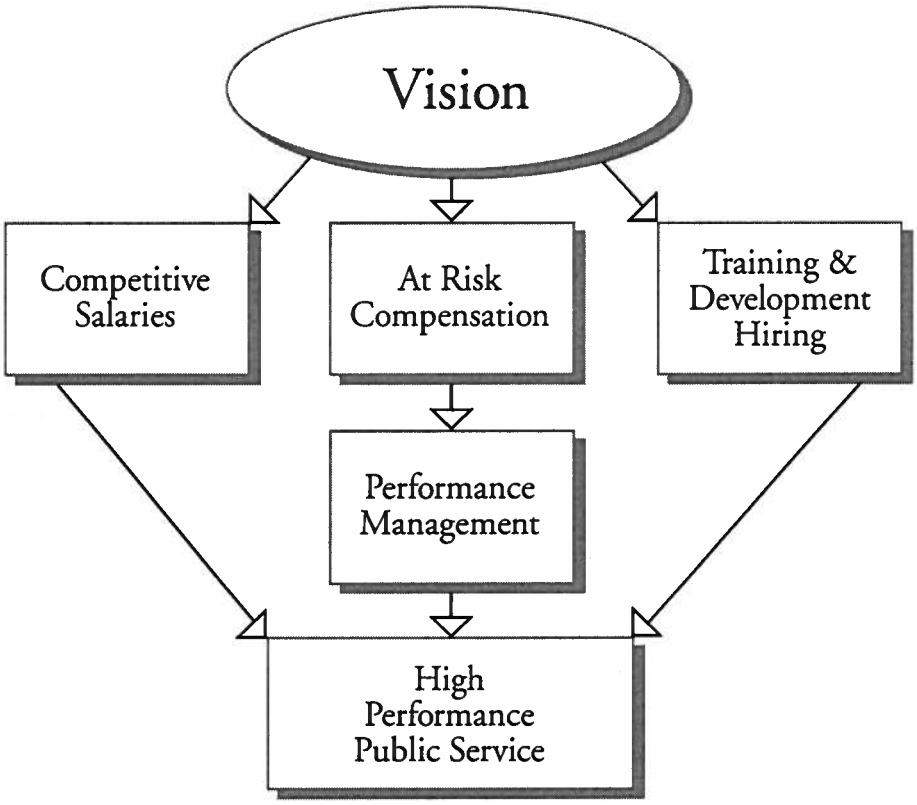


FIG. 7. MODEL OF COMMITTEE'S RECOMMENDATIONS

Appendices

Appendix A

Committee Members

Lawrence F. Strong, B.Sc. – Chair
President and Chief Executive Officer, Unilever Canada Limited

Director, UL Canada Inc., and Unilever Canda. Past President and COO, Unilever Canada. Past Vice-President, Finance, Unilever Canada. Past President, Monarch Fine Foods and Chesebrough-Ponds (Canada). Past Chair, Food and Consumer Products Manufacturers of Canada. Trustee, Grocery Industry Foundation ... Together. Trustee, Electronic Commerce Council of Canada. Chair, Public Policy Forum.

Jacques Bougie, O.C., LL.L.
President and Chief Executive Officer, Alcan Aluminium Ltd.

Past President and Chief Operating Officer, Alcan Aluminium Ltd. Past President, Alcan Enterprises (Canada and U.S.). Chairman of the Canada-Japan Business Committee. Director of Bell Canada, Royal Bank of Canada, Asia Pacific Foundation, Business Council on National Issues and the Conference Board of Canada.

John L. Fryer, C.M., B.Sc.(Econ.), M.A.
President Emeritus, National Union of Public and General Employees (NUPGE)

Senior Partner, Negotiated Solutions Inc., Victoria, B.C., an international consulting firm. Visiting Professor, School of Public Administration, University of Victoria.

Marilyn H. Knox, B.Sc., RD
Senior Vice-President, Nutrition and Corporate Affairs, Nestlé Canada Inc.

Past Deputy Minister, Tourism and Recreation, Government of Ontario. Past Assistant Deputy Minister, Ministry of Agriculture and Food, Government of Ontario. Past Executive Director, Ontario Premier's Council on Health Strategy. Past Vice-President, Grocery Products Manufacturers of Canada. Former consultant, Health Protection Branch, Health and Welfare Canada.

Gaétan Lussier, O.C., B.Sc.(Agr.), M.Sc., D.Sc.
President and Chief Executive Officer, Culinar Inc.

Past Assistant Deputy Minister and Deputy Minister, Quebec Ministry of Agriculture. Past Deputy Minister of Agriculture Canada. Past Deputy Minister and Chairman, Employment and Immigration Canada. Past President, Les Boulangeries Weston Québec Inc.

Judith Maxwell, C.M., B.Com., D.Com.
President, Canadian Policy Research Networks

Past Director, Policy Studies, C.D. Howe Institute. Former consultant, Esso Europe Inc. Former consultant, Economics, Coopers & Lybrand. Past Chairman, Economic Council of Canada. Past Associate Director, School of Policy Studies, Queen's University. Past Executive Director, Queen's-University of Ottawa Economic Projects. Director, Bank of Canada and Mutual Life Assurance of Canada.

Courtney Pratt, B.A.
Chairman and Director, Noranda Inc.

Past Senior Vice-President, Human Resources and Administration, Royal Trust Company. Chairman and Director, Noranda Forest Inc. Director, The Consumers' Gas Company Ltd., The Empire Company, Falconbridge Limited, and Norcen Energy Resources Limited. Past Executive Vice-President and past President, Noranda Inc. Member, Advisory Group on Executive Compensation in the Public Service (Burns Committee). Member, Ontario Advisory Committee on Deputy Minister and Senior Management Compensation.

Appendix B

Committee Mandate

To provide independent advice and recommendations to the President of the Treasury Board concerning executives, deputy ministers and other Governor-in-Council appointees of the federal Public Service and public sector on:

- developing a long-term strategy for the senior levels of the Public Service that will support the human resource management needs of the next decade,
- compensation strategies and principles, and
- overall management matters comprising among other things human resource policies and programmes, terms and conditions of employment, classification and compensation issues including rates of pay, rewards and recognition.

To present recommendations in a report to the President of the Treasury Board. The report will be made public by the President of the Treasury Board.

Appendix C

Glossary of Terms

Base salary: The portion of total cash compensation that is not 'at risk'.

Broader Public Sector or OP/NP (Other Public/Not for Profit Organizations): This refers to the sector of the Canadian economy that includes schools, universities, municipalities, utilities and non-profit organizations such as the Canadian Cancer Society.

Burns Committee: An external Advisory Group on Executive Compensation, created in 1968 to advise the Prime Minister on compensation and related matters. The committee is chaired by Mr. James Burns, Deputy Chairman, Power Corporation of Canada.

'During good behaviour appointment': An appointment that may be terminated by the government only for cause (e.g., for reasons such as misconduct or incapacity).

'During pleasure appointment': An appointment that may be terminated at the discretion of the government.

Governor-in-Council or GIC: GIC appointees are persons appointed by the Governor General on the advice of Cabinet. Governor-in-Council appointees include deputy ministers, associate deputy ministers, chief executive officers of Crown corporations, heads of agencies and heads and members of administrative tribunals and regulatory agencies.

Hay methodology: A point factor job evaluation system that evaluates jobs with respect to "know-how", "problem-solving" and "accountability."

Increments: A fixed annual increase to base salary that moves the salary by steps up to the maximum rate of pay established for the range.

Job rate: The maximum salary an organization is prepared to pay for satisfactory performance by a fully trained incumbent.

La Relève: An initiative the Clerk of the Privy Council launched in concert with the deputy minister community, in January 1997, that aims to renew and revitalize the Public Service. The goal of *La Relève* is to create a modern and vibrant organization where people are valued, recognized, given opportunities for self-development and treated in accordance with the core values of the Public Service.

Median: The median is the value found in the middle of a group of values that have been ranked from lowest to highest. For example, of the group '2,4,7,10,12,' 7 is the median. The median is often used in salary surveys to measure the middle of the market.

Performance management: A comprehensive approach to improving performance that includes defining expectations and accountabilities, setting performance measures, and assessing results. Variable pay may be a feature of such a programme.

Perquisites: Additional elements of a compensation package provided to selected employees on the basis of status or income level.

Salary compression: This exists when there is an insignificant difference between the salary of a subordinate level and that of the superior level. A difference of less than 10 per cent between the salary maximums can create compression problems.

Salary freeze: As a result of the 1991 *Public Sector Compensation Act,* employees of the federal Public Service for a period of time received no increments, performance pay or increases to base salaries.

Salary inversion: This exists when the salary of an employee at a lower level is higher than that of the supervisor (even if the difference is only a dollar).

Salary minimum: The lowest rate of a salary range.

Total compensation: The total dollar value of the combined elements of a compensation package including base salary, variable pay, benefits (e.g., pension, medical coverage) and perquisites.

Variable pay: The portion of an employee's salary that is dependent upon rated achievements over a fixed period of time. A portion of the pay is said to be 'at risk' or re-earnable.

Appendix D

Limitations on Performance Pay, 1981-96

1981	When the Management Category (now called the Executive Group) was created in 1981, a new performance pay plan was introduced. The new plan eliminated the top 15 per cent of the base salary ranges and converted that portion of potential cash income to a lump sum that could be earned only by those who were at their range maximum and had superior or outstanding performance.
1982-83	The *Public Sector Compensation Restraint Act* suspended performance pay for two years.
1984	A modified application of performance pay was used that limited the overall payroll increase to four per cent, which included a 3.5 per cent range increase for performance assessed as fully satisfactory or better.
1985-90	Performance pay was applied with only minor modifications to the original plan design.
April 1991	Performance pay was applied but departmental budgets were limited to the 1990 per capita of 4.75 per cent instead of the 5 per cent budget provided in the pay plan design.
1992-93	Performance pay was suspended by government policy decision.
1994-96	The performance pay suspension was extended for an additional two years by the *Budget Implementation Act*, 1994.
July 1996	The Treasury Board reintroduced performance pay but modified it to limit base salary increases to 2.5 per cent, deferred to January 1, 1997. Budgets for performance pay were five per cent, in accordance with the pay plan design.

Appendix E

Watson Wyatt

Executive Retention Issues in the Federal Public Service

Background

During the summer of 1996, Watson Wyatt undertook a qualitative analysis of what a number of key executives believed to be most critical to their retention by the Public Service. The sample consisted of twenty current and former executives.

General Impressions

- A set of broadly shared views among the participants indicated that a good number were ready to leave the Public Service for the right offer in the near future or within the next few years, if current trends continue unabated. Watson Wyatt concluded that, if the executive group as a whole shared these perceptions, the current and future leadership of the Public Service could be at risk.
- Compensation was seen to be very important to the participants. Although it is only one element, it becomes increasingly important as other elements such as confidence in leadership, sound corporate management and the intangible rewards of public service, begin to weaken.
- The participants felt that the government would have room to restore some degree of competitiveness to executive compensation with the lifting of restraint.
- It was acknowledged that the freedom to change policy may be some way off, but the participants felt that greater fairness could be achieved within the existing system.
- An holistic, corporate approach to the management of the executive group was also mentioned by participants. This corporate resource concept was described as the central agencies working in an integrated way as the comprehensive centre of the Public Service, in partnership with departments, to open and nurture a constructive career-long dialogue with executives.

Appendix F

PUBLIC MANAGEMENT RESEARCH CENTRE

FOCUS GROUP CONSULTATIONS EXAMINING ISSUES RELATED TO ORGANIZATIONAL RETENTION AND COMPENSATION

BACKGROUND

The Public Management Research Centre completed a series of focus groups in the National Capital Region, Toronto, Vancouver, Montreal and Halifax. During these sessions, 116 current and 23 past Public Service executives discussed opinions concerning their work environment, compensation and future plans. The most common and most strongly expressed issues are highlighted below. (It should be noted that the general thrust of comments and perceptions echoes the views expressed during the 'Watson Wyatt' survey of 20 executives which took place a year earlier, in the summer of 1996.)

ISSUES

Compensation

- Salary has never been viewed as competitive with the private sector. In the past, however, the relative security of a Public Service career was viewed as an 'offset'. The salary gap is now far wider, and there is no longer a 'security' offset.
- Executives view the current performance pay process as subjective, inconsistent, inequitable, and artificially constrained by 'quotas'. In addition, they consider the amount of performance pay awarded to be inadequate for recognising and compensating high performance.
- The perceived inflexibility of the Public Service pension plan is considered to restrict mobility, and further, to serve as a disincentive in attracting new employees.

- Executives should be compensated when required to perform the duties of higher level positions for extended periods of time.
- Executives frequently cited the requirement to work excessive hours over extended periods without compensation or "time off" as an irritant.
- Restrictions on travelling "business class"; not being allowed to retain "travel points" for personal use; being required to travel on personal time and to take advantage of lower fares by extending absences over weekends were identified as significant irritants.

Executives also identified a requirement for improvements in the following areas:

- Greater support for the Public Service from the political level — a public affirmation of the quality of the Public Service, and its contribution to Canadian society.
- Recognition of the need for executives to balance work and personal lives.
- Management of executives as a corporate resource — reaffirmation of career possibilities.
- Mobility: greater opportunities within and external to the federal Public Service.
- Greater clarity and vision from leaders regarding the future role of the Public Service and a need to "rebuild" the trust and value system of Public Service employees.
- More flexibility and fewer administrative restrictions on managing.
- More tolerance for risk taking and recognition of the need for taking risks when implementing change and innovation.
- Recognition of the value of the work of executives in the regions.

Appendix G

Public Management Research Centre

Executive Compensation and Retention: Perspectives from the Private Sector

Background

The Public Management Research Centre undertook a series of round table discussions with CEOs and vice presidents of human resources. The purpose was to discuss the problems of senior level retention and compensation in the federal Public Service, and the perceived tolerance of the business community for a number of possible options.

Participants were unanimous in the belief that a highly effective federal Public Service is critical to Canada's competitiveness. They expressed a growing concern regarding the quality of the federal Public Service and its continued ability to attract and retain a competent and challenged workforce.

General Observations from Round Tables

- Politicians must be willing and able to champion Public Service renewal, and assert the value of the Public Service.
- Professional pride must be re-instilled, and an environment created that would allow senior management personnel to feel valued, challenged and empowered.
- The traditional employer-employee contract has been broken, and new ways of compensating and rewarding executives must be developed.
- The federal government must offer challenging job opportunities, relevant skill development, and rewards based on performance.
- Major changes are required to the overall human resource management framework for senior Public Service managers.

- The human resource function must become an integral part of the senior management team and be strategically linked to the business planning process.
- Participants acknowledged the federal Public Service's inability to adopt or adapt private sector, business-like solutions, and the need to balance pressures to reduce government expenditure against the need to pay people what they are worth.
- Participants recommended that the Advisory Committee's first task be to define the problems associated with senior level compensation, and to substantiate the need for change.
- Discussions also highlighted the need to confront the issue of demographics, and the need for succession planning.
- A need for leadership and vision on the part of politicians was emphasized, and a strong conviction that now is the time to act — leadership must be shown, and results must be demonstrated.

Most Significant Recommendations

- Compensation is not the primary driver, but addressing the salary issues should be the first priority in an overall review of the management, retention and recruitment of executives.
- Compensation and performance pay should be removed from the control of politicians, and disconnected from compensation for unionized employees, or from that of politicians.
- Performance pay should be based on organizational, team and individual objectives, and provide the rewards and recognition essential to motivating individuals and reinforcing desired behaviour.
- The government must implement a management infrastructure to ensure the performance pay system is perceived as legitimate and is used properly.
- Competitiveness is essential; the base salary of executives should be equalized relative to salaries outside the Public Service if the government wants to attract prime recruits.

Notes

TAB 13

Advisory Committee

on Senior Level Retention *and* Compensation

Third Report: December 2000

Prepared for the President of the Treasury Board

Advisory Committee

on Senior Level Retention *and* Compensation

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Third Report of the Advisory Committee on Senior Level Retention and Compensation

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Table of Contents

Appendices

Illustrations

Preface

The Advisory Committee on Senior Level Retention and Compensation was established in 1997 with a three year mandate to provide the Treasury Board President with independent advice about senior-level human resource strategies and policies for the federal Public Service. The Committee's mandate identified three priorities:

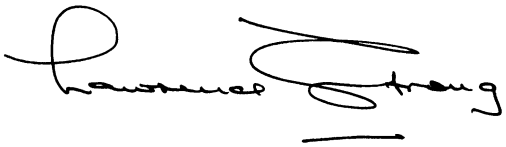
(i) long-term human resource strategies;
(ii) compensation strategies and principles; and
(iii) specific aspects of human resource management, including rates of pay and terms and conditions of employment.

The Committee's First Report raised serious concerns about the federal Public Service of the future and made numerous proposals for dealing with what we judged to be the most pressing issues: the Public Service vision going forward, the need for cultural and human resource renewal, and compensation. The Second Report outlined progress in implementing the earlier recommendations, made specific proposals regarding compensation for the Chief Executive Officers of Crown corporations and reaffirmed the key challenge of Public Service renewal.

While this Third Report makes some further specific proposals on compensation, our major focus is on long-term human resource strategy. It is the Committee's view that the government faces a human capital crisis. As the Public Service talent pool diminishes over the next decade due to the retirement of many long-service public servants, the government must seek to replace them in an increasingly competitive labour market. This demands above all a revitalised workplace which offers challenging work. Ironically, though, the very forces creating the crisis also provide the government with a truly unique opportunity to renew the Public Service, thereby ensuring its continued meaningful contribution to a better quality of life for all Canadians. Achieving this renewal will require some bold actions.

Since the mandate of this Committee concludes with this report, we have one final comment about the possible future role of a similar committee. At the very least, we believe that an independent group should be established for a specific term to make annual recommendations on compensation. This removes from public servants the potential conflict of interest associated with making recommendations that affect their own pay. For simplicity, we have made the assumption of a future committee when writing this report.

Yours sincerely,



Lawrence F. Strong

Long-Term Human Resource Strategy

The Process for Developing Human Resource Strategy

Arguably, the most challenging aspect of the Advisory Committee's mandate has been to make recommendations with respect to the long-term human resource strategy for the senior level Public Service. To do this meaningfully requires a clear understanding of the overall vision of the Public Service as well as its values, the desired mindset of its people, the desired future culture of the organization and the business plans of the government.

This knowledge, supplemented by an understanding of external trends and an objective scrutiny of the Public Service itself, enables the creation of a human resource strategy which is aligned with what the government wants to achieve.

The strategy will establish a human resource vision, set objectives and then identify a series of strategic initiatives designed to meet the objectives and deliver the vision. These initiatives will drive specific implementation plans and the allocation of resources. The suggested process for developing a long-term human resource strategy is shown in the illustration below.

Arguably, the most challenging aspect of the Advisory Committee's mandate has been to make recommendations with respect to the long-term human resource strategy for the senior level Public Service.

The Suggested Process for Developing Human Resource Strategy

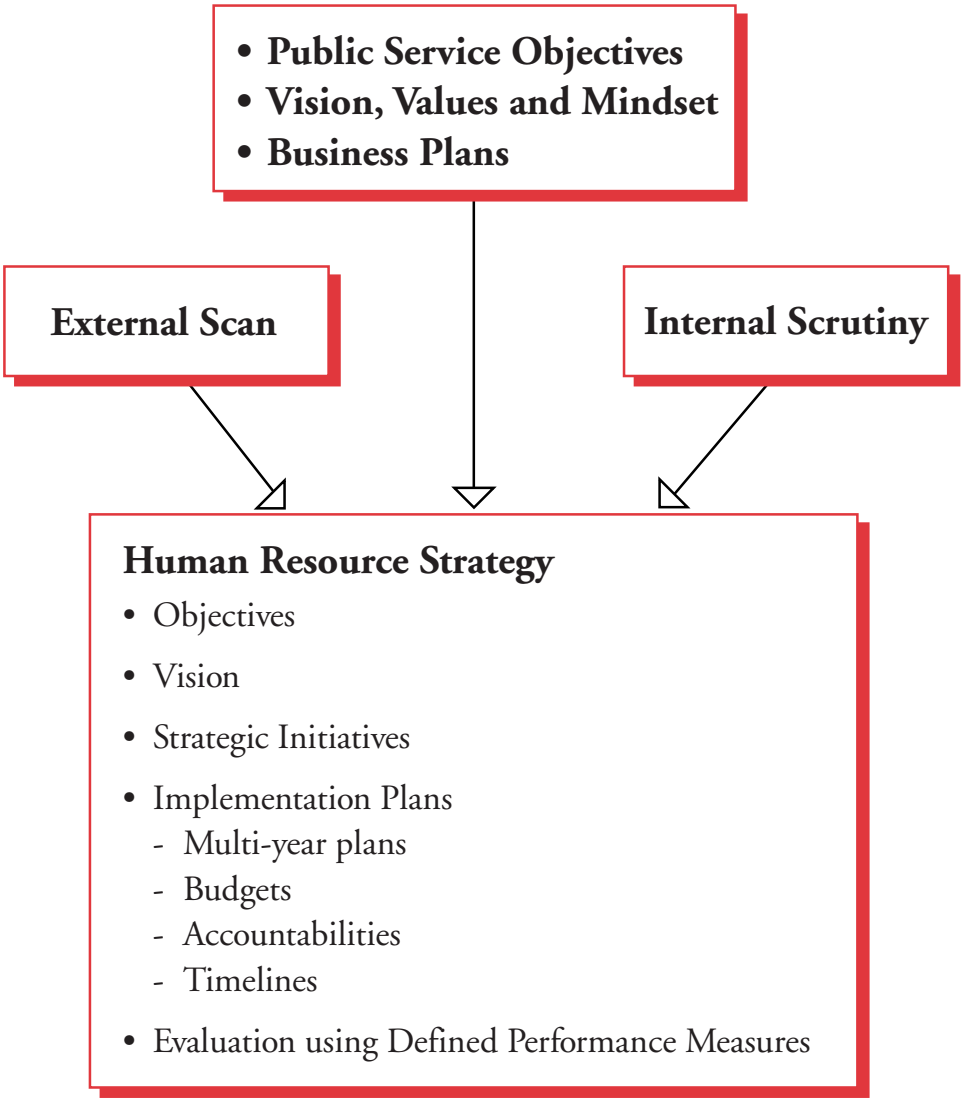


Illustration 1

Public Service Purpose, Values, Vision and Mindset

The Committee in both its First and Second Reports discussed the importance of articulating a vision for the Public Service entering the new millennium. The rationale behind this recommendation was quite simple. Following the fundamental changes in government operation that took place in the 1990s, there was a need to:

(i) ensure clarity and consistency of purpose going forward;

(ii) inspire and re-energize the leadership of the federal Public Service; and

(iii) communicate to outsiders what the federal Public Service is about and to enlist their support.

As noted in the previous section, however, such a statement of vision and values is also a necessary pre-cursor to a long-term human resource strategy.

The Seventh Annual Report to the Prime Minister on the Public Service of Canada by Mel Cappe, Clerk of the Privy Council and Secretary to the Cabinet, provides the most comprehensive view seen by the Committee of where the federal Public Service is going in the future. Using this, coupled with a Treasury Board publication entitled *Results for Canadians – A Management Framework for the Government of Canada*, the Committee has prepared the following summary to serve as a building block for the human resource strategy discussion which follows.

The purpose of the federal Public Service is:

(i) to help ministers under law and the Constitution to serve the public interest;

(ii) to provide high quality, impartial advice to the Government on policy issues; and

(iii) to design and deliver programmes and services to Canadians.

Despite changes in many aspects of how the government does business, the four core values (respect for democracy, professional values, ethical values and people values) have remained unchanged and will continue to serve as the bedrock of the organization into the future.

At the heart of striving to achieve these objectives are a set of four core values embraced by the entire federal Public Service. Despite changes in many aspects of how the government does business, these values have remained unchanged and will continue to serve as the bedrock of the organization into the future.

Respect for democracy recognizes that authority rests with democratically elected officials who are accountable to Parliament, and thereby to the Canadian people. A well-performing public service takes its democratic responsibilities seriously, constantly providing ministers, Parliament and the public with full and accurate information on the results of its work.

Professional values reinforce an unwavering commitment to excellence, merit and, above all, to objective and impartial advice to the Government and service to Canadians.

Ethical values (integrity, trust and honesty) are the personal cornerstone of good governance and democracy. They require public servants to support the common good at all times and recognize the need for openness, transparency and accountability in what they do and how they do it.

People values include courage, decency, responsibility and humanity. In a well-performing workplace they show themselves in respect, civility, fairness and caring. Values-driven organizations support learning and are led through participation, teamwork, openness, communication and a respect for diversity.

These values, which it can be argued, help define Canadian society, influence how the Public Service behaves as well as the actions it takes.

The emerging vision of the Public Service of the future is an exciting one. The following examples of statements have been developed by the Committee from existing government documents and provide an excellent flavour for this:

- be known around the world as the government most connected to its citizens;
- a citizen-focused Public Service concentrating on outcomes and accounting for results;
- a Public Service which promotes value for money in the use of public funds;

- a Public Service which develops innovative policies that contribute to Canada's global competitiveness;
- a Public Service which has the respect of the citizens it serves.

The leadership of the federal Public Service plays a critical role in the delivery of this vision, and has already identified the changes in culture that will be required to achieve the revitalized operating climate necessary for success. These changes in mindset and behaviour are summarized in Illustration 2.

The emerging vision of the Public Service of the future is an exciting one. The leadership of the federal Public Service plays a critical role in the delivery of this vision, and has already identified the changes in culture that will be required to achieve the revitalized operating climate necessary for success.

Changing Public Service Mindset*

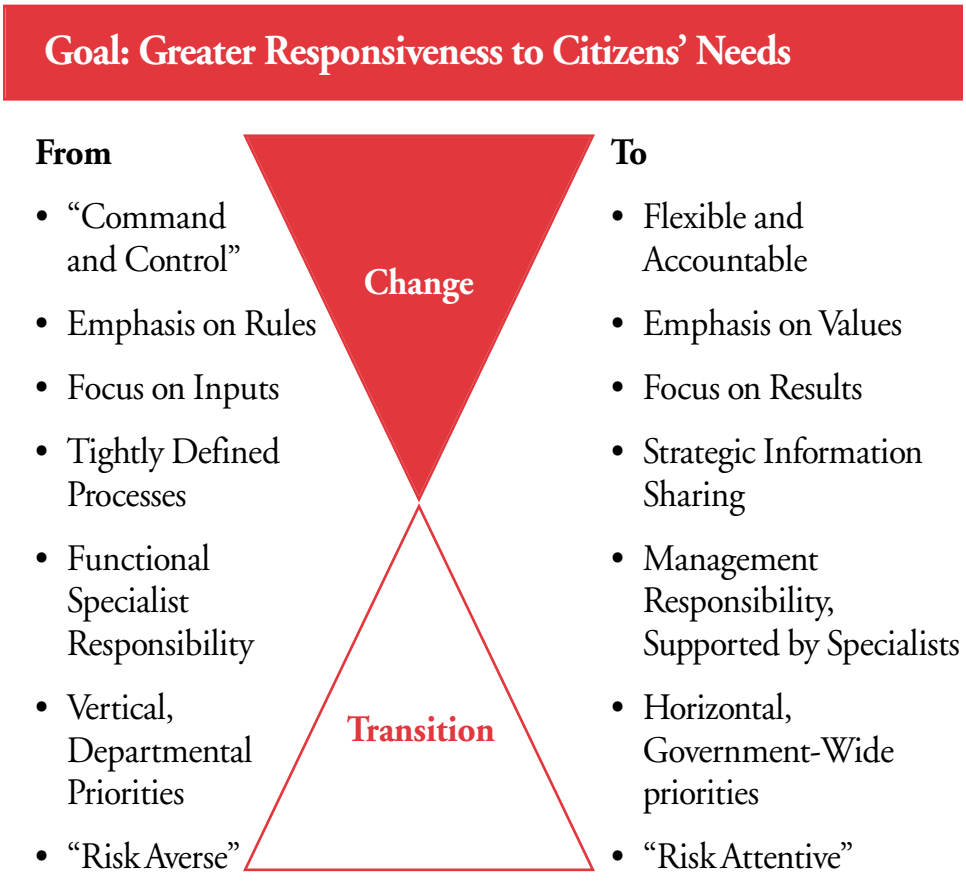


Illustration 2

* Source: Extracted from a presentation made to the Committee by the Public Service Commission.

External Scan

As noted earlier, human resource strategy must reflect not just the business plans of the organization but also the external realities it faces. These are discussed to some degree in the sections which follow but there is one influence which the Committee believes has particular relevance to all aspects of future strategy.

The explosion in technology and the new economics of information will impact the federal Public Service significantly over the next decade.

The explosion in technology and the new economics of information will impact the federal Public Service significantly over the next decade. Specifically:

- they are stimulating, and assisting in, the development of 'electronic government' (e-government);
- traditional concepts of time and distance are collapsing; and
- as connectivity increases, there will be an ever-widening availability of detailed information.

Hierarchies will flatten and decision making will be pushed down lower than in the past, thanks to the ready availability of information.

One consequence of these trends is that the multi-layer organization operating vertically, with span of control (the number of direct reports) primarily a function of the limitations surrounding information flow, will disappear. Hierarchies will flatten and decision making will be pushed down lower than in the past, thanks to the ready availability of information. Management's role in information sharing and decision making will diminish, while the need for steering and coaching will increase.

Internal Scrutiny

Again, most of the Committee's comments on the current strengths and weaknesses of the Public Service are incorporated into later sections which discuss specific areas of human resource management. There is, however, one which is overarching and we believe of critical importance.

In its First Report, the Committee identified that responsibilities for managing human resources were organized in an unnecessarily complex way, a view shared by the Auditor General in his April 2000 report. (See Chapter 9 of that report). According to the Auditor General this has led to inefficiency and lack of clear accountability in the current framework for managing human resources.

The Role of Human Resource Strategy in Delivering the Public Service Vision

The Advisory Committee mandate covers a very broad range of senior level public servants. As a consequence, the Committee has segregated this constituency into three:

(i) the deputy minister and executive community;

(ii) CEOs of Crown corporations; and

(iii) other Governor in Council (GIC) appointees.

The lack of homogeneity amongst this total group, coupled with an incredibly complex framework for managing human resources, makes it very challenging to formulate an integrated and coherent human resource strategy. Thus, this Report focuses primarily on human resource strategy for the executive and deputy minister community where considerable progress has been made since our First Report. Once this human resource strategy is complete, its relevance beyond compensation to the other two groups can be established. In the case of the Crown corporations, this may be restricted to sharing of best practices, since each Crown presumably has in place its own human resource strategy. In the case of the other GIC appointees, it may well be possible to adapt some of the initiatives, although we are once again dealing with many independent organizations – commissions and tribunals – each of which has different circumstances and needs, and will likely need to be treated separately.

This Report focuses primarily on human resource strategy for the executive and deputy minister community where considerable progress has been made since our First Report.

The Committee believes that the role of human resources is best described in such statements as:

- helping the federal Public Service meet its goals;
- ensuring the right calibre of leadership to achieve the Public Service vision; and
- improving the organizational effectiveness of the Public Service through people.

What is critical is that these statements are results oriented rather than activity focussed. The Committee believes that human resources should be integrated into the implementation of the government's mainstream business plans to help achieve the desired results. In the absence of a focus on results, there is the potential for some human resource activities to become ends in themselves.

The Committee believes that human resources should be integrated into the implementation of the government's mainstream business plans to help achieve the desired results.

The Clerk of the Privy Council and Secretary to the Cabinet is also the Head of the Public Service and once again it is the Clerk's Seventh Annual Report that has identified a number of the human resource goals, if the Public Service is to achieve its objectives in the new millennium. These include:

- creating a workforce fully representative of the population it serves;
- becoming a learning organization focussed on continuous improvement;
- ensuring decision making authority is located at the right level to achieve results;
- attracting and retaining Canada's best and brightest minds to ensure strengthened policy capacity;
- becoming an employer of choice;
- removing unnecessary bureaucracy from work processes with a focus on outcomes and accounting for results; and
- creating a culture which is innovative and open to new ideas.

The Committee wholeheartedly supports these ambitions and is particularly pleased to note the following paragraph in the Seventh Annual Report:

> *"As Head of the Public Service, it is my responsibility to set out the direction for the future, and my challenge is to motivate and inspire public servants in that direction".*

The federal Public Service, like many other organizations, is operating in a complex, ever changing and uncertain environment.

Recommended Strategic Initiatives

While developing the strategic initiatives must necessarily be done by the current leadership, the Committee, using a mixture of current Public Service initiatives plus its own input, wishes to suggest some areas for inclusion.

The federal Public Service, like many other organizations, is operating in a complex, ever changing and uncertain environment. However, Human Resource's basic responsibilities remain unchanged – planning, staffing, rewarding, developing and retaining the human capital of the organization. Although these

are identified as discrete, there is a high degree of interdependence among these responsibilities. The Committee believes that the future strategy must, at a minimum, set direction for each of these areas. General comments on each follow.

Planning

It is understandable that during the downsizing of the nineties, little attention was paid to workforce planning. However, the Committee sees it as a critical requirement over the next decade. It will require collecting a vast amount of data on the skills and competencies of the current management cadre as well as identifying the skills and competencies which will be required over the next decade. And make no mistake, these will be different from the past. Finally, there is the need to identify the impact of the expected retirements on the experience base.

It is understandable that during the downsizing of the nineties, little attention was paid to workforce planning. However, the Committee sees it as a critical requirement over the next decade.

Done thoroughly, workforce planning can be time consuming, even tedious. And it is all too easy to become embroiled in a debate about definitions. While the core Public Service is not quite at the point of having a system to roll out, there are pockets of best practice that exist today and, with commitment, the necessary tools can be quickly adopted and implemented.

The Committee therefore suggests that the planning initiative needs:

- an agreed definition of future skills and competencies to use throughout the core Public Service;
- a regime for evaluation of all incumbents;
- a Human Resource Information System to ensure that the information can be effectively collected and used; and
- agreed future needs.

The senior level federal Public Service faces a human capital crisis as the demographics of today's managers suggest that retirements alone will create a significant resource gap.

Staffing

The senior level federal Public Service faces a human capital crisis as the demographics of today's managers suggest that retirements alone will create a significant resource gap. By the year 2010, just over 80% of today's executive community will be eligible to retire without actuarial reduction of their pension.

Cumulative Executive Retirement Potential 1999 to 2010

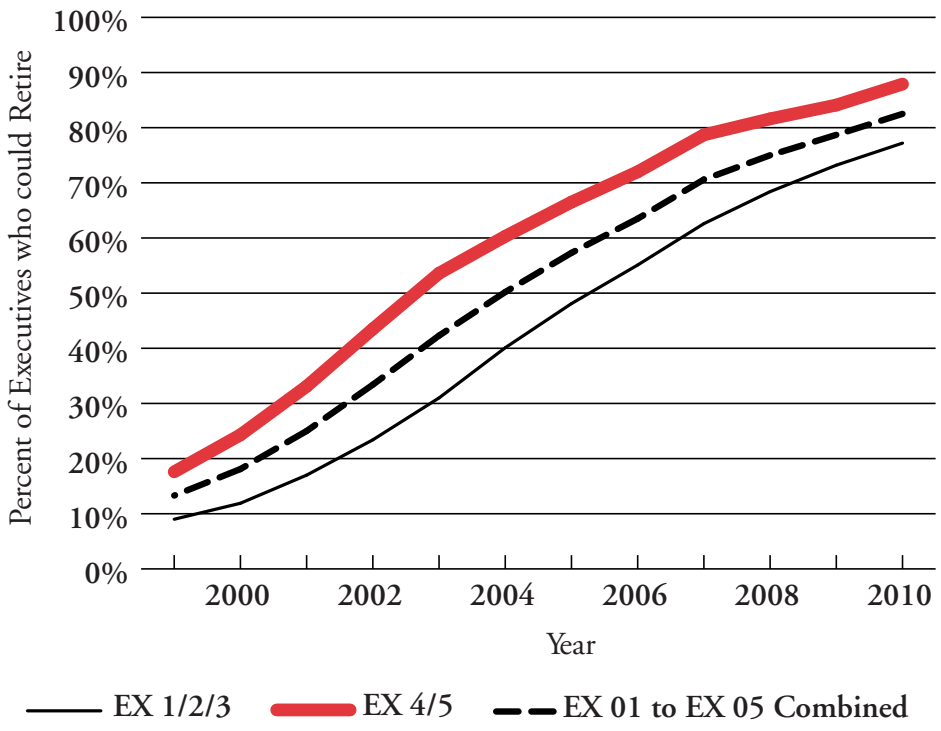
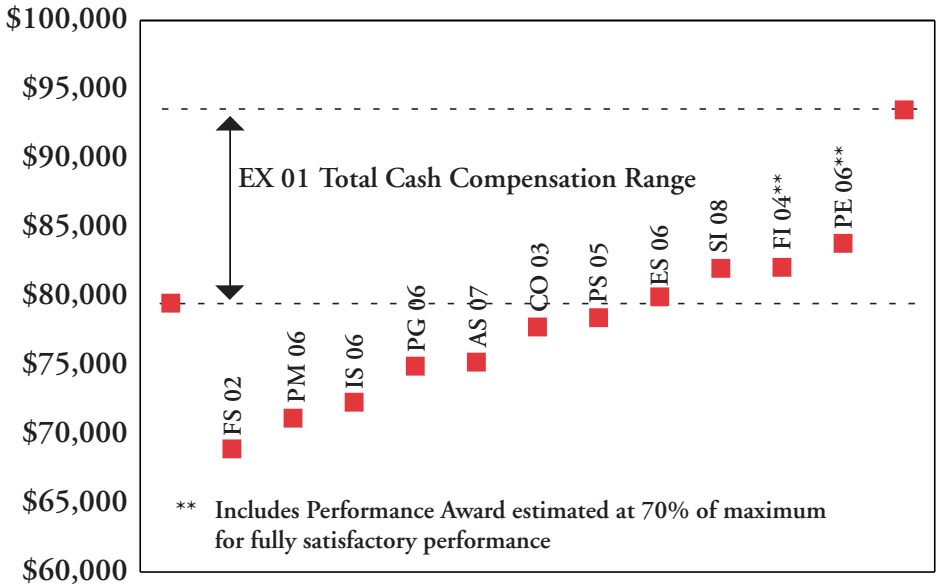


Illustration 3

To aggravate matters, the traditional 'feeder' groups for EX 01 positions have an identical demographic profile. Further, even if that were not so, they have little financial incentive currently to seek promotion. The illustration below shows that

the total cash compensation for several of these feeder groups falls within the current EX 01 range. In addition, some also have access to rewards not available to executives, such as pay for overtime, longer vacation leaves, and bilingualism bonuses. Salary ranges plus at risk pay for the EX 01 level must, we feel, be sufficiently higher than cash compensation of traditional feeder groups to offer an inducement to work towards promotion. This is addressed later in the report under compensation in the context of ensuring internal equity.

Estimated Total Cash Compensation for Feeder Groups versus EX 01



Traditional Feeder Groups to EX 01 Positions – Key to Occupational Groups

AS	Administrative Services	PE	Personnel Administration
CO	Commerce Officer	PG	Purchasing and Supply
ES	Economics, Sociology and Statistics	PM	Program Administration
FI	Financial Management	PS	Psychology
FS	Foreign Service	SI	Social Science
IS	Information Services		

Illustration 4

As the federal Public Service moves to address its resource shortages, it can expect to find itself in a talent war with aggressive private sector and broader public sector competition.

Clearly, given the current demographics of the executive cadre and the traditional feeder groups, there needs to be a major recruitment initiative. However, it is important to recognize that the environment for hiring in the years ahead will be very different from the seventies and eighties when there was a labour surplus. In the emerging knowledge economy, people – talented people – will become an increasingly vital resource. Consequently, as the federal Public Service moves to address its resource shortages, it can expect to find itself in a talent war with aggressive private sector and broader public sector competition.

The Committee again wishes to draw to the government's attention that the most significant under representation amongst the management cadre in purely numerical terms is younger Canadians.

It is no surprise, then, that staffing – recruiting – is one of the three areas in which the Committee of Senior Officials (COSO), a committee of deputy ministers, is currently drawing up plans for the future. In addition to providing the skills and competencies required to meet the goals of the federal Public Service, the Clerk of the Privy Council stresses the importance of ensuring that the work-force is representative of all Canadians and specific reference is made to focussing on women, visible minorities, people with disabilities and aboriginal peoples. Clearly, these initiatives are critical and have been comprehensively reviewed with respect to visible minorities by the Task Force on the Participation of Visible Minorities in the Federal Public Service. (See report entitled *Embracing Change in the Federal Public Service – March 2000*). However, the Committee again wishes to draw to the government's attention that the most significant under-representation amongst the management cadre in purely numerical terms is younger Canadians. This imbalance must also be addressed as part of the strategy.

Age Distribution of Public Service Senior Management vs Canadian Labour Force Senior Management (1996 Census)

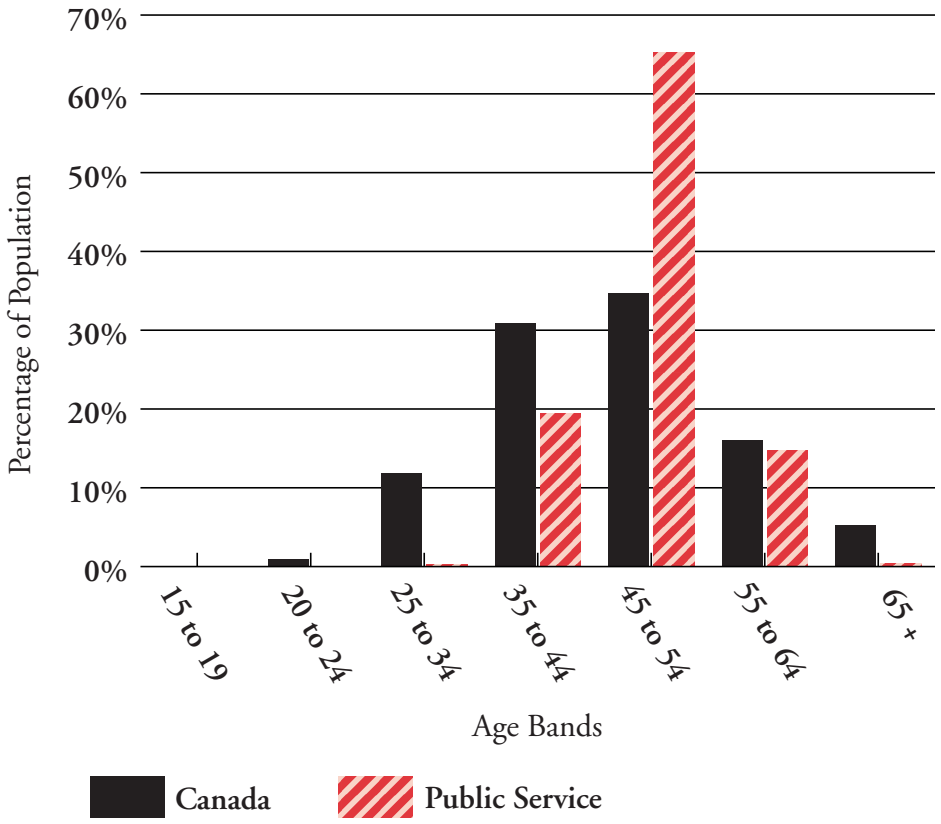


Illustration 5

The Clerk's Seventh Annual Report reiterated that merit will remain central to the Public Service recruitment strategy and that the guardian of merit will remain the Public Service Commission. This is obviously sound. However, the Committee believes that the role of the Commission in staffing operations should be reconsidered. Users consider the existing system complex and inefficient, a view with which the Committee concurs, and there appears to be an inherent conflict between the role of choosing candidates and involvement in the audit and recourse processes. And finally there needs to be a direct link between the authority to choose/hire managers and the accountability for their performance.

There needs to be a direct link between the authority to choose/hire managers and the accountability for their performance.

One of the challenges facing the government is how to become an employer of choice. Interestingly, the Committee does not believe the key issue is about higher pay, although salaries must always be fair and reasonable. Nor is it about job security as part of a massive bureaucracy. It's about challenging work; it's about learning opportunities; it's about the ability to make a difference through their work and it's about Canadians respecting the job done. The government must deliver or people will simply choose to work elsewhere.

Clearly, one of the challenges facing the government is how to become an employer of choice in an environment where competition for talent is increasing and it is here that understanding the attitudes and aspirations of younger Canadians is so critical. Interestingly, the Committee does not believe the key issue is about higher pay, although salaries must always be fair and reasonable. Nor is it about job security as part of a massive bureaucracy. It's about challenging work; it's about learning opportunities; it's about the ability to make a difference through their work and it's about Canadians respecting the job done. Of course, there's nothing new about these thoughts. What is new is that the government must deliver or people will simply choose to work elsewhere. Not only will the next decade be characterized by a shortage of talented managers, but it is estimated that 95% of all professional and management jobs will be posted on the Web. This means that everyone will have easy access to job opportunities and will have detailed information about these jobs. As a consequence, people will be much better informed about their marketability. This will inevitably result in much greater job mobility.

The Committee also believes that the government must become more aggressive at middle and upper-level recruiting into the Public Service. This represents a significant change from the past where promotions have largely been reserved for internal candidates. This change is driven primarily by the need for different skills and competencies than exist in the Public Service today.

In the increasingly complex and rapidly changing environment, the government must access private sector resources more effectively. The Committee therefore recommends that the government find ways to promote two to three year exchanges into the Public Service from the private and broader public sectors.

The Committee's final recommendation in the area of staffing is that a formal policy be established for dealing with poor performers. No matter how many safeguards are built into the recruitment process, there will be managers who fail to meet performance expectations. When taking action in such situations, a clear, fair and overt policy is needed to guide managers and human resource departments.

Rewarding

Compensation, primarily pay and benefits, is at the centre of the rewards strategy. Effective compensation strategy will help the Public Service:

- attract and retain appropriate talent;
- reward superior performers;
- motivate improved performance;
- reinforce core values;
- focus individuals on what they need to deliver.

The Committee's First Report identified key aspects of compensation strategy. First, the total compensation package for the executive and deputy minister cadre should be quite distinct from that offered to unionized employees. Second, this programme needs to support and reward the results and the behaviours necessary for the success of the Public Service. This alignment is critical as the federal government moves to a results oriented management approach. Third, the Committee believes it important to have in place to the greatest extent possible, processes which remove the year-to-year administration of senior level Public Service compensation from the political arena. Establishing clearly defined criteria for assessing market competitiveness and then maintaining appropriate compensation will go a long way to achieving this. Finally, the Committee believes that it will become increasingly important to ensure that there is a meaningful link between results and rewards.

Since compensation strategy is an important part of the Committee's mandate, more detailed recommendations are found in the second Chapter of this report.

Developing

The Committee believes that the development of effective leaders for the future is absolutely critical if the Public Service is to achieve its vision. As a consequence, we are again pleased to see that the Clerk has established a COSO Sub-Committee on learning and development, and that this Committee has completed its First Report in July 2000.

The Committee believes that the development of effective leaders for the future is absolutely critical if the Public Service is to achieve its vision.

Without judging the output from the Sub-Committee, we would make the following observations:

- the principle that managers are responsible for managing their own careers but with proper support from human resources is key;
- meaningful learning and development opportunities represent an important tool for attracting and retaining managers, as well as achieving desired results;
- the expected shortage of talent generally means that management development is mandatory;
- the scale and uniqueness of the Public Service, coupled with its desire for cultural change, reinforces the importance of having leading-edge management development programmes;
- development must focus on the future needs of the knowledge age;
- the goal of creating an organization which looks for best practice, celebrates its successes, and learns from its mistakes is an ambitious one. Whatever the Sub-Committee recommends must be supported by behavioural change at the top of the organization; and
- one of the building blocks of continuous improvement is measurement of outcomes. What to measure depends, of course, on what is important. In the area of human resources, and we suspect elsewhere, such measurement has not always been commonplace. We recommend that COSO agree on and define a common set of measures in human resources. Possible examples are cost per hire, turnover rate, time to fill jobs, days per manager invested in training and development, and so on.

The scale and uniqueness of the Public Service, coupled with its desire for cultural change, reinforces the importance of having leading-edge management development programmes.

Retaining

As the supply of talented people shrinks over the next decade, it is clearly wise to keep those people who are adding value today. As a result, work place well being and retention is the third area being studied by a sub-committee of deputy ministers.

As the supply of talented people shrinks over the next decade, it is clearly wise to keep those people who are adding value today.

Interestingly, there is considerable evidence to suggest that compensation or even opportunity elsewhere are not the major causes of people leaving any organization, although they often tip the scales in that direction. The reasons tend to be problems with one's boss, lack of career or development opportunities, and working conditions. This, in a general sense, was supported by last year's survey of federal public servants which resulted in the establishment of priorities of reducing harassment and discrimination, managing workload, ensuring fairness in the selection process and enhancing career development and learning. The Advisory Committee, looking forward, would add the need for greater flexibility in recognizing the needs of individual managers. We believe that this flexibility will be very important in attracting and retaining young managers.

In addition to these five generic areas of human resource strategy, the Committee recommends including at least two other initiatives, namely:

(i) clarifying accountabilities for human resource management; and

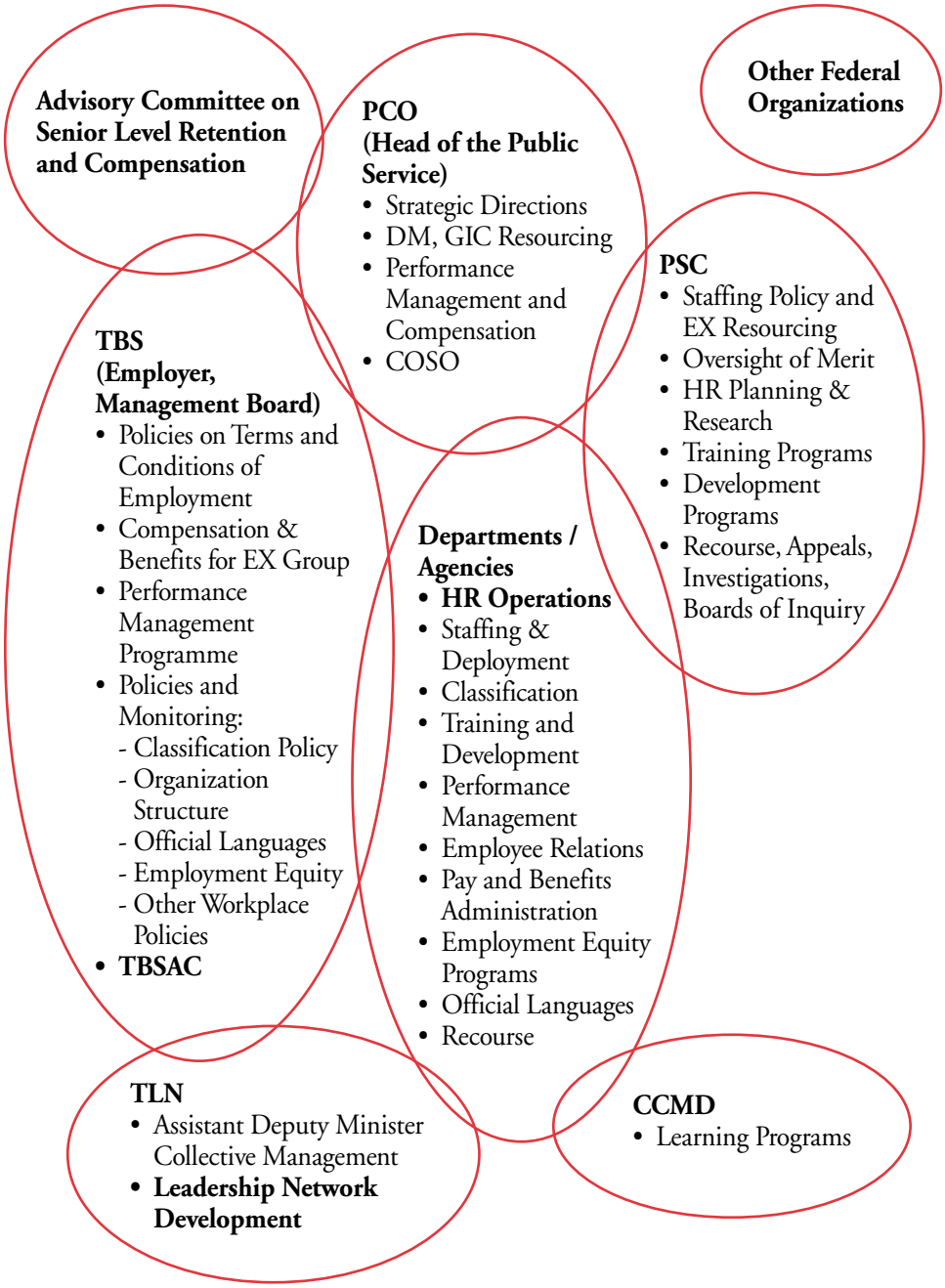
(ii) making it happen.

A discussion of each follows.

Clarifying Accountabilities

In its First Report, the Committee noted that "responsibilities for managing human resources appear to be organized in a way that is unnecessarily complex and administration seems to be overly burdensome. We suspect that one of the reasons behind this lies in the patchwork quilt of historical regulation that impacts human resource management in the public service." If anything, our concerns in this area have grown, as has our understanding of the challenges of making changes. The key players in the human resource management of senior levels form a complex picture.

Key Players in Human Resources Management of Senior Levels (DM, GIC, EX)



TBS: Treasury Board Secretariat

PSC: Public Service Commission

PCO: Privy Council Office

CCMD: Canadian Centre for Management Development

TLN: The Leadership Network

COSO: Committee of Senior Officials

TBSAC: Treasury Board Secretariat Advisory Committee

Illustration 6

To further underline our point, included as Appendix C is an excerpt from the Auditor General's April 2000 Report which provides a more formal review of the framework for all federal public servants.

It is the Committee's view that there is an urgent need for clear accountabilities, matching authorities and a general streamlining of human resource processes if the Public Service is to deliver on its ambitious goals. In this respect, we support the Auditor General's recommendation that the government address the long-standing structural and systemic issues immediately.

However, given that a fundamental review of these issues will inevitably take some time, the Committee also recommends that an interim exercise be undertaken by the government to clarify accountabilities and streamline processes to the greatest extent possible within the context of the current framework.

From a purely pragmatic viewpoint, we are pleased to note that the Head of the federal Public Service, the Clerk of the Privy Council, has assumed the responsibility for development of an overall, integrated human resource strategy for the Public Service. He has sensibly chosen to involve the Treasury Board Secretariat and the Committee of Senior Officials (COSO), and has established three teams to make recommendations in the areas of recruitment, workplace well-being and retention, and learning and development. Compensation strategy is the responsibility of the Treasury Board Secretariat and the Privy Council Office (PCO), and is being developed working primarily through our Committee. Providing everyone is committed to developing a long-term human resource strategy, this structure can work.

Making It Happen

Although the purpose and core values of the Public Service remain unchanged, it is increasingly clear that tomorrow's leaders will behave quite differently from the past. New skills and competencies will be required to become more citizen focused and results oriented. New mindsets will be needed to deliver the exciting vision which is emerging.

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Although the purpose and core values of the Public Service remain unchanged, it is increasingly clear that tomorrow's leaders will behave quite differently from the past. New skills and competencies will be required to become more citizen focused and results oriented. New mindsets will be needed to deliver the exciting vision which is emerging.

Understanding where the Public Service wishes to be in ten years is the vital first step. Making it happen, driving the necessary changes through the organization, is a massive task given both its size and complexity as well as its historical culture. For this reason, the Committee recommends that the Clerk of the Privy Council consider requesting that COSO develop implementation plans to achieve the desired changes in operating climate, mindset and culture. Commitment from the top of the organization as well as "walking the talk" are critical to the success of "making it happen".

The opportunity that exists today is truly unique as the Public Service begins to staff itself with a new generation of managers replacing the many retirees expected over the next decade. New skills and competencies can be added, new flatter structures introduced with minimal threat and disruption and, above all, a new culture created.

Conclusion

Since the Advisory Committee began its work three years ago, considerable progress has been made in formulating an integrated and comprehensive human resource strategy for leading the Public Service into the new millennium. This work must be completed by the government and the new directions clearly agreed. The strategy will then guide the preparation of policies, programmes and implementation plans and will drive questions of resource allocation with respect to human resource management in the senior level federal Public Service. We also recommend that once the strategy is finished, it is widely communicated throughout the Public Service.

The opportunity that exists today is truly unique as the Public Service begins to staff itself with a new generation of managers, replacing the many retirees expected over the next decade. New skills and competencies can be added, new flatter structures introduced with minimal threat and disruption and, above all, a new culture created.

Our Committee has reaffirmed many times our belief in the importance of an effective and efficient Public Service to the well being of all Canadians. Now is the time to invest in the Public Service in terms of its human capital.

Compensation Strategies and Principles

In its Second Report, the Committee identified three discrete populations within the federal Public Service management cadre for purposes of setting compensation. These were:

- *the executive and deputy minister community;*
- *CEOs of Crown corporations: and*
- *other full time Governor in Council appointees.*

Detailed recommendations have been made with respect to cash compensation structures for all three, although the PCO is now leading a review of the remaining GIC positions to test the adequacy of the current structure as well as our proposals. This review will cover approximately 120 different jobs within some 70 organizations (see Appendix D) and will not be complete until early in 2001. The study will include updating the method for evaluating job responsibilities, conducting actual evaluations and then developing an appropriate compensation structure.

In our First Report, the Committee identified that compensation policy needs to be internally equitable, to be responsive to the economic and social environment, and to encourage and reward outstanding performance. Two critical building blocks are therefore:

- the system used to evaluate job responsibilities; and
- the process for external benchmarking.

The following sections make recommendations for addressing each of these.

System for Evaluation of Job Responsibilities

Earlier this year, Treasury Board Secretariat engaged KPMG to make recommendations as to the optimal job evaluation plan for the senior level federal Public Service. A summary of this report is included as Appendix E.

In order to have a basis for comparing plans, KPMG developed through consultation with senior public servants and academics, a list of characteristics and criteria of an ideal job evaluation plan. They also conducted a survey to identify the plans used to evaluate executive positions in other organizations including provincial public sectors, Crown corporations, a select number of private sector organizations in Canada and the public services of the United Kingdom, Australia and the United States.

The Advisory Committee recommends that the current Hay-based position evaluation plan, with the addition of a Working Conditions factor, be used for all senior level federal public servants.

The Advisory Committee recommends that the current Hay-based position evaluation plan, with the addition of a Working Conditions factor, be used for all senior level federal public servants. The reasoning behind this recommendation is as follows:

(i) the current executive group position evaluation plan essentially meets all the criteria established for an ideal plan, except for Working Conditions and up-to-date benchmarks;

(ii) Hay has well-established versions of the plan with a Working Conditions factor measuring physical effort, physical environment, sensory attention and mental stress;

(iii) adopting the Working Conditions factor ensures that the government meets the requirements of the Canadian Human Rights Act;

(iv) there is no other readily available job evaluation system that would do a better job than the Hay Plan;

(v) the benchmark positions can (and should) be updated.

The negative to this recommendation is the work involved in rewriting and evaluating over 4000 positions, especially when it is KPMG's view that it is unlikely to change the classification of the positions significantly. However, including Working Conditions is the right thing to do and the entire exercise,

which can be spread over time, can also be used to update the benchmark positions and to ensure that changes discussed elsewhere in this report are properly incorporated, including clarified accountability for human resource management.

KPMG also proposed that the Treasury Board Secretariat consider the collapse of the executive group into three classification levels. The Committee believes this has merit and should be studied further.

Process for Comparing Compensation Externally

Understanding where senior-level Public Service compensation stands in relation to external benchmarks is critical if the government is to have an appropriate compensation strategy. Over the past two years, the Committee's recommendations have focussed on restoring internal equity, introducing a new concept of " at risk" pay together with a new regime for performance management, and improving the competitiveness of cash compensation.

Understanding where senior-level Public Service compensation stands in relation to external benchmarks is critical if the government is to have an appropriate compensation strategy.

Over the course of the next decade, the competition for talented people will increase and will undoubtedly bring upward pressure on compensation. As a result, commencing in the fall of the year 2000, the Committee recommends:

Over the course of the next decade, the competition for talented people will increase and will undoubtedly bring upward pressure on compensation.

(i) the government survey cash compensation amongst the private sector and the broader public sector annually;

(ii) given our earlier recommendations to adopt the Hay job evaluation plan, one of the sources of compensation data should be Hay although at least one other survey should also be used as a cross-check;

(iii) prior to April 1 of each year following, the salary and "at risk" pay structure be adjusted to maintain competitiveness as defined later;

(iv) every third year and commencing in 2000, one of the surveys be expanded to include total compensation; and

(v) to the greatest extent possible, the scope and methodology of these surveys be consistent from year to year.

This annual review process will cover all three senior level populations i.e. executive and deputy minister cadre, CEOs of Crown corporations and other GIC appointees.

While this approach means that the Public Service is lagging their benchmarks by up to a year, it should ensure that government increases are not fuelling inflation. This fact, coupled with the transparent process for arriving at future adjustments and their routine annual nature, will hopefully depoliticize the process of establishing senior level public servants' pay structures.

It should be noted that this proposal covers structure and not annual budgets. Annual budgets are more complex and are a function of movement within the structure, turnover, adding or subtracting managers and so on.

Ensuring Internal Equity

The adoption of a single system for evaluating the positions of all senior level federal public servants, coupled with its rigorous and timely application, should guarantee internal equity within the management cadre. However, there is another factor which must be considered in setting the compensation of EX 01 managers and CEOs of Crown corporations. It is ensuring that there is an appropriate salary difference between a manager and the employees he or she is managing. This is an issue for EX 01s because pay for their direct reports is set as part of the bargaining process and is quite separate from the recommendations of this Committee. Similarly, as noted in our Second Report, the Crown corporations pursue independent compensation policies for managers below the CEO level.

The Committee believes that there should, in principle, be a discernible difference between the EX 01 pay and that of the various groups of typical direct reports.

Thus, when establishing the pay structure for EX 01s and CEOs of Crowns we must test for compression, i.e. where pay for direct reports is very close, typically within 10%, and inversion, i.e. where a subordinate earns more than his or her boss. In the case of EX 01s, the Committee believes that there should, in principle, be a discernible difference between the EX 01 pay and that of the various groups of typical direct reports. Given that there is a clear difference in level of responsibility, we recommend that, in future, consideration be given to this principle. More discussion of the compression/inversion issue is provided in Chapter Three, which deals with specific compensation issues.

In the case of the CEOs of Crown corporations, a similar comparison is appropriate but should be done in the context of total compensation.

Defining Compensation Competitiveness

As part of establishing a framework for managing compensation, any organization needs to define where it wishes to position itself versus its "competitors" in terms of compensation. At present, executive and deputy minister compensation is defined by setting EX 01 total compensation comparable to an external benchmark and then using internal relativities, defined in terms of job responsibilities, to establish compensation for the higher management levels. This same approach (i.e. setting EX 01 total compensation equal to the median total compensation of a defined benchmark) is recommended going forward, with the external benchmark defined as a representative sample of private sector and broader public sector organizations combined. The Committee believes that such a sample is the best starting point for defining the organizations with which the federal Public Service competes in terms of attracting people. This recommendation also has the advantage that most compensation consultants provide such data routinely and it is widely used.

Given the Committee's earlier recommendation to use the Hay-based position evaluation plan, we also recommend that one of the sources for benchmark data is the Hay All Organizations sample. This sample consists of approximately 250 industrial organizations, some 60 financial organizations and about 50 organizations from the public sector. However, a second source of benchmark data should also be used to check competitive positioning.

It is very important that the government analyse its experience recruiting people and quantify where people go when they leave the Public Service in mid-career. This will be input to test the validity of the assumption about the government's competitors for talent. While this policy gives reasonable competitiveness at the management entry level, there will be a widening compensation gap with the predominantly private sector sample as responsibility grows. This has been discussed elsewhere in the report but, again, serves to underline the significance of the nature of the work and the workplace as important factors in attracting and retaining talent.

It is very important that the government analyse its experience recruiting people and quantify where people go when they leave the Public Service in mid-career. This will be input to test the validity of the assumption about the government's competitors for talent.

The competitive positioning for the CEOs of Crown corporations is less clear since the Committee needed to balance a number of competing factors in setting their structure. Thus, the Group 1 job rate recommended in our Second Report equalled the first quartile cash compensation in the Hay All Organizations sample, with bigger jobs based upon internal relativities. This competitive positioning will be revisited in the light of actual experience in recruiting qualified candidates for these CEO positions and following a review of competitiveness based on total compensation. It is also discussed later in this report.

Compensation policies for the balance of the Governor in Council group may need to be re-examined once the study of this group is complete. If required, recommendations should be made prior to April 2001.

Cash Compensation Structures

Following the Committee's first two reports, revised cash compensation structures are now in place as follows.

Executives and Deputy Ministers: 8 salary job rates plus "at risk" pay ranging from a maximum of 10% to a maximum of 20% to be paid annually based upon results.

CEOs of Crown corporations: 10 salary job rates plus "at risk" pay ranging from a maximum of 10% to a maximum of 25% to be paid annually based upon results (Governor of Bank of Canada excepted).

Other GIC appointees: 11 salary job ranges but often no "at risk" pay as this was judged inappropriate to the quasi-judicial/regulatory nature of many of the positions.

As noted earlier, this third group is being reviewed and there may be changes recommended in 2001.

Along with the introduction of "at risk" pay came the introduction of a new performance management regime, with emphasis on target setting and performance assessment. This is in the process of being implemented and will be an important contributor to the government's emphasis on becoming more results

oriented. Although it is premature to recommend further changes just yet, it is important to signal that changes are to be expected as compensation strategies increasingly focus public servants on delivering key results and demonstrating key behaviours.

Performance Management

An effective process of performance management is critical to any learning organization seeking to improve continuously. First, there is a need to identify executives' skills and competencies in order to inventory them for the Public Service workforce planning and to identify specific training needs or development opportunities. Second, there is a need to evaluate how each manager is performing overall in his/her position usually based upon the most recent 12 months – this impacts on the speed with which salary movement through the job-range takes place. Third, there is the process of setting specific short term objectives and then measuring achievements – this determines the degree of pay-out in the incentive or "at risk" pay.

An effective process of performance management is critical to any learning organization seeking to improve continuously.

Common processes for each of these steps should be used throughout the senior management cadre and every effort should be made to ensure consistent and regular application throughout all departments and regions. The deputy minister community must lead these initiatives.

As the federal Public Service moves to an increased focus on results, these processes will adapt and grow in importance. It is critical that there is a sharper focus on individual accountability. There needs to be an on-going drive to ensure that objectives – whether corporate, team or personal – are clearly expressed, are quantified where feasible, and are mutually agreed between boss and subordinate. The incentive pay component is designed to reward the desired results and behaviours. This link needs to be as transparent as possible and the application of the programme must be equitable across the senior management cadre.

It is critical that there is a sharper focus on individual accountability.

Benefits

The Committee's First Report recommended that a study of flexible benefits be undertaken. The Committee felt that adopting a 'cafeteria' style approach to non-cash portions of the compensation package would reinforce that the leadership group was being treated as distinct. From a strategic human resources viewpoint, this approach also enables employees the flexibility to design programmes that best fit their individual needs. This, in turn, provides the employer – the government – with a maximum return on its benefit dollars.

The Committee has increasingly come to the view that flexible benefits can be a very positive contributor to the government's strategies to attract and retain the best.

A major survey conducted earlier this year by Watson Wyatt has confirmed the desirability of the notion of flexible benefits. While the specific findings are summarized in Appendix F, the Committee has increasingly come to the view that flexible benefits can be a very positive contributor to the government's strategies to attract and retain the best. We believe that the key is to design a programme that will not only meet the needs of today's management cadre but will also be attractive to the managers of the future.

Although the Committee had originally thought of such a change as broadly cost-neutral, it is highly likely that investment in this area will yield considerable value in contributing to recruitment and retention strategies. As such, the Committee is prepared to consider and recommend options which increase cost. We also recommend that the government investigate ways of introducing greater flexibility in the pension area which we had previously excluded from consideration.

Conclusion

The Committee believes that good progress has been made in the area of compensation. Strategies are evolving, principles are well established and the specifics have been addressed in a completely transparent manner.

The Committee believes that good progress has been made in the area of compensation. Strategies are evolving, principles are well established and the specifics have been addressed in a completely transparent manner. However, there are more recommendations in Chapter 3 which we believe are necessary to maintain competitiveness. And then in the next eighteen months, we would expect more structural recommendations primarily dealing with other GIC appointees and Crown corporations.

Specific Human Resource Matters

This section of our Third Report deals with a series of specific recommendations and reports on progress with respect to certain of our previous recommendations. We revisit pay, following an external benchmarking survey completed early this year, recommend more specifically how to move forward with flexible benefits, address the creation of another Deputy Minister level, provide updates on performance management and job evaluations, provide comment on certain workplace policies and, finally, suggest one approach to the issue of work load.

What is encouraging to the Committee is that we are able to address these specific matters of human resource management against the backdrop of an increasingly well-defined long-term strategy. As a consequence, the Committee is comfortable that our recommendations are fully consistent with the evolving strategy.

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Pay

As indicated in our First and Second Reports, the Committee has again compared Public Service cash compensation externally. Consistent with the recommendations in the previous chapter, the benchmark data was sourced from Hay Management Consultants (All Organizations sample) and a special survey conducted by William M. Mercer Limited amongst 320 private and public sector organizations. The external data was as of December 1999 whereas the Public Service data reflects the April 2000 structure. The implications of this most recent data are now analysed for each of three discrete federal Public Service management communities – executives and deputy ministers, CEOs of Crown corporations and other GIC appointees.

(a) Executives and Deputy Ministers

The illustration below compares federal Public Service total cash compensation (defined as salary job rate plus 70% of the maximum available "at risk" pay) at April 2000 with the 1999 actual cash compensation for equivalent positions in the two benchmark samples. The following conclusions can be drawn:

(i) as would be expected, there are some differences between the two sources of comparative data – both are based upon samples and different methods are used for establishing the equivalency of jobs. However, directionally the external data are largely consistent and show similar pictures;

(ii) the Public Service is behind the benchmarks in both samples at all levels of job responsibility;

(iii) the shortfalls in both absolute and relative terms increase as job responsibility grows. This is consistent with all previous findings.

The disquieting fact about the comparisons is the quite significant shortfall at the EX 01 level, which, only two years ago, was set equivalent to the median of a similarly-defined external benchmark.

The disquieting fact about the comparisons is the quite significant shortfall at the EX 01 level, which, only two years ago, was set equivalent to the median of a similarly defined external benchmark. This is particularly important since the entire executive and deputy minister salary structure is built upon the compensation for an EX 01. In 1998, we set total EX 01 compensation and then created a structure based upon internal relativities in job responsibilities.

Public Service Total Cash Compensation vs Mercer and Hay Medians

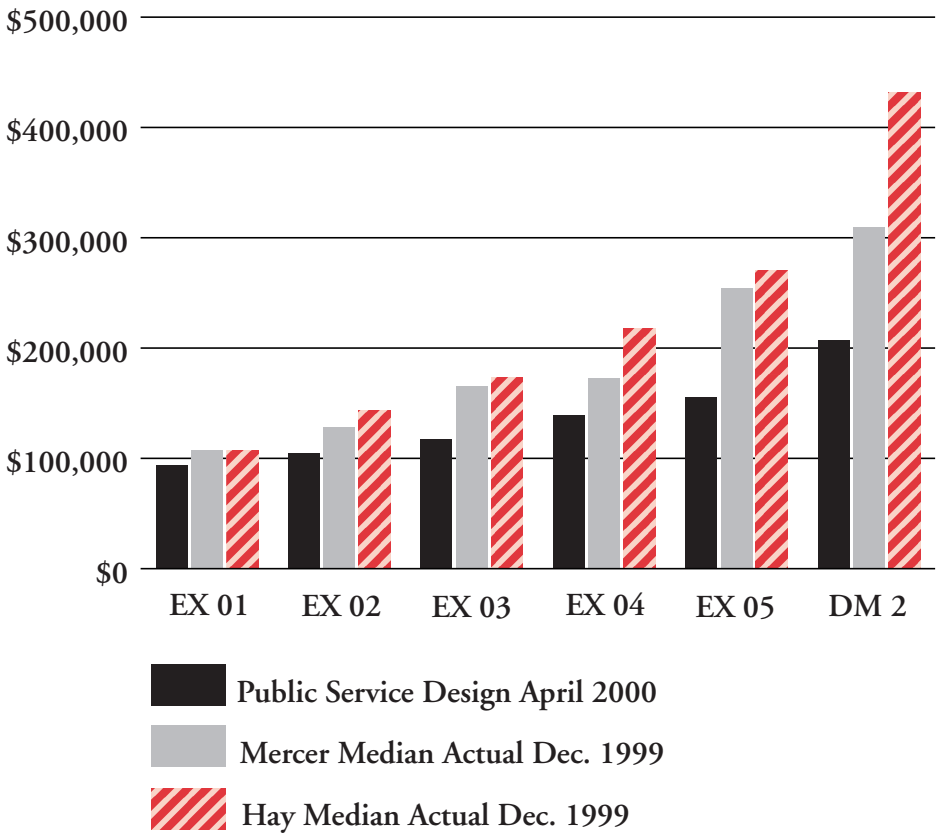


Illustration 7

The results of the external benchmarking have led the Committee to revisit cash compensation. Consistent with the principles outlined in the previous chapter, we first investigated whether there were problems of compression or inversion. The Committee therefore requested that Treasury Board Secretariat conduct a study of actual compression. Based upon a significant sample of EX 01s from 11 of the largest employing departments, salary compression exists for 9% of the positions. In other words 9% of EX 01s have direct reports earning greater than 90% of their own total cash compensation. However, based on a conservative estimate of what might happen in collective bargaining over the balance

of this year, the incidence of compression will rise to 21 % by year-end. It is the Committee's view that this is not acceptable. In order to substantially eliminate the problem of salary compression by this year-end, the EX 01 job rate would need to increase by 10%.

Clearly, the market has risen more sharply than anticipated in late 1997. Three factors appear to have caused this – the impact of the new economy, the significant number of mergers and consolidations, and the early stages of the supply shortage.

The Treasury Board Secretariat study also showed evidence of salary inversion. However, the incidence is low, and occurs generally where the direct reports are senior professionals, such as medical officers.

Next, the Committee focused on a more detailed analysis of the benchmark results and, in particular, sought to understand why EX 01 cash compensation had fallen behind.

We started by looking at salaries. The current EX 01 job rate of $87,400 was set using data from a 1997 Mercer Survey adjusted to reflect an estimated movement in 1998. Clearly, the market has risen more sharply than anticipated in late 1997. Three factors appear to have caused this – the impact of the new economy, the significant number of mergers and consolidations, and the early stages of the supply shortage discussed earlier in this report.

The illustration below summarizes salary data from both external surveys. In both cases, the survey data used is the median of the sample.

Public Service Salary Job Rates vs. Median Benchmark Salaries

	Mercer Actual	**Hay** Actual
Salaries at December 1999	$95,000	$97,800
Difference from EX 01	– $7,600	– $10,400
Job Rate at April 2000	– 8.7%	– 11.9%

Illustration 8

Both Mercer and Hay showed the median Total Cash Compensation for the EX 01 benchmark as $107,000, with the compensation above salary deriving from "at risk" or incentive pay. Consequently, the Committee reviewed the variable pay situation with respect to EX 01s. As noted earlier, an EX 01 can earn between 0 and 10% of salary in incentive pay. A reasonable expectation of average payout in a typical year would be 70% of the maximum or 7% of salary. 7% of even the higher Hay salary benchmark would still leave the Public Service total cash below $107,000, indicating that the "at risk" pay in the Public Service also trails where it should be.

Based upon this analysis, the Committee has concluded that an upward adjustment to salary job rates is needed. Before deciding the precise amount of this increase, the Committee reviewed other elements of total compensation and noted:

(a) the total cash compensation reported earlier does not include long-term incentives such as stock options or performance unit plans. This form of reward has been growing in the private sector, as focus on creating shareholder value has increased. Thus, the difference in total compensation between the Public Service and the benchmarks would be even greater than shown, especially in the jobs with more responsibilities.

(b) we believe there are few material differences in fringe benefits and perquisites between the Public Service and the benchmarks. The only exception is the pension plan for deputy ministers which is likely more valuable than the sample median. However, it is also at these most senior levels that the differences in salary and incentive pay (both short and long-term) are the greatest.

Thus, the Committee is satisfied that the shortfalls in cash compensation carry through to total compensation. The Committee therefore recommends an increase of 8.7% in the job rates structure for all EX and DM levels to be effective April 1, 2000. No changes are recommended to the incentive pay structure at this time. This recommendation:

(1) in large measure eliminates the compression problems noted earlier, although this issue will need to be revisited on a regular basis;

(2) equates the EX 01 salary job rate to the "actual" median salary of the lower of the two benchmark samples;

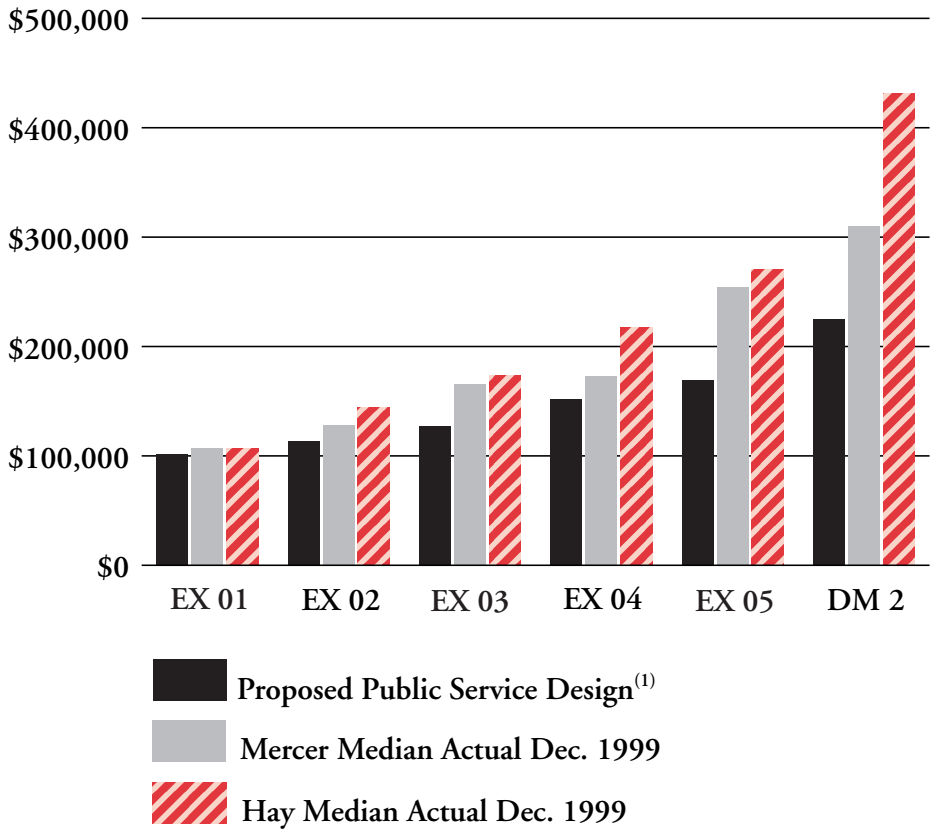
The Committee recommends an increase of 8.7% in the job rates structure for all EX and DM levels to be effective April 1, 2000. No changes are recommended to the incentive pay structure at this time.

(3) moves the salary structure closer to the desired long-term positioning;

(4) leaves a shortfall in incentive and total cash compensation. Given that this is the first year of full implementation of at risk pay, the Committee feels possible adjustments are best considered when this experience has been fully analysed.

The illustration below demonstrates the impact of this proposal. It significantly narrows the gap compared to our benchmark at the EX 01 positioning but it does not address the now familiar widening gap in compensation as job responsibility increases.

Proposed Public Service Total Cash Compensation vs Hay and Mercer Medians



(1) At risk pay included at 70% of maximum

Illustration 9

Given the magnitude of the recommended change to the job rates, the Committee also discussed implementation options. In other words, how quickly should actual salaries be adjusted? Here, the government needs to weigh the cost implications to its various departmental budgets with the human resource risks of slow implementation (poor morale, and impact on attracting and retaining key people). It should also be pointed out that it is highly probable that, following the proposed benchmark surveys, a further adjustment to job rates is likely for April 2001. This is currently estimated in the 3-4% range. Without being overly prescriptive with respect to implementation, the Committee therefore recommends that the government target to have full integrity restored to actual salaries by no later than April 1, 2001.

One final set of comments on the implementation of the "at risk" pay programme. Firstly, its intent is to reward the achievement of results and as a consequence, the Committee would expect to see a well-dispersed distribution of awards ranging from the minimum (no payment) to the maximum (10% or 15% or 20% of salary). In an organization as large and diverse as the federal Public Service there will necessarily be some departments or individuals who have been severely challenged in any given year, while there will be others who have had great success. A heavy concentration of average payouts would suggest that the programme is not working as intended. However, the initial feedback received by the Committee is promising with respect to the distribution of payouts.

Secondly, an observation about budgeting for this at risk pay programme: unlike salary budgets which can be easily prescribed in any year, the "at risk" component is a consequence of results achieved compared to an objective. Thus, while guidance can be given to departments on how best to budget for "at risk" pay, actual payouts should be determined after the year-end on the basis of a rigorous assessment of results achieved. These results cannot, with integrity, be forced to comply with some pre-determined budget number.

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While guidance can be given to departments on how best to budget for "at risk" pay, actual payouts should be determined after the year-end on the basis of a rigorous assessment of results achieved.

(B) CEOs OF CROWN CORPORATIONS

The Advisory Committee's Second Report, published in March 2000, recommended a new structure for salary and "at risk" pay of Crown corporation CEOs and was based upon Hay 1999 data. As a consequence, the Committee is not making any further recommendations for changes. We have looked at broad compatibility with this report's proposals and are satisfied that the equity across the Public Sector has, in fact, been enhanced. That said, the Committee proposes a series of actions to be completed over the next eighteen months:

(i) continue to monitor whether the larger Crowns are sufficiently competitive to attract qualified candidates;

(ii) based upon the proposed benchmark survey, adjust the current salary structure for April 1, 2001;

(iii) measure each CEO position in terms of total compensation and test rigorously for compression;

(iv) use the input from (i) and (iii) plus the findings from the proposed survey of total compensation to make changes, if warranted, to the salary structure and "at risk" pay for April 1, 2002. Given the relatively independent nature of the Crowns, special attention should be given to the possibility of increasing the "at risk" component of total cash compensation.

(C) OTHER GOVERNOR IN COUNCIL APPOINTEES

The Committee recommends that the existing GIC job rates be increased by 8.7%. This is consistent with the approach taken in our First Report which tied GIC appointees into the executive/deputy minister structure. Any further changes should await the currently underway Privy Council Office review of this entire group. Implementation should follow the proposals made for Executives and Deputy Ministers.

Benefits

The survey carried out in February by Watson Wyatt confirms a high level of support for the notion of flexible benefits. Interest is particularly high amongst younger managers. A summary of the survey results is included in Appendix F.

As already discussed in the previous chapter, the Committee believes that such a programme will play an important role in attracting and retaining good people in the Public Service and offers the government excellent potential value for dollars invested. The Committee therefore recommends that the government proceed with a full feasibility study including developing and costing a suitable programme.

The Committee believes that a programme of Flexible Benefits … offers the government excellent potential value for dollars invested.

The Committee favours a programme which has a set of core benefits which all executives receive automatically plus a series of optional benefits from which executives may choose to meet their individual needs and lifestyles. Directionally, the core programme should be as narrowly defined as possible while the optional programme should be as broadly defined as possible. The programme should also offer a choice of coverage level – executive only, executive plus one dependant, and executive plus two or more dependants. Managers of the future will want a significant degree of flexibility.

As part of the new flexible benefits programme, the Committee recommends that the government consider phasing out the current sick leave provisions for executives and moving to a regime of short-term salary continuance plus long-term disability coverage. Such programmes are common practice in the private sector and have two major advantages. Firstly, such an approach is more effective and equitable in providing salary protection when a manager is sick and does not tie coverage entitlement to length of service. Secondly, it enables outsourcing the administration, particularly the adjudication of claims. The Committee recognizes that some transition rules may be required.

During the course of our discussions on benefits, it came to the Committee's attention that executives were irritated by the fact that their vacation entitlement was inferior to that of their unionized staff. The Committee therefore investigated the adequacy of the current entitlement. The following chart shows current vacation policy for executives and compares this with current practices as measured in the Hay Group Report on Prevalence of Benefits Practices 1999-2000.

SERVICE NEEDED TO QUALIFY FOR VACATION ENTITLEMENTS PUBLIC SERVICE VS. BENCHMARK

	Required Years of Service		
Weeks of Vacation	**Public Service Executives**	**Benchmark[1]**	**Incidence Amongst Benchmark[2]**
3	–	2-5 years	100%
4	On appointment	10-15 years	99%
5	20 years[3]	20 years	92%
6	No provision	25-30 years	60%
7	No provision	30 years	8%

(1) These ranges represent the most common service requirements to earn the vacation amongst those organizations offering that vacation. However, it is based upon all employees, not just executives.

(2) The percentage of organizations offering each vacation. For example, 92% of all organizations in the benchmark sample offer 5 weeks of vacation subject to defined service requirements.

(3) This is the most common criterion – other options do, however, exist which accelerate the entitlement.

ILLUSTRATION 10

As can be seen from Illustration 10 above, 60% of organizations in the benchmark sample do offer a vacation entitlement of six or more weeks. This incidence rises to 77% of public sector organizations in the sample. The Committee has therefore concluded that the addition of a 6 week entitlement for vacation is consistent with the majority practice in our benchmark sample. The remaining issue, then, is the service requirement to earn this vacation. 85% of organizations offering six weeks of vacation have a requirement falling within the 25-30 years of service range, with 25 the most popular. However, as noted above, this needs

to be weighed against the fact that there are 40% of organizations which do not offer this entitlement. The Committee therefore recommends that the deputy minister, executive and Governor in Council communities be entitled to 6 weeks of paid vacation after 28 years of service.

However, the Committee also recommends that the proposed total compensation benchmark review study executive vacation entitlements in more detail.

The Committee has also had a lot of discussion about work/life balance and workload. While the Public Service is by no means alone in facing these challenges, the government needs to create a climate in which it is acceptable to take vacation! We propose, therefore, that the government ensure rigorous and consistent application of vacation policy. This will hopefully go some distance to restoring a proper work/life balance. But it is also important for the employer, since vacations are an opportunity to "recharge the batteries", to relax and relieve the stresses of the job. Without them, there is substantial evidence that productivity and managerial effectiveness steadily decline.

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Deputy Ministers

At the request of the Committee, the Privy Council Office evaluated Deputy Minister responsibilities. This confirmed that certain positions are larger in scope than others.

Recognizing the value and flexibility of the current appointment to level system, the Committee recommends the creation of a DM 4 level. The salary job rate would be 12% higher that DM 3 and the "at risk" pay would be a maximum of 25%. If the earlier changes in structure are accepted by the government this would equate to a job rate of $247,700 with maximum "at risk" pay of $61,900. Even though the number of people impacted by from this proposal (and hence its cost) is small, this recommendation:

- ensures greater equity between the most senior deputy ministers and the CEOs of some of the larger Crowns; and
- sends an important message in terms of the government's willingness to attract and retain qualified and experienced staff.

Performance Management

Indications are that the Performance Management Programme has got off to a good start. Importantly, it is clearly being led from the top.

Indications are that the Performance Management Programme has got off to a good start. Importantly, it is clearly being led from the top. The Committee has had the opportunity to review the Treasury Board Secretariat preliminary evaluation of the 1999-2000 process (see Appendix G for the summary). We were encouraged to see good practices identified as well as a list of lessons learned. Stemming from this review were numerous recommendations for improving the 2000-2001 cycle. We hope that this process for continuous improvement will be institutionalized.

The Committee believes this programme, which supports the "at risk" compensation, is a critical factor in the drive to become more results oriented. From our viewpoint, the key factors in success are:

- continued top management support;
- clear objectives and priorities, quantified where feasible; and
- focus on fewer rather than more key commitments.

Job Evaluation

Job evaluations have now been completed for all executive positions. However, with the adoption of a revised Hay plan incorporating Working Conditions, all positions will need to be revisited.

A fundamental review of all "other" Governor in Council positions, as referenced earlier, is currently commencing.

Work Place Policies

The Committee is pleased to note that the Treasury Board Secretariat is beginning to update a number of workplace policies.

(a) **Travel:** The purpose of this initiative is to modernize the structures and processes governing travel by federal public servants. Overall recommendations are expected by February 2001 and will focus on streamlining processes and reflecting recent structural and technological changes in the travel industry. While the primary goal should be to leverage the scale of the government to minimize costs, important secondary goals are reducing the administrative burden for travellers and providing public servants more flexibility in areas such as spousal/dependent travel providing the option is cost neutral to the Crown.

(b) **Integrated Relocation Programme:** An equitable relocation programme for executives will likely become increasingly important as mobility and transfers grow. A revised policy came into effect April 1, 2000 and should continue to be monitored for simplification and modification.

(c) **Harassment in the Workplace:** Treasury Board Secretariat is currently engaged in a substantive review of the existing Harassment Policy. There are current executive concerns about inconsistent application, the lengthy resolution process and inadequate resources. The only recommendation the Committee would put forward is that Treasury Board Secretariat ensures that any changes are tested for consistency with the new culture which the Public Service is seeking to create.

(d) **Legal Representation and Recourse:** Executives have expressed concerns about the adequacy of existing policies on legal representation and recourse. While the Committee has not studied this complex area of human resource policy, we believe there is merit in a review by Treasury Board Secretariat. As the Public Service moves to give managers more authority to make decisions and to take risks, it is important that executives feel confident that they have the support of their organization, providing, of course, they have not acted illegally or improperly.

Work Load

Following the downsizing of the early nineties, the Public Service leadership feels they have too much work and too little time to do it. While it probably does not serve as much comfort, the Committee would add that there are many private sector organizations which feel exactly the same.

The Committee has one suggestion for a pilot study, probably in one of the smaller departments. It builds upon the Public Service commitment to continuous improvement and utilizes some well-established techniques used by many private sector organizations. Basically, the approach focuses on analysing the work done and the work processes used. We would recommend working with an outside consultant so that the government can use an established set of tools and measurements.

The results from such studies usually indicate a lot of wasted time doing unnecessary tasks, redoing activities and so on. We have certainly heard enough complaints about bureaucratic processes to know that an opportunity for gain certainly exists. There is also the opportunity to use information technology more effectively to upgrade processes. And finally, as the government becomes more citizen focused, it will be important to test that work done adds value for citizens.

Summary

Over the past three years, our Committee has learned a great deal about the senior levels of the federal Public Service. Despite our private sector roots, we have become more committed than ever to the importance of ensuring that the Public Service of Canada remains strong, representative, professional and non-partisan. But this will not happen, unless the Government takes some bold actions now, and it will not happen unless today's Public Service leaders commit to making significant changes in how human resources are managed and in the culture of the organization going forward.

The Committee is not talking about changing the core values of the Public Service. These have served as the bedrock of the Public Service for decades and will continue to do so for many years to come. However, if the Public Service is to meet the expectations of Canadians, there is a need to develop new mindsets, new skills and new abilities.

First, it is critical that the government recognize that the senior level federal Public Service is facing a human capital crisis. Retirements alone over the next decade could result in the loss of just over 80% of today's cadre. Filling this void will be immensely challenging since we are entering a period where the demand for talented people will exceed the supply.

It is critical that the government recognize that the senior level federal Public Service is facing a human capital crisis.

In order to successfully compete for the high calibre people it requires, the Committee believes that the government needs a clearly articulated human resource strategy. The good news is that in the traditional human resource areas of workforce planning, recruiting, developing and retaining, very good progress is being made, led by the Clerk of the Privy Council and the Committee of

If our proposals in this Third Report are accepted, considerable progress will have been made in the past three years – restored integrity, a transparent policy, improved competitive standing and a start on aligning rewards and performance.

Senior Officials. This strategic work needs to be completed and rigorous implementation plans developed. The fifth basic function of human resources is paying, recommendations for which are part of our Committee's mandate. Again, if our proposals in this Third Report are accepted, considerable progress will have been made in the past three years – restored integrity, a transparent policy, improved competitive standing and a start on aligning rewards and performance. What is important to note, however, is that the Committee does not believe that the government will win the recruiting battle with higher pay alone. Of course, pay must be adequate but we do not believe it is practical, in the short term, to match the private sector at the most senior levels. Given this reality, how will the government become an employer of choice?

The Committee believes the answer lies in the nature of the work and the workplace that the Public Service can offer. Talented managers of the future will want challenging and interesting work; they will want to feel that the results they achieve will make a difference; they want to be pro-active with the freedom to make decisions; they want to work in an innovative and flexible environment. The federal Public Service can offer all of these things but only if there are some significant changes in the organization and culture.

The Committee has therefore recommended that the government add two initiatives to its core human resource strategies. The first is to focus on streamlining the framework for managing human resources. This is by no means a new recommendation as this area has been the subject of numerous studies in the past. However, now is the time for action. The leaders of tomorrow do not want to be part of a slow moving, inefficient bureaucracy. Without reform, the Committee does not believe the Public Service can become an employer of choice.

The second strategic initiative recommended by the Committee addresses cultural renewal – ensuring that the desired mindsets and behaviours become the norm. The Committee is pleased to note that an exciting vision for the Public Service is basically in place. However, the challenge of changing the culture of any organization the size of the federal Public Service is immense. The Committee believes that specific implementation plans covering a broad range of initiatives will be necessary to be successful. Further, the Committee urges the Clerk to establish an aggressive timetable for this implementation.

In closing, the Committee believes that the federal Public Service has reached a unique point in its long and distinguished history. The convergence of a number of factors – workforce demographics, information technology, citizen expectations – demands change. With these changes comes an immense opportunity to modernize and revitalize the Public Service and to ensure that all Canadians continue to be well served both domestically and internationally.

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Appendices

Appendix A

Committee Members

Lawrence F. Strong, B.Sc. – Chair
Director, Unilever Canada Limited

Past President and Chief Executive Officer, Unilever Canada Limited. Past President and COO, Unilever Canada. Past Vice-President, Finance, Unilever Canada. Past President, Monarch Fine Foods and Chesebrough-Pond's (Canada). Past Chair, Food and Consumer Products Manufacturers of Canada (FCPMC), Public Policy Forum (PPF) and Electronic Commerce Council of Canada (ECCC). Trustee, Grocery Industry Foundation Together (GIFT) and the Invest in Kids Foundation. Director, Canadian Council of Christians and Jews (CCCJ), Public Policy Forum and Electronic Commerce Council of Canada.

John L. Fryer, C.M., B.Sc.(Econ.), M.A.
Chair, Advisory Committee on Labour Management Relations in the Federal Public Service

Adjunct Professor, School of Public Administration, University of Victoria. President Emeritus, National Union of Public and General Employees (NUPGE).

Marilyn H. Knox, B.Sc., RD
President, Nutrition, Nestlé Canada Inc.

Past Deputy Minister, Tourism and Recreation, Government of Ontario. Past Assistant Deputy Minister, Ministry of Agriculture and Food, Government of Ontario. Past Executive Director, Ontario Premier's Council on Health Strategy. Past Vice-President, Grocery Products Manufacturers of Canada. Former consultant, Health Protection Branch, Health and Welfare Canada.

Gaétan Lussier, O.C., B.Sc. (Agr.), M.Sc., Ph.D.
President, Gaétan Lussier and Associates

Past Assistant Deputy Minister and Deputy Minister, Quebec Ministry of Agriculture. Past Deputy Minister of Agriculture Canada. Past Deputy Minister and Chairman, Employment and Immigration Canada. Past President, Les Boulangeries Weston Québec Inc. Past President and Chief Executive Officer, Culinar Inc.

Judith Maxwell, C.M., B.Com., D.Com.
President, Canadian Policy Research Networks

Past Director, Policy Studies, C.D. Howe Institute. Former consultant, Esso Europe Inc. Former consultant, Economics, Coopers & Lybrand. Past Chairman, Economic Council of Canada. Past Associate Director, School of Policy Studies, Queen's University. Past Executive Director, Queen's University of Ottawa Economic Projects. Director, BCE Inc. and Clarica (formerly Mutual Life Assurance of Canada).

Courtney Pratt, C.M., B.A., LLD (Hon)
President and Chief Executive Officer, Hydro One Networks Inc.

Past Chairman and Director, Noranda Inc. Director, The Empire Company and Moosehead Breweries. Chairman, Imagine and Director, The Learning Partnership, Career Edge and The University Health Network. Past Executive Vice-President and Past President, Noranda Inc. Past Senior Vice-President, Human Resources and Administration, Royal Trust Company. Member, Advisory Group on Executive Compensation in the Public Service (Burns Committee). Member, Ontario Advisory Committee on Deputy Minister and Senior Management Compensation.

Appendix B

Committee Mandate

To provide independent advice and recommendations to the President of the Treasury Board concerning executives, deputy ministers and other Governor-in-Council appointees of the federal Public Service and Public sector on:

- developing a long-term strategy for the senior levels of the Public Service that will support the human resource management needs of the next decade,
- compensation strategies and principles, and
- overall management matters comprising among other things human resource policies and programmes, terms and conditions of employment, classification and compensation issues including rates of pay, rewards and recognition.

To present recommendations in a report to the President of the Treasury Board. The report will be made public by the President of the Treasury Board.

Appendix C

Extract from Auditor General of Canada's April 2000 Report Outlining the Basic Legislative Framework for Managing Public Servants*

- The basic framework for managing people in the 20 departments and some 60 agencies that form the "core" public service comprises three pieces of legislation enacted in 1967: the *Public Service Staff Relations Act*, the *Financial Administration Act*, and the *Public Service Employment Act*. A fourth Act, the *Public Service Superannuation Act*, provides for pensions for the public service of Canada. The legislative framework is designed to uphold basic public service values and to provide for the protection and monitoring of merit.
- The *Public Service Staff Relations Act* introduced collective bargaining, to which about 85 percent of employees are now subject. In general, the design of the collective bargaining regime adheres to principles and processes established in law to govern relations between other employers and their employees. An important exception in the public service is the exclusion of job classification and staffing from collective bargaining.
- Since 1967, several pieces of legislation have been added to the governing framework. Notable among these are the *Official Languages Act*, the *Canadian Human Rights Act*, the *Canadian Charter of Rights and Freedoms*, the *Access to Information Act*, the *Privacy Act*, and the *Employment Equity Act*.

* Source: The April 2000 Report of the Auditor General of Canada – Chapter 9

THE MAIN MANAGEMENT PLAYERS

- Today, key roles in the management of human resources in the core public service are played by Treasury Board, the Privy Council Office, the Public Service Commission and line departments. Federal public sector entities outside the "core" have greater autonomy in managing their people.

- **Treasury Board.** Under the *Public Service Staff Relations Act*, the Board acts on behalf of the government as the "employer" for the core public service. The Treasury Board is a Cabinet committee with a number of statutory authorities in the areas of expenditure and financial management, service and innovation, information technology and human resource management. In this domain, Treasury Board ministers are concerned with maintaining a strong, competent and representative work force. Through the Treasury Board Secretariat, the Board consults and negotiates with the public service unions. The Treasury Board also has general responsibility under the *Financial Administration Act* for administrative policy and for financial and personnel management (except appointments, the domain of the Public Service Commission). Treasury Board, with the support of the Secretariat, sets out policies on such matters as job evaluation, compensation, terms and conditions of employment, training and development, labour relations, work force adjustment, pension programs, employee benefits and insurance, employment equity and official languages.

- **The Privy Council Office (PCO).** Headed by the Clerk of the Privy Council and Secretary to the Cabinet, the PCO is responsible for ensuring the satisfactory performance of the public service in support of the Prime Minister and Cabinet. This includes strategic management of senior people. The PCO provides advice and support in the selection of deputy ministers and other Governor-in-Council appointees, and in the related processes for performance review, compensation and termination. For deputy ministers, it also provides advice and support for career planning. The Clerk became the statutory Head of the Public Service in 1993, and plays a prominent role of leadership to deputy ministers and public servants generally, by establishing strategic direction and management priorities for the public service.

- **The Public Service Commission (PSC).** Under the *Public Service Employment Act*, the Commission is an independent parliamentary agent with exclusive statutory authority to appoint or provide for the appointment of "qualified persons" to and within the public service. It ensures that appointments are based on merit "as determined by the Commission." The Commission is also responsible for conducting investigations and audits of matters under its jurisdiction and for administering the staffing recourse mechanisms provided under the Act. It operates staff training and development programs, and assists deputy heads in operating such programs. It also has responsibilities for employment equity, and handles matters assigned to it by the Treasury Board or by the Governor in Council.

- **Departments.** Ministers are assigned broad powers over the organization and allocation of resources in their departments. Deputy ministers have responsibility and authority to manage the department in support of their ministers. Beyond this, deputy ministers have little statutory authority in human resource management. Instead, their authority is derived primarily from delegation instruments under which the Treasury Board and Public Service Commission delegate powers to them.

The many other players

- There are many other management players. The Canadian Centre for Management Development is responsible for developing a strong management cadre. The Leadership Network is responsible for supporting network development and promoting public service renewal, and for central management of the assistant deputy minister community. This reflects the notion that its members represent a vital corporate resource.

- Various management committees also play an important role. Most prominent are two standing committees of deputy ministers:

  - the Committee of Senior Officials (COSO), which advises the Clerk on senior appointments and other human resource management priorities and issues; and

  - the Treasury Board Secretariat Advisory Committee (TBSAC), which advises the Secretary of the Treasury Board on all administrative matters to be brought before the Board, including those related to "personnel management."

- Other bodies play a role in the co-ordination, debate or review of human resource management issues, or perform administrative functions (see Appendix A). These include various standing or ad hoc bodies, and oversight institutions – the Office of the Commissioner of Official Languages, the offices of the Information Commissioner and the Privacy Commissioner, the Canadian Human Rights Commission and the Public Service Staff Relations Board, which administers the *Public Service Staff Relations Act*. They also include the 16 unions and various forums for consultation among employer, employees and bargaining agents, such as the National Joint Council and the Public Service Commission Advisory Council.

Appendix A

A Summary of the Roles and Responsibilities of Some of the Many Players in Human Resource Management in the Public Service

The players whose roles are discussed in the chapter are the Treasury Board and its Secretariat, the Privy Council Office under the direction of the Clerk, the Public Service Commission, departments and their deputy ministers, and the two key deputy ministerial committees – the Committee of Senior Officials (COSO) and the Treasury Board Secretariat Advisory Committee (TBSAC). There are numerous others that influence the management of human resources in the core public service. Some are briefly described below.

The National Joint Council (NJC)

The Council is a "consultative" body comprising representatives of the Treasury Board (acting as the "employer" for the core public service), a number of "separate employers," and bargaining agents. Its recommendations must be approved by the appropriate executive body of government. Established before the advent of collective bargaining, the Council is a forum for regular consultation on issues bearing on the efficiency of the public service and the well-being of its employees. The NJC deals with matters on which consultation is more efficient across the public service than at each bargaining table. These matters may include any benefit or condition of work that applies service-wide. Examples include travel, relocation, isolated post allowances, foreign service, work force adjustment, and

benefit plans like health care and disability insurance. When the Council agrees to "consult" on a matter it is understood that, on approval, the matter either will be deemed to constitute a part of collective agreements or will result only in recommendations to the employer.

Bargaining Agents

Currently, 16 unions certified by the Public Service Staff Relations Board are authorized to represent particular groups of public servants in collective bargaining. The Public Service Alliance of Canada represents the largest number of public servants (approximately 116,000) and the Professional Institute of the Public Service of Canada represents another 31,000. No other bargaining agent represents more than 6,000 federal public servants, and most represent fewer than 1,000.

The Public Service Commission Advisory Council

Created in 1998, the Advisory Council provides a forum for Commissioners and senior Commission staff to discuss and consult on issues related to the *Public Service Employment Act* . The Council includes a representative of each of the public service bargaining agents and more than a dozen representatives of federal departments and agencies, with a Treasury Board observer. Meetings of the Council and its Steering Committee are co-chaired by a representative of the unions and of the departments. The Council has a number of working groups dealing with current issues such as mobility, recourse and merit.

Association of Professional Executives of the Public Services of Canada (APEX)

The Association represents the interests of executives and promotes management excellence and professionalism in the federal public service. It tracks current and emerging issues of concern to its members, gathers members' views and represents them to government decision makers. Membership in the Association is voluntary.

The Public Service Staff Relations Board

The Board is a quasi-judicial statutory tribunal, responsible for administration of the *Public Service Staff Relations Act*. Its responsibilities include such matters as determining bargaining units, unfair labour practices, certifying and decertifying of bargaining agents, adjudication of rights disputes (grievances not resolved satisfactorily in the employee's department) mediation services for grievances, complaints and collective bargaining disputes, and generally providing an administrative structure in which the rights and responsibilities of the employer and employees in the federal public service may be exercised and/or enforced.

The Commissioner of Official Languages

The Treasury Board is responsible for providing a policy framework to ensure that departments and agencies meet the requirements of the *Official Languages Act*. The Commissioner is an ombudsman, responsible under the *Official Languages Act* to protect:

- the rights of members of the public to communicate in either official language with federal institutions and to receive services from them as provided for in the Act and its regulations;
- the right of federal employees to work in the official language of their choice in designated regions; and
- the right of English-speaking and French-speaking Canadians to equal opportunities for employment and advancement in federal institutions.

Official language requirements must be established for positions in the public service, and the ability of public servants to meet them must be assessed. The Commissioner's office conducts audits and studies of performance in departments and agencies and investigates individual complaints. It makes recommendations for corrective action, appealing to the Federal Court on behalf of complainants when all other recourse has been exhausted.

The Privacy Commissioner of Canada

The Privacy Commissioner is an ombudsman, appointed by and accountable to Parliament, who monitors the government's collection, use and disclosure of the personal information of individuals, and its handling of individuals' requests to see their records. The *Privacy Act* gives the Commissioner powers to investigate individual complaints, to launch his own complaints, and to audit compliance with the Act.

The Information Commissioner

The Commissioner deals with complaints from people who believe they have been denied rights under the *Access to Information Act*. The Commissioner is an independent ombudsman with investigative powers, who mediates between complainants and government institutions. The head of a government institution may, in certain circumstances, refuse to disclose a record that contains plans related to the management of personnel or the administration of the institution. This does not apply to decisions made in exercising a discretionary power or an adjudicative function that affects the rights of a person.

The Canadian Human Rights Commission

The Commission was established as an agency reporting to Parliament to administer the *Canadian Human Rights Act* and deal with related complaints. An example of the latter is the 1999 pay equity decision, which found that the job classification and evaluation system in the federal public service was discriminatory on the basis of gender, and thus in contravention of the Act. The Commission is also mandated to ensure that the requirements of the *Employment Equity Act* are met by all federal departments and agencies as well as Crown corporations and federally regulated private sector companies. To that end, the Commission conducts audits of these entities.

The Canadian Centre for Management Development

The Centre was created in 1988 under an order-in-council, and became a departmental corporation under legislation passed in 1991.

Under its Act, the Centre's objectives include:

- encouraging pride and excellence in the management of the public service and fostering among managers a sense of the purposes, values and traditions of the public service; and
- helping to ensure the growth and development of managers and ensuring that they have the skills and knowledge required to manage staff effectively, including leadership, motivational and communications skills.

The minister responsible for the Centre is the Prime Minister. The Centre is managed by a President, having the rank and status of a deputy minister, under the direction of a board of governors. The board comprises up to 15 governors, including the Clerk of the Privy Council as the ex officio chair, and equal numbers of persons who are employed in the public service and persons who are not. The former include, as ex officio members, the President of the Centre, the Secretary of the Treasury Board, and the President of the Public Service Commission.

In developing the programs and studies of the Centre, the President is required to take government policies into consideration, along with public service management training needs and priorities as determined by the Treasury Board.

The Leadership Network

The Leadership Network was created by order-in-council in June 1998 to maintain the momentum of the public service renewal initiative, La Relève. It is included in the portfolio of the Prime Minister. The Head of The Leadership Network receives functional direction from the Committee of Senior Officials (COSO). It has three specific areas of responsibility:

- to facilitate the collective management of the community of assistant deputy ministers (ADMs) as a corporate resource (this includes providing career counselling and advisory services related to entry into the ADM ranks, assignments, personal and career development strategies, and learning and promotion opportunities);

- to facilitate internal communication and dialogue on renewal by promoting, developing and supporting networks of leaders at all levels in the public service (for example, networks of middle managers and of federal regional officials); and
- to help consolidate La Relève successes, share lessons learned and foster change initiatives of departments and agencies, functional communities and regions.

Federal Regional Councils

In the early 1980s, Regional Councils were formed primarily to facilitate coordination of federal economic programs at the regional level. These have evolved considerably, particularly in the last several years, and play a role at the regional level in communication and information sharing, in administrative and human resource management matters, and in liaison with provincial counterparts. Today, there is a Council of senior federal officials in each province. Their roles and the extent of their development vary, and continue to evolve. They now serve as sounding boards for proposed central agency policies. Most have established human resource management subcommittees to deal with work force adjustment and other issues. For example, some regions have created interdepartmental assignment programs, career centres, mentoring and middle managers' programs.

The Human Resources Council

The Council is mandated by the heads of human resources in departments and agencies to contribute to determining strategic direction for the management of human resources in the public service. It provides leadership on the renewal and development of the human resources community and on the development of innovative solutions to human resource management issues. The deputy minister "champion" who acts as spokesperson on human resources at senior management forums looks to the Council for advice, as do others such as the Chief Human Resources Officer of the Treasury Board Secretariat. The Council (formed in 1992 as the Personnel Renewal Council) comprises about 20 officials, including 12 heads of personnel and non-voting, ex officio representatives of the central agencies and other bodies. The members who are heads of personnel represent the interests of all departments and the human resource management community. Ex officio members represent the Treasury Board Secretariat, the Public Service

Commission, the Privy Council Office, the Canadian Centre for Management Development, The Leadership Network, the Human Resources Learning Advisory Panel and the Human Resources Community Secretariat (the latter two are described below). The Council relies for funding primarily on contributions by departments and agencies. Its members lead or participate in numerous other committees or working groups.

The Human Resources Community Secretariat

At 31 March 1998, the human resources community in the public service consisted of approximately 7,000 full-time staff (down from about 11,000 in 1990). Some 2,500 were human resource management specialists, supported by about 2,400 clerks and 1,300 administrative officers working in areas such as pay and benefits administration and staffing. A Human Resources Community Secretariat (HRCS) was formed in 1998 to play an advocacy role for the human resources community and to pursue implementation of the community's La Relève action plan. HRCS is a joint initiative of the Human Resources Council, the Treasury Board Secretariat and the Public Service Commission. It operates under the leadership of the Treasury Board Secretariat's Chief Human Resources Officer.

Learning Advisory Panels

Learning Advisory Panels were created as a result of a recommendation by the Treasury Board Secretariat Advisory Committee. The purpose of such panels is to focus on the learning needs of specific public service communities, such as the policy or the communications communities. A Learning Advisory Panel for the Human Resource Community was formed in 1997 to help guide the development of this group's corporate learning agenda. It comprises about a dozen senior officials with human resource management responsibilities in departments and central agencies. It is supported by a working group of more junior officials.

Advisory Committee on Senior Level Retention and Compensation

This Committee (the Strong Committee, named after its chair) comprises seven private sector senior executives. It was established in 1997 for a term of three years, to provide independent advice to the President of the Treasury Board on retention and compensation issues for executives, deputy ministers and other Governor-in-Council appointees in the federal public sector. The Committee is charged with providing reports (to be made public by the Minister) setting out a long-term strategy to meet senior-level human resource management needs, compensation strategies and principles, and recommendations on overall management. This includes such matters as human resource policies and programs, terms and conditions of employment, classification and compensation issues, including rates of pay and rewards and recognition.

Appendix D

Full-Time GIC Positions Being Reviewed

Agriculture and Agri-food

Administrative Monetary Penalties Review Tribunal
Chairperson

Canadian Grain Commission
Chief Commissioner
Commissioner
Assistant Chief Commissioner
Assistant Commissioner

National Farm Products Council
Chairman and Member
Vice-Chairman and Member

Canadian Heritage

Canadian Radio-Television and Telecommunications Commission
Chairman and Member
Vice-Chairman and Member
Member (Regional)

National Archives of Canada
National Archivist

National Battlefields Commission
Secretary

National Film Board
Chairman and Government Film Commissioner

National Library
National Librarian

Office of the Coordinator (Status of Women Canada)
Coordinator

Public Service Commission
Commissioner

Citizenship and Immigration

Citizenship Commission
Senior Judge
Judge

Immigration and Refugee Board
Chairperson
Executive Director
Deputy Chairperson and Member *(Convention Refugee Determination Division)*
Deputy Chairperson and Member *(Appeal Division)*
Assistant Deputy Chairperson *(Convention Refugee Determination Division)*
Assistant Deputy Chairperson and Member *(Appeal Division)*
Member *(Convention Refugee Determination Division)*
Coordinating Member
Member *(Appeal Division)*

Environment

Canadian Environmental Assessment Agency
President / Chief Executive Officer
Executive Vice-President

Finance

Canadian International Trade Tribunal
Chairperson
Vice-Chairperson
Permanent / Temporary Member

Office of the Superintendent of Financial Institutions
Superintendent

Fisheries and Oceans

Department of Fisheries and Oceans
Commissioner for Aquaculture Development

Foreign Affairs and International Trade

International Centre for Human Rights and Democratic Development
President

International Joint Commission
Chairman and Commissioner

Health

Canadian Centre on Substance Abuse
Chief Executive Officer

Hazardous Materials Information Review Commission
President

Canadian Institutes of Health Research
President

Human Resources Development

Canada Employment Insurance Commission
Commissioner (Workers / Employers)

Canada Pension Plan / Old Age Security: Review Tribunals
Commissioner
Deputy Commissioner

Indian Affairs and Northern Development

British Columbia Treaty Commission
Chief Commissioner

Canadian Polar Commission
Chairperson

Northwest Territories / Yukon / Nunavut
Commissioner

Office of the Treaty Commissioner in Saskatchewan
Commissioner

Industry

Bankruptcy
Superintendent

Canadian Space Agency
President
Executive Vice-President

Competition Tribunal
Lay Member

Copyright Board
Vice-Chairman
Member

National Research Council of Canada
President

Natural Sciences and Engineering Research Council
President

Office of the Commissioner of Competition
Commissioner

Patents and Trade Marks
Commissioner of Patents and Registrar of Trade Marks

Social Sciences and Humanities Research Council
President

International Trade

Canadian Secretariat – North American Free Trade Agreement
Secretary

Justice

Canadian Human Rights Commission
Chief Commissioner

Canadian Human Rights Tribunal
Chairperson
Vice-Chairperson
Member

Law Commission of Canada
President

Office of the Commissioner for Federal Judicial Affairs
Commissioner

Supreme Court of Canada
Registrar
Deputy Registrar

Labour

Canada Industrial Relations Board
Chairperson
Vice-Chairperson
Member (Employees / Employers)

Canadian Artists and Producers Professional Relations Tribunal
Chairperson
Vice-Chairperson

Canadian Centre for Occupational Health and Safety
President

Leader of the Government in the House of Commons

Office of the Chief Electoral Officer
Assistant Chief Electoral Officer

National Defence

Canadian Forces
Chief of Defence Staff

Canadian Forces Grievance Board
Chairperson
Vice-Chairperson

Judge Advocate General of the Canadian Forces
Judge Advocate General

Military Police Complaints Commission
Chairperson
Member

Office of the Ombudsperson for the Department of National Defence and the Canadian Forces
Ombudsperson

Natural Resources

Canadian Nuclear Safety Commission
President and Member

National Energy Board
Chairman and Member
Vice-Chairman and Member
Member

Parliament

House of Commons
Clerk of the House
Sergeant-at-Arms
Deputy Clerk
Law Clerk and Parliamentary Counsel
Clerk Assistant

Library of Parliament
Parliamentary Librarian
Associate Parliamentary Librarian

Senate
Clerk of the Senate and Clerk of the Parliaments
Usher of the Senate

President of the Queen's Privy Council for Canada

Canadian Transportation Accident Investigation and Safety Board
Chairperson and Member
Member

Public Service Staff Relations Board
Chairperson

Vice-Chairperson
Deputy Chairperson
Member (Full-Time)

Prime Minister

Canadian Intergovernmental Conference Secretariat
Secretary

Governor General's Office
Secretary

National Round Table on the Environment and the Economy
Executive Director

Solicitor General of Canada

Department of the Solicitor General
Inspector General

National Parole Board
Chairperson and Member
Executive Vice-Chairperson and Member
Vice-Chairperson and Member (Appeal Division)
Vice-Chairperson and Member (Regional Division)
Member (Regional Division)
Member (Appeal Division)

Office of the Correctional Investigator of Canada
Correctional Investigator

Royal Canadian Mounted Police
Commissioner

Royal Canadian Mounted Police External Review Committee
Chairman

Royal Canadian Mounted Police Public Complaints Commission
Chairman

Transport

Canadian Transportation Agency
Chairperson and Member
Vice-Chairperson and Member
Member

Civil Aviation Tribunal
Chairman
Vice-Chairman

Veterans Affairs

Veterans Review and Appeal Board
Chairperson/Member
Deputy Chairperson/Member
Permanent/Temporary Member

Appendix E

Executive Summary of KPMG Review of Job Evaluation

Plans for Executive Positions in the Federal Public Service

Treasury Board Secretariat (TBS) engaged KPMG to undertake a review of the performance of the current Hay-based EX Group Position Evaluation Plan (EGPEP), including suggestions for improvement. We were also to consider the Universal Classification Standard (UCS) and two other "major job evaluation plans" and make recommendations as to the optimal job evaluation (JE) plan for the federal Public Service.

In order to have a common basis for comparability, KPMG developed through consultation with senior public servants and academics, a list of characteristics and criteria of an ideal JE plan for the federal Public Service. The criteria were:

1. Gender neutral
2. Proven
3. Ease of comparability to executive positions in other public and private sector jurisdictions
4. Comprehensive
5. Credible
6. Reliable
7. Flexible
8. A balance between flexibility and reliability
9. Work and results oriented
10. Ease of use
11. Currency

We assessed the EGPEP against these criteria and conclude that the EGPEP meets all but two of the criteria of an ideal job evaluation plan for executive positions in the federal Public Service. The exceptions being that the current plan is likely to be found not gender neutral and the plan lacks the required flexibility because of out-dated benchmarks.

We assessed the Universal Classification Standard against these criteria and concluded that the UCS should not be considered at the present time as a job evaluation plan for executive positions in the federal Public Service.

We conducted a survey of provincial public sectors, Crown Corporations and a select number of private sector organizations in Canada and, through our international KPMG connections, the public services of the United Kingdom, Australia and the United States to identify the JE plans used to evaluate executive positions.

The results of our survey of 24 organizations show:

- 11 use the Hay plan
- 6 use customized plans
- 4 use other plans (Willis, Towers Perrin, KPMG COMP-ETE and Ernst & Young's Decision Band Method)
- 3 have no executive JE plans

We approached Towers Perrin to obtain information about their plan but they declined to participate in this review. In consultation with TBS we agreed to concentrate our efforts on obtaining information on the nature and extent of modifications to the Hay Plan made by the surveyed organizations.

We conclude that there is little to learn from the experiences of these organizations that would help in improving the EGPEP except with respect to the Working Conditions factor, should TBS choose to add this factor to the EGPEP.

Our review concludes with five recommendations:

Recommendation 1: We recommend that EGPEP be maintained as the job evaluation system for federal Public Service executive positions.

Recommendation 2: We recommend that Treasury Board Secretariat assess whether it is in the best interest of the Public Service to implement a Working Conditions factor into the EGPEP.

Recommendation 3: We recommend that Treasury Board Secretariat develop a plan to update within the next two years the benchmark positions in the EGPEP to better reflect the current work realities of Public Service executive jobs and that benchmark positions be regularly reviewed and up-dated on a three to five year cycle.

Recommendation 4: We recommend that Treasury Board Secretariat review the Criticality of Human Relations element to determine whether to leave it as is, make it more discriminating amongst executive positions or remove it as an element in the EGPEP.

Recommendation 5: We recommend that the Treasury Board Secretariat consider the collapse of the Executive Group to three classification levels.

Appendix F

Summary of Watson Wyatt Survey on Flexible Benefits

In February 2000, the Treasury Board Secretariat distributed an excellent information package to Executives and Deputy Ministers describing their benefits and requesting their response to a survey of their interest in flexible benefits. Watson Wyatt Canada collected and analyzed the responses. The survey results have provided a wealth of information.

Nine hundred and forty-six (946) Executives of all ages, gender, marital status, length of service and location responded to the survey to constitute a highly credible base for the purposes of statistical inferences. Responses were provided by 29% of the surveyed group, a participation rate that is average for a survey of this type. This response rate provides a confidence level of 95%, or 19 times out of 20, that the survey results would yield the same responses, within + or – 2.7%. Demographic data provided by the respondents indicate that they are highly representative of the current workforce.

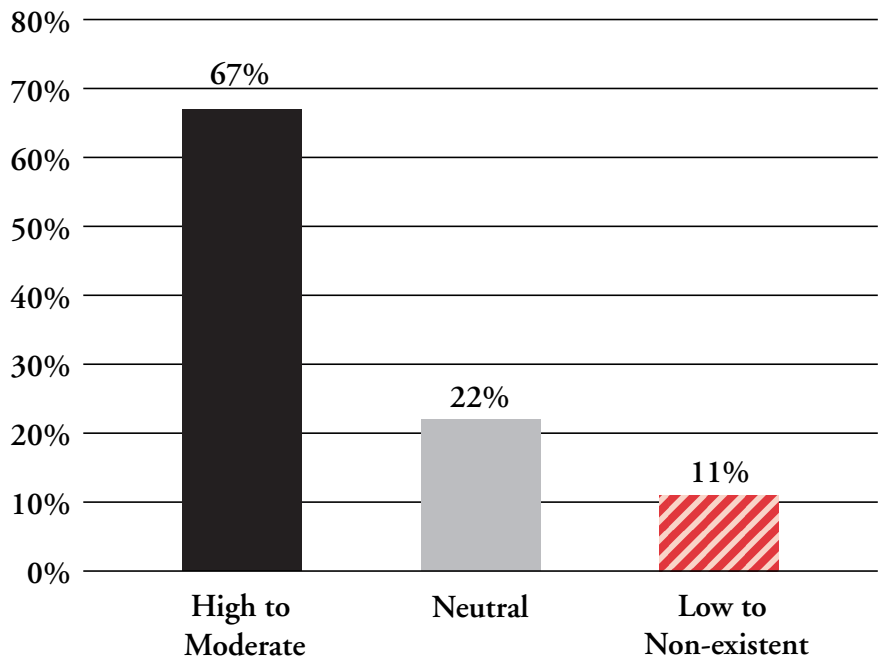
In their responses, 67% of Executives clearly indicated that the ability to tailor, customize, adapt, and change benefit levels as life and work circumstances evolve would meet their needs. It was clear that flexible benefits are viewed as an opportunity to redirect employer benefit dollars from benefits not needed to areas of greater need. Recorded comments showed that there was enthusiastic support for flexible benefits provided that:

- it made their package a distinctive feature of their compensation;
- It reduced perceived and ill-accepted internal inequities (e.g., vacation, severance, overtime, salary inversion);
- their base salary and performance-based incentives were competitive with private and other large public organizations.

Major Findings

While overall, 67% of respondents indicated high to moderate interest, interest was highest for those without dependents (89%) and those younger than age 45 (81%). Many were undecided (22%). Recorded comments showed that the undecided group prefers to evaluate the options, the extent of flexibility offered and the cost/value implications before deciding. Some respondents (11%) were not, or were barely, interested in flexible benefits. Current benefits, they argued, are adequate; others believed the annual selection of complicated benefit choices would be too time-consuming.

Level of Interest in Flexible Benefits



Desirable Plan Design and Plan Elements

Survey responses also provided some preliminary indications of a preferred plan design. A 'core plus options' approach wherein there are mandatory benefits plus an array of options was preferred by 71% of respondents, while 37% preferred an "à la carte" plan, or full cafeteria plan. Younger and single Executives expressed the highest level of interest in having the most flexibility.

The results made it clear that simply flexing traditional insurance-type benefits would not meet the needs of respondents. In fact, overall, there was only a small number who would reduce or opt-out of the traditional group insurance plans. Respondents preferred a broad, more inclusive definition of flexibility, one that extends beyond the spectrum of traditional group insurance plans to include total compensation issues, working conditions, perquisites, and work/life balance.

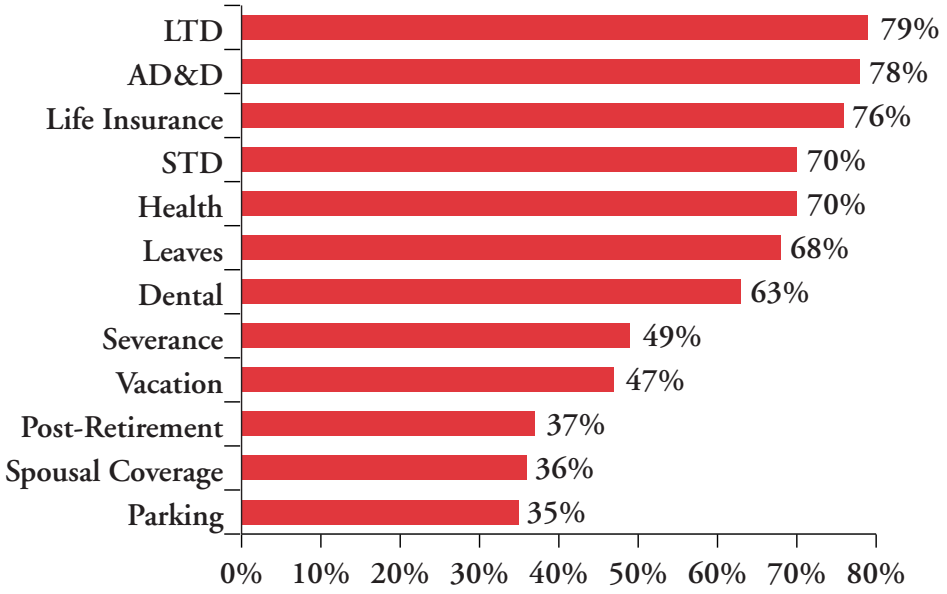
As one respondent said, "flexible benefits, especially if they include the new ones suggested (sabbaticals, HCSA, Health club memberships, etc.), might actually give me the perception I do have some benefits aside from retirement or dying." Based on the results of the survey and supported by the numerous open-ended comments, it appears that for many respondents, flexibility means:

1. the ability/opportunity to access and redirect funds that currently are not available to them, specifically the value of unused sick leave credits, funds earmarked for parking, and uncompensated overtime work; and
2. the ability/opportunity to tailor other benefits and working conditions to help manage the pressures of work and strike a proper balance between work/family/personal priorities.

Adequacy of Current Benefits

Respondents' view of the adequacy of current benefits varies significantly, and ranges from a low of 35% (parking subsidy) to a high of 79% (long-term disability). Generally, respondents indicated that the current traditional group insurance plans offer adequate protection, with the exception of spousal/dependent life insurance. Other benefits, however, such as vacation, severance, parking, and post-retirement benefits are clearly perceived as inadequate. Open-ended comments suggest that those benefits need to be improved.

Perceived Adequacy of Current Benefits



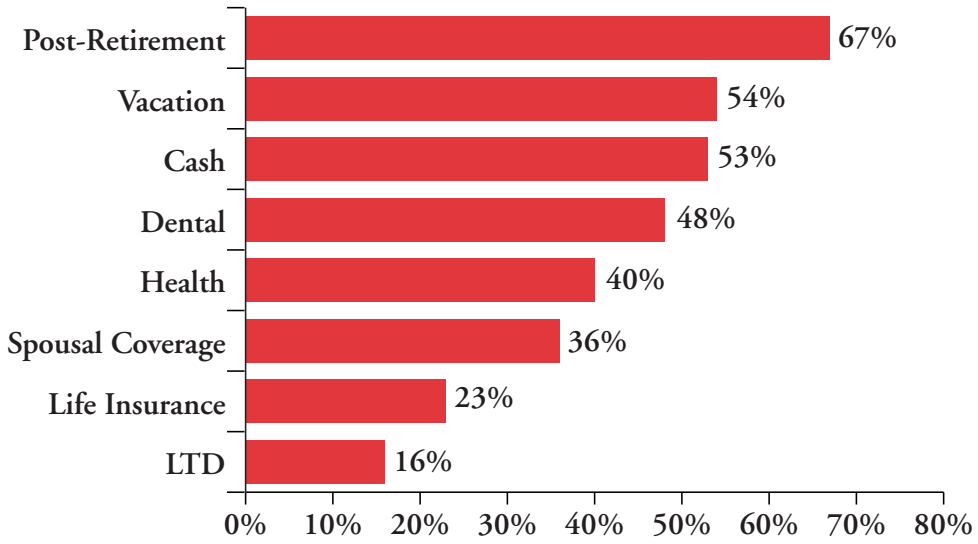
Respondents' Perception of Competitiveness of Current Benefits

Less than a quarter of respondents believed that their benefits were competitive with those offered by other major Canadian employers, particularly in the private sector. For example, there are no-stock accumulation opportunities, less generous pension accrual features, no flexible benefits, lower salaries and bonus arrangements, no air miles, no business class, no expense accounts. However, respondents appear to be as much, if not more, concerned by internal relativities, as their benefits are seen as poorer than those offered to unionized employees, for example, a less generous vacation schedule, lower severance accrual opportunity, no overtime pay, and salary inversion.

Benefits Perceived as Needing Improvement

Responses indicated that some of the current benefits need to be improved, especially post-retirement benefits (67%), vacation entitlements (54%), dental (48%) and health (40%). A significant number of respondents (53%) indicated they would consider receiving additional cash in lieu of benefit dollars allocated to unwanted benefits. The number dramatically increases to 66% for those younger than 45.

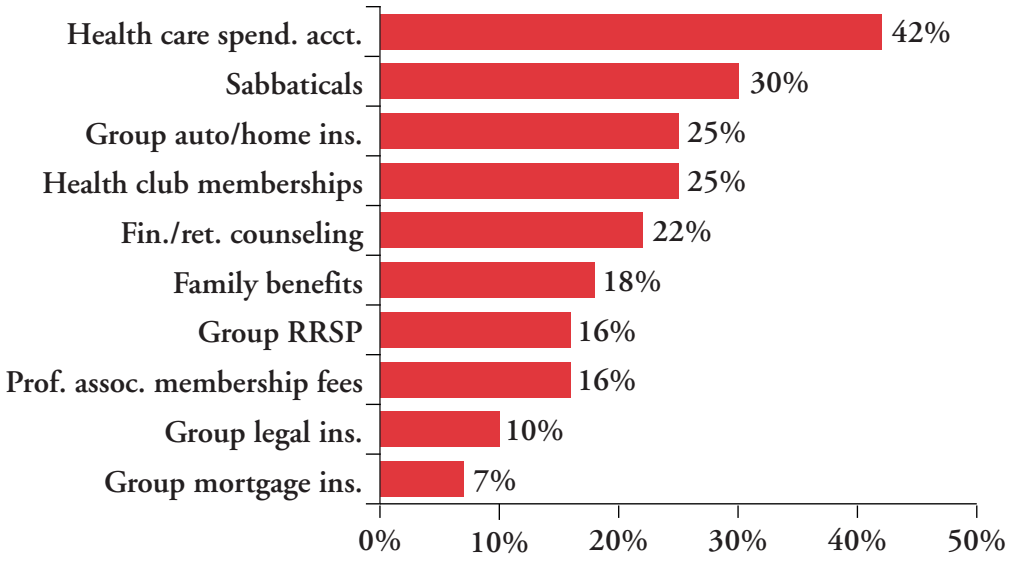
Benefits Perceived as Needing Improvement



Additional Options Desired

The survey asked respondents to choose which benefits, from an array of choices common to many flexible benefits plans, would be of most interest to them. 42% indicated a health care spending account would be an attractive feature. This option was equally attractive to all age groups and to both genders. Notable interest occurred for sabbaticals (30%), health club memberships (29%), group auto/homeowner insurance (25%), and financial/retirement counseling (22%). Younger respondents valued sabbaticals (40%), health club memberships (37%) and family benefits (30%).

Interest in Additional Benefits Options



Other Issues Raised

In response to the opportunity to provide a recorded comment, respondents provided additional information of interest. On pension plan benefits, some respondents indicated they were disappointed that pension benefits were not included in the discussion on flexible benefits. Pension enhancements and pension portability were identified as key issues, for example:

- increase pension accrual percentage from 2% to 2.5%/3% per year of service as an executive;
- increase the survivor pension, from 50% to 60%/75%;
- reduce the formula for full pension entitlement;
- count sick leave as credited service;
- permit opting-out of registered pension plan.

Travel benefits were clearly perceived as inadequate and not in line with private sector offerings; for example, there are no air miles, no business class, no luggage allowance, no airport lounge privileges, no travel with spouses, and restricted hotel accommodations. Respondents, especially those who traveled a lot, believed that they should be compensated for the significant investment in time spent away from home.

Appendix G

Performance Management Program for the Executive Group (PMP)

Preliminary Results for the Learning Year (1999-2000)

Background

The new Performance Management Program for the Executive Group (PMP) was launched April 1,1999. The "learning year" for the program has been completed. The Treasury Board Secretariat (TBS) is responsible for ensuring the consistent and equitable application of the PMP for the Executive Group across departments and agencies. To begin to achieve this objective, it is important that TBS assess the performance agreements developed to date.

Consulting and Audit Canada (CAC) reviewed the level of compliance to the 1999-2000 PMP guidelines related to the development of performance agreements based on a 10% sampling of performance agreements developed by Executives (EX) in departments. CAC made recommendations regarding lessons learned, good practices and tools that could help build a foundation for consistency across organisations in the application of the PMP policy. CAC reviewed 140 out of 285 performance agreements. This number represents a distribution of the EX population by department/agency size, EX level, geographic location and functional area of work.

The PMP guidelines indicate that *ongoing commitments* and *key commitments* should be identified within a performance agreement, with specific, results-oriented *performance measures* clearly linked to the commitments. Progression through the salary range is dependent on satisfactory achievement of *ongoing commitments*. *Ongoing Commitments* are recurring, and form part of core operational activities (e.g. financial management, HR management, and program delivery.)

The variable 'at-risk' portion of performance pay is dependent on the achievement of *key commitments*, which focus on corporate priorities for the annual performance cycle, and are challenging, i.e. they involve "stretch" beyond ongoing commitments.

Good Practices

The following good practices were noted in the sample of performance agreements:

- The average length of performance agreements, number of ongoing and key commitments and respective performance measures follow PMP guidelines;
- Over half of key commitments reviewed are results-oriented, as per the PMP guidelines;
- Almost half of the performance agreements mention Public Service leadership competencies, especially in the ongoing commitment area; and
- Core accountabilities identified in the PMP guidelines are well represented in the ongoing commitments.

Lessons Learned

Some lessons learned from the "learning year" review include:

- Drafting the performance agreement in a non-standard format such as listing goals or objectives or job description elements instead of commitments makes the information presented inconsistent with the policy guidelines, and difficult for managers and review committees to evaluate consistently at the end of the performance cycle;
- Providing more context around the commitments would allow for more informed assessment at the end of the performance cycle;
- Vague and unclear wording impacts on how well performance measures can be quantified, measured or linked to the commitments. Performance measures often do not clearly permit an assessment of level of attainment of the commitments; and

- Several of the agreements either made no mention of the timeframe during which the commitments and related measures would be completed, or went beyond the performance cycle.

Recommendations

1. To address the issue of departmental consistency and equity in the application of the PMP, it is suggested that a standard departmental template be developed. A standard template would reduce some of the inconsistencies noted.

2. To make performance agreements clearer and easier to understand, it is suggested that managers provide a context for their commitments and performance measures.

3. The PMP guidelines should emphasise that commitments be worded in a more results oriented manner, e.g. verbs are written in the past tense, "course outline developed" (more results-oriented) vs. "develop a course outline" (more process-oriented).

4. PMP guidelines should include a clear statement of what constitutes a performance measure i.e. "a performance measure will clearly indicate that a commitment has been achieved, within a certain timeframe and a defined level of quantity and quality". The performance measures should identify "what" is going to be measured, "when" and "how" with expected quantity and quality.

5. The PMP guidelines should indicate a clear requirement to explicitly include the timeframe for the commitments and the performance measures. Also, there is a need to draft commitments that are measurable within the performance cycle. When commitments extend beyond the review cycle, milestones that respect the performance cycle timeframe should be set.

6. More detail may be required on which Public Service leadership competencies to include. Developing a framework and including suggestions and examples of how Public Service leadership competencies can be integrated into the agreements would ensure that they are taken into account when developing a performance agreement.

7. To determine the degree of stretch of key commitments within departments it was recommended that an internal review of the cascade of commitments within a functional level be conducted with feedback obtained on the degree of stretch from departmental review committees.

8. These recommendations could be implemented partly through enhanced PMP guidelines in 2000-2001 **and** through coaching sessions for Executives.

TAB 14

Advisory Committee on Senior Level Retention and Compensation

Chair:

Carol Stephenson
Dean
Richard Ivey School of Business

Members:

Gaétan Lussier
President
Gaétan Lussier and Associates

Rose Patten
Special Advisor to the President and CEO
BMO Financial Group

Patrick O'Callaghan
President
Patrick O'Callaghan and Associates

Angela Tu Weissenberger
President
ATW Associates, Inc.

Contents

Context

The Government has taken the following management measures that are to be considered in the positioning of our advice in this report: last year's budget announced a number of government spending restraint measures which put new pressure on government organizations to contain their spending, including the constraints on departmental operating budgets and the concomitant requirement for departments to absorb any wage increases in their existing budgets through to 2012–13. Unlike in previous years, funding will not be added to their budgets to help them absorb these pressures.

Consistent with these budgetary measures, the President of the Treasury Board has emphasized the priority he places on finding efficiencies and savings in government organizations. He has asked us to consider how executive compensation might be positioned to provide them with strong incentives to find savings and efficiencies in the operations they manage.

As the Advisory Committee on Senior Level Retention and Compensation, we are sensitive to Government's need both to reduce the deficit and continue to compensate, attract and retain quality talent to senior leadership positions in the federal public service. It is also timely for this Committee to make recommendations for total compensation increases, given the imminent expiry of the *Expenditure Restraint Act* in April 2011.

We have noted Budget 2010's indication that, "Given the constraints on departments' operating budgets, the Government will...assess measures taken by other jurisdictions in Canada to ensure that total costs of compensation are reasonable, the organization of work is effective...and the federal public service maintains its reputation for excellence." The recommendations we make in this report address the objectives of maintaining reasonable comparability of executive total compensation with organizations from the broader Canadian public sector and the Canadian private sector, while respecting spending constraints, and aligning total compensation structures with the Government's management objectives. They also support the continued excellence of the federal public service by placing greater emphasis on productivity and performance. As part of the future work of the Committee, we intend to review the evolving nature of executive work, including the composition, size and responsibilities of executives in the federal public service.

Given the need for government organizations to plan ahead and anticipate budget pressures, including salary increases that they will need to absorb themselves, our recommendations cover fiscal years 2011–12 and 2012–13.

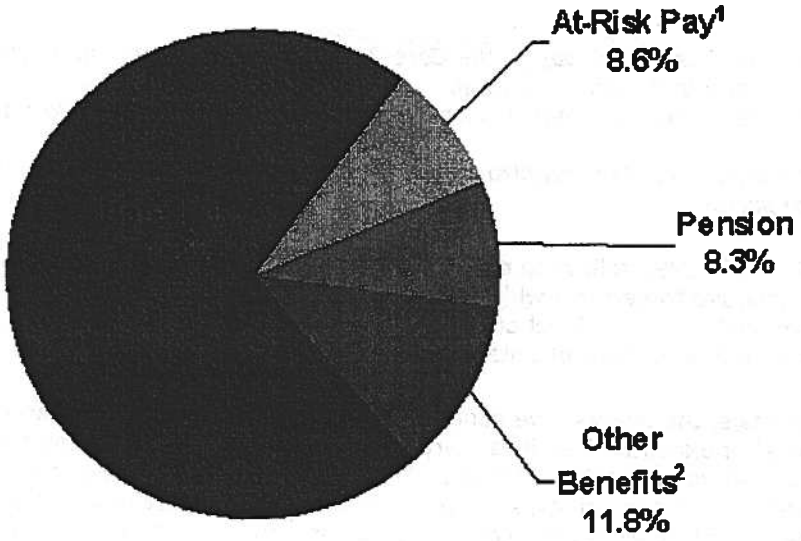
Taking Stock of Senior Level Total Compensation

As outlined in our previous reports, our Committee follows a total compensation approach with respect to the senior leaders of the federal public service. Total compensation refers to the sum of the cash values of base salary, at-risk pay, pension, benefits, and perquisites for federal public service executives at the EX–01 level. This cash amount is compared to the sum of the cash values of these same elements for equivalent positions within the Canadian Labour Market.

The following pie charts compare the structure of executive compensation at the first level of executive in the core public administration with that of executives working in an equivalent position in the Canadian Labour Market. They suggest that government executives receive a higher proportion of their total compensation in pension and benefits and a relatively lower amount in short-term incentives, or at-risk pay.*

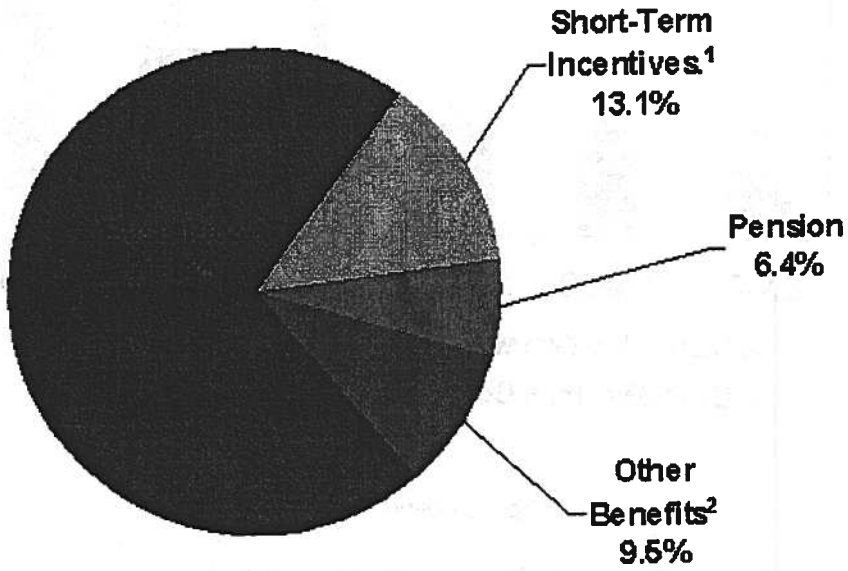
Structure of Total Compensation

EX-01 level Core Public Administration



Text Version

Position Equivalent to EX-01 Canadian Labour Market[3]



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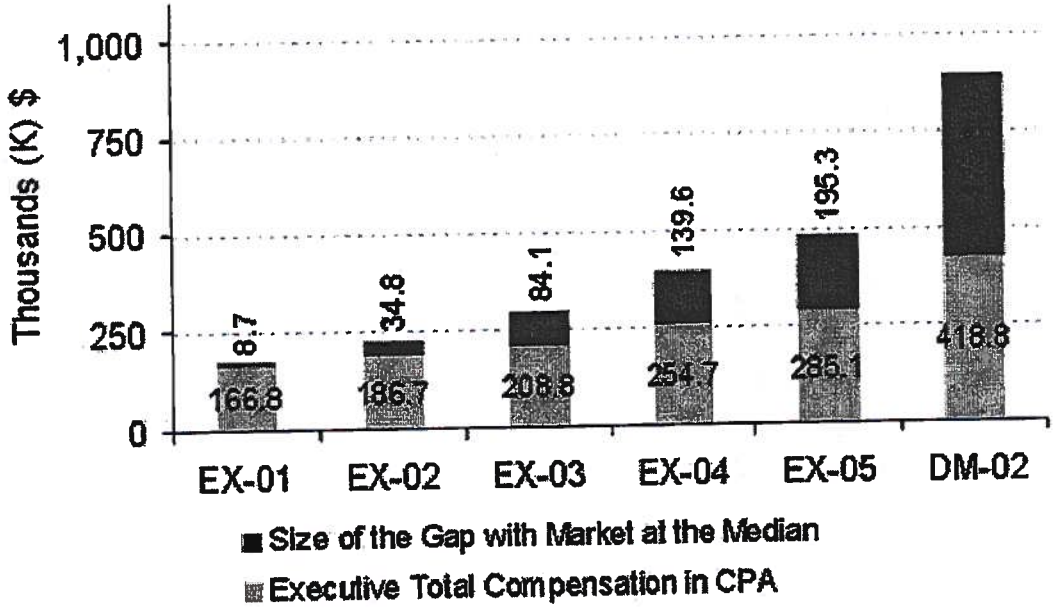
Source: Hay Group 2010

Notes:
1) performance pay is awarded as at-risk pay in the Core Public Administration and as short-term incentives in the Canadian Labour Market in general.
2) Other benefits include income replacement, health benefits, severance, perks, paid time off and survivor benefits.
3) The Canadian Labour Market includes organizations from the Canadian broader public sector and the Canadian private sector.

*At-risk pay was established in 1999 following the Committee's recommendation that executives should have a financial incentive to perform with excellence. Accordingly, a portion of executive salary was made "re-earnable" based on level of performance. This variable pay includes a component reserved for a limited number of outstanding performers.

On a total compensation basis, the analysis we conducted in December 2010 as indicated below suggests that the first level of executive receives marginally lower compensation than their market counterpart (measured at the median of the market, or the 50th percentile). The gap increases relative to market for higher level executives, such that for a Deputy Minister at the DM-2 level, total compensation is less than half what their counterpart in an equivalent job would make in the Canadian Labour Market.

Core Public Administration (CPA) Total Executive Compensation Comparison to Canadian Labour Market As of December 2010



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Recommendations Regarding Senior Level Total Compensation

Better Align Benefits with Market

Benefits for senior level leaders in the federal public service include paid vacation and sick leave, health care and dental benefits, disability insurance, death benefits and severance. This latter benefit accumulates at a rate of one week of salary for each year of service and is paid out on departure from the public service. Unlike for virtually all other organizations, it is paid out for voluntary resignations, including at retirement.

We recommend that the accumulation of this benefit be discontinued for voluntary separations, in order to bring the benefit structure and benefit levels into greater alignment with the comparator market.

The Committee notes that the removal of this benefit has been part of the recent agreement reached between the government and the Public Service Alliance of Canada (PSAC) with respect to three occupational groups, the Program and Administrative Services Group (PA), the Education and Library Science Group (EB) and the Operational Services Group (SV). We recommend that the transition options agreed to with that union also be offered to executives, namely:

1. Immediately cash out the accumulated severance pay; or
2. Cash out the accumulated severance pay only upon resignation or retirement and at the salary they are receiving at that time; or
3. Immediately cash out part of the accumulated severance pay and cash out the remaining amount upon resignation or retirement.

Freeze Base Pay

The Committee is recommending that there should be no economic increases to base pay for the next two fiscal years, that is, 2011–12 and 2012–13. This is in recognition of the constraints on departmental operating budgets over this period and the need to plan compensation accordingly.

Increases to At-Risk Pay

As noted above, the key shortfall between compensation of the senior ranks of the federal public service and the Canadian Labour Market is in short-term incentives or at-risk pay. At the EX-01 level in the federal public service, overall total compensation currently trails the Market by 6.3 percent, base pay lags by 10 percent and at-risk pay is behind by 34 percent. We recommend that all of the increase in total compensation given to the senior levels of the public service over the next two years be focused on at-risk pay.

Maintain Total Compensation at Within Five Percent of Market

The question remains as to what extent this at-risk pay, or short term incentives, should be allowed to increase. Here we want to keep executive total compensation adequately aligned to market.

Recognizing the period of restraint, and for public service leaders to model restraint through their own compensation, the Committee is prepared to accept that executive total compensation will lag that of other organizations for the two-year period of restraint. We would, however, recommend limiting the gap relative to market to approximately five percent.

Table 1 forecasts what the gap would be without increases in total compensation for 2011–12 and 2012–13, and what increase in total compensation is recommended for each year in order to remain within five percent of the benchmark total compensation level.

Table 1
Impact of Advisory Committee Recommendations

on Total Compensation Gap at the EX-01 Level

	2011–12	2012–13
Gap	6.3	7.2*
Total Comp. Increase	1.8	2.2
Remaining Gap	4.5	5.0

** Gap in 2012–13 assumes a salary growth of 2.7% based on survey results from compensation firms.*
Source: TBS.

We are therefore making the following recommendations, applying to the executive group, deputy ministers, and other Governor in Council (GiCs) appointees, with the exception** of those appointed on a part-time basis and those in a quasi-judicial or regulatory role (GCQ):

- In 2011–12, an increase in overall total compensation of 1.8 percent through adjustments to at-risk pay;
- In 2012–13, an increase in overall total compensation of 2.2 percent also through adjustments to at-risk pay.

The impact of the Committee's recommendations on the base pay ranges and at-risk pay percentages are outlined at Annex B.

**Recommendations for these groups will be made later in this Report.

Using At-Risk Pay to Meet Government Objectives

The Committee has previously endorsed the Performance Management Program for executives and GiC appointees as an important part of their total compensation. The program provides for transparent and clear performance expectations, rigorous assessment and meaningful feedback to continually improve performance. It is designed to support the achievement of policy and program objectives, management excellence and effective leadership in the delivery of results.

While the Performance Management Program has traditionally been implemented to reward the performance achievements of individuals, it can also provide for a collective approach in achieving results and responding to the priorities of the Government. The latter approach is often employed in private and public organizations to ensure that performance incentives are tightly matched to corporate objectives.

Accordingly, we recommend that for fiscal years 2011–12 and 2012–13, a portion of at-risk pay be awarded on the basis of achieving departmental results in support of a government-wide, corporate commitment.

We suggest that in tandem with the freeze on base pay, the departmental operating budget constraints and the Government's priority to contain costs, 25 percent of the at-risk pay component of each executive and GiC appointee subject to performance pay should be linked to the demonstration of fiscal savings and efficiencies determined at the departmental level, while maintaining or improving service offerings to Canadians. The remaining 75 percent of at-risk pay would be awarded based on individual achievements pertaining to program and policy commitments, sound management and the display of leadership competencies.

We also recommend that with respect to this collective corporate commitment, all executives and

GIC appointees in the same organization be evaluated on the basis of the results achieved by their organization as a whole. The 25 percent portion of at-risk pay would then be awarded proportionately to each eligible individual, according to their group and level.

The Committee will review the effectiveness of this new approach before determining whether it should continue after 2012–13.

In regard to those individuals not subject to performance pay, primarily those in quasi-judicial organizations (GCQs), the Committee suggests that they also be asked to identify savings and efficiencies as part of this collective corporate commitment.

Recommended Revisions to Compensation for Governor in Council (GIC) Appointees to Crown Corporation Boards of Directors and for GIC Appointees to Agencies, Boards and Commissions

In our Twelfth Report of April 2009, we recommended changes to the compensation structure for part-time Governor in Council (GIC) appointees to Crown corporation boards, and to agencies, boards, and commissions. This group has not had a remuneration update since 2000 and, as a result, has fallen significantly behind the comparator group. In April 2009, we acknowledged the government's efforts to manage the economic downturn through *The Expenditure Restraint Act*. As a result, we recommended implementation of these changes immediately following the expiry of the Act on April 1, 2011.

Given the need for strong corporate governance, the Government must offer reasonable compensation to attract qualified candidates to serve on the boards of these federal entities and to acknowledge their commitment and contribution. We are renewing our recommendation from April 2009 that the remuneration framework be amended as follows:

- **For chairs and directors of Crown corporation boards of directors:**
  - introduce a compensation framework that is benchmarked against the Canadian public sector market;
  - reduce board compensation categories from ten to four and place the boards in the new categories based on groupings of organizations by industry type and size;
  - replace the current annual retainer ranges with single retainer rates per level;
  - replace per diem ranges with meeting fees consisting of a single rate payable for attendance at meetings. Any additional services would be compensated through the annual retainer; and
  - introduce a retainer premium for directors who are designated as committee chairs.

Boards of directors of federal Crown corporations should be grouped into four broad categories based on the type of corporation, size, complexity of operation, strategic importance to the country, and the degree of knowledge and specialized skills required. Fewer and broader categories recognize that all chairpersons and directors have the same basic skills sets, while acknowledging that those in larger Crowns assume greater risk in relation to today's high standard of corporate governance and oversight. The result is a compensation structure that offers a logical, transparent grouping of organizations into categories which have meaningful monetary distinctions between them.

- **For chairs and members of agencies, boards and commissions, we recommend maintaining the current four-level structure, and:**
  - replace per diem ranges with single rates in the existing remuneration structure; and
  - update the rates consistent with the proposed compensation for boards of directors.

The current and recommended remuneration tables are provided at Annexes C and D.

Promoting the Health of Executives

As part of our ongoing interest in the linkages between workplace health, productivity and engagement, we have been following the survey reports on executive health produced by the Association of Professional Executives of the Public Service (APEX) over the past decade.

APEX recently reported that executive health issues cost the Government $100 million annually in lost productivity, representing 10 to 15 percent of the executive payroll. At our most recent meeting in February 2011, APEX offered three major recommendations of ways in which this Committee can positively promote the health of executives in the workplace:

1. Support the development of a departmental scorecard for executive health to benchmark, measure and evaluate changes in workplace health for executives;
2. Encourage a culture of health, well-being, performance and productivity in the federal workplace; and
3. Monitor the state of executive health as a part of this Committee's ongoing senior advisory responsibility.

We are very receptive to these recommendations. As a first step, we are supportive of the development of a departmental scorecard for executive health as a way to provide departments with baseline information on health issues against industry standards. With this information, we believe that this Committee would be positioned to take an active role both in monitoring executive health and in recommending ways in which it can be promoted. We would look forward to a progress report on this initiative at our next meeting.

On a related subject, we are also interested in learning more about the Government's *Disability Management Initiative*, a strategy aimed at promoting a productive public service through improvements to the management of workplace health issues and reductions in the costs associated with workplace disability.

Summary of Recommendations

In this report, we have made the following recommendations:

1. Given the current context of fiscal restraint, the accumulation of severance in the case of voluntary departures should cease with respect to the senior ranks of the Public Service; the provision of options for the immediate or deferred payout of existing entitlements should be as follows:
    i. Immediately cash out the accumulated severance pay; or
    ii. Cash out the accumulated severance pay only upon resignation or retirement and at the salary they are receiving at that time; or
    iii. Immediately cash out part of the accumulated severance pay and cash out the remaining amount upon resignation or retirement.
2. No economic increases to base pay should be made in 2011–12 and 2012–13 in recognition of the constraints on departmental operating budgets over this period and the need to plan compensation accordingly.
3. To place further emphasis on performance and recognition for results achieved, total compensation for the senior ranks should be increased by 1.8 percent in 2011–12 and by 2.2 percent in 2012–13 through adjustments to at-risk pay, the portion of salary that is held back and must be re-earned each year based on the achievement of objectives.
4. For 2011–12 and 2012–13, in tandem with the freeze on base pay, the departmental operating budget constraints, and the Government's priority to contain costs, we

recommend that for fiscal years 2011–12 and 2012–13, in alignment with an Industry "best practice" of pursuing a collective corporate objective and rewarding executives' contribution to their organization's overall efforts in achieving efficiencies and internal savings, the Performance Management Program should be adjusted as follows:

i. 25 percent of at-risk pay should be linked to the achievement of a collective corporate commitment; and

ii. The collective corporate commitment should be linked to achieving the government's fiscal and management objectives for the next two years.

The remaining 75 percent of at-risk pay should be awarded for individual achievements pertaining to departmental program and policy commitments, sound management and the display of leadership competencies. The Committee will assess whether this approach has achieved the desired goals before determining whether it should continue following 2012–13.

5. The remuneration frameworks for chairs and directors of boards of directors of Crown corporations, and for chairs and members of agencies, boards and commissions, should be modernized upon the expiry of the *Expenditure Restraint Act* according to the recommendations made by this Committee in our Twelfth Report and endorsed once again in this Report.
6. Using industry standards, a departmental scorecard for executive health should be developed as a source of baseline information for departments on executive health issues, facilitating the measurement, monitoring and improvement of the health of the executive cadre.

Topics of Focus for the Future

At our next meeting, we would like to be updated on the progress made in the following areas:

- The close monitoring of the total compensation gap at the EX-01 benchmark in comparison to the Canadian Labour Market.
- The health of the executive ranks, including the progress made on the development of a departmental scorecard to benchmark, measure and evaluate changes in workplace health for executives.
- The *Disability Management Initiative*, a government strategy aimed at promoting a productive public service through improvements to the management of workplace health issues and reductions in the costs associated with workplace disability.
- Work being done to review the evolving nature of executive work, including the composition, size and responsibilities of executives in the federal public service.
- Advancements in leadership development to ensure that the federal public service continues to benefit from effective, productive leaders, now and in the future.

Annex A – Committee Correspondence Concerning a Possible New Incentive

October 5, 2010

Ms. Carol Stephenson
Dean, Richard Ivey School of Business
Chair, Advisory Committee on Senior Level Retention and Compensation
1151 Richmond Street North
London, Ontario
N6A 3K7

Dear Ms. Stephenson:

Over the past few months, the Government of Canada has taken steps to streamline and reduce expenditures in order to get the deficit under control and 'get back to black'.

To that end, we announced three measures in Budget 2010: Strategic Reviews (whereby departments are expected to identify 5% of their program expenditures for reallocation); a review of administrative and operational expenditures with a view to optimizing and consolidating our distributed environment (I understand that you are advising us on that initiative); and an operating budget freeze whereby departments are to manage their operating costs (including wages) over the next three years on the basis of their 2010–2011 operating funds.

In addition to these measures, I am interested in knowing if and how our performance management program for executives could be used to incent and reward executives in reducing expenditures while achieving their objectives.

Given your committee's mandate to advise me on senior-level compensation, I am writing to seek your views and your Committee's assistance with respect to the possible use of our performance management program for executives as a means of encouraging innovative approaches to voluntary expenditure reductions. I would be interested in any suggestions you might have for putting this type of measure into effect (including timing, performance metrics, criteria, etc). I am also interested in knowing what approaches might exist in other jurisdictions or in the private sector and what results have been achieved, and what differences there might be between the private and public sectors in applying such measures.

I understand that your Committee is meeting in mid-November, and would ask you to provide me with your advice following that meeting.

I look forward to your views and recommendations.

Signed: Hon. Stockwell Day

Advisory Committee on Senior Level Retention and Compensation

December 15, 2010

The Honourable Stockwell Day
President of the Treasury Board
House of Commons
Ottawa, Ontario
K1A 0A6

Dear Minister Day:

In your letter of October 5, 2010, you requested the advice of the Advisory Committee on Senior Level Retention and Compensation regarding the potential use of the Performance Management Program to incent and reward executives for making voluntary expense reductions. At our meeting of November 18 and 19, 2010, the Committee had an extensive discussion on this subject.

We noted that there are currently a number of important restraint initiatives underway within the federal Public Service, most notably the strategic and horizontal reviews, Budget 2010 restrain measures on departmental operating budgets, and the cross-cutting administrative services review. The magnitude of the cost savings expected from success with these major undertakings is

substantial. We concluded that an incentive to reward executives for their contribution to implementing a major government-wide initiative within their respective departments has much potential. We will provide you with our recommendation for a corporate incentive following our next meeting in February, 2011.

Also following our February meeting, we plan to provide you with all of our recommendations, including those concerning other human resources management matters, such as the cessation of severance pay accumulation for executives, compensation for the senior ranks upon the expiry of the *Expenditure Restraint Act*, and the Performance Management Program.

I look forward to providing you with our recommendations.

Best wishes for a happy holiday.

Signed: Carol Stephenson, O.C.
Dean
Richard Ivey School of Business

January 28, 2011

Ms. Carol Stephenson
Dean, Richard Ivey School of Business
Chair, Advisory Committee on Senior Level Retention and Compensation
1151 Richmond Street North
London, Ontario
N6A 3K7

Dear Ms. Stephenson,

Thank you for you r letter of December 15th, 2010 regarding my request seeking input of the Advisory Committee on Senior Level Retention and Compensation regarding the potential use of the Performance Management Program to incent and reward executives for making voluntary expense reductions.

In this current climate of fiscal restraint, it is important that executives take an entrepreneurial approach to finding internal savings and efficiencies within their organizations.

I look forward to receiving your recommendations for a corporate incentive after your next meeting with the committee on February 14th, 2011. I kindly ask that your report be made available to me for review and consideration by March 15th, 2011.

Thank you for your leadership and work on this important issue.

Signed: Hon. Stockwell Day.

Annex B – Current and Recommended Cash Compensation for the EX and DM Groups

	Current 2010–2011			Recommended 2011–2012				Recommended 2012–2013			
		Individual Award			At Risk Pay				At Risk Pay		
	Salary Range	Max. At	Max.	Salary Range	Max Collective	Max Individual	Max.	Salary Range	Max Collective	Max Individual	Max.

Level	Max.	Risk Pay	Bonus	Max.	Award	Award	Bonus	Max.	Award	Award	Bonus
EX-1	$119,000	12.0%	3.0%	$119,000	3.5%	10.7%	3.0%	$119,000	4.2%	12.7%	3.0%
EX-2	$133,400	12.0%	3.0%	$133,400	3.5%	10.7%	3.0%	$133,400	4.2%	12.7%	3.0%
EX-3	$149,300	12.0%	3.0%	$149,300	3.5%	10.7%	3.0%	$149,300	4.2%	12.7%	3.0%
EX-4	$171,300	20.0%	6.0%	$171,300	5.5%	16.7%	6.0%	$171,300	6.2%	18.7%	6.0%
EX-5	$191,900	20.0%	6.0%	$191,900	5.5%	16.7%	6.0%	$191,900	6.2%	18.7%	6.0%
DM-1	$214,700	20.0%	6.0%	$214,700	5.5%	16.7%	6.0%	$214,700	6.2%	18.7%	6.0%
DM-2	$246,900	25.0%	8.0%	$246,900	6.8%	20.4%	8.0%	$246,900	7.5%	22.4%	8.0%
DM-3	$276,500	25.0%	8.0%	$276,500	6.8%	20.4%	8.0%	$276,500	7.5%	22.4%	8.0%
DM-4	$309,600	30.0%	9.0%	$309,600	8.0%	24.2%	9.0%	$309,600	8.7%	26.2%	9.0%

Annex C – Current and Recommended Remuneration for Chairs and Directors of Crown Corporation Boards of Directors

A) Current

Group	Per Diem Ranges	Annual Retainer Ranges	
	Chairs & Directors	Chairs	Directors
1	$160 – $250	$5,100 – $6,000	$2,600 – $3,000
2	$220 – $260	$5,700 – $6,700	$2,900 – $3,400
3	$200 – $300	$6,400 – $7,500	$3,200 – $3,800
4	$275 – $325	$7,100 – $8,400	$3,600 – $4,200
5	$310 – $375	$8,000 – $9,400	$4,000 – $4,700
6	$360 – $420	$9,200 – $10,800	$4,600 – $5,400
7	$410 – $485	$10,500 – $12,400	$5,300 – $6,200
8	$470 – $555	$12,200 – $14,300	$6,100 – $7,200
9	$565 – $665	$14,500 – $17,100	$7,300 – $8,600
10	$680 – $800	$17,400 – $20,500	$8,800 – $10,300

B) Recommended

Effective April 1, 2011				
Level	Chairperson Retainer	Director Retainer	Committee Chair Premium	Meeting Fee
Level 1	$14,000	$7,000	$2,400	$500
Level 2	$20,000	$10,000	$3,400	$750
Level 3	$27,000	$13,500	$4,500	$750
Level 4	$35,000	$17,500	$5,900	$1,000

Annex D – Current and Recommended Remuneration for Chairs and Members of Agencies, Boards and Commissions

A) Current:

Category	Executive		Advisory	

	Chair	Member	Chair	Member
I	$675 – $800	$475 – $550	$550 – $650	$375 – $450
II	$475 – $550	$350 – $400	$375 – $450	$275 – $325
III	$350 – $425	$250 – $300	$300 – $350	$200 – $250
IV	$300 – $350	$200 – $250	--	--

B) Recommended:

Effective April 1, 2011				
	Executive		Advisory	
Level	Chairperson Per Diem	Member Per Diem	Chairperson Per Diem	Member Per Diem
Level 1	$1,000	$700	$850	$600
Level 2	$700	$500	$600	$400
Level 3	$550	$400	$450	$300
Level 4	$450	$300	--	--

See also

- Information Notice: Changes to Executive Level Total Compensation

Date Modified: 2011-07-29

TAB 15

The Fiscal Monitor

A Publication of the Department of Finance Canada

Highlights

January 2006: budgetary surplus of $1.7 billion

There was a budgetary surplus of $1.7 billion in January 2006, down $0.7 billion from January 2005. Total budgetary revenues rose $1.3 billion, reflecting solid growth in all major tax streams. Program expenses were up $2.2 billion, reflecting the impact of $0.8 billion in assistance for grain and oilseed producers and $0.6 billion related to the Energy Cost Benefit. Public debt charges were $0.2 billion lower.

April 2005 to January 2006: budgetary surplus of $9.0 billion

For the first 10 months of the 2005–06 fiscal year (April to January), the budgetary surplus is estimated at $9.0 billion, down $3.9 billion from the $12.9-billion surplus reported in the same period of 2004–05. Budgetary revenues were up $6.5 billion or 4.1 per cent. This gain is net of the $4.0-billion cost of the personal income tax reduction measures announced in the November 2005 *Economic and Fiscal Update* pertaining to the 2005 tax year. Program expenses were up $11.1 billion or 9.5 per cent, primarily due to higher transfers to the provinces and territories for health care and equalization/Territorial Formula Financing (TFF). Public debt charges were $0.7 billion lower.

January 2006

There was a budgetary surplus of $1.7 billion in January 2006, down $0.7 billion from January 2005.

Budgetary revenues rose $1.3 billion or 6.9 per cent to $20.2 billion.

- Personal income tax receipts were up $1.0 billion or 11.5 per cent, primarily due to stronger source deductions from employment income.
- Corporate income tax revenues rose $0.2 billion or 10.2 per cent, reflecting ongoing profitability in the corporate sector.
- Other income tax receipts—withholdings from non-residents—rose 14.7 per cent.
- Excise taxes and duties rose $0.2 billion or 5.3 per cent, largely due to a $0.2-billion or 7.1-per-cent increase in goods and services tax (GST) revenues. Customs import duties were up $52 million, while sales and excise taxes were down $49 million. Revenues from the Air Travellers Security Charge were down $6 million.
- Employment insurance (EI) premiums declined by 11.3 per cent, reflecting the decline in the premium rate from $1.95 to $1.87 per $100 of insurable earnings, effective January 1, 2006.

- Other revenues, consisting of revenues from Crown corporations, sales of goods and services and foreign exchange revenues, were down 3.0 per cent. Other revenues can be volatile on a monthly basis.

Program expenses in January 2006 were $15.8 billion, up $2.2 billion or 15.8 per cent from January 2005.

Transfer payments were up $1.5 billion or 18.1 per cent.

- Major transfers to persons, consisting of elderly and EI benefits, were up $84 million or 2.1 per cent. Elderly benefits increased 5.5 per cent due to both higher average benefits, which are indexed to Consumer Price Index inflation, and an increase in the number of individuals eligible for benefits. EI benefit payments decreased 2.8 per cent, reflecting a decline in regular benefits.
- Major transfers to other levels of government, consisting of federal transfers in support of health and other social programs (Canada Health Transfer and Canada Social Transfer), fiscal transfers, transfers to provinces on behalf of Canada's cities and communities, and Alternative Payments for Standing Programs, were up $0.5 billion or 20.6 per cent. The increase in federal transfers in support of health and other social programs and higher fiscal transfers largely reflect increased funding under the 2004 agreements on health care and equalization/TFF.
- Subsidies and other transfers increased by $0.9 billion or 46.7 per cent, largely reflecting transfers under the Grains and Oilseeds Payment Program (Agriculture and Agri-Food Canada) and the Energy Cost Benefit (Canada Revenue Agency and Human Resources and Social Development).

Other program expenses consist of transfers to Crown corporations, operating expenses for departments and agencies including National Defence, and the ongoing assessment of the Government's liabilities. These expenses increased by $0.6 billion or 12.0 per cent.

Public debt charges decreased by $0.2 billion or 6.3 per cent due to a decrease in the average effective interest rate on the debt.

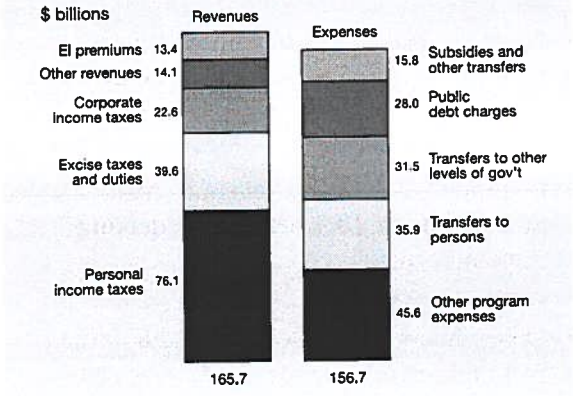
April 2005 to January 2006

In the first 10 months of the 2005–06 fiscal year, there was a budgetary surplus of $9.0 billion, $3.9 billion below the $12.9-billion surplus reported in the same period of 2004–05.

Budgetary revenues were up $6.5 billion or 4.1 per cent to $165.7 billion.

- Personal income tax revenues rose $3.0 billion or 4.1 per cent. This gain is net of the $4.0-billion cost of the personal income tax reduction measures announced in the November 2005 *Economic and Fiscal Update* pertaining to the 2005 tax year.
- Corporate income tax revenues were up $2.7 billion or 13.7 per cent, reflecting gains in corporate profitability in 2005.

Revenues and expenses
(April 2005-January 2006)



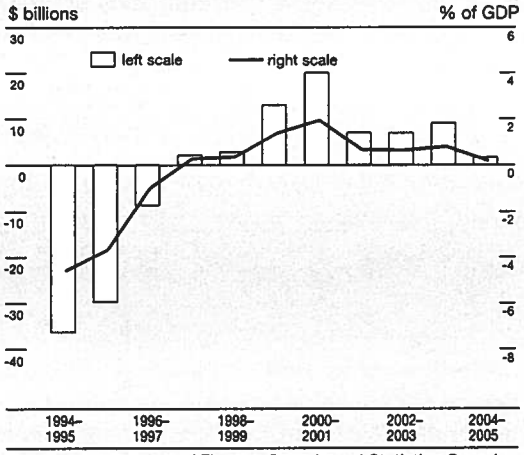
- Other income tax revenues increased by $1.0 billion or 34.9 per cent, reflecting increased dividend payments to non-residents.
- Excise taxes and duties rose $1.9 billion or 5.1 per cent. GST revenues increased $1.8 billion or 6.8 per cent, broadly consistent with the growth rate of retail sales of 6.6 per cent over the same period. Customs import duties were up 12.9 per cent. Sales and excise taxes were down 2.1 per cent, while the Air Travellers Security Charge was down 14.2 per cent, reflecting reductions in the charge effective April 1, 2005.
- EI premiums were down 1.6 per cent, as the impact of the reduction in the premium rate in January 2005 more than offset the impact of higher employment and wages and salaries.
- Other revenues were down $1.9 billion or 16.0 per cent, reflecting the impact of the one-time gain ($2.6 billion) from the sale of the Government's remaining shares in Petro-Canada in September 2004.

Program expenses in the April 2005 to January 2006 period were $128.7 billion, up $11.1 billion or 9.5 per cent over the same period of 2004–05, with most of the increase attributable to higher transfers to provinces and territories for health care and equalization/TFF. Public debt charges declined by $0.7 billion.

Transfer payments, which account for nearly two-thirds of total program expenses, increased by $8.7 billion or 11.7 per cent.

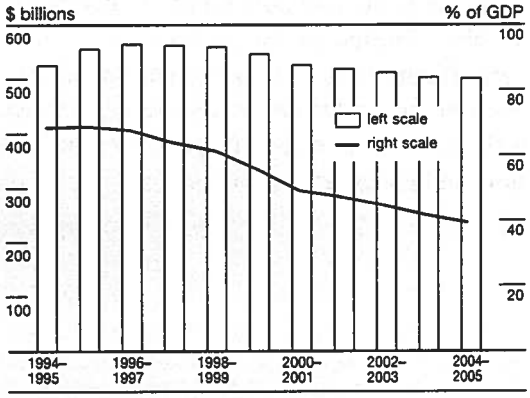
- Transfers to persons advanced by 2.1 per cent. Elderly benefits were up 4.3 per cent while EI benefits were down 2.2 per cent. The year-to-date decline in EI benefits is mainly attributable to a decline in regular benefits, which is in turn due to improved labour market conditions compared to the same period in 2004–05.
- Transfers to other levels of government were up $6.0 billion or 23.5 per cent, reflecting the impact of the 2004 agreement on health care and the new framework for equalization and TFF.

Budgetary balance



Sources: Department of Finance Canada and Statistics Canada.

Federal debt (accumulated deficit)



Sources: Department of Finance Canada and Statistics Canada.

- Subsidies and other transfers increased by 14.7 per cent, reflecting the impact of measures from recent budgets as well as transfers under the Grains and Oilseeds Payment Program and the Energy Cost Benefit.

Other program expenses increased by 5.6 per cent.

Public debt charges were down 2.5 per cent due to a decline in the stock of interest-bearing debt and a decline in the average effective interest rate on that debt.

Financial source of $3.8 billion for April 2005 to January 2006

The budgetary balance is presented on a full accrual basis of accounting, recording government assets and liabilities when they are receivable or incurred, regardless of when the cash is received or paid. In contrast, the financial source/requirement measures the difference between cash coming in to the Government and cash going out. This measure is affected not only by changes in the budgetary balance but also by the cash source/requirement resulting from the Government's investing activities through its acquisition of capital assets and its loans, financial investments and advances, as well as from other activities, including payment of accounts payable and collection of accounts receivable, foreign exchange activities, and the amortization of its tangible capital assets. The difference between the budgetary balance and financial source/requirement is recorded in non-budgetary transactions.

Non-budgetary transactions resulted in a net requirement of $5.2 billion in the April-to-January period, up $0.2 billion from the requirement in the same period of 2004–05.

With a budgetary surplus of $9.0 billion and a net requirement of $5.2 billion from non-budgetary transactions, there was a financial source of $3.8 billion in the first 10 months of 2005–06 compared to a financial source of $7.9 billion in the same period of 2004–05.

Net financing activities down $18.2 billion

The Government used this financial source of $3.8 billion and a reduction in its cash balances of $14.4 billion to reduce its market debt by $18.2 billion by the end of January 2006, largely through a reduction of marketable bonds and treasury bills. The level of cash balances varies from month to month based on a number of factors including periodic large debt maturities, which can be quite volatile on a monthly basis. Cash balances at the end of January stood at $2.7 billion.

Table 1
Summary statement of transactions

	January		April to January	
	2005	2006	2004–05	2005–06
	($ millions)			
Budgetary transactions				
Revenues	18,856	20,150	159,202	165,713
Expenses				
Program expenses	-13,638	-15,793	-117,587	-128,729
Public debt charges	-2,857	-2,676	-28,714	-27,986
Budgetary balance (deficit/surplus)	2,361	1,681	12,901	8,998
Non-budgetary transactions	-880	2,023	-5,014	-5,226
Financial source/requirement	1,481	3,704	7,887	3,772
Net change in financing activities	-2,027	-5,434	-21,657	-18,163
Net change in cash balances	-546	-1,730	-13,770	-14,391
Cash balance at end of period			3,480	2,730

Note: Positive numbers indicate net source of funds. Negative numbers indicate net requirement for funds.

Table 2
Budgetary revenues

	January			April to January		
	2005	2006	Change	2004–05	2005–06	Change
	($ millions)		(%)	($ millions)		(%)
Tax revenues						
Income taxes						
Personal income tax	8,677	9,673	11.5	73,101	76,108	4.1
Corporate income tax	2,358	2,599	10.2	19,854	22,573	13.7
Other income tax revenue	607	696	14.7	2,899	3,910	34.9
Total income tax	11,642	12,968	11.4	95,854	102,591	7.0
Excise taxes and duties						
Goods and services tax	3,125	3,346	7.1	26,679	28,502	6.8
Customs import duties	192	244	27.1	2,511	2,836	12.9
Sales and excise taxes	759	710	-6.5	8,154	7,983	-2.1
Air Travellers Security Charge	28	22	-21.4	325	279	-14.2
Total excise taxes and duties	4,104	4,322	5.3	37,669	39,600	5.1
Total tax revenues	15,746	17,290	9.8	133,523	142,191	6.5
Employment insurance premiums	1,891	1,677	-11.3	13,604	13,381	-1.6
Other revenues	1,219	1,183	-3.0	12,075	10,141	-16.0
Total budgetary revenues	18,856	20,150	6.9	159,202	165,713	4.1

Note: Totals may not sum due to rounding.

Table 3
Budgetary expenses

	January			April to January		
	2005	2006	Change	2004–05	2005–06	Change
	($ millions)		(%)	($ millions)		(%)
Transfer payments						
Transfers to persons						
Elderly benefits	2,362	2,491	5.5	23,194	24,184	4.3
Employment insurance benefits	1,615	1,570	-2.8	11,982	11,714	-2.2
Total	3,977	4,061	2.1	35,176	35,898	2.1
Transfers to other levels of government						
Support for health and other social programs						
Canada Health Transfer	1,054	1,583	50.2	10,542	15,833	50.2
Canada Social Transfer	652	685	5.1	6,521	6,854	5.1
Health Reform Transfer	125	0	n/a	1,250	0	n/a
Total	1,831	2,268	23.9	18,313	22,687	23.9
Fiscal transfers	933	1,059	13.5	9,387	10,597	12.9
Canada's cities and communities	0	14	n/a	0	670	n/a
Alternative Payments for Standing Programs	-210	-261	24.3	-2,203	-2,461	11.7
Total	2,554	3,080	20.6	25,497	31,493	23.5
Subsidies and other transfers						
Agriculture	146	777	432.2	826	1,693	105.0
Foreign Affairs	310	333	7.4	2,010	1,933	-3.8
Health	234	207	-11.5	1,494	1,547	3.5
Human Resources Development	264	232	-12.1	1,050	1,144	9.0
Indian and Northern Development	347	368	6.1	3,618	3,986	10.2
Industry and Regional Development	100	159	59.0	1,491	1,610	8.0
Other	593	850	43.4	3,269	3,871	18.4
Total	1,994	2,926	46.7	13,758	15,784	14.7
Total transfer payments	8,525	10,067	18.1	74,431	83,175	11.7
Other program expenses						
Crown corporation expenses						
Canadian Broadcasting Corporation	108	50	-53.7	972	1,028	5.8
Canada Mortgage and Housing Corporation	170	171	0.6	1,685	1,707	1.3
Other	200	161	-19.5	1,731	1,511	-12.7
Total	478	382	-20.1	4,388	4,246	-3.2
Defence	1,156	1,221	5.6	10,905	11,987	9.9
All other departments and agencies	3,479	4,123	18.5	27,863	29,321	5.2
Total other program expenses	5,113	5,726	12.0	43,156	45,554	5.6
Total program expenses	13,638	15,793	15.8	117,587	128,729	9.5
Public debt charges	2,857	2,676	-6.3	28,714	27,986	-2.5
Total budgetary expenses	16,495	18,469	12.0	146,301	156,715	7.1

Note: Totals may not sum due to rounding.

Table 4
Budgetary balance and financial source/requirement

	January		April to January	
	2005	2006	2004–05	2005–06
			($ millions)	
Budgetary balance (deficit/surplus)	2,361	1,681	12,901	8,998
Non-budgetary transactions				
Capital investing activities	-86	-300	-1,088	-1,815
Other investing activities	-531	316	-1,914	-2,460
Pension and other accounts	-565	206	-1,974	-103
Other activities				
Accounts payable, receivables, accruals and allowances	928	1,277	-5,699	-5,994
Foreign exchange activities	-868	284	3,091	2,597
Amortization of tangible capital assets	242	240	2,570	2,549
Total other activities	302	1,801	-38	-848
Total non-budgetary transactions	-880	2,023	-5,014	-5,226
Net financial source/requirement	1,481	3,704	7,887	3,772

Note: Totals may not sum due to rounding.

Table 5
Financial source/requirement and net financing activities

	January		April to January	
	2005	2006	2004–05	2005–06
			($ millions)	
Net financial source/requirement	1,481	3,704	7,887	3,772
Net increase (+)/decrease (-) in financing activities				
Unmatured debt transactions				
Canadian currency borrowings				
Marketable bonds	387	221	-15,523	-7,771
Treasury bills	-2,450	-5,100	1,200	-5,200
Canada Savings Bonds	-96	-103	-1,964	-1,471
Other	0	-19	-28	-223
Total	-2,159	-5,001	-16,315	-14,665
Foreign currency borrowings	69	-428	-5,473	-3,559
Total	-2,090	-5,429	-21,788	-18,224
Obligations related to capital leases	63	-5	131	61
Net change in financing activities	-2,027	-5,434	-21,657	-18,163
Change in cash balance	-546	-1,730	-13,770	-14,391

Note: Totals may not sum due to rounding.

Table 6

Condensed statement of assets and liabilities

	March 31, 2005	January 31, 2006	Change
		($ millions)	
Liabilities			
Accounts payable, accruals and allowances	90,473	84,573	-5,900
Interest-bearing debt			
Unmatured debt			
Payable in Canadian dollars			
Marketable bonds	266,570	258,799	-7,771
Treasury bills	127,199	121,999	-5,200
Canada Savings Bonds	19,080	17,609	-1,471
Other	3,393	3,170	-223
Subtotal	416,242	401,577	-14,665
Payable in foreign currencies	16,286	12,727	-3,559
Obligations related to capital leases	2,932	2,993	61
Total unmatured debt	435,460	417,297	-18,163
Pension and other accounts			
Public sector pensions	129,579	131,281	1,702
Other employee and veteran future benefits	41,549	42,848	1,299
Other pension and other accounts	8,680	5,576	-3,104
Total pension and other accounts	179,808	179,705	-103
Total interest-bearing debt	615,268	597,002	-18,266
Total liabilities	705,741	681,575	-24,166
Financial assets			
Cash and accounts receivable	76,281	61,984	-14,297
Foreign exchange accounts	40,871	38,274	-2,597
Loans, investments and advances (net of allowances)	33,860	36,320	2,460
Total financial assets	151,012	136,578	-14,434
Net debt	554,729	544,997	-9,732
Non-financial assets	54,866	54,132	-734
Federal debt (accumulated deficit)	499,863	490,865	-8,998

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March 2006

The Fiscal Monitor

A Publication of the Department of Finance Canada

Highlights

February 2006: budgetary surplus of $4.1 billion

There was a budgetary surplus of $4.1 billion in February 2006, down $1.7 billion from February 2005. Total budgetary revenues were $0.1 billion lower, primarily due to a $0.6-billion decline in corporate income tax revenues. This decline is primarily due to an increase in refunds to the non-energy manufacturing sector. Program expenses were up $1.6 billion, primarily reflecting higher transfer payments to the provinces and territories as specified under the 2004 agreements on health care and equalization/Territorial Formula Financing (TFF). Public debt charges were flat compared to the same month last year.

April 2005 to February 2006: budgetary surplus of $13.1 billion

For the first 11 months of the 2005–06 fiscal year (April to February), the budgetary surplus is estimated at $13.1 billion, down $5.6 billion from the $18.7-billion surplus reported in the same period of 2004–05. Budgetary revenues were up $6.4 billion or 3.6 per cent. This gain is net of the $4.7-billion cost of the personal income tax reduction measures pertaining to the 2005 tax year and the first two months of this year. Program expenses were up $12.7 billion or 9.9 per cent, primarily due to higher transfers to the provinces and territories for health care and equalization/TFF. Public debt charges were $0.7 billion lower. A full update of the fiscal projections for the year as a whole, including the year-end accrual adjustments, will be provided in the budget.

February 2006

There was a budgetary surplus of $4.1 billion in February 2006, down $1.7 billion from February 2005.

Budgetary revenues declined by $0.1 billion, or 0.5 per cent, to $19.7 billion.

- Personal income tax receipts were up $0.3 billion or 4.7 per cent.
- Corporate income tax revenues were down $0.6 billion or 9.6 per cent, largely due to an increase in refunds to the non-energy manufacturing sector, reflecting weak profitability in that sector in 2005. In addition, corporate year-end settlement payments were weaker than in February last year, due in part to lower settlement payments from the non-energy manufacturing sector.
- Other income tax receipts—withholdings from non-residents—rose $59 million or 16.8 per cent in February.
- Excise taxes and duties rose $0.2 billion or 5.0 per cent due to a $0.3-billion increase in goods and services tax (GST) revenues. Customs import duties were down $38 million, while sales and excise taxes were down $78 million. Revenues from the Air Travellers Security Charge were up $5 million.

- Employment insurance (EI) premiums declined by 4.8 per cent, reflecting the decline in the premium rate from $1.95 to $1.87 per $100 of insurable earnings, effective January 1, 2006.
- Other revenues, consisting of revenues from Crown corporations, sales of goods and services, return on investments, foreign exchange revenues and miscellaneous revenues, were down 3.7 per cent. Other revenues can be volatile on a monthly basis.

Program expenses in February 2006 were $12.9 billion, up $1.6 billion or 13.9 per cent from February 2005, primarily due to higher transfer payments.

Transfer payments were up $1.3 billion or 16.0 per cent.

- Transfers to persons, consisting of elderly and EI benefits, were up $61 million or 1.6 per cent. Elderly benefits increased 5.4 per cent due to both higher average benefits, which are indexed to Consumer Price Index inflation, and an increase in the number of individuals eligible for benefits. EI benefit payments decreased 4.8 per cent, reflecting a decline in regular benefits.
- Transfers to other levels of government, consisting of federal transfers in support of health and other social programs (Canada Health Transfer and Canada Social Transfer), fiscal transfers, transfers to provinces on behalf of Canada's cities and communities, and Alternative Payments for Standing Programs, were up $0.8 billion or 35.3 per cent. The increase in federal transfers in support of health and other social programs and higher fiscal transfers largely reflect increased funding under the 2004 agreements on health care and equalization/TFF.
- Subsidies and other transfers increased $0.4 billion or 21.9 per cent. This component is volatile on a monthly basis.

Other program expenses consist of transfers to Crown corporations and operating expenses for departments and agencies, including National Defence, and also reflect the ongoing assessment of the Government's liabilities. These expenses increased $0.3 billion or 9.4 per cent.

Public debt charges increased marginally, by $9 million.

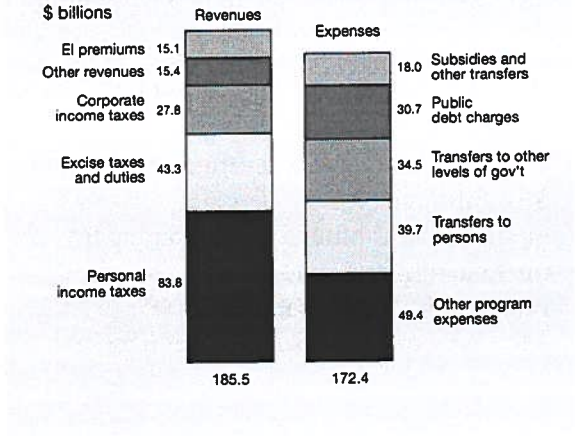
April 2005 to February 2006

In the first 11 months of the 2005–06 fiscal year, there was a budgetary surplus of $13.1 billion, $5.6 billion below the $18.7-billion surplus reported in the same period of 2004–05.

Budgetary revenues increased $6.4 billion or 3.6 per cent to $185.5 billion.

- Personal income tax revenues rose $3.4 billion or 4.2 per cent. This gain is net of the $4.7-billion cost of the personal income tax reduction measures pertaining to the 2005 tax year and the first two months of this year.
- Corporate income tax revenues were up $2.2 billion or 8.4 per cent, reflecting gains in corporate profitability in 2005.

Revenues and expenses
(April 2005-February 2006)



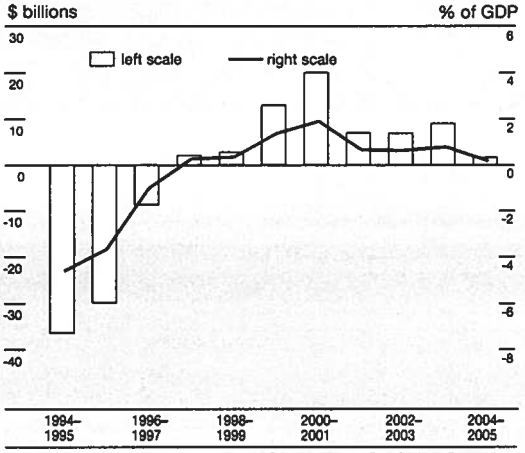
- Other income tax revenues increased $1.1 billion or 32.9 per cent, reflecting increased dividend payments to non-residents.
- Excise taxes and duties rose $2.1 billion or 5.1 per cent. GST revenues increased $2.1 billion or 7.2 per cent, broadly consistent with the growth rate of retail sales of 6.9 per cent over the same period. Customs import duties were up 10.3 per cent. Sales and excise taxes were down 2.8 per cent, while the Air Travellers Security Charge was down 11.2 per cent, reflecting reductions in the charge, effective April 1, 2005.
- EI premiums were down 2.0 per cent, as the impact of the reduction in the premium rate in January 2005 and January 2006 more than offset the impact of higher employment and wages and salaries.
- Other revenues were down $2.0 billion or 15.1 per cent, reflecting the impact of the one-time gain ($2.6 billion) from the sale of the Government's remaining shares in Petro-Canada in September 2004.

Program expenses in the April 2005 to February 2006 period were $141.7 billion, up $12.7 billion or 9.9 per cent from the same period of 2004–05, primarily due to higher transfers to the provinces and territories for health care and equalization/TFF. Public debt charges declined by $0.7 billion.

Transfer payments, which account for nearly two-thirds of total program expenses, increased $10.0 billion or 12.2 per cent.

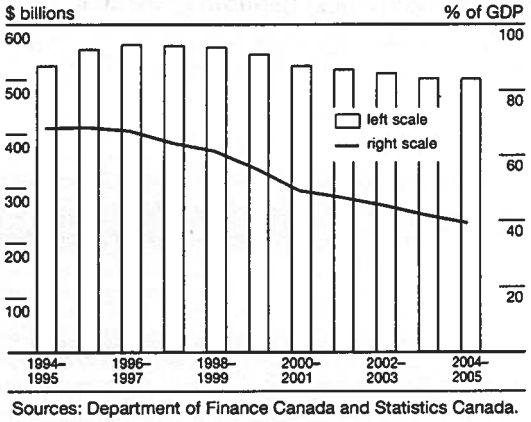
- Transfers to persons advanced by 2.0 per cent. Elderly benefits were up 4.4 per cent while EI benefits were down 2.5 per cent. The year-to-date decline in EI benefits is mainly attributable to a decline in regular benefits, which is in turn due to improved labour market conditions compared to the same period in 2004–05.
- Transfers to other levels of government were up $6.8 billion or 24.5 per cent, reflecting the impact of the 2004 agreements on health care and the new framework for equalization and TFF.

Budgetary balance



Sources: Department of Finance Canada and Statistics Canada.

Federal debt (accumulated deficit)



Sources: Department of Finance Canada and Statistics Canada.

- Subsidies and other transfers increased 15.6 per cent, reflecting the impact of measures from recent budgets as well as transfers under the Grains and Oilseeds Payment Program and the Energy Cost Benefit.

Other program expenses increased 5.8 per cent.

Public debt charges were down 2.3 per cent compared to the same period last year, due to a decline in the stock of interest-bearing debt and a decline in the average effective interest rate on that debt.

Financial source of $5.4 billion for April 2005 to February 2006

The budgetary balance is presented on a full accrual basis of accounting, recording government assets and liabilities when they are receivable or incurred, regardless of when the cash is received or paid. In contrast, the financial source/requirement measures the difference between cash coming in to the Government and cash going out. This measure is affected not only by changes in the budgetary balance but also by the cash source/requirement resulting from the Government's investing activities through its acquisition of capital assets and its loans, financial investments and advances, as well as from other activities, including payment of accounts payable and collection of accounts receivable, foreign exchange activities, and the amortization of its tangible capital assets. The difference between the budgetary balance and financial source/requirement is recorded in non-budgetary transactions.

Non-budgetary transactions resulted in a net requirement of $7.6 billion in the April-to-February period, down $2.6 billion from the requirement in the same period of 2004–05.

With a budgetary surplus of $13.1 billion and a net requirement of $7.6 billion from non-budgetary transactions, there was a financial source of $5.4 billion in the first 11 months of 2005–06 compared to a financial source of $8.5 billion in the same period of 2004–05.

Net financing activities down $18.5 billion

The Government used this financial source of $5.4 billion and a reduction in its cash balances of $13.1 billion to reduce its market debt by $18.5 billion by the end of February 2006, largely through a reduction of marketable bonds and treasury bills. The level of cash balances varies from month to month based on a number of factors including periodic large debt maturities, which can be quite volatile on a monthly basis. Cash balances at the end of February stood at $4.0 billion.

Table 1
Summary statement of transactions

	February		April to February	
	2005	2006	2004–05	2005–06
	($ millions)			
Budgetary transactions				
Revenues	19,840	19,743	179,044	185,456
Expenses				
Program expenses	-11,348	-12,928	-128,936	-141,658
Public debt charges	-2,722	-2,731	-31,436	-30,717
Budgetary balance (deficit/surplus)	5,770	4,084	18,672	13,081
Non-budgetary transactions	-5,198	-2,416	-10,212	-7,638
Financial source/requirement	572	1,668	8,460	5,443
Net change in financing activities	3,221	-348	-18,437	-18,513
Net change in cash balances	3,793	1,320	-9,977	-13,070
Cash balance at end of period			7,273	4,048

Note: Positive numbers indicate net source of funds. Negative numbers indicate net requirement for funds.

Table 2
Budgetary revenues

	February			April to February		
	2005	2006	Change	2004–05	2005–06	Change
	($ millions)		(%)	($ millions)		(%)
Tax revenues						
Income taxes						
Personal income tax	7,372	7,717	4.7	80,474	83,825	4.2
Corporate income tax	5,780	5,225	-9.6	25,635	27,799	8.4
Other income tax revenue	352	411	16.8	3,251	4,321	32.9
Total income tax	13,504	13,353	-1.1	109,360	115,945	6.0
Excise taxes and duties						
Goods and services tax	2,542	2,830	11.3	29,221	31,333	7.2
Customs import duties	275	237	-13.8	2,785	3,073	10.3
Sales and excise taxes	723	645	-10.8	8,878	8,626	-2.8
Air Travellers Security Charge	31	36	16.1	356	316	-11.2
Total excise taxes and duties	3,571	3,748	5.0	41,240	43,348	5.1
Total tax revenues	17,075	17,101	0.2	150,600	159,293	5.8
Employment insurance premiums	1,797	1,710	-4.8	15,401	15,091	-2.0
Other revenues	968	932	-3.7	13,043	11,072	-15.1
Total budgetary revenues	19,840	19,743	-0.5	179,044	185,456	3.6

Note: Totals may not sum due to rounding.

Table 3
Budgetary expenses

	February			April to February		
	2005	2006	Change	2004–05	2005–06	Change
	($ millions)		(%)	($ millions)		(%)
Transfer payments						
Transfers to persons						
Elderly benefits	2,367	2,496	5.4	25,561	26,680	4.4
Employment insurance benefits	1,423	1,355	-4.8	13,405	13,069	-2.5
Total	3,790	3,851	1.6	38,966	39,749	2.0
Transfers to other levels of government						
Support for health and other social programs						
Canada Health Transfer	1,054	1,583	50.2	11,596	17,417	50.2
Canada Social Transfer	652	685	5.1	7,173	7,540	5.1
Health Reform Transfer	125	0	n/a	1,375	0	n/a
Total	1,831	2,268	23.9	20,144	24,957	23.9
Fiscal transfers	634	1,045	64.8	10,020	11,641	16.2
Canada's cities and communities	0	0	n/a	0	670	n/a
Alternative Payments for Standing Programs	-210	-261	24.3	-2,413	-2,722	12.8
Total	2,255	3,052	35.3	27,751	34,546	24.5
Subsidies and other transfers						
Agriculture	780	720	-7.7	1,606	2,414	50.3
Foreign Affairs	200	238	19.0	2,210	2,171	-1.8
Health	124	86	-30.6	1,618	1,633	0.9
Human Resources Development	104	124	19.2	1,154	1,268	9.9
Indian and Northern Development	285	278	-2.5	3,903	4,263	9.2
Industry and Regional Development	-16	168	n/a	1,475	1,778	20.5
Other	313	568	81.5	3,582	4,439	23.9
Total	1,790	2,182	21.9	15,548	17,966	15.6
Total transfer payments	7,835	9,085	16.0	82,265	92,261	12.2
Other program expenses						
Crown corporation expenses						
Canadian Broadcasting Corporation	65	69	6.2	1,037	1,098	5.9
Canada Mortgage and Housing Corporation	170	150	-11.8	1,855	1,857	0.1
Other	107	188	75.7	1,838	1,698	-7.6
Total	342	407	19.0	4,730	4,653	-1.6
Defence	1,024	1,183	15.5	11,929	13,170	10.4
All other departments and agencies	2,147	2,253	4.9	30,012	31,574	5.2
Total other program expenses	3,513	3,843	9.4	46,671	49,397	5.8
Total program expenses	11,348	12,928	13.9	128,936	141,658	9.9
Public debt charges	2,722	2,731	0.3	31,436	30,717	-2.3
Total budgetary expenses	14,070	15,659	11.3	160,372	172,375	7.5

Note: Totals may not sum due to rounding.

Table 4

Budgetary balance and financial source/requirement

	February		April to February	
	2005	2006	2004–05	2005–06
			($ millions)	
Budgetary balance (deficit/surplus)	5,770	4,084	18,672	13,081
Non-budgetary transactions				
Capital investing activities	-313	-294	-1,402	-2,108
Other investing activities	-101	-670	-2,015	-3,129
Pension and other accounts	-934	-262	-2,907	-363
Other activities				
Accounts payable, receivables, accruals and allowances	-2,930	-1,404	-8,629	-7,397
Foreign exchange activities	-1,166	15	1,925	2,611
Amortization of tangible capital assets	246	199	2,816	2,748
Total other activities	-3,850	-1,190	-3,888	-2,038
Total non-budgetary transactions	-5,198	-2,416	-10,212	-7,638
Net financial source/requirement	572	1,668	8,460	5,443

Note: Totals may not sum due to rounding.

Table 5

Financial source/requirement and net financing activities

	February		April to February	
	2005	2006	2004–05	2005–06
			($ millions)	
Net financial source/requirement	572	1,668	8,460	5,443
Net increase (+)/decrease (-) in financing activities				
Unmatured debt transactions				
Canadian currency borrowings				
Marketable bonds	1,887	2,245	-13,636	-5,526
Treasury bills	1,100	-2,100	2,300	-7,300
Canada Savings Bonds	-196	-137	-2,161	-1,609
Other	-1	0	-29	-223
Total	2,790	8	-13,526	-14,658
Foreign currency borrowings	397	-361	-5,076	-3,920
Total	3,187	-353	-18,602	-18,578
Obligations related to capital leases	34	5	165	65
Net change in financing activities	3,221	-348	-18,437	-18,513
Change in cash balance	3,793	1,320	-9,977	-13,070

Note: Totals may not sum due to rounding.

Table 6

Condensed statement of assets and liabilities

	March 31, 2005	February 28, 2006	Change
		($ millions)	
Liabilities			
Accounts payable, accruals and allowances	90,473	89,251	-1,222
Interest-bearing debt			
Unmatured debt			
Payable in Canadian dollars			
Marketable bonds	266,570	261,044	-5,526
Treasury bills	127,199	119,899	-7,300
Canada Savings Bonds	19,080	17,471	-1,609
Other	3,393	3,170	-223
Subtotal	416,242	401,584	-14,658
Payable in foreign currencies	16,286	12,366	-3,920
Obligations related to capital leases	2,932	2,997	65
Total unmatured debt	435,460	416,947	-18,513
Pension and other accounts			
Public sector pensions	129,579	131,407	1,828
Other employee and veteran future benefits	41,549	42,982	1,433
Other pension and other accounts	8,680	5,056	-3,624
Total pension and other accounts	179,808	179,445	-363
Total interest-bearing debt	615,268	596,392	-18,876
Total liabilities	705,741	685,643	-20,098
Financial assets			
Cash and accounts receivable	76,281	69,386	-6,895
Foreign exchange accounts	40,871	38,260	-2,611
Loans, investments and advances (net of allowances)	33,860	36,989	3,129
Total financial assets	151,012	144,635	-6,377
Net debt	554,729	541,008	-13,721
Non-financial assets	54,866	54,226	-640
Federal debt (accumulated deficit)	499,863	486,782	-13,081

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April 2006

The Fiscal Monitor

A Publication of the Department of Finance Canada

Highlights

March 2006: budgetary deficit of $1.1 billion

There was a budgetary deficit of $1.1 billion in March 2006, down from the $9.9-billion deficit recorded in March 2005. The improvement is almost entirely due to lower program expenses resulting from lower transfer payments, reflecting $7.2 billion in one-time transfers and adjustments recorded in March 2005 related to the federal-provincial-territorial agreements on health care and Equalization/Territorial Formula Financing (TFF). Program expenses were down $8.4 billion in March. Budgetary revenues were $0.8 billion higher, reflecting solid growth in personal income tax revenues and an increase in non-tax revenues, partially offset by declines in corporate income tax and goods and services tax (GST) revenues. Public debt charges were up $0.3 billion compared to the same month last year.

April 2005 to March 2006: budgetary surplus of $8.4 billion, net of anticipated costs related to Bill C-48

For the April 2005 to March 2006 period, the budgetary surplus is estimated at $12.0 billion, up $3.3 billion from the $8.8-billion surplus reported in the same period of 2004–05. Budgetary revenues were up $7.2 billion, or 3.6 per cent. This gain is net of the $5.0-billion cost of the personal income tax reduction measures pertaining to the 2005 tax year and the first quarter of 2006. Program expenses were up $4.3 billion, or 2.8 per cent, primarily due to higher operating expenses for National Defence and other departments and agencies. Public debt charges were $0.4 billion lower.

The April 2005 to March 2006 monthly results are not the final results for the year as a whole. They do not account for $3.6 billion in costs related to anticipated payments made under Bill C-48 for 2005–06. After adjusting for these payments, the April to March surplus is $8.4 billion. Nor do the results reflect the regular end-of-year accounting adjustments, which include final tax accrual adjustments as well as final estimates of the cost of liabilities incurred during the fiscal year.

A discussion of the impact of the March results on the budget forecast for 2005–06 is provided later in this document.

Note to Readers:
Budget 2006 was presented on a gross reporting basis, whereas The Fiscal Monitor *for March 2006 is presented on a net basis. Beginning with the April 2006 monthly financial results,* The Fiscal Monitor *will also report the monthly financial results on a gross basis. A reconciliation table is provided later in this document showing the monthly results for the April 2005 to March 2006 period on a gross reporting basis, consistent with the Budget 2006 presentation.*

The Fiscal Monitor

March 2006

There was a budgetary deficit of $1.1 billion in March 2006, down $8.9 billion from the $9.9-billion deficit recorded in March 2005.

Budgetary revenues rose $0.8 billion, or 4.3 per cent, to $18.6 billion.

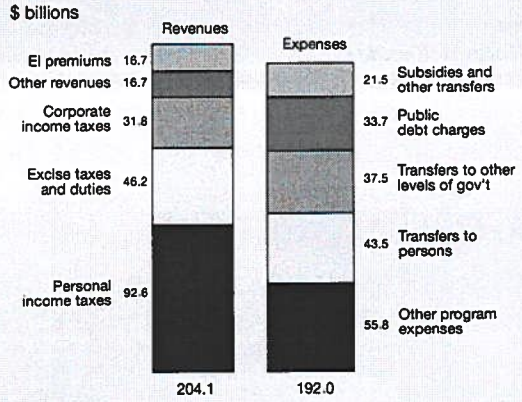
- Personal income tax revenues were up $0.5 billion, or 6.3 per cent.
- Corporate income tax revenues were down $0.2 billion, or 4.6 per cent, reflecting weaker corporate year-end settlement payments from the refining and non-energy manufacturing sectors.
- Other income tax revenues—withholdings from non-residents—rose $34 million, or 10.8 per cent.
- Excise taxes and duties were down $0.1 billion, or 4.1 per cent, due to a $0.2-billion decline in GST revenues. Customs import duties were up $87 million, sales and excise taxes rose $35 million and revenues from the Air Travellers Security Charge were up $2 million.
- Employment insurance (EI) premiums declined by 6.3 per cent, reflecting the decline in the premium rate from $1.95 to $1.87 per $100 of insurable earnings, effective January 1, 2006.
- Other revenues consist of net profits from enterprise Crown corporations, sales of goods and services, returns on investments, foreign exchange revenues and miscellaneous revenues. Other revenues, which are volatile on a monthly basis, were up $0.6 billion.

Program expenses in March 2006 were $16.7 billion, down $8.4 billion, or 33.6 per cent, from March 2005, primarily reflecting lower transfer payments.

Transfer payments were down $8.3 billion, or 44.8 per cent.

- Transfers to persons, consisting of elderly and EI benefits, were up $103 million, or 2.8 per cent. Elderly benefits increased 6.2 per cent due to both higher average benefits, which are indexed to Consumer Price Index inflation, and an increase in the number of individuals eligible for benefits. EI benefit payments decreased 3.3 per cent, reflecting a decline in regular benefits.
- Transfers to other levels of government, consisting of federal transfers in support of health and other social programs (Canada Health Transfer and Canada Social Transfer), fiscal transfers, transfers to provinces on behalf of Canada's cities and communities, and Alternative Payments for Standing Programs, were down $7.2 billion, or 70.2 per cent. The decrease in federal transfers in support of health and other social programs and lower fiscal transfers reflect one-time transfers and adjustments under the 2004 agreements on health care and Equalization/TFF recorded in March 2005.

Revenues and expenses
(April 2005-March 2006)



- Subsidies and other transfers decreased by $1.3 billion, or 26.9 per cent. This component is volatile on a monthly basis.

Other program expenses consist of transfers to Crown corporations and operating expenses for departments and agencies, including National Defence, and also reflect the ongoing assessment of the Government's liabilities. Consistent with the announcement in Budget 2006, this category now also includes the net expenses of foundations. On a year-over-year basis, other program expenses decreased $0.1 billion, or 1.3 per cent.

Public debt charges increased $0.3 billion, or 11.8 per cent, due to an increase in the average effective interest rate on the debt.

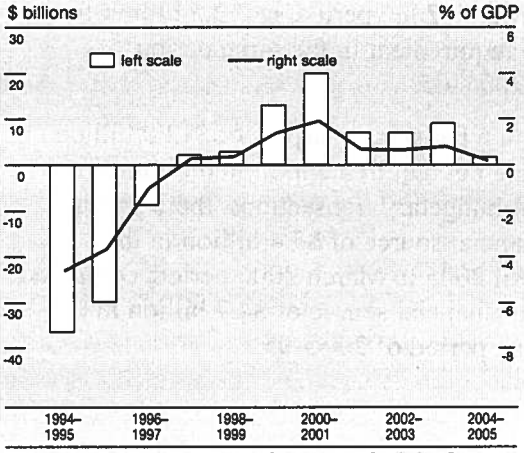
April 2005 to March 2006

For the April 2005 to March 2006 period, there was a budgetary surplus of $12.0 billion, $3.3 billion higher than the $8.8-billion surplus reported in the same period of 2004–05.

Budgetary revenues rose $7.2 billion, or 3.6 per cent, to $204.1 billion.

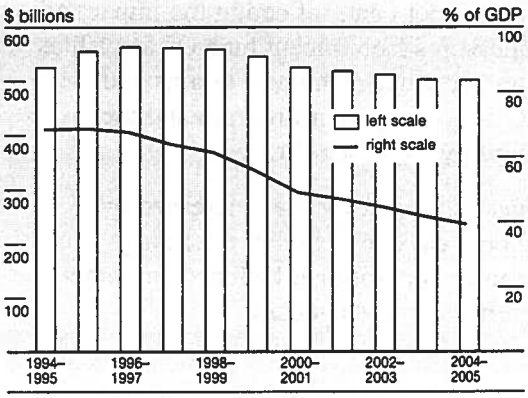
- Personal income tax revenues rose $3.9 billion, or 4.4 per cent. This gain is net of the $5.0-billion cost of the personal income tax reduction measures pertaining to the 2005 tax year and the first quarter of 2006.
- Corporate income tax revenues were up $2.0 billion, or 6.6 per cent, reflecting gains in corporate profitability in 2005.
- Other income tax revenues increased by $1.1 billion, or 31.0 per cent, reflecting increased dividend payments to non-residents.
- Excise taxes and duties rose $2.0 billion, or 4.5 per cent. GST revenues increased $1.9 billion, or 6.0 per cent, broadly consistent with growth in retail sales of 6.7 per cent over the comparable period. Customs import duties were up 12.4 per cent. Sales and excise taxes were down 2.2 per cent, while the Air Travellers Security Charge was down 9.8 per cent, reflecting reductions in the charge, effective April 1, 2005.

Budgetary balance



Sources: Department of Finance Canada and Statistics Canada.

Federal debt (accumulated deficit)



Sources: Department of Finance Canada and Statistics Canada.

- EI premiums were down 2.5 per cent, as the impact of the reductions in premium rates in January 2005 and January 2006 more than offset the impact of higher employment and wages and salaries.
- Other revenues were down $1.3 billion, or 10.0 per cent, reflecting the impact of the one-time gain ($2.6 billion) from the sale of the Government's remaining shares in Petro-Canada in September 2004.

Program expenses in the April 2005 to March 2006 period were $158.3 billion, up $4.3 billion, or 2.8 per cent, over the same period of 2004–05. Public debt charges declined by $0.4 billion. Transfer payments, which account for over half of program expenses, increased by $1.7 billion, or 1.6 per cent.

- Transfers to persons advanced by 2.1 per cent. Elderly benefits were up 4.5 per cent while EI benefits were down 2.6 per cent. The year-to-date decline in EI benefits is mainly attributable to a decline in regular benefits, which is in turn due to improved labour market conditions compared to the same period in 2004–05.
- Transfers to other levels of government were down $0.5 billion, or 1.3 per cent.
- Subsidies and other transfers increased by 6.2 per cent, reflecting the impact of measures from recent budgets as well as transfers under the new Grains and Oilseeds Payment Program and the Energy Cost Benefit.

Other program expenses increased by 5.0 per cent due to higher operating expenses for National Defence and other departments and agencies.

Public debt charges were down 1.2 per cent due to a decline in the stock of interest-bearing debt and a decline in the average effective interest rate on that debt.

Financial source of $5.4 billion for April 2005 to March 2006

The budgetary balance is presented on a full accrual basis of accounting, recording government assets and liabilities when they are receivable or incurred, regardless of when the cash is received or paid. In contrast, the financial source/requirement measures the difference between cash coming in to the Government and cash going out. This measure is affected not only by changes in the budgetary balance but also by the cash source/requirement resulting from the Government's investing activities through its acquisition of capital assets and its loans, financial investments and advances, as well as from other activities, including payment of accounts payable and collection of accounts receivable, foreign exchange activities, and the amortization of its tangible capital assets. The difference between the budgetary balance and financial source/requirement is recorded in non-budgetary transactions.

Non-budgetary transactions resulted in a net requirement of $6.6 billion in the April 2005 to March 2006 period, up $2.5 billion from the requirement in the same period of 2004–05.

With a budgetary surplus of $12.0 billion and a net requirement of $6.6 billion from non-budgetary transactions, there was a financial source of $5.4 billion in the April 2005 to March 2006 period, compared to a financial source of $4.7 billion in the same period of 2004–05.

Net financing activities down $4.6 billion

The Government used this financial source of $5.4 billion to increase its cash balances by $0.8 billion and to reduce its market debt by $4.6 billion by the end of March 2006, largely through a reduction of marketable bonds. The level of cash balances varies from month to month based on a number of factors including periodic large debt maturities, which can be quite volatile on a monthly basis. Cash balances at the end of March stood at $17.9 billion.

The Fiscal Monitor

Quarterly update of the fiscal outlook for 2005–06: estimated outcome for 2005–06 unchanged from budget, with a projected budgetary surplus of $8.0 billion

The monthly results for the 12-month period ended March 2006 are consistent with the forecast presented in the 2006 budget, which was prepared based on monthly financial information through February 2006. However, March data show that both corporate income tax revenues and direct program expenses came in lower than expected.

Corporate income tax revenues in March 2006 were weaker than expected due to lower than anticipated settlement payments from the energy sector. Corporations make monthly tax instalment payments based on either their previous year's actual tax liability or their current year's estimated liability, with any differences made up within 60 days of the close of their taxation year. As roughly three-quarters of Canadian corporations have corporate year-ends in September through December, most corporate settlement payments are received in January through March. As such, the magnitude of corporate receipts in March is very volatile. However, the final result for corporate income tax receipts for 2005–06 will likely be higher than reported in the April to March period. Positive year-end accrual adjustments are generally recorded in the corporate tax stream. This reflects the fact that no adjustments are made to the monthly corporate data for payables and receivables due to a lack of reliable information on which to base such adjustments.

The shortfall in corporate income tax revenues was offset by lower than projected direct program expenses, as it appears that the dissolution of Parliament in November lowered program expenses by more than anticipated in the budget forecast.

All told, the year-to-date results are consistent with the budget forecast of a surplus of $8.0 billion for 2005–06.

The above results are not the final results for the year as a whole.

- The April 2005 to March 2006 monthly results do not account for $3.6 billion in costs related to anticipated payments made under Bill C-48 for 2005–06, yielding a surplus estimate of $8.4 billion.
- Nor do the results reflect the regular end-of-year accounting adjustments, which include final tax accrual adjustments as well as final estimates of the cost of liabilities incurred during the fiscal year.
- While the monthly results include estimates of tax accruals, the final accruals can vary significantly from the monthly estimates due to factors such as the magnitude of registered retirement savings plan contributions and variations in capital gains and losses reported at tax filing. Final accrual estimates will be determined based on assessments of tax files as at May 31.
- Similarly, while the monthly results attempt to reflect the most up-to-date information on the Government's legal and environmental liabilities, provisions for guarantees, and allowances for valuation of loans, investments and advances, these are ultimately determined when the books are closed for the year, generally in September.

Differences between net and gross reporting

The revenues and expenses in Tables 1–6 are presented on a "net" basis, with certain expenses netted against budgetary revenues and certain revenues netted against expenses: the Canada Child Tax Benefit is netted against personal income tax revenues; departmental revenues that are levied for specific purposes, such as the contract costs of policing services in provinces, are netted against expenses; and revenues of consolidated Crown corporations and other entities are netted against their total expenses. This classification has the effect of reducing both revenues and expenses but has no impact on the budgetary balance. The following table shows the impact of "grossing up" budgetary revenues and expenses for these adjustments. Beginning with the April 2006 monthly financial results, *The Fiscal Monitor* will be presented on a gross basis, consistent with the presentation in Budget 2006.

Differences between net and gross reporting

	March		April to March	
	2005	2006	2004–05	2005–06
	($ millions)			
Net revenues	17,844	18,607	196,889	204,061
Add: Adjustments				
Canada Child Tax Benefit (personal income tax)	752	809	8,745	9,278
Revenues netted against program expenses (other revenues)	481	515	2,493	2,837
Revenues of consolidated Crown corporations and foundations (other revenues)	386	361	1,761	1,718
Net adjustment	1,619	1,685	12,999	13,833
Gross revenues	19,463	20,292	209,888	217,894
Net program expenses	25,076	16,654	154,015	158,311
Add: Adjustments				
Canada Child Tax Benefit (transfers to persons)	752	809	8,745	9,278
Revenues netted against program expenses (other program expenses)	481	515	2,493	2,837
Revenues of consolidated Crown corporations and foundations (other program expenses)	386	361	1,761	1,718
Net adjustment	1,619	1,685	12,999	13,833
Gross program expenses	26,695	18,339	167,014	172,144

Table 1
Summary statement of transactions

	March		April to March	
	2005	2006	2004–05	2005–06
	($ millions)			
Budgetary transactions				
Revenues	17,844	18,607	196,889	204,061
Expenses				
Program expenses	-25,076	-16,654	-154,015	-158,311
Public debt charges	-2,687	-3,004	-34,122	-33,722
Budgetary balance (deficit/surplus)	-9,919	-1,051	8,752	12,028
Non-budgetary transactions	6,120	1,046	-4,091	-6,593
Financial source/requirement	-3,799	-5	4,661	5,435
Net change in financing activities	13,647	13,886	-4,790	-4,626
Net change in cash balances	9,848	13,881	-129	809
Cash balance at end of period			17,122	17,931

Note: Positive numbers indicate net source of funds. Negative numbers indicate net requirement for funds.

Table 2
Budgetary revenues

	March			April to March		
	2005	2006	Change	2004–05	2005–06	Change
	($ millions)		(%)	($ millions)		(%)
Tax revenues						
Income taxes						
Personal income tax	8,213	8,732	6.3	88,686	92,558	4.4
Corporate income tax	4,238	4,043	-4.6	29,872	31,842	6.6
Other income tax revenue	316	350	10.8	3,567	4,671	31.0
Total income tax	12,767	13,125	2.8	122,125	129,071	5.7
Excise taxes and duties						
Goods and services tax	1,939	1,694	-12.6	31,161	33,027	6.0
Customs import duties	249	336	34.9	3,034	3,409	12.4
Sales and excise taxes	728	763	4.8	9,606	9,390	-2.2
Air Travellers Security Charge	33	35	6.1	389	351	-9.8
Total excise taxes and duties	2,949	2,828	-4.1	44,190	46,177	4.5
Total tax revenues	15,716	15,953	1.5	166,315	175,248	5.4
Employment insurance premiums	1,768	1,657	-6.3	17,169	16,748	-2.5
Other revenues	360	997	176.9	13,405	12,065	-10.0
Total budgetary revenues	17,844	18,607	4.3	196,889	204,061	3.6

Note: Totals may not sum due to rounding.

Table 3
Budgetary expenses

	March			April to March		
	2005	2006	Change	2004–05	2005–06	Change
	($ millions)		(%)	($ millions)		(%)
Transfer payments						
Transfers to persons						
Elderly benefits	2,365	2,512	6.2	27,926	29,192	4.5
Employment insurance benefits	1,328	1,284	-3.3	14,734	14,352	-2.6
Total	3,693	3,796	2.8	42,660	43,544	2.1
Transfers to other levels of government						
Support for health and other social programs						
Canada Health Transfer	6,835	1,583	-76.8	18,431	19,000	3.1
Canada Social Transfer	727	685	-5.8	7,900	8,225	4.1
Health Reform Transfer	125	0	n/a	1,500	0	n/a
Total	7,687	2,268	-70.5	27,831	27,225	-2.2
Fiscal transfers	2,882	796	-72.4	12,902	12,437	-3.6
Canada's cities and communities	0	0	n/a	0	580	n/a
Alternative Payments for Standing Programs	-333	-10	-97.0	-2,746	-2,732	-0.5
Total	10,236	3,054	-70.2	37,987	37,510	-1.3
Subsidies and other transfers						
Agriculture	1,044	244	-76.6	2,650	2,658	0.3
Foreign Affairs	1,182	887	-25.0	3,391	3,058	-9.8
Health	246	287	16.7	1,864	1,920	3.0
Human Resources Development	49	148	202.0	1,203	1,416	17.7
Indian and Northern Development	452	544	20.4	4,354	4,807	10.4
Industry and Regional Development	207	205	-1.0	1,682	1,983	17.9
Other	1,497	1,102	-26.4	5,080	5,632	10.9
Total	4,677	3,417	-26.9	20,224	21,474	6.2
Total transfer payments	18,606	10,267	-44.8	100,871	102,528	1.6
Other program expenses						
Crown corporation and foundation expenses						
Canadian Broadcasting Corporation	0	0	n/a	1,037	1,098	5.9
Canada Mortgage and Housing Corporation	190	176	-7.4	2,045	2,033	-0.6
Other	697	874	25.4	2,535	2,571	1.4
Total	887	1,050	18.4	5,617	5,702	1.5
Defence	1,633	1,566	-4.1	13,562	14,736	8.7
All other departments and agencies	3,950	3,771	-4.5	33,965	35,345	4.1
Total other program expenses	6,470	6,387	-1.3	53,144	55,783	5.0
Total program expenses	25,076	16,654	-33.6	154,015	158,311	2.8
Public debt charges	2,687	3,004	11.8	34,122	33,722	-1.2
Total budgetary expenses	27,763	19,658	-29.2	188,137	192,033	2.1

Note: Totals may not sum due to rounding.

Table 4
Budgetary balance and financial source/requirement

	March		April to March	
	2005	2006	2004–05	2005–06
			($ millions)	
Budgetary balance (deficit/surplus)	-9,919	-1,051	8,752	12,028
Non-budgetary transactions				
Capital investing activities	-862	-674	-2,264	-2,783
Other investing activities	-636	359	-2,651	-2,772
Pension and other accounts	278	515	-2,628	153
Other activities				
Accounts payable, receivables, accruals and allowances	5,321	2,192	-3,307	-5,205
Foreign exchange activities	1,517	-1,567	3,441	1,045
Amortization of tangible capital assets	502	221	3,318	2,969
Total other activities	7,340	846	3,452	-1,191
Total non-budgetary transactions	6,120	1,046	-4,091	-6,593
Net financial source/requirement	-3,799	-5	4,661	5,435

Note: Totals may not sum due to rounding.

Table 5
Financial source/requirement and net financing activities

	March		April to March	
	2005	2006	2004–05	2005–06
			($ millions)	
Net financial source/requirement	-3,799	-5	4,661	5,435
Net increase (+)/decrease (-) in financing activities				
Unmatured debt transactions				
Canadian currency borrowings				
Marketable bonds	1,348	674	-12,288	-4,852
Treasury bills	11,500	11,700	13,800	4,400
Canada Savings Bonds	-83	-124	-2,244	-1,732
Other	-6	-68	-35	-290
Total	12,759	12,182	-767	-2,474
Foreign currency borrowings	822	1,719	-4,254	-2,202
Total	13,581	13,901	-5,021	-4,676
Obligations related to capital leases	66	-15	231	50
Net change in financing activities	13,647	13,886	-4,790	-4,626
Change in cash balance	9,848	13,881	-129	809

Note: Totals may not sum due to rounding.

Table 6

Condensed statement of assets and liabilities

	March 31, 2005	March 31, 2006	Change
		($ millions)	
Liabilities			
Accounts payable, accruals and allowances	90,478	85,961	-4,517
Interest-bearing debt			
Unmatured debt			
Payable in Canadian dollars			
Marketable bonds	266,570	261,718	-4,852
Treasury bills	127,199	131,599	4,400
Canada Savings Bonds	19,080	17,348	-1,732
Other	3,393	3,103	-290
Subtotal	416,242	413,768	-2,474
Payable in foreign currencies	16,286	14,084	-2,202
Obligations related to capital leases	2,932	2,982	50
Total unmatured debt	435,460	430,834	-4,626
Pension and other accounts			
Public sector pensions	129,579	131,479	1,900
Other employee and veteran future benefits	41,549	43,112	1,563
Other pension and other accounts	8,680	5,370	-3,310
Total pension and other accounts	179,808	179,961	153
Total interest-bearing debt	615,268	610,795	-4,473
Total liabilities	705,746	696,756	-8,990
Financial assets			
Cash and accounts receivable	76,349	77,846	1,497
Foreign exchange accounts	40,871	39,826	-1,045
Loans, investments and advances (net of allowances)	39,249	42,021	2,772
Total financial assets	156,469	159,693	3,224
Net debt	549,277	537,063	-12,214
Non-financial assets	54,870	54,684	-186
Federal debt (accumulated deficit)	494,407	482,379	-12,028

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May 2006

TAB 16

Economic accounts key indicators, Canada[1]

	2004	2005	2006	2007	2008	2009	2010
	millions of dollars at current prices						
GDP by income and by expenditure							
Wages, salaries and supplementary labour income	657,249	695,093	743,392	784,885	818,563	814,707	849,618
	5.8	*5.8*	*6.9*	*5.6*	*4.3*	*-0.5*	*4.3*
Corporation profits before taxes	168,219	186,585	197,286	200,943	223,001	149,087	180,723
	16.4	*10.9*	*5.7*	*1.9*	*11.0*	*-33.1*	*21.2*
Interest and miscellaneous investment income	66,835	76,714	81,209	87,082	98,337	79,387	85,598
	6.8	*14.8*	*5.9*	*7.2*	*12.9*	*-19.3*	*7.8*
Net income of unincorporated business	84,210	85,234	86,750	90,411	94,675	98,843	104,989
	7.1	*1.2*	*1.8*	*4.2*	*4.7*	*4.4*	*6.2*
Taxes less subsidies	148,822	155,284	160,588	166,716	164,776	164,064	172,628
	6.0	*4.3*	*3.4*	*3.8*	*-1.2*	*-0.4*	*5.2*
Personal disposable income	760,462	794,269	853,190	901,634	953,568	966,269	1,013,778
	5.5	*4.4*	*7.4*	*5.7*	*5.8*	*1.3*	*4.9*
Personal saving rate[2]	3.2	2.1	3.5	2.8	3.9	4.6	4.8
	...	...	...	...	...	...	...
	millions of chained (2002) dollars						
Personal expenditure on consumer goods and services	697,566	723,146	753,263	787,765	811,157	814,215	841,466
	3.3	*3.7*	*4.2*	*4.6*	*3.0*	*0.4*	*3.3*
Government current expenditure on goods and services	236,138	239,471	246,749	253,466	264,608	274,131	280,846
	2.0	*1.4*	*3.0*	*2.7*	*4.4*	*3.6*	*2.4*
Gross fixed capital formation	257,712	281,727	301,606	312,285	318,670	277,316	305,166
	7.8	*9.3*	*7.1*	*3.5*	*2.0*	*-13.0*	*10.0*
Investment in inventories	7,723	14,254	12,563	12,256	9,715	-540	8,872
	...	...	...	...	...	...	...
Exports of goods and services	491,675	500,988	503,934	510,105	486,145	419,126	445,967
	5.0	*1.9*	*0.6*	*1.2*	*-4.7*	*-13.8*	*6.4*
Imports of goods and services	481,854	516,269	541,720	573,732	582,178	504,142	570,377
	8.0	*7.1*	*4.9*	*5.9*	*1.5*	*-13.4*	*13.1*
Gross domestic product at market prices	1,211,239	1,247,807	1,283,033	1,311,260	1,320,291	1,283,722	1,324,993
	3.1	*3.0*	*2.8*	*2.2*	*0.7*	*-2.8*	*3.2*
GDP at basic prices, by industry							
Goods-producing industries	360,281	368,652	371,046	372,586	368,514	334,478	352,456
	2.7	*2.3*	*0.6*	*0.4*	*-1.1*	*-9.2*	*5.4*
Services-producing industries	764,791	790,243	821,208	847,881	863,697	864,940	886,794
	3.3	*3.3*	*3.9*	*3.2*	*1.9*	*0.1*	*2.5*
Industrial production	269,590	274,074	273,998	272,736	264,301	239,250	251,004
	1.5	*1.7*	*-0.0*	*-0.5*	*-3.1*	*-9.5*	*4.9*
Non-durable manufacturing	75,534	75,467	73,385	71,006	67,793	63,860	65,151
	-0.6	*-0.1*	*-2.8*	*-3.2*	*-4.5*	*-5.8*	*2.0*
Durable manufacturing	109,362	112,607	112,440	110,733	104,283	86,116	93,022
	3.8	*3.0*	*-0.1*	*-1.5*	*-5.8*	*-17.4*	*8.0*
Agriculture, forestry, fishing and hunting	27,669	28,404	27,958	27,570	30,008	28,082	28,487
	8.6	*2.7*	*-1.6*	*-1.4*	*8.8*	*-6.4*	*1.4*
Mining, oil and gas extraction	55,672	55,941	57,271	57,776	56,538	52,125	54,967
	1.3	*0.5*	*2.4*	*0.9*	*-2.1*	*-7.8*	*5.5*
Construction	63,453	66,725	69,462	72,330	74,875	68,011	73,467
	6.0	*5.2*	*4.1*	*4.1*	*3.5*	*-9.2*	*8.0*
Manufacturing	184,814	187,901	185,527	181,348	171,785	150,431	158,326
	1.9	*1.7*	*-1.3*	*-2.3*	*-5.3*	*-12.4*	*5.2*
Wholesale trade	59,990	63,662	66,839	70,107	69,628	65,268	68,822
	3.8	*6.1*	*5.0*	*4.9*	*-0.7*	*-6.3*	*5.4*
Retail trade	62,666	64,841	68,822	71,733	73,293	72,774	75,634
	3.6	*3.5*	*6.1*	*4.2*	*2.2*	*-0.7*	*3.9*
Finance and insurance, real estate and renting and leasing and management of companies and enterprises	215,074	222,677	232,289	240,577	245,547	251,128	257,488
	3.6	*3.5*	*4.3*	*3.6*	*2.1*	*2.3*	*2.5*
Education services	53,764	55,292	57,008	58,413	60,140	61,219	62,539
	2.3	*2.8*	*3.1*	*2.5*	*3.0*	*1.8*	*2.2*
Health care and social assistance	71,589	72,735	74,468	76,715	78,715	80,888	82,761
	1.8	*1.6*	*2.4*	*3.0*	*2.6*	*2.8*	*2.3*
Public administration	64,085	65,115	67,452	69,136	71,447	73,742	75,390
	1.2	*1.6*	*3.6*	*2.5*	*3.3*	*3.2*	*2.2*

1. The first line is the series itself. The second line is the percentage change.
2. Personal saving divided by personal disposable income, multiplied by 100.

TAB 17

Department of Finance Canada
Ministère des Finances Canada

Fiscal Reference Tables

October 2011

Canada

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Preface

The *Fiscal Reference Tables* provide annual data on the financial position of the federal, provincial-territorial and local governments. The data are presented on both a Public Accounts basis—corresponding to the accounting conventions used to report financial information to the respective legislatures—as well as on a National Accounts basis—as prepared by Statistics Canada and the Organisation for Economic Co-operation and Development.

For information or clarification, please contact Douglas Nevison at 613-995-6391, Fiscal Policy Division, Department of Finance, Ottawa, Ontario, K1A 0G5.

Table of Contents

National Accounts

International Fiscal Comparisons

Federal Government
Public Accounts

Table 1

Fiscal transactions (millions of dollars)

Year	Revenues	Program expenses	Operating surplus or deficit (-)	Public debt charges	Budgetary surplus or deficit (-)	Other comprehensive income	Accumulated deficit	Non-budgetary transactions	Financial requirement (-)/ source
					(millions of dollars)				
1966-67	9,975	9,278	697	1,182	-485		17,708	86	-399
1967-68	10,925	10,681	244	1,286	-1,042		18,750	508	-534
1968-69	12,320	11,523	797	1,464	-667		19,417	-1,167	-1,834
1969-70	14,755	12,921	1,834	1,694	140		19,277	-284	-144
1970-71	15,387	14,516	871	1,887	-1,016		20,293	-1,310	-2,326
1971-72	17,119	16,795	324	2,110	-1,786		22,079	-263	-2,049
1972-73	19,808	19,409	399	2,300	-1,901		23,980	501	-1,400
1973-74	22,997	22,643	354	2,565	-2,211		26,191	893	-1,318
1974-75	29,965	28,952	1,013	3,238	-2,225		28,416	763	-1,462
1975-76	32,441	34,675	-2,234	3,970	-6,204		34,620	1,501	-4,703
1976-77	35,283	37,472	-2,189	4,708	-6,897		41,517	2,490	-4,407
1977-78	35,633	40,981	-5,348	5,531	-10,879		52,396	2,816	-8,063
1978-79	38,214	44,219	-6,005	7,024	-13,029		65,425	103	-12,926
1979-80	43,310	46,783	-3,473	8,494	-11,967		77,392	4,074	-7,893
1980-81	53,181	57,079	-3,898	10,658	-14,556		91,948	5,845	-8,711
1981-82	67,289	67,849	-560	15,114	-15,674		107,622	6,249	-9,425
1982-83	67,430	79,576	-12,146	16,903	-29,049		136,671	2,698	-26,351
1983-84	65,261	77,194	-11,933	20,430	-32,363		157,252	8,185	-24,178
1984-85	71,999	84,279	-12,280	24,887	-37,167		194,419	7,166	-30,001
1985-86	77,742	83,474	-5,732	27,657	-33,389		227,808	3,870	-29,519
1986-87	86,746	87,870	-1,124	28,718	-29,842		257,650	2,356	-27,486
1987-88	97,215	95,009	2,206	31,223	-29,017		286,667	4,225	-24,792
1988-89	106,349	98,764	7,585	35,532	-27,947		314,614	4,016	-23,931
1989-90	115,887	103,784	12,103	41,246	-29,143		343,757	11,324	-17,819
1990-91	119,685	108,550	11,135	45,034	-33,899		377,656	5,888	-28,011
1991-92	126,086	114,544	11,542	43,861	-32,319		409,975	1,566	-30,753
1992-93	124,486	122,173	2,313	41,332	-39,019		448,994	11,100	-27,919
1993-94	123,873	122,304	1,569	40,099	-38,530		487,524	4,898	-33,632
1994-95	130,791	123,238	7,553	44,185	-36,632		524,156	11,147	-25,485
1995-96	140,257	120,856	19,401	49,407	-30,006		554,162	7,392	-22,614
1996-97	149,889	111,327	38,562	47,281	-8,719		562,881	515	-8,204
1997-98	160,864	114,785	46,079	43,120	2,959		559,922	7,566	10,525
1998-99	165,520	116,438	49,082	43,303	5,779		554,143	1,111	6,890
1999-00	176,408	118,766	57,642	43,384	14,258		539,885	-3,231	11,027
2000-01	194,349	130,566	63,783	43,892	19,891		519,994	-11,651	8,240
2001-02	183,930	136,231	47,699	39,651	8,048		511,946	-8,120	-72
2002-03	190,570	146,679	43,891	37,270	6,621		505,325	2,777	9,398
2003-04	198,590	153,676	44,914	35,769	9,145		496,180	-1,542	7,603
2004-05	211,943	176,362	35,581	34,118	1,463		494,717	5,140	6,603
2005-06	222,203	175,213	46,990	33,772	13,218		481,499	-6,409	6,809
2006-07	235,966	188,269	47,697	33,945	13,752	479	467,268	-5,248	8,504
2007-08	242,420	199,498	42,922	33,325	9,597	34	457,637	4,931	14,528
2008-09	233,092	207,857	25,235	30,990	-5,755	-318	463,710	-84,312	-90,067
2009-10	218,600	244,784	-26,184	29,414	-55,598	211	519,097	-8,043	-63,641
2010-11	237,091	239,592	-2,501	30,871	-33,372	2,142	550,327	-12,784	-46,156

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 2

Fiscal transactions (per cent of GDP)

Year	Revenues	Program expenses	Operating surplus or deficit (-)	Public debt charges	Budgetary surplus or deficit (-)	Other comprehensive income	Accumulated deficit	Non-budgetary transactions	Financial requirement (-)/ source
					(per cent of GDP)				
1966-67	15.4	14.3	1.1	1.8	-0.7		27.3	0.1	-0.6
1967-68	15.7	15.3	0.4	1.8	-1.5		26.9	0.7	-0.8
1968-69	16.2	15.1	1.0	1.9	-0.9		25.5	-1.5	-2.4
1969-70	17.6	15.4	2.2	2.0	0.2		23.0	-0.3	-0.2
1970-71	17.1	16.1	1.0	2.1	-1.1		22.5	-1.5	-2.6
1971-72	17.4	17.1	0.3	2.1	-1.8		22.4	-0.3	-2.1
1972-73	18.0	17.7	0.4	2.1	-1.7		21.8	0.5	-1.3
1973-74	17.8	17.6	0.3	2.0	-1.7		20.3	0.7	-1.0
1974-75	19.5	18.8	0.7	2.1	-1.4		18.4	0.5	-0.9
1975-76	18.7	20.0	-1.3	2.3	-3.6		19.9	0.9	-2.7
1976-77	17.6	18.7	-1.1	2.4	-3.4		20.8	1.2	-2.2
1977-78	16.1	18.5	-2.4	2.5	-4.9		23.7	1.3	-3.6
1978-79	15.6	18.1	-2.5	2.9	-5.3		26.7	0.0	-5.3
1979-80	15.5	16.7	-1.2	3.0	-4.3		27.7	1.5	-2.8
1980-81	16.9	18.2	-1.2	3.4	-4.6		29.2	1.9	-2.8
1981-82	18.7	18.8	-0.2	4.2	-4.3		29.9	1.7	-2.6
1982-83	17.8	20.9	-3.2	4.4	-7.6		36.0	0.7	-6.9
1983-84	15.9	18.8	-2.9	5.0	-7.9		38.2	2.0	-5.9
1984-85	16.0	18.7	-2.7	5.5	-8.3		43.2	1.6	-6.7
1985-86	16.0	17.2	-1.2	5.7	-6.9		46.9	0.8	-6.1
1986-87	16.9	17.1	-0.2	5.6	-5.8		50.3	0.5	-5.4
1987-88	17.4	17.0	0.4	5.6	-5.2		51.3	0.8	-4.4
1988-89	17.3	16.1	1.2	5.8	-4.6		51.3	0.7	-3.9
1989-90	17.6	15.8	1.8	6.3	-4.4		52.3	1.7	-2.7
1990-91	17.6	16.0	1.6	6.6	-5.0		55.5	0.9	-4.1
1991-92	18.4	16.7	1.7	6.4	-4.7		59.8	0.2	-4.5
1992-93	17.8	17.4	0.3	5.9	-5.6		64.1	1.6	-4.0
1993-94	17.0	16.8	0.2	5.5	-5.3		67.0	0.7	-4.6
1994-95	17.0	16.0	1.0	5.7	-4.8		68.0	1.4	-3.3
1995-96	17.3	14.9	2.4	6.1	-3.7		68.4	0.9	-2.8
1996-97	17.9	13.3	4.6	5.6	-1.0		67.3	0.1	-1.0
1997-98	18.2	13.0	5.2	4.9	0.3		63.4	0.9	1.2
1998-99	18.1	12.7	5.4	4.7	0.6		60.6	0.1	0.8
1999-00	18.0	12.1	5.9	4.4	1.5		55.0	-0.3	1.1
2000-01	18.1	12.1	5.9	4.1	1.8		48.3	-1.1	0.8
2001-02	16.6	12.3	4.3	3.6	0.7		46.2	-0.7	0.0
2002-03	16.5	12.7	3.8	3.2	0.6		43.8	0.2	0.8
2003-04	16.4	12.7	3.7	2.9	0.8		40.9	-0.1	0.6
2004-05	16.4	13.7	2.8	2.6	0.1		38.3	0.4	0.5
2005-06	16.2	12.8	3.4	2.5	1.0		35.0	-0.5	0.5
2006-07	16.3	13.0	3.3	2.3	0.9	0.0	32.2	-0.4	0.6
2007-08	15.8	13.0	2.8	2.2	0.6	0.0	29.9	0.3	0.9
2008-09	14.5	13.0	1.6	1.9	-0.4	0.0	28.9	-5.3	-5.6
2009-10	14.3	16.0	-1.7	1.9	-3.6	0.0	34.0	-0.5	-4.2
2010-11	14.6	14.7	-0.2	1.9	-2.1	0.1	33.9	-0.8	-2.8

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 3

Revenues (millions of dollars)

Year	Personal income tax	Corporate income tax	Non-resident income tax	Other taxes and duties	Total tax revenues	Employment Insurance premiums	Other revenues	Total revenues
				(millions of dollars)				
1966-67	3,050	1,743	305	3,628	8,726	343	906	9,975
1967-68	3,650	1,821	323	3,718	9,512	346	1,067	10,925
1968-69	4,334	2,213	318	3,747	10,612	432	1,276	12,320
1969-70	5,588	2,839	349	4,009	12,785	490	1,480	14,755
1970-71	6,395	2,426	378	4,060	13,259	493	1,635	15,387
1971-72	7,227	2,396	420	4,637	14,680	569	1,870	17,119
1972-73	8,378	2,920	353	5,272	16,923	745	2,140	19,808
1973-74	9,226	3,710	338	6,355	19,629	1,001	2,367	22,997
1974-75	11,710	4,836	434	8,506	25,486	1,585	2,894	29,965
1975-76	12,709	5,748	493	8,143	27,093	2,039	3,309	32,441
1976-77	14,634	5,363	521	8,637	29,155	2,470	3,658	35,283
1977-78	13,988	5,280	569	9,123	28,960	2,537	4,136	35,633
1978-79	14,656	5,654	645	9,697	30,652	2,783	4,779	38,214
1979-80	16,808	6,951	883	10,215	34,857	2,778	5,675	43,310
1980-81	19,837	8,106	966	11,661	40,570	3,303	9,308	53,181
1981-82	24,046	8,118	1,138	15,843	49,145	4,753	13,391	67,289
1982-83	26,330	7,139	1,130	15,776	50,375	4,900	12,155	67,430
1983-84	26,530	7,174	908	16,215	50,827	7,229	7,205	65,261
1984-85	28,455	9,234	1,021	18,177	56,887	7,676	7,436	71,999
1985-86	32,238	9,068	1,053	19,491	61,850	8,630	7,262	77,742
1986-87	36,733	9,732	1,355	21,049	68,869	9,667	8,210	86,746
1987-88	42,422	10,710	1,162	22,941	77,235	10,602	9,378	97,215
1988-89	45,456	11,549	1,578	25,771	84,354	11,107	10,888	106,349
1989-90	50,584	12,820	1,361	28,155	92,920	10,727	12,240	115,887
1990-91	56,201	11,545	1,372	24,067	93,185	12,551	13,949	119,685
1991-92	59,687	9,215	1,261	27,308	97,471	15,338	13,277	126,086
1992-93	58,331	7,095	1,191	26,771	93,388	17,576	13,522	124,486
1993-94	55,173	9,098	1,533	26,940	92,744	19,298	11,831	123,873
1994-95	60,648	10,969	1,700	27,457	100,774	18,293	11,724	130,791
1995-96	64,049	15,372	1,882	27,251	108,554	19,089	12,614	140,257
1996-97	67,796	16,235	2,671	29,204	115,906	19,949	14,034	149,889
1997-98	74,949	21,179	1,999	31,146	129,273	19,242	12,349	160,864
1998-99	77,894	21,213	2,208	31,717	133,032	19,064	13,424	165,520
1999-00	85,070	22,115	2,646	33,298	143,129	18,628	14,651	176,408
2000-01	92,662	28,293	2,982	35,769	159,706	18,655	15,988	194,349
2001-02	86,972	24,242	2,925	37,133	151,272	17,637	15,021	183,930
2002-03	89,530	22,222	3,291	41,357	156,400	17,870	16,300	190,570
2003-04	92,957	27,431	3,142	41,365	164,895	17,546	16,149	198,590
2004-05	98,521	29,956	3,560	42,857	174,894	17,307	19,742	211,943
2005-06	103,691	31,724	4,529	46,156	186,100	16,535	19,568	222,203
2006-07	110,477	37,745	4,877	45,317	198,416	16,789	20,761	235,966
2007-08	113,063	40,628	5,693	44,207	203,591	16,558	22,271	242,420
2008-09	116,024	29,476	6,298	39,806	191,604	16,887	24,601	233,092
2009-10	103,947	30,361	5,293	40,573	180,174	16,761	21,665	218,600
2010-11	113,457	29,969	5,137	42,903	191,466	17,501	28,124	237,091

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 4

Revenues (per cent of GDP)

Year	Personal income tax	Corporate incomein tax	Non-resident come tax	Other taxes and duties	Total tax revenues	Employment Insurance premiums	Other revenues	Total revenues
				(per cent of GDP)				
1966-67	4.7	2.7	0.5	5.6	13.5	0.5	1.4	15.4
1967-68	5.2	2.6	0.5	5.3	13.6	0.5	1.5	15.7
1968-69	5.7	2.9	0.4	4.9	13.9	0.6	1.7	16.2
1969-70	6.7	3.4	0.4	4.8	15.3	0.6	1.8	17.6
1970-71	7.1	2.7	0.4	4.5	14.7	0.5	1.8	17.1
1971-72	7.3	2.4	0.4	4.7	14.9	0.6	1.9	17.4
1972-73	7.6	2.7	0.3	4.8	15.4	0.7	1.9	18.0
1973-74	7.2	2.9	0.3	4.9	15.2	0.8	1.8	17.8
1974-75	7.6	3.1	0.3	5.5	16.5	1.0	1.9	19.5
1975-76	7.3	3.3	0.3	4.7	15.6	1.2	1.9	18.7
1976-77	7.3	2.7	0.3	4.3	14.6	1.2	1.8	17.6
1977-78	6.3	2.4	0.3	4.1	13.1	1.1	1.9	16.1
1978-79	6.0	2.3	0.3	4.0	12.5	1.1	2.0	15.6
1979-80	6.0	2.5	0.3	3.7	12.5	1.0	2.0	15.5
1980-81	6.3	2.6	0.3	3.7	12.9	1.1	3.0	16.9
1981-82	6.7	2.3	0.3	4.4	13.6	1.3	3.7	18.7
1982-83	6.9	1.9	0.3	4.2	13.3	1.3	3.2	17.8
1983-84	6.4	1.7	0.2	3.9	12.4	1.8	1.8	15.9
1984-85	6.3	2.1	0.2	4.0	12.7	1.7	1.7	16.0
1985-86	6.6	1.9	0.2	4.0	12.7	1.8	1.5	16.0
1986-87	7.2	1.9	0.3	4.1	13.4	1.9	1.6	16.9
1987-88	7.6	1.9	0.2	4.1	13.8	1.9	1.7	17.4
1988-89	7.4	1.9	0.3	4.2	13.8	1.8	1.8	17.3
1989-90	7.7	1.9	0.2	4.3	14.1	1.6	1.9	17.6
1990-91	8.3	1.7	0.2	3.5	13.7	1.8	2.1	17.6
1991-92	8.7	1.3	0.2	4.0	14.2	2.2	1.9	18.4
1992-93	8.3	1.0	0.2	3.8	13.3	2.5	1.9	17.8
1993-94	7.6	1.3	0.2	3.7	12.8	2.7	1.6	17.0
1994-95	7.9	1.4	0.2	3.6	13.1	2.4	1.5	17.0
1995-96	7.9	1.9	0.2	3.4	13.4	2.4	1.6	17.3
1996-97	8.1	1.9	0.3	3.5	13.9	2.4	1.7	17.9
1997-98	8.5	2.4	0.2	3.5	14.6	2.2	1.4	18.2
1998-99	8.5	2.3	0.2	3.5	14.5	2.1	1.5	18.1
1999-00	8.7	2.3	0.3	3.4	14.6	1.9	1.5	18.0
2000-01	8.6	2.6	0.3	3.3	14.8	1.7	1.5	18.1
2001-02	7.8	2.2	0.3	3.4	13.7	1.6	1.4	16.6
2002-03	7.8	1.9	0.3	3.6	13.6	1.5	1.4	16.5
2003-04	7.7	2.3	0.3	3.4	13.6	1.4	1.3	16.4
2004-05	7.6	2.3	0.3	3.3	13.5	1.3	1.5	16.4
2005-06	7.5	2.3	0.3	3.4	13.5	1.2	1.4	16.2
2006-07	7.6	2.6	0.3	3.1	13.7	1.2	1.4	16.3
2007-08	7.4	2.7	0.4	2.9	13.3	1.1	1.5	15.8
2008-09	7.2	1.8	0.4	2.5	11.9	1.1	1.5	14.5
2009-10	6.8	2.0	0.3	2.7	11.8	1.1	1.4	14.3
2010-11	7.0	1.8	0.3	2.6	11.8	1.1	1.7	14.6

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 5

Revenues (per cent of total)

Year	Personal income tax	Corporate income tax	Non-resident income tax	Other taxes and duties	Total tax revenues	Employment Insurance premiums	Other revenues	Total revenues
				(per cent of total)				
1966-67	30.6	17.5	3.1	36.4	87.5	3.4	9.1	100.0
1967-68	33.4	16.7	3.0	34.0	87.1	3.2	9.8	100.0
1968-69	35.2	18.0	2.6	30.4	86.1	3.5	10.4	100.0
1969-70	37.9	19.2	2.4	27.2	86.6	3.3	10.0	100.0
1970-71	41.6	15.8	2.5	26.4	86.2	3.2	10.6	100.0
1971-72	42.2	14.0	2.5	27.1	85.8	3.3	10.9	100.0
1972-73	42.3	14.7	1.8	26.6	85.4	3.8	10.8	100.0
1973-74	40.1	16.1	1.5	27.6	85.4	4.4	10.3	100.0
1974-75	39.1	16.1	1.4	28.4	85.1	5.3	9.7	100.0
1975-76	39.2	17.7	1.5	25.1	83.5	6.3	10.2	100.0
1976-77	41.5	15.2	1.5	24.5	82.6	7.0	10.4	100.0
1977-78	39.3	14.8	1.6	25.6	81.3	7.1	11.6	100.0
1978-79	38.4	14.8	1.7	25.4	80.2	7.3	12.5	100.0
1979-80	38.8	16.0	2.0	23.6	80.5	6.4	13.1	100.0
1980-81	37.3	15.2	1.8	21.9	76.3	6.2	17.5	100.0
1981-82	35.7	12.1	1.7	23.5	73.0	7.1	19.9	100.0
1982-83	39.0	10.6	1.7	23.4	74.7	7.3	18.0	100.0
1983-84	40.7	11.0	1.4	24.8	77.9	11.1	11.0	100.0
1984-85	39.5	12.8	1.4	25.2	79.0	10.7	10.3	100.0
1985-86	41.5	11.7	1.4	25.1	79.6	11.1	9.3	100.0
1986-87	42.3	11.2	1.6	24.3	79.4	11.1	9.5	100.0
1987-88	43.6	11.0	1.2	23.6	79.4	10.9	9.6	100.0
1988-89	42.7	10.9	1.5	24.2	79.3	10.4	10.2	100.0
1989-90	43.6	11.1	1.2	24.3	80.2	9.3	10.6	100.0
1990-91	47.0	9.6	1.1	20.1	77.9	10.5	11.7	100.0
1991-92	47.3	7.3	1.0	21.7	77.3	12.2	10.5	100.0
1992-93	46.9	5.7	1.0	21.5	75.0	14.1	10.9	100.0
1993-94	44.5	7.3	1.2	21.7	74.9	15.6	9.6	100.0
1994-95	46.4	8.4	1.3	21.0	77.0	14.0	9.0	100.0
1995-96	45.7	11.0	1.3	19.4	77.4	13.6	9.0	100.0
1996-97	45.2	10.8	1.8	19.5	77.3	13.3	9.4	100.0
1997-98	46.6	13.2	1.2	19.4	80.4	12.0	7.7	100.0
1998-99	47.1	12.8	1.3	19.2	80.4	11.5	8.1	100.0
1999-00	48.2	12.5	1.5	18.9	81.1	10.6	8.3	100.0
2000-01	47.7	14.6	1.5	18.4	82.2	9.6	8.2	100.0
2001-02	47.3	13.2	1.6	20.2	82.2	9.6	8.2	100.0
2002-03	47.0	11.7	1.7	21.7	82.1	9.4	8.6	100.0
2003-04	46.8	13.8	1.6	20.8	83.0	8.8	8.1	100.0
2004-05	46.5	14.1	1.7	20.2	82.5	8.2	9.3	100.0
2005-06	46.7	14.3	2.0	20.8	83.8	7.4	8.8	100.0
2006-07	46.8	16.0	2.1	19.2	84.1	7.1	8.8	100.0
2007-08	46.6	16.8	2.3	18.2	84.0	6.8	9.2	100.0
2008-09	49.8	12.6	2.7	17.1	82.2	7.2	10.6	100.0
2009-10	47.6	13.9	2.4	18.6	82.4	7.7	9.9	100.0
2010-11	47.9	12.6	2.2	18.1	80.8	7.4	11.9	100.0

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 6

Other taxes and duties

Year	Goods and Services Tax	Sales tax	Customs import duties	Energy taxes	Other	Total other taxes and duties
			(millions of dollars)			
1966-67		2,073	778		777	3,628
1967-68		2,146	746		826	3,718
1968-69		2,098	762		887	3,747
1969-70		2,294	818		897	4,009
1970-71		2,281	815		964	4,060
1971-72		2,653	989		995	4,637
1972-73		3,052	1,182		1,038	5,272
1973-74		3,590	1,384	287	1,094	6,355
1974-75		3,866	1,809	1,669	1,162	8,506
1975-76		3,515	1,887	1,488	1,253	8,143
1976-77		3,929	2,097	1,261	1,350	8,637
1977-78		4,427	2,312	1,030	1,354	9,123
1978-79		4,729	2,747	844	1,377	9,697
1979-80		4,651	2,996	1,171	1,397	10,215
1980-81		5,355	3,185	1,509	1,612	11,661
1981-82		6,148	3,435	4,521	1,739	15,843
1982-83		5,842	2,828	5,147	1,959	15,776
1983-84		6,561	3,376	4,168	2,110	16,215
1984-85		7,592	3,794	4,479	2,312	18,177
1985-86		9,345	3,971	3,348	2,827	19,491
1986-87		11,972	4,187	1,965	2,925	21,049
1987-88		12,927	4,385	2,603	3,026	22,941
1988-89		15,645	4,521	2,646	2,959	25,771
1989-90		17,672	4,587	2,471	3,425	28,155
1990-91	3,110	10,053	4,001	3,192	3,711	24,067
1991-92	15,311		3,999	3,441	4,557	27,308
1992-93	15,420		3,811	3,437	4,103	26,771
1993-94	15,939		3,652	3,640	3,709	26,940
1994-95	17,062		3,575	3,824	2,996	27,457
1995-96	16,880		2,969	4,404	2,998	27,251
1996-97	18,159		2,676	4,467	3,902	29,204
1997-98	19,717		2,766	4,638	4,025	31,146
1998-99	20,936		2,359	4,716	3,706	31,717
1999-00	23,121		2,105	4,757	3,315	33,298
2000-01	24,759		2,784	4,792	3,434	35,769
2001-02	25,292		3,040	4,848	3,953	37,133
2002-03	28,248		3,278	4,935	4,896	41,357
2003-04	28,286		2,887	4,952	5,240	41,365
2004-05	29,758		3,091	5,054	4,954	42,857
2005-06	33,020		3,330	5,076	4,730	46,156
2006-07	31,296		3,704	5,128	5,189	45,317
2007-08	29,920		3,903	5,139	5,245	44,207
2008-09	25,740		4,036	5,161	4,869	39,806
2009-10	26,947		3,490	5,178	4,958	40,573
2010-11	28,379		3,520	5,342	5,662	42,903

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 7

Expenses (millions of dollars)

Year	Major transfers to persons	Major transfers to other levels of government	National Defence	Other	Total program expenses	Public debt charges	Total expenses
				(millions of dollars)			
1966-67	1,983	1,016	1,702	4,577	9,278	1,182	10,460
1967-68	2,385	1,464	1,842	4,990	10,681	1,286	11,967
1968-69	2,612	1,813	1,875	5,223	11,523	1,464	12,987
1969-70	2,888	2,237	1,892	5,904	12,921	1,694	14,615
1970-71	3,281	2,954	1,932	6,349	14,516	1,887	16,403
1971-72	3,942	3,610	2,019	7,224	16,795	2,110	18,905
1972-73	5,153	4,134	2,096	8,026	19,409	2,300	21,709
1973-74	6,042	4,585	2,377	9,639	22,643	2,565	25,208
1974-75	7,620	5,884	2,722	12,726	28,952	3,238	32,190
1975-76	9,233	6,874	3,163	15,405	34,675	3,970	38,645
1976-77	9,873	8,399	3,564	15,636	37,472	4,708	42,180
1977-78	11,104	8,512	3,981	17,384	40,981	5,531	46,512
1978-79	12,030	9,551	4,315	18,323	44,219	7,024	51,243
1979-80	11,967	10,601	4,588	19,627	46,783	8,494	55,277
1980-81	13,793	11,578	5,298	26,410	57,079	10,658	67,737
1981-82	16,051	13,088	5,975	32,735	67,849	15,114	82,963
1982-83	21,697	14,177	6,903	36,799	79,576	16,903	96,479
1983-84	22,514	17,125	7,209	30,346	77,194	20,430	97,624
1984-85	23,888	18,548	7,900	33,943	84,279	24,887	109,166
1985-86	25,062	18,879	8,386	31,147	83,474	27,657	111,131
1986-87	26,423	19,569	9,143	32,735	87,870	28,718	116,588
1987-88	27,400	20,518	9,708	37,383	95,009	31,223	126,232
1988-89	28,780	22,145	10,206	37,633	98,764	35,532	134,296
1989-90	30,501	23,417	10,982	38,884	103,784	41,246	145,030
1990-91	34,343	22,928	11,323	39,956	108,550	45,034	153,584
1991-92	38,900	24,865	10,759	40,020	114,544	43,861	158,405
1992-93	41,002	26,544	10,780	43,847	122,173	41,332	163,505
1993-94	42,407	26,947	11,087	41,863	122,304	40,099	162,403
1994-95	40,280	26,313	10,580	46,065	123,238	44,185	167,423
1995-96	39,121	26,076	9,817	45,842	120,856	49,407	170,263
1996-97	38,826	22,162	8,807	41,532	111,327	47,281	158,608
1997-98	38,952	20,504	9,087	46,242	114,785	43,120	157,905
1998-99	39,884	25,523	9,308	41,723	116,438	43,303	159,741
1999-00	40,157	23,243	10,113	45,253	118,766	43,384	162,150
2000-01	43,354	24,724	9,744	52,744	130,566	43,892	174,458
2001-02	45,880	26,616	10,443	53,292	136,231	39,651	175,882
2002-03	48,011	30,645	11,803	56,220	146,679	37,270	183,949
2003-04	50,022	29,392	12,869	61,393	153,676	35,769	189,445
2004-05	51,307	41,955	14,318	68,782	176,362	34,118	210,480
2005-06	52,609	40,815	15,034	66,755	175,213	33,772	208,985
2006-07	55,582	42,514	15,732	74,441	188,269	33,945	222,214
2007-08	58,147	46,152	17,331	77,868	199,498	33,325	232,823
2008-09	61,586	46,515	18,770	80,986	207,857	30,990	238,847
2009-10	68,579	56,990	20,863	98,352	244,784	29,414	274,198
2010-11	68,135	52,971	21,273	97,213	239,592	30,871	270,463

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 8

Expenses (per cent of GDP)

Year	Major transfers to persons	Major transfers to other levels of government	National Defence	Other	Total program expenses	Public debt charges	Total expenses
				(per cent of GDP)			
1966-67	3.1	1.6	2.6	7.1	14.3	1.8	16.1
1967-68	3.4	2.1	2.6	7.2	15.3	1.8	17.2
1968-69	3.4	2.4	2.5	6.9	15.1	1.9	17.1
1969-70	3.4	2.7	2.3	7.0	15.4	2.0	17.4
1970-71	3.6	3.3	2.1	7.0	16.1	2.1	18.2
1971-72	4.0	3.7	2.1	7.3	17.1	2.1	19.2
1972-73	4.7	3.8	1.9	7.3	17.7	2.1	19.8
1973-74	4.7	3.6	1.8	7.5	17.6	2.0	19.5
1974-75	4.9	3.8	1.8	8.3	18.8	2.1	20.9
1975-76	5.3	4.0	1.8	8.9	20.0	2.3	22.3
1976-77	4.9	4.2	1.8	7.8	18.7	2.4	21.1
1977-78	5.0	3.9	1.8	7.9	18.5	2.5	21.0
1978-79	4.9	3.9	1.8	7.5	18.1	2.9	20.9
1979-80	4.3	3.8	1.6	7.0	16.7	3.0	19.8
1980-81	4.4	3.7	1.7	8.4	18.2	3.4	21.5
1981-82	4.5	3.6	1.7	9.1	18.8	4.2	23.0
1982-83	5.7	3.7	1.8	9.7	20.9	4.4	25.4
1983-84	5.5	4.2	1.8	7.4	18.8	5.0	23.7
1984-85	5.3	4.1	1.8	7.5	18.7	5.5	24.3
1985-86	5.2	3.9	1.7	6.4	17.2	5.7	22.9
1986-87	5.2	3.8	1.8	6.4	17.1	5.6	22.7
1987-88	4.9	3.7	1.7	6.7	17.0	5.6	22.6
1988-89	4.7	3.6	1.7	6.1	16.1	5.8	21.9
1989-90	4.6	3.6	1.7	5.9	15.8	6.3	22.1
1990-91	5.1	3.4	1.7	5.9	16.0	6.6	22.6
1991-92	5.7	3.6	1.6	5.8	16.7	6.4	23.1
1992-93	5.9	3.8	1.5	6.3	17.4	5.9	23.3
1993-94	5.8	3.7	1.5	5.8	16.8	5.5	22.3
1994-95	5.2	3.4	1.4	6.0	16.0	5.7	21.7
1995-96	4.8	3.2	1.2	5.7	14.9	6.1	21.0
1996-97	4.6	2.6	1.1	5.0	13.3	5.6	19.0
1997-98	4.4	2.3	1.0	5.2	13.0	4.9	17.9
1998-99	4.4	2.8	1.0	4.6	12.7	4.7	17.5
1999-00	4.1	2.4	1.0	4.6	12.1	4.4	16.5
2000-01	4.0	2.3	0.9	4.9	12.1	4.1	16.2
2001-02	4.1	2.4	0.9	4.8	12.3	3.6	15.9
2002-03	4.2	2.7	1.0	4.9	12.7	3.2	16.0
2003-04	4.1	2.4	1.1	5.1	12.7	2.9	15.6
2004-05	4.0	3.3	1.1	5.3	13.7	2.6	16.3
2005-06	3.8	3.0	1.1	4.9	12.8	2.5	15.2
2006-07	3.8	2.9	1.1	5.1	13.0	2.3	15.3
2007-08	3.8	3.0	1.1	5.1	13.0	2.2	15.2
2008-09	3.8	2.9	1.2	5.1	13.0	1.9	14.9
2009-10	4.5	3.7	1.4	6.4	16.0	1.9	17.9
2010-11	4.2	3.3	1.3	6.0	14.7	1.9	16.6

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 9

Expenses (per cent of total)

Year	Major transfers to persons	Major transfers to other levels of government	National Defence	Other	Total program expenses	Public debt charges	Total expenses
				(per cent of total)			
1966-67	19.0	9.7	16.3	43.8	88.7	11.3	100.0
1967-68	19.9	12.2	15.4	41.7	89.3	10.7	100.0
1968-69	20.1	14.0	14.4	40.2	88.7	11.3	100.0
1969-70	19.8	15.3	12.9	40.4	88.4	11.6	100.0
1970-71	20.0	18.0	11.8	38.7	88.5	11.5	100.0
1971-72	20.9	19.1	10.7	38.2	88.8	11.2	100.0
1972-73	23.7	19.0	9.7	37.0	89.4	10.6	100.0
1973-74	24.0	18.2	9.4	38.2	89.8	10.2	100.0
1974-75	23.7	18.3	8.5	39.5	89.9	10.1	100.0
1975-76	23.9	17.8	8.2	39.9	89.7	10.3	100.0
1976-77	23.4	19.9	8.4	37.1	88.8	11.2	100.0
1977-78	23.9	18.3	8.6	37.4	88.1	11.9	100.0
1978-79	23.5	18.6	8.4	35.8	86.3	13.7	100.0
1979-80	21.6	19.2	8.3	35.5	84.6	15.4	100.0
1980-81	20.4	17.1	7.8	39.0	84.3	15.7	100.0
1981-82	19.3	15.8	7.2	39.5	81.8	18.2	100.0
1982-83	22.5	14.7	7.2	38.1	82.5	17.5	100.0
1983-84	23.1	17.5	7.4	31.1	79.1	20.9	100.0
1984-85	21.9	17.0	7.2	31.1	77.2	22.8	100.0
1985-86	22.6	17.0	7.5	28.0	75.1	24.9	100.0
1986-87	22.7	16.8	7.8	28.1	75.4	24.6	100.0
1987-88	21.7	16.3	7.7	29.6	75.3	24.7	100.0
1988-89	21.4	16.5	7.6	28.0	73.5	26.5	100.0
1989-90	21.0	16.1	7.6	26.8	71.6	28.4	100.0
1990-91	22.4	14.9	7.4	26.0	70.7	29.3	100.0
1991-92	24.6	15.7	6.8	25.3	72.3	27.7	100.0
1992-93	25.1	16.2	6.6	26.8	74.7	25.3	100.0
1993-94	26.1	16.6	6.8	25.8	75.3	24.7	100.0
1994-95	24.1	15.7	6.3	27.5	73.6	26.4	100.0
1995-96	23.0	15.3	5.8	26.9	71.0	29.0	100.0
1996-97	24.5	14.0	5.6	26.2	70.2	29.8	100.0
1997-98	24.7	13.0	5.8	29.3	72.7	27.3	100.0
1998-99	25.0	16.0	5.8	26.1	72.9	27.1	100.0
1999-00	24.8	14.3	6.2	27.9	73.2	26.8	100.0
2000-01	24.9	14.2	5.6	30.2	74.8	25.2	100.0
2001-02	26.1	15.1	5.9	30.3	77.5	22.5	100.0
2002-03	26.1	16.7	6.4	30.6	79.7	20.3	100.0
2003-04	26.4	15.5	6.8	32.4	81.1	18.9	100.0
2004-05	24.4	19.9	6.8	32.7	83.8	16.2	100.0
2005-06	25.2	19.5	7.2	31.9	83.8	16.2	100.0
2006-07	25.0	19.1	7.1	33.5	84.7	15.3	100.0
2007-08	25.0	19.8	7.4	33.4	85.7	14.3	100.0
2008-09	25.8	19.5	7.9	33.9	87.0	13.0	100.0
2009-10	25.0	20.8	7.6	35.9	89.3	10.7	100.0
2010-11	25.2	19.6	7.9	35.9	88.6	11.4	100.0

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 10

Major transfers to persons

Year	Old Age Security benefits	Family allowance/ children's benefits	Employment Insurance benefits	Relief for Heating Expenses	Total
		(millions of dollars)			
1966-67	1,073	603	307		1,983
1967-68	1,388	608	389		2,385
1968-69	1,541	612	459		2,612
1969-70	1,731	615	542		2,888
1970-71	1,907	616	758		3,281
1971-72	2,205	614	1,123		3,942
1972-73	2,524	608	2,021		5,153
1973-74	3,035	993	2,014		6,042
1974-75	3,445	1,824	2,351		7,620
1975-76	3,934	1,958	3,341		9,233
1976-77	4,437	1,980	3,456		9,873
1977-78	4,861	2,122	4,121		11,104
1978-79	5,491	2,093	4,446		12,030
1979-80	6,320	1,725	3,922		11,967
1980-81	7,418	1,851	4,524		13,793
1981-82	8,585	2,020	5,446		16,051
1982-83	9,643	2,231	9,823		21,697
1983-84	10,406	2,326	9,782		22,514
1984-85	11,418	2,418	10,052		23,888
1985-86	12,525	2,501	10,036		25,062
1986-87	13,445	2,534	10,444		26,423
1987-88	14,349	2,564	10,487		27,400
1988-89	15,202	2,606	10,972		28,780
1989-90	16,154	2,653	11,694		30,501
1990-91	17,039	2,639	14,665		34,343
1991-92	18,168	2,606	18,126		38,900
1992-93	18,758	3,179	19,065		41,002
1993-94	19,578	5,203	17,626		42,407
1994-95	20,143	5,322	14,815		40,280
1995-96	20,430	5,215	13,476		39,121
1996-97	21,207	5,239	12,380		38,826
1997-98	21,758	5,352	11,842		38,952
1998-99	22,285	5,715	11,884		39,884
1999-00	22,856	6,000	11,301		40,157
2000-01	23,668	6,783	11,444	1,459	43,354
2001-02	24,641	7,471	13,726	42	45,880
2002-03	25,692	7,823	14,496		48,011
2003-04	26,902	8,062	15,058		50,022
2004-05	27,871	8,688	14,748		51,307
2005-06	28,992	9,200	14,417		52,609
2006-07	30,284	11,214	14,084		55,582
2007-08	31,955	11,894	14,298		58,147
2008-09	33,377	11,901	16,308		61,586
2009-10	34,653	12,340	21,586		68,579
2010-11	35,629	12,656	19,850		68,135

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 11

Major transfers to other levels of government

Year	Canada Health and Social Transfer [1]	Fiscal transfers [2]	Insurance and medical care	Education support	Canada Assistance Plan	Other	Quebec Abatement [2]	Total
				(millions of dollars)				
1966-67		371	384	71	190			1,016
1967-68		578	435	108	343			1,464
1968-69		615	588	227	383			1,813
1969-70		734	806	301	396			2,237
1970-71		959	1,088	388	519			2,954
1971-72		1,136	1,400	450	624			3,610
1972-73		1,326	1,649	481	678			4,134
1973-74		1,633	1,749	485	718			4,585
1974-75		2,323	2,121	504	936			5,884
1975-76		2,511	2,549	535	1,279			6,874
1976-77		3,252	3,008	649	1,490			8,399
1977-78		3,206	2,814	1,096	1,396			8,512
1978-79		3,175	3,488	1,365	1,523			9,551
1979-80		3,575	3,858	1,515	1,653			10,601
1980-81		4,055	3,982	1,600	1,941			11,578
1981-82		4,879	4,283	1,628	2,298			13,088
1982-83		5,753	4,060	1,532	2,832			14,177
1983-84		6,208	5,564	2,065	3,288			17,125
1984-85		6,208	6,330	2,265	3,745			18,548
1985-86		6,286	6,400	2,277	3,916			18,879
1986-87		6,679	6,607	2,232	4,051			19,569
1987-88		7,472	6,558	2,242	4,246			20,518
1988-89		8,684	6,678	2,227	4,556			22,145
1989-90		9,582	6,663	2,166	5,006			23,417
1990-91		9,245	6,033	1,862	5,788			22,928
1991-92		9,935	6,689	2,142	6,099			24,865
1992-93		8,664	8,307	2,887	6,686			26,544
1993-94		10,101	7,232	2,378	7,236			26,947
1994-95		8,870	7,691	2,486	7,266			26,313
1995-96		9,822	7,115	2,365	7,191		-417	26,076
1996-97	14,911	9,863	-217	-41	105		-2,459	22,162
1997-98	12,421	10,464	162	5	24		-2,572	20,504
1998-99	16,018	12,121	2		8		-2,626	25,523
1999-00	14,891	11,254			56		-2,958	23,243
2000-01	13,500	13,016				1,217	-3,009	24,724
2001-02	17,300	12,188				375	-3,247	26,616
2002-03	21,100	11,397				987	-2,839	30,645
2003-04	22,341	10,004				342	-3,295	29,392
2004-05	28,031	13,467				3,807	-3,350	41,955
2005-06	27,225	12,977				3,940	-3,327	40,815
2006-07	28,640	13,740				4,018	-3,884	42,514
2007-08	31,346	15,178				2,956	-3,328	46,152
2008-09	33,327	15,807				1,024	-3,643	46,515
2009-10	35,678	16,789				7,822	-3,299	56,990
2010-11	37,210	17,577				1,935	-3,751	52,971

[1] In 1996-97, the Canada Health and Social Transfer (CHST) was introduced to replace the Canada Assistance Plan, education support, and insurance and medical care. Since April 2004, the CHST has been divided into the Canada Health Transfer and the Canada Social Transfer.

[2] Certain comparative figures have been reclassified to conform to the current year's presentation.

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 12

Details of program expenses

Year	Transfers to persons	Transfers to other levels of government	Other transfers	Total transfer payments	Crown corporation expenses	National Defence	Other departments and agencies	Total program expenses
				(millions of dollars)				
1983-84	22,514	17,125	12,367	52,006	4,760	7,209	13,219	77,194
1984-85	23,888	18,548	14,719	57,155	6,159	7,900	13,065	84,279
1985-86	25,062	18,879	13,375	57,316	4,479	8,386	13,293	83,474
1986-87	26,423	19,569	13,262	59,254	4,936	9,143	14,537	87,870
1987-88	27,400	20,518	15,272	63,190	5,872	9,708	16,239	95,009
1988-89	28,780	22,145	15,249	66,174	4,772	10,206	17,612	98,764
1989-90	30,501	23,417	14,450	68,368	5,237	10,982	19,197	103,784
1990-91	34,343	22,928	13,808	71,079	6,575	11,323	19,573	108,550
1991-92	38,900	24,865	15,808	79,573	6,349	10,759	17,863	114,544
1992-93	41,002	26,544	16,520	84,066	6,880	10,780	20,447	122,173
1993-94	42,407	26,947	16,844	86,198	4,715	11,087	20,304	122,304
1994-95	40,280	26,313	18,450	85,043	5,217	10,580	22,398	123,238
1995-96	39,121	26,076	16,638	81,835	9,606	9,817	19,598	120,856
1996-97	38,826	22,162	16,011	76,999	5,204	8,807	20,317	111,327
1997-98	38,952	20,504	20,236	79,692	4,441	9,087	21,565	114,785
1998-99	39,884	25,523	14,343	79,750	5,790	9,308	21,590	116,438
1999-00	40,157	23,243	17,212	80,612	5,246	10,113	22,795	118,766
2000-01	43,354	24,724	20,116	88,194	5,402	9,744	27,226	130,566
2001-02	45,880	26,616	17,504	90,000	6,085	10,443	29,703	136,231
2002-03	48,011	30,645	20,673	99,329	6,551	11,803	28,996	146,679
2003-04	50,022	29,392	22,945	102,359	6,566	12,869	31,882	153,676
2004-05	51,307	41,955	25,453	118,715	8,907	14,318	34,422	176,362
2005-06	52,609	40,815	24,893	118,317	7,195	15,034	34,667	175,213
2006-07	55,582	42,514	26,844	124,940	7,211	15,732	40,386	188,269
2007-08	58,147	46,152	27,032	131,331	7,340	17,331	43,496	199,498
2008-09	61,586	46,515	30,192	138,293	8,066	18,770	42,728	207,857
2009-10	68,579	56,990	39,892	165,461	10,428	20,863	48,032	244,784
2010-11	68,135	52,971	36,820	157,926	10,547	21,273	49,846	239,592

Table 13
Public debt charges

Year	Gross public debt charges	Return on investments	Net public debt charges	Gross public debt charges as a percentage of revenues	Gross public debt charges as a percentage of expenses	Gross public debt charges as a percentage of interest- bearing debt
		(millions of dollars)			(per cent)	
1966-67	1,182	519	663	11.8	11.3	4.4
1967-68	1,286	612	674	11.8	10.7	4.5
1968-69	1,464	695	769	11.9	11.3	4.8
1969-70	1,694	860	834	11.5	11.6	5.3
1970-71	1,887	1,000	887	12.3	11.5	5.3
1971-72	2,110	1,133	977	12.3	11.2	5.4
1972-73	2,300	1,265	1,035	11.6	10.6	5.5
1973-74	2,565	1,461	1,104	11.2	10.2	5.9
1974-75	3,238	1,802	1,436	10.8	10.1	6.6
1975-76	3,970	2,083	1,887	12.2	10.3	7.2
1976-77	4,708	2,410	2,298	13.3	11.2	7.6
1977-78	5,531	2,592	2,939	15.5	11.9	7.6
1978-79	7,024	3,059	3,965	18.4	13.7	7.8
1979-80	8,494	3,646	4,848	19.6	15.4	8.7
1980-81	10,658	4,409	6,249	20.0	15.7	9.5
1981-82	15,114	5,200	9,914	22.5	18.2	12.0
1982-83	16,903	4,628	12,275	25.1	17.5	11.0
1983-84	20,430	4,266	16,164	31.3	20.9	9.7
1984-85	24,887	4,298	20,589	34.6	22.8	10.1
1985-86	27,657	3,661	23,996	35.6	24.9	9.9
1986-87	28,718	4,255	24,463	33.1	24.6	9.2
1987-88	31,223	4,737	26,486	32.1	24.7	9.2
1988-89	35,532	5,547	29,985	33.4	26.5	9.6
1989-90	41,246	5,850	35,396	35.6	28.4	10.4
1990-91	45,034	6,807	38,227	37.6	29.3	10.4
1991-92	43,861	6,521	37,340	34.8	27.7	9.4
1992-93	41,332	6,838	34,494	33.2	25.3	8.2
1993-94	40,099	5,240	34,859	32.4	24.7	7.4
1994-95	44,185	4,719	39,466	33.8	26.4	7.7
1995-96	49,407	5,344	44,063	35.2	29.0	8.0
1996-97	47,281	4,247	43,034	31.5	29.8	7.5
1997-98	43,120	4,721	38,399	26.8	27.3	6.9
1998-99	43,303	4,890	38,413	26.2	27.1	6.9
1999-00	43,384	5,455	37,929	24.6	26.8	6.9
2000-01	43,892	6,424	37,468	22.6	25.2	7.0
2001-02	39,651	5,625	34,026	21.6	22.5	6.4
2002-03	37,270	7,127	30,143	19.6	20.3	6.1
2003-04	35,769	6,809	28,960	18.0	18.9	5.8
2004-05	34,118	6,985	27,133	16.1	16.2	5.6
2005-06	33,772	8,184	25,588	15.2	16.2	5.6
2006-07	33,945	8,642	25,303	14.4	15.3	5.7
2007-08	33,325	7,308	26,017	13.7	14.3	5.7
2008-09	30,990	9,566	21,424	13.3	13.0	4.4
2009-10	29,414	6,487	22,927	13.5	10.7	3.9
2010-11	30,871	12,236	18,635	13.0	11.4	3.9

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 14

Interest-bearing debt

Year	Unmatured debt held by residents	Unmatured debt held by non-residents	Total unmatured debt	Percentage held by non-residents	Public sector pensions	Other liabilities	Total pension and other liabilities	Total interest-bearing debt
	(millions of dollars)			(per cent)		(millions of dollars)		
1966-67	18,734	815	19,549	4.2	5,530	1,833	7,363	26,912
1967-68	19,593	693	20,286	3.4	6,310	1,816	8,126	28,412
1968-69	20,712	993	21,705	4.6	7,163	1,852	9,015	30,720
1969-70	21,145	939	22,084	4.3	8,003	1,840	9,843	31,927
1970-71	24,132	709	24,841	2.9	8,920	1,914	10,834	35,675
1971-72	26,495	717	27,212	2.6	9,874	1,953	11,827	39,039
1972-73	28,156	855	29,011	2.9	10,952	1,975	12,927	41,938
1973-74	28,417	724	29,141	2.5	12,174	1,998	14,172	43,313
1974-75	32,147	850	32,997	2.6	13,654	2,089	15,743	48,740
1975-76	36,138	1,410	37,548	3.8	15,377	2,037	17,414	54,962
1976-77	40,367	2,134	42,501	5.0	17,252	2,060	19,312	61,813
1977-78	49,068	2,405	51,473	4.7	19,361	2,217	21,578	73,051
1978-79	59,323	7,003	66,326	10.6	21,536	2,383	23,919	90,245
1979-80	64,119	7,405	71,524	10.4	23,722	2,562	26,284	97,808
1980-81	73,151	9,276	82,427	11.3	26,529	2,751	29,280	111,707
1981-82	81,963	10,578	92,541	11.4	30,143	3,374	33,517	126,058
1982-83	104,089	11,785	115,874	10.2	34,143	3,516	37,659	153,533
1983-84	130,027	12,970	142,997	9.1	38,009	29,492	67,501	210,498
1984-85	152,573	19,871	172,444	11.5	42,312	30,908	73,220	245,664
1985-86	174,990	25,859	200,849	12.9	46,994	32,110	79,104	279,953
1986-87	191,283	36,926	228,209	16.2	51,992	32,684	84,676	312,885
1987-88	205,344	44,572	249,916	17.8	57,417	33,467	90,884	340,800
1988-89	215,769	58,378	274,147	21.3	63,241	33,846	97,087	371,234
1989-90	227,686	63,959	291,645	21.9	69,626	34,861	104,487	396,132
1990-91	246,962	73,751	320,713	23.0	76,139	35,916	112,055	432,768
1991-92	264,792	84,879	349,671	24.3	81,881	36,621	118,502	468,173
1992-93	273,729	105,968	379,697	27.9	87,911	37,184	125,095	504,792
1993-94	298,159	114,021	412,180	27.7	94,097	37,253	131,350	543,530
1994-95	321,238	116,375	437,613	26.6	101,033	38,766	139,799	577,412
1995-96	343,412	124,476	467,888	26.6	107,882	40,612	148,494	616,382
1996-97	352,767	124,430	477,197	26.1	114,205	42,073	156,278	633,475
1997-98	349,451	118,737	468,188	25.4	117,457	43,417	160,874	629,062
1998-99	353,275	107,027	460,302	23.3	122,407	45,784	168,191	628,493
1999-00	355,036	98,960	453,996	21.8	128,346	47,405	175,751	629,747
2000-01	353,548	92,610	446,158	20.8	129,185	49,788	178,973	625,131
2001-02	366,754	75,056	441,810	17.0	126,921	51,021	177,942	619,752
2002-03	352,209	85,334	437,543	19.5	125,708	52,579	178,287	615,830
2003-04	373,759	60,225	433,984	13.9	127,560	53,338	180,898	614,882
2004-05	370,148	57,276	427,424	13.4	129,579	50,229	179,808	607,232
2005-06	361,452	59,697	421,149	14.2	131,062	48,862	179,924	601,073
2006-07	358,972	55,220	414,192	13.3	134,726	50,334	185,060	599,252
2007-08	339,962	50,735	390,697	13.0	137,371	53,796	191,167	581,864
2008-09	441,408	72,612	514,020	14.1	139,909	56,234	196,143	710,163
2009-10	467,984	91,142	559,126	16.3	142,843	60,814	203,657	762,783
2010-11	462,620	128,535	591,155	21.7	146,135	64,521	210,656	801,811

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 15

Gross and net debt

Year	Interest-bearing debt	Accounts payable and accrued liabilities	Gross debt	Financial assets	Net debt	Non-financial assets	Accumulated deficit
				(millions of dollars)			
1966-67	26,912	1,487	28,399	10,691			17,708
1967-68	28,412	1,835	30,247	11,497			18,750
1968-69	30,720	1,977	32,697	13,280			19,417
1969-70	31,927	2,164	34,091	14,814			19,277
1970-71	35,675	2,368	38,043	17,750			20,293
1971-72	39,039	3,194	42,233	20,154			22,079
1972-73	41,938	4,092	46,030	22,050			23,980
1973-74	43,313	5,345	48,658	22,467			26,191
1974-75	48,740	5,560	54,300	25,884			28,416
1975-76	54,962	6,007	60,969	26,349			34,620
1976-77	61,813	7,457	69,270	27,753			41,517
1977-78	73,051	8,487	81,538	29,142			52,396
1978-79	90,245	8,972	99,217	33,792			65,425
1979-80	97,808	9,262	107,070	29,678			77,392
1980-81	111,707	11,859	123,566	31,618			91,948
1981-82	126,058	15,529	141,587	33,965			107,622
1982-83	153,533	17,361	170,894	34,223			136,671
1983-84	210,498	34,475	244,973	73,117	171,856	14,604	157,252
1984-85	245,664	38,817	284,481	71,811	212,670	18,251	194,419
1985-86	279,953	39,416	319,369	70,125	249,244	21,436	227,808
1986-87	312,885	42,131	355,016	73,184	281,832	24,182	257,650
1987-88	340,800	47,211	388,011	75,036	312,975	26,308	286,667
1988-89	371,234	50,214	421,448	77,879	343,569	28,955	314,614
1989-90	396,132	53,164	449,296	74,539	374,757	31,000	343,757
1990-91	432,768	54,894	487,662	76,582	411,080	33,424	377,656
1991-92	468,173	56,075	524,248	78,519	445,729	35,754	409,975
1992-93	504,792	58,398	563,190	75,973	487,217	38,223	448,994
1993-94	543,530	63,723	607,253	79,327	527,926	40,402	487,524
1994-95	577,412	71,321	648,733	81,239	567,494	43,338	524,156
1995-96	616,382	74,881	691,263	92,655	598,608	44,446	554,162
1996-97	633,475	75,928	709,403	100,407	608,996	46,115	562,881
1997-98	629,062	81,739	710,801	103,644	607,157	47,235	559,922
1998-99	628,493	83,671	712,164	109,298	602,866	48,723	554,143
1999-00	629,747	83,876	713,623	123,507	590,116	50,231	539,885
2000-01	625,131	88,479	713,610	141,873	571,737	51,743	519,994
2001-02	619,752	83,244	702,996	137,684	565,312	53,366	511,946
2002-03	615,830	83,196	699,026	139,456	559,570	54,245	505,325
2003-04	614,882	85,212	700,094	149,092	551,002	54,822	496,180
2004-05	607,232	97,740	704,972	155,385	549,587	54,870	494,717
2005-06	601,073	101,432	702,505	165,559	536,946	55,447	481,499
2006-07	599,252	106,511	705,763	181,858	523,905	56,637	467,268
2007-08	581,864	110,463	692,327	176,046	516,281	58,644	457,637
2008-09	710,163	113,999	824,162	298,949	525,213	61,503	463,710
2009-10	762,783	120,525	883,308	300,836	582,472	63,375	519,097
2010-11	801,811	119,060	920,871	303,963	616,908	66,581	550,327

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 16

Unmatured debt held by outside parties

Year	Domestic marketable bonds [1]	Foreign marketable bonds [1, 2]	Total marketable bonds	Treasury bills [1]	Retail debt [3]	Canada Pension Plan bonds	Other unmatured debt	Unamortized discounts and premiums and cross-currency swap revaluation	Less: government's own holdings	Total
					(millions of dollars)					
1966-67	11,018	523	11,541	2,310	6,017	2		-121	-200	19,549
1967-68	11,573	318	11,891	2,480	6,096	6		-138	-49	20,286
1968-69	12,294	600	12,894	2,840	6,169	12		-163	-47	21,705
1969-70	12,279	605	12,884	2,895	6,579	16		-183	-107	22,084
1970-71	13,021	495	13,516	3,735	7,804	21		-175	-60	24,841
1971-72	13,385	493	13,878	3,830	9,712	28		-169	-67	27,212
1972-73	13,423	491	13,914	4,290	10,989	35		-157	-60	29,011
1973-74	13,592	415	14,007	4,905	10,406	43		-156	-64	29,141
1974-75	14,311	365	14,676	5,630	12,915	52		-199	-77	32,997
1975-76	15,481	337	15,818	6,495	15,517	62		-257	-87	37,548
1976-77	17,748	335	18,083	8,255	16,304	72		-124	-89	42,501
1977-78	21,182	1,190	22,372	11,295	18,011	84		-191	-98	51,473
1978-79	26,532	7,376	33,908	13,535	19,247	96		-314	-146	66,326
1979-80	32,947	4,860	37,807	16,325	18,081	113		-497	-305	71,524
1980-81	40,849	4,794	45,643	21,770	15,812	136		-711	-223	82,427
1981-82	43,493	5,428	48,921	19,375	24,978	154		-626	-261	92,541
1982-83	48,377	6,385	54,762	29,125	32,641	171		-688	-137	115,874
1983-84	57,036	6,086	63,122	41,700	38,204	189	1,112	-1,016	-314	142,997
1984-85	69,438	9,057	78,495	52,300	41,960	205	1,112	-1,387	-241	172,444
1985-86	81,067	13,797	94,864	61,950	44,245	445	1,112	-1,492	-275	200,849
1986-87	94,426	11,997	106,423	76,950	44,309	1,796	1,112	-1,514	-867	228,209
1987-88	103,899	11,282	115,181	81,050	53,323	2,492	1,112	-2,005	-1,237	249,916
1988-89	115,748	8,320	124,068	102,700	47,756	3,005	1,112	-3,266	-1,228	274,147
1989-90	127,682	5,675	133,357	118,550	40,929	3,072	1,112	-4,029	-1,346	291,645
1990-91	143,600	4,526	148,126	139,150	34,444	3,492	1,112	-4,302	-1,309	320,713
1991-92	158,062	3,444	161,506	152,300	35,598	3,501	1,112	-3,326	-1,020	349,671
1992-93	178,465	5,409	183,874	162,050	34,369	3,505	1,112	-4,156	-1,057	379,697
1993-94	203,445	10,668	214,113	166,000	31,331	3,497	1,112	-2,907	-966	412,180
1994-95	225,747	16,921	242,668	164,450	31,386	3,488	1,838	-5,223	-994	437,613
1995-96	252,766	16,809	269,575	166,100	31,428	3,478	1,885	-3,544	-1,034	467,888
1996-97	282,563	23,016	305,579	135,400	33,493	3,468	1,935	-1,590	-1,088	477,197
1997-98	294,605	27,183	321,788	112,300	30,479	3,456	1,924	-528	-1,231	468,188
1998-99	295,774	36,000	331,774	96,950	28,217	4,063	2,614	-4	-3,312	460,302
1999-00	294,441	32,588	327,029	99,850	26,899	3,552	2,601	-2,823	-3,112	453,996
2000-01	295,487	33,664	329,151	88,700	26,416	3,473	2,591	-1,304	-2,869	446,158
2001-02	294,898	27,547	322,445	94,200	24,021	3,391	2,619	-1,737	-3,129	441,810
2002-03	289,208	21,603	310,811	104,600	22,584	3,371	2,664	-3,760	-2,727	437,543
2003-04	278,962	20,828	299,790	113,400	21,330	3,427	2,774	-5,247	-1,490	433,984
2004-05	266,674	16,543	283,217	127,200	19,080	3,393	2,932	-7,264	-1,134	427,424
2005-06	261,872	14,333	276,205	131,600	17,342	3,102	2,927	-9,038	-989	421,149
2006-07	257,909	10,617	268,526	134,100	15,175	1,743	3,096	-7,750	-698	414,192
2007-08	253,802	9,716	263,518	117,000	13,068	1,042	4,236	-7,633	-534	390,697
2008-09	295,322	10,649	305,971	192,500	12,532	523	4,184	-1,061	-629	514,020
2009-10	368,013	8,298	376,311	175,900	11,855	452	4,090	-9,325	-157	559,126
2010-11	416,411	7,681	424,092	163,000	10,141	27	3,875	-9,576	-404	591,155

[1] Including government holdings of its own debt.

[2] Including Canada bills, Canada notes and Euro medium-term notes.

[3] Includes Canada Savings Bonds and Canada Premium Bonds.

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Provincial and Territorial Governments Public Accounts

Table 17

Newfoundland and Labrador

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other[1]	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	1,328	1,218	2,546	2,286	457	2,743	-	-197	3,289
1988-89	1,350	1,315	2,664	2,436	454	2,890	-	-226	3,195
1989-90	1,505	1,426	2,931	2,647	459	3,106	-	-175	3,369
1990-91	1,569	1,398	2,967	2,824	490	3,314	-	-347	3,550
1991-92	1,681	1,427	3,108	2,888	496	3,384	-	-276	3,918
1992-93	1,693	1,500	3,194	2,967	488	3,455	-	-261	4,270
1993-94	1,696	1,462	3,158	2,864	500	3,364	-	-205	6,453
1994-95	1,887	1,710	3,597	3,041	1,004	4,045	74	-374	6,831
1995-96	2,076	1,572	3,647	3,115	822	3,937	100	-190	7,121
1996-97	2,132	1,578	3,711	3,092	819	3,911	93	-107	7,254
1997-98	1,981	2,019	4,000	3,131	865	3,996	129	133	7,301
1998-99	1,961	1,834	3,795	3,131	1,008	4,139	157	-187	7,851
1999-00	2,134	1,620	3,755	3,285	883	4,168	144	-269	8,087
2000-01	2,144	1,757	3,901	3,430	951	4,382	131	-350	8,437
2001-02	2,243	1,657	3,900	3,572	942	4,514	146	-468	8,932
2002-03	2,360	1,589	3,950	3,765	979	4,744	150	-644	10,616
2003-04	2,651	1,543	4,194	4,151	982	5,133	25	-914	11,487
2004-05	2,799	1,513	4,312	4,032	940	4,972	171	-489	11,888
2005-06	3,498	1,880	5,378	4,409	947	5,356	178	199	11,684
2006-07	3,597	1,743	5,340	4,590	777	5,367	181	154	11,558
2007-08	5,154	1,788	6,942	4,969	751	5,720	199	1,421	10,188
2008-09	5,869	2,558	8,427	5,537	745	6,282	205	2,350	7,968
2009-10	5,560	1,545	7,106	6,439	890	7,329	191	-33	8,220
2010-11	6,071	1,760	7,831	6,723	823	7,547	201	485	8,218

Source: Public Accounts of Newfoundland and Labrador. (For 2010-11: 2011 Budget).

[1] Net income of government business entreprises.

Due to a break in the series following accounting changes, data from 1994-95 onward are not directly comparable with earlier years.

Table 18

Prince Edward Island

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other[1]	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	312	245	557	503	71	574	-	-17	179
1988-89	344	282	626	556	81	637	-	-11	191
1989-90	374	299	673	594	87	681	-	-8	199
1990-91	395	312	707	632	95	727	-	-20	219
1991-92	416	299	715	662	103	765	-	-50	269
1992-93	408	303	711	692	101	793	-	-82	351
1993-94	457	282	739	699	111	810	-	-71	772
1994-95	480	332	812	704	117	821	7	-1	990
1995-96	481	308	789	669	120	789	4	4	986
1996-97	513	287	800	692	118	810	7	-4	990
1997-98	496	292	788	702	102	804	9	-7	997
1998-99	502	350	852	750	101	852	6	6	990
1999-00	547	353	900	806	103	908	3	-5	1,024
2000-01	568	383	952	855	108	963	0	-12	1,036
2001-02	573	400	974	876	106	982	-9	-17	1,053
2002-03	628	341	969	895	103	998	-26	-55	1,178
2003-04	634	387	1,021	988	106	1,095	-52	-125	1,313
2004-05	673	444	1,116	1,031	105	1,136	-14	-34	1,330
2005-06	726	444	1,170	1,059	110	1,169	-	1	1,323
2006-07	756	474	1,231	1,086	120	1,207	-	24	1,312
2007-08	785	518	1,303	1,188	119	1,307	-	-4	1,347
2008-09	832	558	1,390	1,312	109	1,420	-	-31	1,415
2009-10	868	639	1,507	1,477	104	1,581	-	-74	1,581
2010-11	834	624	1,459	1,407	106	1,512	-	-54	1,720

Source: Public Accounts of Prince Edward Island. (For 2010-11: 2011 Budget).

[1] Pension adjustment, Workforce Renewal Program adjustment (2004-05).

Table 19

Nova Scotia

Year	Own-source revenues	Federal sh transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other[1]	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	1,955	1,253	3,208	2,977	566	3,543	108	-227	3,756
1988-89	2,109	1,438	3,547	3,347	560	3,907	118	-242	3,947
1989-90	2,245	1,530	3,775	3,602	571	4,173	131	-267	4,454
1990-91	2,349	1,599	3,948	3,676	672	4,348	143	-257	4,731
1991-92	2,321	1,602	3,923	3,799	682	4,481	152	-406	5,426
1992-93	2,335	1,591	3,926	3,916	779	4,695	152	-617	7,288
1993-94	2,493	1,567	4,060	3,861	865	4,727	121	-546	8,120
1994-95	2,510	1,858	4,368	3,799	912	4,711	110	-233	8,514
1995-96	2,548	1,938	4,486	3,907	897	4,804	116	-201	8,715
1996-97	2,751	1,757	4,508	3,813	811	4,624	0	-116	9,139
1997-98	2,522	1,927	4,449	4,018	865	4,884	-7	-442	9,290
1998-99	2,637	2,016	4,653	4,414	1,003	5,418	503	-261	10,298
1999-00	2,850	1,972	4,822	4,508	1,060	5,568	-51	-797	11,231
2000-01	3,023	2,040	5,063	4,434	1,115	5,549	633	147	11,370
2001-02	3,203	2,054	5,257	4,555	1,161	5,715	572	113	12,144
2002-03	3,366	1,908	5,274	4,737	1,046	5,782	535	28	12,226
2003-04	3,743	2,024	5,767	5,196	1,040	6,236	507	38	12,328
2004-05	3,932	2,327	6,259	5,604	1,034	6,638	549	170	12,305
2005-06	4,367	2,428	6,795	6,118	988	7,106	508	196	12,239
2006-07	4,602	2,570	7,172	6,579	930	7,508	519	182	12,357
2007-08	5,043	3,023	8,066	7,208	925	8,133	486	419	12,115
2008-09	5,072	2,947	8,018	7,648	867	8,515	522	26	12,318
2009-10	4,871	3,240	8,112	8,047	823	8,870	489	-269	13,045
2010-11	5,585	3,152	8,738	7,897	843	8,740	571	569	12,827

Source: Public Accounts of Nova Scotia.

[1] Includes sinking fund earnings, net income (losses) of government business enterprises, and consolidation, accounting and other adjustments.

Table 20

New Brunswick

Year	Own-source revenues	Federal sh transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other[1]	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	1,918	1,261	3,179	3,100	415	3,515	-	-335	2,919
1988-89	2,167	1,360	3,527	3,179	427	3,606	-	-79	2,993
1989-90	2,214	1,459	3,673	3,260	437	3,697	-	-24	3,013
1990-91	2,297	1,504	3,801	3,507	475	3,982	-	-182	3,236
1991-92	2,352	1,455	3,807	3,686	476	4,162	-	-354	3,603
1992-93	2,268	1,742	4,011	3,737	538	4,275	-	-264	5,297
1993-94	2,507	1,517	4,024	3,705	585	4,290	-	-266	5,810
1994-95	2,672	1,626	4,298	3,732	645	4,377	-	-79	5,889
1995-96	2,803	1,623	4,426	3,791	595	4,386	-	41	5,850
1996-97	2,950	1,521	4,471	3,840	564	4,405	-	66	5,783
1997-98	2,786	1,653	4,439	3,865	574	4,439	-	0	5,788
1998-99	2,325	2,122	4,447	4,034	616	4,651	-	-204	5,992
1999-00	2,974	1,827	4,801	4,219	611	4,830	-	-30	7,056
2000-01	3,068	1,795	4,863	4,082	637	4,719	-100	43	6,915
2001-02	3,216	2,035	5,251	4,421	652	5,073	-100	79	6,759
2002-03	3,331	1,930	5,261	4,710	661	5,371	110	1	6,865
2003-04	3,569	1,918	5,487	5,086	583	5,669	-	-182	6,963
2004-05	3,664	2,355	6,019	5,203	581	5,784	-	235	6,824
2005-06	3,970	2,393	6,363	5,530	591	6,122	-	241	6,710
2006-07	4,202	2,487	6,689	5,883	559	6,443	-	247	6,576
2007-08	4,444	2,578	7,022	6,333	577	6,910	-	112	6,949
2008-09	4,440	2,727	7,166	6,740	603	7,342	-	-176	7,388
2009-10	4,147	2,901	7,048	7,154	617	7,770	-	-722	8,471
2010-11	4,577	2,919	7,497	7,487	643	8,130	-	-633	9,480

Source: Public Accounts of New Brunswick.

[1] Contribution to/from Fiscal Stabilization Fund.

Table 21

Quebec

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other[1]	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	21,992	6,117	28,109	26,830	3,675	30,505	-	-2,396	31,115
1988-89	23,366	6,386	29,752	27,654	3,802	31,456	-	-1,704	32,819
1989-90	24,359	6,674	31,033	28,782	4,015	32,797	-	-1,764	34,583
1990-91	26,073	6,972	33,045	31,583	4,437	36,020	-	-2,975	37,558
1991-92	27,720	6,747	34,467	34,102	4,666	38,768	-	-4,301	41,885
1992-93	27,561	7,764	35,325	35,599	4,756	40,355	-	-5,030	46,914
1993-94	28,165	7,762	35,927	35,534	5,316	40,850	-	-4,923	51,837
1994-95	28,815	7,494	36,309	36,248	5,882	42,130	-	-5,821	57,677
1995-96	30,000	8,126	38,126	36,039	6,034	42,073	-	-3,947	61,624
1996-97	30,522	6,704	37,226	34,583	5,855	40,438	-	-3,212	64,833
1997-98	30,415	5,656	36,071	33,037	6,765	39,802	1,574	-2,157	88,597
1998-99	32,936	7,813	40,749	35,440	6,573	42,013	1,390	126	88,810
1999-00	35,417	6,064	41,481	36,074	6,752	42,826	1,352	7	89,162
2000-01	37,447	7,895	45,342	38,394	6,972	45,366	451	427	88,208
2001-02	35,638	8,885	44,523	40,377	6,687	47,064	2,563	22	92,772
2002-03	37,301	8,932	46,233	42,111	6,583	48,694	1,733	-728	95,601
2003-04	38,819	9,370	48,189	43,598	6,655	50,253	1,706	-358	97,025
2004-05	41,069	9,229	50,298	45,619	6,853	52,472	1,510	-664	99,042
2005-06	42,374	9,969	52,343	46,996	6,875	53,871	1,565	37	104,683
2006-07	46,184	11,015	57,199	49,293	7,039	56,332	-758	109	124,297
2007-08	45,881	13,629	59,510	52,080	7,021	59,101	-409	0	124,681
2008-09	45,152	14,023	59,175	55,442	6,504	61,946	2,771	0	134,237
2009-10	44,130	15,161	59,291	58,389	6,117	64,506	2,041	-3,174	150,100
2010-11	46,925	15,451	62,376	59,819	6,934	66,753	177	-4,200	158,995

Source: Public Accounts of Quebec. (For 2010-11: 2011 Budget).

[1] Includes the net results of consolidated organizations, contingency reserve, transactions with the budgetary reserve and transfers to the Generations Fund.

Due to a break in the series following the implementation of the accounting reform, data from 1997-98 onward are not directly comparable with earlier years.

Table 22

Ontario

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	27,174	4,984	32,158	31,171	3,476	34,647	-	-2,489	34,020
1988-89	31,878	5,113	36,991	34,703	3,767	38,470	-	-1,479	35,499
1989-90	35,861	5,364	41,225	37,318	3,817	41,135	-	90	35,409
1990-91	37,130	5,762	42,892	42,145	3,776	45,921	-	-3,029	38,438
1991-92	34,429	6,324	40,753	47,487	4,196	51,683	-	-10,930	49,368
1992-93	34,253	7,554	41,807	48,942	5,293	54,235	-	-12,428	61,796
1993-94	36,603	7,071	43,674	47,747	7,129	54,876	-	-11,202	80,599
1994-95	38,432	7,607	46,039	48,336	7,832	56,168	-	-10,129	90,728
1995-96	41,857	7,880	49,737	50,062	8,475	58,537	-	-8,800	101,864
1996-97	43,936	5,778	49,714	48,012	8,607	56,619	-	-6,905	108,769
1997-98	47,684	5,098	52,782	48,019	8,729	56,748	-	-3,966	112,735
1998-99	51,535	4,515	56,050	49,036	9,016	58,052	-	-2,002	114,737
1999-00	59,157	5,885	65,042	53,347	11,027	64,374	-	668	134,398
2000-01	60,165	6,129	66,294	53,519	10,873	64,392	-	1,902	132,496
2001-02	64,553	7,754	72,307	61,595	10,337	71,932	-	375	132,121
2002-03	65,781	8,894	74,675	64,864	9,694	74,558	-	117	132,647
2003-04	64,376	9,893	74,269	70,148	9,604	79,752	-	-5,483	138,816
2004-05	71,979	11,882	83,861	76,048	9,368	85,416	-	-1,555	140,921
2005-06	77,054	13,251	90,305	80,988	9,019	90,007	-	298	149,928
2006-07	82,604	14,036	96,640	85,540	8,831	94,371	-	2,269	150,618
2007-08	86,982	16,597	103,579	94,065	8,914	102,979	-	600	156,616
2008-09	80,342	16,591	96,933	94,776	8,566	103,342	-	-6,409	169,585
2009-10	77,173	18,620	95,793	106,336	8,719	115,055	-	-19,262	193,589
2010-11	83,617	23,041	106,658	111,189	9,480	120,669	-	-14,011	214,511

Source: Public Accounts of Ontario.

Due to a break in the series following the line-by-line consolidation of the Ontario Electricity Financial Corporation, data from 1999-2000 onward are not directly comparable with earlier years.

Due to a break in the series, data from 2001-2002 onward are not directly comparable with earlier years. Notably, Education Property Taxes are reported as revenue starting with the 2010 Budget, whereas previously they were netted against expenditures.

Table 23

Manitoba

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other[1]	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	2,726	1,313	4,039	3,848	490	4,338	0	-300	4,415
1988-89	2,975	1,568	4,543	4,045	439	4,484	-200	-141	4,332
1989-90	2,949	1,657	4,606	4,261	487	4,748	0	-142	4,449
1990-91	2,983	1,695	4,678	4,536	501	5,037	67	-292	4,773
1991-92	3,146	1,821	4,967	4,779	492	5,271	-30	-334	5,216
1992-93	2,882	1,816	4,698	4,905	559	5,464	200	-566	6,378
1993-94	3,247	1,629	4,876	4,752	585	5,337	30	-431	6,806
1994-95	3,310	1,895	5,205	4,804	597	5,401	0	-196	6,901
1995-96	3,789	1,873	5,662	4,913	592	5,505	0	157	6,854
1996-97	4,107	1,716	5,823	4,929	539	5,468	-264	91	6,474
1997-98	3,920	1,884	5,804	5,232	520	5,752	25	77	9,719
1998-99	4,393	1,560	5,953	5,442	515	5,957	36	32	9,926
1999-00	4,335	2,073	6,408	6,042	465	6,507	110	11	10,046
2000-01	4,739	2,091	6,830	6,182	511	6,693	-96	41	9,888
2001-02	4,623	2,206	6,829	6,406	414	6,820	54	63	10,001
2002-03	4,874	2,230	7,104	6,705	321	7,026	-74	4	10,341
2003-04	5,775	2,716	8,491	8,271	799	9,070	0	-579	11,052
2004-05	7,037	3,156	10,193	8,813	818	9,631	0	562	11,101
2005-06	7,625	3,103	10,728	9,474	860	10,334	0	394	10,952
2006-07	8,113	3,320	11,433	10,155	793	10,948	0	485	10,800
2007-08	8,899	3,597	12,496	11,074	864	11,938	0	558	10,550
2008-09	8,897	3,866	12,763	11,482	830	12,312	0	451	11,468
2009-10	8,723	3,924	12,647	12,092	756	12,848	0	-201	11,794
2010-11	9,044	4,086	13,130	12,905	762	13,667	70	-467	13,244

Source: Public Accounts of Manitoba. (For 2010-11: 2011 Budget).

[1] Includes the contribution to/from the Fiscal Stabilization Fund and contributions to the Debt Retirement Fund.
Due to a break in the series following the move to summary account budgeting, data from 2003-04 onward are not directly comparable with earlier years.

Table 24

Saskatchewan

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other[1]	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	2,382	914	3,296	3,556	282	3,838	-	-542	2,517
1988-89	2,628	1,067	3,695	3,700	320	4,020	-	-324	2,885
1989-90	2,927	1,231	4,158	4,013	523	4,536	-	-378	3,316
1990-91	3,169	1,489	4,658	4,544	475	5,019	-	-361	3,688
1991-92	2,789	1,260	4,049	4,390	502	4,892	-	-843	5,999
1992-93	3,072	1,304	4,376	4,228	740	4,968	-	-592	6,587
1993-94	3,432	1,248	4,680	4,079	873	4,952	-	-272	7,769
1994-95	3,928	1,297	5,225	4,215	882	5,097	-	128	7,641
1995-96	4,157	975	5,132	4,264	849	5,113	-	19	7,622
1996-97	4,742	761	5,503	4,302	794	5,096	-	407	7,215
1997-98	4,609	553	5,162	4,372	755	5,127	-	35	7,180
1998-99	4,642	961	5,603	4,830	745	5,575	-	28	7,152
1999-00	4,648	1,209	5,857	5,077	696	5,773	-	83	7,069
2000-01	5,881	872	6,754	5,257	664	5,921	-775	58	7,011
2001-02	4,822	1,237	6,059	5,721	617	6,338	280	1	7,010
2002-03	5,656	801	6,457	5,762	611	6,374	-82	1	7,009
2003-04	5,525	1,033	6,558	6,166	603	6,768	211	1	7,054
2004-05	6,126	1,666	7,792	6,448	579	7,027	-383	383	6,880
2005-06	6,952	1,265	8,218	7,133	545	7,678	-139	400	6,636
2006-07	7,254	1,389	8,643	7,707	538	8,245	-105	293	6,446
2007-08	8,263	1,603	9,866	8,036	547	8,583	-641	641	6,049
2008-09	10,616	1,709	12,325	9,835	520	10,355	419	2,389	3,848
2009-10	8,662	1,604	10,266	9,619	480	10,099	257	425	3,638
2010-11	9,460	1,600	11,061	10,541	424	10,965	-48	47	3,676

Source: Public Accounts of Saskatchewan.

[1] Contribution from/to (-) the Fiscal Stabilization Fund and to the Saskatchewan Infrastructure Fund.

Table 25

Alberta

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	9,993	1,912	11,905	12,698	572	13,270	-	-1,365	1,527
1988-89	9,765	2,135	11,900	13,110	797	13,907	-	-2,007	3,592
1989-90	10,896	1,943	12,839	13,840	1,115	14,955	-	-2,116	5,947
1990-91	11,820	2,365	14,185	14,735	1,282	16,017	-	-1,832	5,692
1991-92	11,587	2,150	13,737	15,052	1,314	16,366	-	-2,629	7,939
1992-93	11,814	2,457	14,271	16,176	1,419	17,595	-	-3,324	11,824
1993-94	13,316	2,090	15,406	15,123	1,654	16,777	-	-1,371	13,379
1994-95	14,235	1,929	16,164	13,480	1,746	15,226	-	938	12,707
1995-96	13,767	1,748	15,515	12,681	1,683	14,364	-	1,151	11,607
1996-97	15,301	1,351	16,652	12,701	1,462	14,163	-	2,489	8,709
1997-98	16,571	1,183	17,754	13,773	1,322	15,095	-	2,659	5,979
1998-99	15,484	1,335	16,819	14,346	1,379	15,725	-	1,094	4,876
1999-00	18,463	1,640	20,103	16,356	956	17,312	-	2,791	2,074
2000-01	23,714	1,813	25,527	17,976	980	18,956	-	6,571	-4,300
2001-02	19,662	2,264	21,926	20,071	774	20,845	-	1,081	-5,043
2002-03	20,588	2,074	22,662	20,053	476	20,529	-	2,133	-6,769
2003-04	22,961	2,926	25,887	21,480	271	21,751	-	4,136	-10,548
2004-05	26,109	3,219	29,328	23,851	302	24,153	-	5,175	-15,160
2005-06	32,150	3,392	35,542	26,743	248	26,991	-	8,551	-22,883
2006-07	34,940	3,077	38,017	29,292	215	29,507	-	8,510	-30,454
2007-08	35,121	3,048	38,169	33,218	214	33,432	-	4,737	-31,527
2008-09	31,620	4,185	35,805	36,455	208	36,663	-	-858	-26,873
2009-10	30,717	4,941	35,658	36,327	363	36,690	-	-1,032	-23,738
2010-11	29,829	5,025	34,854	37,969	295	38,264	-	-3,410	-18,398

Source: Public Accounts of Alberta.

Table 26

British Columbia

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other[1]	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	9,072	2,054	11,126	10,530	525	11,055	0	71	3,762
1988-89	10,615	2,149	12,764	11,304	530	11,834	0	930	3,533
1989-90	11,575	2,121	13,696	12,743	457	13,200	0	496	5,538
1990-91	12,247	2,096	14,343	14,532	478	15,010	0	-667	6,312
1991-92	12,564	2,198	14,762	16,511	590	17,101	0	-2,339	8,843
1992-93	13,967	2,416	16,382	17,122	736	17,858	0	-1,476	10,529
1993-94	15,665	2,269	17,934	17,989	844	18,833	0	-899	11,507
1994-95	17,264	2,463	19,726	19,023	931	19,954	0	-228	11,954
1995-96	17,343	2,394	19,737	19,167	887	20,054	0	-317	12,162
1996-97	17,755	1,955	19,710	19,596	867	20,463	0	-753	12,338
1997-98	18,131	1,837	19,968	19,301	834	20,135	0	-167	12,515
1998-99	22,823	2,549	25,372	23,284	3,049	26,333	0	-961	21,914
1999-00	23,627	3,180	26,807	23,884	2,936	26,820	0	-13	22,966
2000-01	26,393	3,296	29,689	25,459	2,980	28,439	-52	1,198	23,136
2001-02	24,849	3,320	28,169	27,573	2,748	30,321	1,117	-1,035	24,797
2002-03	23,952	3,823	27,775	27,687	2,540	30,227	-169	-2,621	27,691
2003-04	25,536	3,619	29,155	27,926	2,448	30,374	-123	-1,342	28,876
2004-05	28,133	5,222	33,355	28,360	2,306	30,666	0	2,689	27,152
2005-06	30,121	5,825	35,946	30,038	2,203	32,241	-710	2,995	25,910
2006-07	32,047	6,387	38,434	32,187	2,270	34,457	-264	3,713	23,411
2007-08	33,812	5,932	39,744	34,762	2,236	36,998	-444	2,302	22,638
2008-09	32,360	5,985	38,345	36,060	2,158	38,218	18	145	24,912
2009-10	30,551	6,917	37,468	37,128	2,204	39,332	0	-1,864	28,112
2010-11	31,929	7,997	39,926	37,982	2,253	40,235	0	-309	30,637

Source: Public Accounts of British Columbia.

[1] Includes the impacts of the joint trusteeship of pension plans, restructuring exit expenses, negociating framework incentive payments and climate action dividend.

Due to a break in the series following the move to fully comply with generally accepted accounting principles (GAAP), data from 1998-99 onward are not directly comparable with earlier years.

Table 27

Yukon Territory

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other[1]	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	92	184	276	279	0	279	-	-3	-45
1988-89	111	191	302	297	0	297	-	5	-50
1989-90	112	199	311	308	0	308	-	3	-54
1990-91	104	229	333	344	0	344	-	-12	-64
1991-92	108	243	351	365	0	365	-	-14	-50
1992-93	89	267	356	419	1	420	-	-64	13
1993-94	154	307	461	445	1	446	-	15	-2
1994-95	172	310	482	452	1	453	-	29	-31
1995-96	168	321	489	460	0	460	-	29	-60
1996-97	157	286	443	454	0	455	-	-12	-48
1997-98	153	302	455	450	0	451	-	4	-51
1998-99	115	371	485	455	0	455	-	30	-80
1999-00	153	330	483	499	0	500	-	-16	-64
2000-01	166	386	552	518	0	518	1	35	-99
2001-02	129	374	503	524	0	525	1	-21	-85
2002-03	148	402	550	555	0	556	1	-5	-80
2003-04	140	456	597	585	0	586	1	12	-76
2004-05	154	506	659	654	0	655	1	5	-48
2005-06	158	584	742	668	0	668	1	75	-100
2006-07	175	610	784	727	0	727	1	57	-132
2007-08	128	650	778	769	0	769	1	10	-140
2008-09	250	632	882	890	0	890	1	-7	-136
2009-10	279	656	935	1,007	0	1,007	46	-26	-67
2010-11	355	690	1,046	1,128	0	1,128	62	-20	-18

Source: Public Accounts of the Yukon Territory. (For 2010-11: 2011 Budget).

[1] Includes changes in tangible capital assets, estimated year-end lapses, recoveries of prior years' expenditures, net profits of restricted funds and items transferred to the balance sheet.

Table 28

Northwest Territories

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	120	649	769	798	0	798	-	-29	-41
1988-89	130	747	877	854	5	858	-	19	-66
1989-90	167	796	962	967	5	972	-	-10	-55
1990-91	163	879	1,042	1,045	5	1,050	-	-8	-55
1991-92	216	900	1,116	1,140	4	1,144	-	-28	-31
1992-93	222	911	1,133	1,123	4	1,127	-	6	-56
1993-94	215	973	1,188	1,207	3	1,210	-	-22	-19
1994-95	214	1,004	1,218	1,244	0	1,244	-	-26	12
1995-96	234	1,026	1,260	1,277	5	1,282	-	-22	28
1996-97	219	963	1,182	1,189	5	1,194	-	-12	21
1997-98	244	1,066	1,311	1,175	5	1,180	-	131	-85
1998-99	203	1,016	1,220	1,253	0	1,253	-	-33	-43
1999-00	140	572	712	747	2	749	-	-37	17
2000-01	268	615	883	765	0	766	-	118	-66
2001-02	642	315	957	837	0	837	-	120	-127
2002-03	438	408	846	880	0	880	-	-34	-29
2003-04	-43	914	871	936	0	936	-	-65	76
2004-05	201	780	981	998	0	998	-	-17	133
2005-06	224	877	1,101	1,065	0	1,065	-	36	124
2006-07	324	879	1,204	1,116	0	1,116	-	88	105
2007-08	346	959	1,306	1,211	0	1,212	-	94	54
2008-09	337	919	1,256	1,297	0	1,297	-	-41	132
2009-10	306	988	1,294	1,341	0	1,341	-	-48	245
2010-11	298	1,022	1,320	1,314	0	1,314	-	6	N/A

Source: Public Accounts of the Northwest Territories. (For 2010-11: 2011 Budget).

Starting in 1999-2000, the figures represent the Northwest Territories Budget after the division of the territories.

Table 29

Nunavut

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other[1]	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1999-00	55	591	646	574	-	574	0	72	-23
2000-01	88	652	740	678	-	678	0	62	-7
2001-02	79	654	733	731	-	731	0	2	25
2002-03	95	713	809	797	-	797	0	12	43
2003-04	90	754	844	837	-	837	0	7	100
2004-05	84	848	932	877	-	877	0	55	99
2005-06	97	946	1,043	933	-	933	0	109	9
2006-07	94	1,176	1,270	1,124	-	1,124	0	146	-100
2007-08	134	1,042	1,177	1,155	-	1,155	0	21	-75
2008-09	145	1,115	1,260	1,283	-	1,283	0	-23	-17
2009-10	144	1,096	1,241	1,186	-	1,186	0	54	24
2010-11	133	1,171	1,305	1,211	-	1,211	-48	48	101

Source: Public Accounts of Nunavut. (For 2010-11: 2011 Budget).

[1] Supplementary requirements

Table 30

All provinces and territories (millions of dollars)

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other	Deficit (-) or surplus	Debt
				(millions of dollars)					
1987-88	79,064	22,104	101,168	98,576	10,529	109,105	108	-7,829	87,412
1988-89	87,438	23,750	111,188	105,184	11,182	116,366	-82	-5,259	92,869
1989-90	95,184	24,699	119,883	112,334	11,974	124,308	131	-4,294	100,168
1990-91	100,299	26,299	126,598	124,104	12,686	136,790	210	-9,981	108,078
1991-92	99,329	26,426	125,755	134,861	13,521	148,382	122	-22,505	132,385
1992-93	100,564	29,625	130,189	139,826	15,414	155,240	352	-24,698	161,191
1993-94	107,950	28,177	136,127	138,005	18,466	156,471	151	-20,193	193,032
1994-95	113,918	29,525	143,443	139,078	20,549	159,627	192	-15,992	209,813
1995-96	119,222	29,785	149,006	140,345	20,959	161,304	221	-12,077	224,374
1996-97	125,085	24,657	149,742	137,203	20,442	157,646	-165	-8,068	231,476
1997-98	129,511	23,471	152,982	137,076	21,337	158,413	1,730	-3,701	259,966
1998-99	139,556	26,442	165,998	146,416	24,006	170,422	2,092	-2,332	272,423
1999-00	154,500	27,316	181,816	155,418	25,491	180,910	1,558	2,465	293,044
2000-01	167,664	29,725	197,389	161,550	25,792	187,342	192	10,240	284,024
2001-02	164,233	33,155	197,388	177,260	24,437	201,697	4,624	315	290,359
2002-03	168,519	34,045	202,564	183,520	23,015	206,535	2,179	-1,792	297,339
2003-04	173,777	37,554	211,331	195,369	23,091	218,460	2,275	-4,854	304,465
2004-05	191,958	43,147	235,105	207,538	22,886	230,424	1,834	6,516	302,467
2005-06	209,315	46,358	255,673	221,156	22,386	243,543	1,403	13,533	307,215
2006-07	224,893	49,163	274,056	235,280	22,073	257,353	-426	16,277	316,794
2007-08	234,993	54,963	289,957	256,069	22,168	278,236	-809	10,911	319,445
2008-09	225,931	57,813	283,744	268,756	21,109	289,864	3,943	-2,177	346,247
2009-10	216,132	62,233	278,365	286,542	21,073	307,615	3,025	-26,225	395,014
2010-11	228,659	68,540	297,199	297,571	22,563	320,135	988	-21,947	434,994

Sources: Provincial/territorial Public Accounts and 2011 Budgets.

Table 31

All provinces and territories (per cent of GDP)

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other	Deficit (-) or surplus	Debt
				(per cent of GDP)					
1987-88	14.1	4.0	18.1	17.6	1.9	19.5	0.0	-1.4	15.6
1988-89	14.3	3.9	18.1	17.2	1.8	19.0	0.0	-0.9	15.1
1989-90	14.5	3.8	18.2	17.1	1.8	18.9	0.0	-0.7	15.2
1990-91	14.8	3.9	18.6	18.3	1.9	20.1	0.0	-1.5	15.9
1991-92	14.5	3.9	18.3	19.7	2.0	21.6	0.0	-3.3	19.3
1992-93	14.4	4.2	18.6	20.0	2.2	22.2	0.1	-3.5	23.0
1993-94	14.8	3.9	18.7	19.0	2.5	21.5	0.0	-2.8	26.5
1994-95	14.8	3.8	18.6	18.0	2.7	20.7	0.0	-2.1	27.2
1995-96	14.7	3.7	18.4	17.3	2.6	19.9	0.0	-1.5	27.7
1996-97	14.9	2.9	17.9	16.4	2.4	18.8	0.0	-1.0	27.7
1997-98	14.7	2.7	17.3	15.5	2.4	17.9	0.2	-0.4	29.5
1998-99	15.3	2.9	18.1	16.0	2.6	18.6	0.2	-0.3	29.8
1999-00	15.7	2.8	18.5	15.8	2.6	18.4	0.2	0.3	29.8
2000-01	15.6	2.8	18.3	15.0	2.4	17.4	0.0	1.0	26.4
2001-02	14.8	3.0	17.8	16.0	2.2	18.2	0.4	0.0	26.2
2002-03	14.6	3.0	17.6	15.9	2.0	17.9	0.2	-0.2	25.8
2003-04	14.3	3.1	17.4	16.1	1.9	18.0	0.2	-0.4	25.1
2004-05	14.9	3.3	18.2	16.1	1.8	17.8	0.1	0.5	23.4
2005-06	15.2	3.4	18.6	16.1	1.6	17.7	0.1	1.0	22.4
2006-07	15.5	3.4	18.9	16.2	1.5	17.7	0.0	1.1	21.9
2007-08	15.4	3.6	19.0	16.7	1.4	18.2	-0.1	0.7	20.9
2008-09	14.1	3.6	17.7	16.8	1.3	18.1	0.2	-0.1	21.6
2009-10	14.1	4.1	18.2	18.7	1.4	20.1	0.2	-1.7	25.8
2010-11	14.1	4.2	18.3	18.3	1.4	19.7	0.1	-1.4	26.8

Sources: Provincial/territorial Public Accounts and 2011 Budgets and *National Income and Expenditure Accounts* (13-001).

National Accounts

Table 32

Total government income

National Economic and Financial Accounts

Year	Taxes on incomes, persons	Taxes on incomes, corporations	Taxes on incomes, non-residents	Contributions to social insurance plans	Taxes on production and imports	Other transfers from persons	Investment income	Sales of goods and services	Total income[1]
				(millions of dollars)					
1966	4,114	2,355	195	1,324	8,638	446	1,510	1,308	19,890
1967	5,106	2,396	211	1,489	9,448	488	1,684	1,511	22,333
1968	6,145	2,852	200	1,608	10,260	653	2,038	1,630	25,386
1969	7,697	3,221	222	1,818	11,337	897	2,510	1,754	29,456
1970	9,069	3,070	260	1,883	12,040	1,126	2,762	1,956	32,166
1971	10,417	3,346	272	1,995	13,131	1,163	3,146	2,240	35,710
1972	11,611	3,920	276	2,306	14,796	1,099	3,678	2,494	40,180
1973	13,618	5,079	324	2,738	16,815	1,149	4,607	2,865	47,195
1974	16,602	7,051	434	3,844	21,048	1,228	6,172	3,210	59,589
1975	18,538	7,494	464	4,741	21,728	1,249	7,274	3,746	65,234
1976	21,400	7,128	500	5,895	25,376	1,619	8,396	4,518	74,832
1977	23,811	7,238	532	6,357	27,863	1,812	9,957	4,927	82,497
1978	24,728	8,188	570	7,067	29,576	2,007	12,087	5,997	90,220
1979	27,774	10,038	764	7,571	32,321	2,251	14,790	6,889	102,398
1980	32,139	12,078	1,013	8,446	36,520	2,469	17,519	7,672	117,856
1981	38,565	12,796	1,113	10,863	47,870	2,755	19,995	8,924	142,881
1982	43,098	11,755	1,196	11,980	50,320	3,222	20,975	10,273	152,819
1983	45,667	12,320	1,052	14,184	52,780	3,633	22,441	11,314	163,391
1984	48,721	14,984	1,019	15,612	57,354	3,831	24,377	12,848	178,746
1985	53,262	15,563	955	17,633	61,339	3,974	25,381	13,512	191,619
1986	61,618	14,573	1,683	19,601	67,495	4,135	22,900	14,837	206,842
1987	69,288	16,990	1,222	21,721	74,613	4,508	22,786	16,015	227,143
1988	77,568	17,586	1,678	24,775	82,565	4,982	25,114	17,243	251,511
1989	83,222	18,566	1,545	24,849	90,939	5,481	28,025	18,632	271,259
1990	96,171	16,834	1,727	28,944	94,693	4,051	29,257	20,073	291,750
1991	97,154	15,015	1,514	31,071	100,693	4,588	28,207	21,425	299,667
1992	97,283	14,517	1,576	35,011	104,677	4,989	27,824	22,562	308,439
1993	96,379	16,263	1,649	36,545	107,609	5,191	28,057	23,351	315,044
1994	100,311	19,342	1,698	38,938	110,658	5,421	29,571	24,574	330,513
1995	106,190	22,138	1,964	40,489	113,945	5,844	31,295	26,115	347,980
1996	113,608	26,239	2,844	39,980	116,876	5,832	31,763	26,994	364,136
1997	120,790	32,250	2,958	42,029	123,207	6,510	31,887	28,499	388,130
1998	128,935	30,800	2,817	43,465	127,238	7,155	31,823	30,549	402,782
1999	134,197	39,410	3,386	45,721	133,273	6,915	33,038	32,368	428,308
2000	143,951	48,175	3,755	49,748	138,998	7,116	43,512	33,414	468,669
2001	145,926	36,352	4,530	53,178	143,651	8,171	40,824	34,771	467,403
2002	138,655	35,746	4,381	57,303	151,426	8,875	37,377	36,687	470,450
2003	140,803	39,909	4,157	60,404	158,093	9,711	43,014	37,975	494,066
2004	151,364	46,244	4,643	62,122	165,484	10,216	43,428	40,471	523,972
2005	165,051	48,687	5,478	65,374	172,548	10,892	48,360	43,392	559,782
2006	174,237	57,177	7,001	68,122	177,116	11,283	53,211	46,137	594,284
2007	190,753	55,285	6,890	70,394	183,239	11,902	54,374	49,191	622,028
2008	190,994	54,761	7,810	71,895	182,302	11,905	61,121	51,881	632,669
2009	176,658	53,320	5,868	74,571	182,283	11,204	44,429	54,116	602,449
2010	179,394	55,160	5,966	75,258	191,247	11,492	49,428	57,097	625,042

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

[1] Includes Canada Pension Plan and Québec Pension Plan. Excludes intergovernmental transfers.

Table 33

Total government outlay

National Economic and Financial Accounts

Year	Goods and services	Transfers to persons	Transfers to business	Transfers to non-residents	Interest on the public debt	Total outlay[1]
			(millions of dollars)			
1966	11,977	3,016	685	228	1,883	17,789
1967	13,910	3,746	669	250	2,110	20,685
1968	15,708	4,397	681	200	2,433	23,419
1969	17,717	4,867	732	208	2,816	26,340
1970	20,498	5,552	785	295	3,309	30,439
1971	22,702	6,526	860	301	3,751	34,140
1972	25,197	7,930	929	326	4,244	38,626
1973	28,600	9,052	1,178	369	4,910	44,109
1974	34,456	11,412	2,920	468	5,488	54,744
1975	41,649	14,207	4,371	670	6,639	67,536
1976	48,017	16,082	3,984	637	8,242	76,962
1977	54,276	18,389	4,078	728	9,432	86,903
1978	59,488	20,675	4,146	925	11,741	96,975
1979	65,934	21,448	5,686	960	14,057	108,085
1980	74,755	24,848	8,628	1,084	17,033	126,348
1981	85,372	28,392	9,934	1,152	22,530	147,380
1982	97,212	36,210	9,635	1,386	27,419	171,862
1983	104,731	41,839	10,487	1,489	29,858	188,404
1984	110,933	45,075	12,295	1,854	35,147	205,304
1985	119,577	48,668	12,129	1,919	40,585	222,878
1986	126,248	52,136	11,174	2,223	43,222	235,003
1987	133,883	56,068	11,028	2,606	46,279	249,864
1988	145,155	59,923	10,611	2,875	50,806	269,370
1989	157,093	64,724	9,818	2,785	58,285	292,705
1990	171,491	73,004	10,052	2,969	64,286	321,802
1991	183,659	83,830	12,854	3,177	64,526	348,046
1992	191,349	93,077	12,323	3,196	65,241	365,186
1993	194,514	98,323	10,382	2,997	66,851	373,067
1994	196,164	98,495	9,608	2,899	69,597	376,763
1995	198,574	98,512	8,746	2,867	77,527	386,226
1996	198,155	98,865	8,710	2,800	76,284	384,814
1997	200,255	100,431	9,361	2,716	74,035	386,798
1998	209,866	104,558	9,900	2,634	75,476	402,434
1999	218,422	106,006	9,853	2,852	75,030	412,163
2000	233,498	110,487	10,658	2,770	76,491	433,904
2001	246,477	117,633	15,130	3,033	73,219	455,492
2002	261,115	121,047	13,371	3,207	67,081	465,821
2003	276,391	124,775	17,641	3,587	65,413	487,807
2004	287,868	130,153	16,662	3,834	63,807	502,324
2005	303,249	136,247	17,264	4,718	62,630	524,108
2006	323,745	145,754	16,528	4,419	62,971	553,417
2007	342,799	154,609	16,523	4,632	63,510	582,073
2008	367,858	165,101	17,526	5,135	62,041	617,661
2009	391,851	176,630	18,219	5,308	58,361	650,369
2010	410,666	185,601	18,619	5,683	60,210	680,779

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

[1] Includes Canada Pension Plan and Québec Pension Plan. Excludes intergovernmental transfers.

Table 34

Total government saving and capital and financial account

National Economic and Financial Accounts

Year	Saving	Capital consumption allowances	Net capital transfers	Non-financial capital acquisition	Net lending[1]
			(millions of dollars)		
1966	2,101	1,241	-98	3,289	-45
1967	1,648	1,360	-125	3,457	-574
1968	1,967	1,456	-137	3,627	-341
1969	3,116	1,616	-176	3,553	1,003
1970	1,727	1,787	-214	3,625	-325
1971	1,570	2,012	-290	4,292	-1,000
1972	1,554	2,231	-383	4,472	-1,070
1973	3,086	2,595	-455	4,454	772
1974	4,845	3,290	-477	5,967	1,691
1975	-2,302	3,839	-645	7,035	-6,143
1976	-2,130	4,230	-763	6,904	-5,567
1977	-4,406	4,671	-1,394	7,925	-9,054
1978	-6,755	5,148	-2,174	7,905	-11,686
1979	-5,687	5,744	-1,193	8,406	-9,542
1980	-8,492	6,492	-1,300	9,487	-12,787
1981	-4,499	7,621	-2,330	10,987	-10,195
1982	-19,043	8,498	-3,638	12,510	-26,693
1983	-25,013	9,015	-5,346	12,269	-33,613
1984	-26,558	9,581	-4,807	13,173	-34,957
1985	-31,259	10,249	-5,231	15,470	-41,711
1986	-28,161	10,673	-4,086	15,031	-36,605
1987	-22,721	11,318	-3,370	15,534	-30,307
1988	-17,859	12,186	-4,265	16,634	-26,572
1989	-21,446	13,195	-2,995	18,989	-30,235
1990	-30,052	14,180	-3,013	20,748	-39,633
1991	-48,379	14,250	-2,081	21,047	-57,257
1992	-56,747	14,690	-1,215	20,656	-63,928
1993	-58,023	15,282	-726	19,887	-63,354
1994	-46,250	16,181	-364	21,251	-51,684
1995	-38,246	17,004	-278	21,661	-43,181
1996	-20,678	17,441	-816	19,368	-23,421
1997	1,332	18,100	2,525	20,317	1,640
1998	348	18,649	1,956	20,188	765
1999	16,145	19,236	607	20,133	15,855
2000	34,765	20,145	1,505	24,710	31,705
2001	11,911	20,884	1,945	27,448	7,292
2002	4,629	21,830	997	28,544	-1,088
2003	6,259	22,227	612	30,122	-1,024
2004	21,648	23,300	-1,277	32,525	11,146
2005	35,674	24,626	-1,958	37,094	21,248
2006	40,867	26,494	-2,471	41,110	23,780
2007	39,955	28,650	-1,718	45,336	21,551
2008	15,008	31,760	-934	52,151	-6,317
2009	-47,920	33,896	-3,566	57,134	-74,724
2010	-55,737	36,237	-3,456	67,288	-90,244

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

[1] Includes Canada Pension Plan and Québec Pension Plan.

Table 35

Federal government income

National Economic and Financial Accounts

Year	Taxes on incomes, persons	Taxes on incomes, corporations	Taxes on incomes, non-residents	Contributions to social insurance plans	Taxes on production and imports	Other transfers from persons	Transfers from other levels of government	Investment income	Sales of goods and services	Total income
					(millions of dollars)					
1966	2,952	1,774	195	342	3,572	3	0	542	194	9,574
1967	3,569	1,758	211	350	3,713	3	0	629	259	10,492
1968	4,279	2,107	200	399	3,770	4	0	699	290	11,748
1969	5,519	2,402	222	494	4,038	2	0	939	304	13,920
1970	6,413	2,276	260	490	4,045	2	0	1,051	328	14,865
1971	7,217	2,477	272	530	4,492	4	0	1,179	377	16,548
1972	7,969	2,901	276	696	5,134	5	0	1,326	455	18,762
1973	9,250	3,643	324	903	5,850	6	0	1,488	473	21,937
1974	11,131	5,012	434	1,542	8,513	8	0	1,832	517	28,989
1975	12,284	5,380	464	1,952	7,987	8	87	2,081	625	30,868
1976	14,489	5,061	500	2,476	8,747	10	128	2,347	739	34,497
1977	14,305	5,135	532	2,551	9,249	12	126	2,638	743	35,291
1978	13,707	5,737	570	2,814	9,866	14	130	3,016	895	36,749
1979	16,336	6,860	764	2,799	10,788	16	147	3,160	1,158	42,028
1980	19,132	8,406	1,013	3,125	12,312	17	167	3,791	1,106	49,069
1981	22,977	9,323	1,113	4,717	19,126	14	184	4,648	1,321	63,423
1982	25,747	9,212	1,196	4,793	17,724	14	233	4,661	1,566	65,146
1983	26,809	9,536	1,052	7,017	16,483	15	224	4,557	1,732	67,425
1984	28,189	11,319	1,019	7,627	18,310	17	222	4,632	2,207	73,542
1985	32,141	11,586	955	8,753	19,113	21	260	4,814	2,522	80,165
1986	37,898	10,302	1,683	9,615	21,413	22	290	4,606	2,744	88,573
1987	42,143	11,864	1,222	10,250	23,921	23	317	4,499	3,054	97,293
1988	46,511	11,857	1,678	11,637	26,057	19	354	5,238	3,220	106,571
1989	51,130	12,132	1,545	10,315	28,922	32	382	5,769	3,480	113,707
1990	58,636	10,442	1,727	13,027	27,160	34	256	5,937	3,660	120,879
1991	59,039	9,892	1,514	15,064	30,367	40	461	5,613	3,843	125,833
1992	60,056	9,981	1,576	17,922	30,998	61	523	5,224	3,728	130,069
1993	58,400	10,695	1,649	18,619	31,055	53	539	4,151	3,554	128,715
1994	58,723	12,200	1,698	19,940	30,632	27	555	4,142	3,994	131,911
1995	63,582	13,372	1,964	19,497	31,447	25	757	5,439	4,230	140,313
1996	67,712	16,225	2,844	18,824	32,383	52	667	4,750	4,497	147,954
1997	73,735	20,229	2,958	20,212	34,936	52	662	5,240	4,532	162,556
1998	80,043	19,416	2,817	19,005	35,457	22	712	5,657	4,321	167,450
1999	82,573	25,798	3,386	18,659	36,237	14	785	6,158	4,074	177,684
2000	90,220	31,763	3,755	18,751	38,339	28	739	7,597	4,534	195,726
2001	93,446	24,223	4,530	18,344	39,841	33	796	7,959	4,763	193,935
2002	87,484	24,258	4,381	18,213	43,229	62	906	7,118	4,797	190,448
2003	88,511	27,893	4,157	17,833	45,084	57	789	7,083	4,819	196,226
2004	94,943	31,744	4,643	17,172	46,551	69	997	6,419	5,130	207,668
2005	102,450	32,201	5,478	17,830	48,516	93	1,049	6,455	5,693	219,765
2006	105,705	38,409	7,001	16,949	48,315	55	837	7,143	6,160	230,574
2007	116,950	37,096	6,890	17,001	48,768	53	1,061	9,631	6,773	244,223
2008	117,449	35,303	7,810	16,663	44,445	106	997	11,592	7,048	241,413
2009	107,378	32,745	5,868	16,790	43,634	107	899	8,598	7,301	223,320
2010	108,853	33,418	5,966	17,366	45,611	69	939	8,828	7,582	228,632

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

Table 36

Federal government outlay

National Economic and Financial Accounts

Year	Goods and services	Transfers to persons	Transfers to business	Transfers to non-residents	Transfers to other levels of government	Interest on the public debt	Total outlay
			(millions of dollars)				
1966	3,577	2,214	521	228	2,071	1,151	9,762
1967	3,957	2,678	544	250	2,327	1,245	11,001
1968	4,276	3,020	569	200	2,739	1,409	12,213
1969	4,610	3,293	577	208	2,947	1,589	13,224
1970	4,922	3,707	635	295	3,637	1,862	15,058
1971	5,401	4,289	553	301	4,680	1,974	17,198
1972	6,029	5,738	584	326	4,709	2,253	19,639
1973	6,706	6,538	758	365	4,959	2,518	21,844
1974	8,137	8,199	2,253	464	6,340	2,961	28,354
1975	9,369	10,056	3,543	666	8,025	3,705	35,364
1976	10,832	10,842	2,898	632	8,975	4,519	38,698
1977	12,362	12,271	2,710	720	10,294	5,101	43,458
1978	13,279	13,670	2,640	916	11,276	6,410	48,191
1979	14,215	13,469	3,675	948	12,087	8,080	52,474
1980	15,335	15,043	6,193	1,071	13,307	9,897	60,846
1981	18,183	17,039	7,042	1,136	14,583	13,739	71,722
1982	20,567	22,488	5,995	1,366	16,516	16,675	83,607
1983	21,725	25,960	6,094	1,464	18,303	17,463	91,009
1984	23,771	27,368	7,390	1,826	20,876	21,006	102,237
1985	26,657	29,190	7,074	1,885	22,774	24,738	112,318
1986	27,276	30,816	5,741	2,183	22,185	26,216	114,417
1987	28,370	31,635	6,263	2,555	23,899	27,883	120,605
1988	29,878	33,048	5,357	2,814	26,132	31,711	128,940
1989	31,813	34,923	4,579	2,715	27,016	37,424	138,470
1990	34,965	38,997	4,293	2,887	28,466	41,880	151,488
1991	35,803	45,385	6,604	3,086	29,276	41,053	161,207
1992	36,386	49,317	4,587	3,091	31,496	39,558	164,435
1993	37,575	51,600	3,586	2,886	32,320	39,219	167,186
1994	37,797	50,166	3,439	2,784	31,545	40,157	165,888
1995	37,777	48,879	3,270	2,747	33,463	46,254	172,390
1996	36,610	48,752	3,252	2,671	29,449	45,352	166,086
1997	35,019	49,234	4,135	2,577	25,697	43,407	160,069
1998	36,268	50,739	3,825	2,490	26,452	43,910	163,684
1999	37,909	51,575	3,587	2,704	32,458	43,632	171,865
2000	42,137	53,479	3,537	2,613	32,239	45,299	179,304
2001	43,189	57,965	3,682	2,867	34,937	41,830	184,470
2002	46,427	60,857	2,969	3,032	33,316	36,767	183,368
2003	47,979	62,949	4,313	3,402	40,191	35,169	194,003
2004	49,274	65,603	5,083	3,538	39,596	33,458	196,552
2005	51,904	67,903	4,887	4,400	56,819	32,103	218,016
2006	54,645	70,547	4,293	4,076	51,690	32,122	217,373
2007	56,233	76,578	3,638	4,262	56,177	31,543	228,431
2008	61,509	81,119	3,782	4,737	62,423	30,034	243,604
2009	65,404	88,051	4,484	4,875	64,611	26,850	254,275
2010	66,762	90,670	4,210	5,222	73,854	27,544	268,262

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

Table 37

Federal government saving and capital and financial account

National Economic and Financial Accounts

Year	Saving	Capital consumption allowances	Net capital transfers	Non-financial capital acquisition	Net lending
			(millions of dollars)		
1966	-188	322	-95	499	-460
1967	-509	350	-107	525	-791
1968	-465	368	-115	682	-894
1969	696	399	-154	516	425
1970	-193	429	-188	469	-421
1971	-650	476	-236	521	-931
1972	-877	517	-269	655	-1,284
1973	93	589	-317	505	-140
1974	635	731	-308	1,033	25
1975	-4,496	850	-395	1,174	-5,215
1976	-4,201	923	-485	1,072	-4,835
1977	-8,167	1,006	-1,132	1,212	-9,505
1978	-11,442	1,094	-1,898	1,280	-13,526
1979	-10,446	1,195	-873	1,038	-11,162
1980	-11,777	1,306	-898	1,176	-12,545
1981	-8,299	1,500	-1,866	1,336	-10,001
1982	-18,461	1,649	-2,834	1,695	-21,341
1983	-23,584	1,706	-4,010	1,992	-27,880
1984	-28,695	1,824	-3,784	3,022	-33,677
1985	-32,153	1,963	-4,085	3,723	-37,998
1986	-25,844	2,064	-2,556	2,597	-28,933
1987	-23,312	2,201	-2,079	2,800	-25,990
1988	-22,369	2,353	-3,112	3,164	-26,292
1989	-24,763	2,542	-1,841	3,635	-27,697
1990	-30,609	2,733	-1,835	3,598	-33,309
1991	-35,374	2,720	-950	3,610	-37,214
1992	-34,366	2,772	-251	3,942	-35,787
1993	-38,471	2,923	137	4,285	-39,696
1994	-33,977	3,179	62	4,352	-35,088
1995	-32,077	3,311	691	3,625	-31,700
1996	-18,132	3,288	-22	2,091	-16,957
1997	2,487	3,427	3,837	3,275	6,476
1998	3,766	3,509	3,374	2,973	7,676
1999	5,819	3,460	3,041	3,550	8,770
2000	16,422	3,451	3,668	3,513	20,028
2001	9,465	3,575	2,919	3,949	12,010
2002	7,080	3,840	2,014	3,538	9,396
2003	2,223	3,717	1,722	3,541	4,121
2004	11,116	3,726	-118	3,894	10,830
2005	1,749	3,780	-535	3,975	1,019
2006	13,201	3,866	-508	4,081	12,478
2007	15,792	4,051	-483	3,985	15,375
2008	-2,191	4,333	383	4,546	-2,021
2009	-30,955	4,557	-1,721	4,838	-32,957
2010	-39,630	4,789	-1,725	6,019	-42,585

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

Table 38

Provincial and territorial government income

National Economic and Financial Accounts

Year	Taxes on incomes, persons	Taxes on incomes, corporations	Contributions to social insurance plans	Taxes on production and imports	Other transfers from persons	Transfers from other levels of government	Investment income	Sales of goods and services	Total income
				(millions of dollars)					
1966	1,162	581	263	2,599	400	2,060	863	722	8,650
1967	1,537	638	289	2,976	435	2,346	887	815	9,923
1968	1,866	745	287	3,405	607	2,745	1,093	894	11,642
1969	2,178	819	315	3,879	854	2,986	1,241	969	13,241
1970	2,656	794	336	4,269	1,080	3,678	1,275	1,083	15,171
1971	3,200	869	362	4,681	1,111	4,725	1,398	1,260	17,606
1972	3,642	1,019	420	5,378	1,043	4,714	1,679	1,369	19,264
1973	4,368	1,436	535	6,343	1,087	4,997	2,299	1,597	22,662
1974	5,471	2,039	694	7,379	1,162	6,384	3,315	1,739	28,183
1975	6,254	2,114	884	7,747	1,177	8,031	3,986	2,056	32,249
1976	6,911	2,067	1,215	9,469	1,531	8,935	4,549	2,478	37,155
1977	9,506	2,103	1,367	10,499	1,713	10,303	5,612	2,772	43,875
1978	11,021	2,451	1,527	10,757	1,895	11,331	7,052	3,307	49,341
1979	11,438	3,178	1,685	12,172	2,101	12,171	9,113	3,625	55,483
1980	13,007	3,672	1,782	13,437	2,310	13,369	10,664	4,067	62,308
1981	15,588	3,473	2,175	16,400	2,585	14,683	11,478	4,644	71,026
1982	17,351	2,543	2,443	19,407	3,041	16,572	11,827	5,437	78,621
1983	18,858	2,784	2,609	22,261	3,436	18,350	13,145	5,999	87,442
1984	20,532	3,665	2,842	24,038	3,626	20,883	14,386	6,625	96,597
1985	21,121	3,977	3,176	26,211	3,758	22,760	14,797	6,987	102,787
1986	23,720	4,271	3,741	28,626	3,896	22,174	12,196	7,554	106,178
1987	27,145	5,126	4,340	31,655	4,231	23,800	11,900	7,733	115,930
1988	31,057	5,729	5,202	35,822	4,656	26,011	12,945	8,344	129,766
1989	32,092	6,434	5,733	39,047	5,108	26,753	14,585	9,009	138,761
1990	37,535	6,392	5,800	42,685	3,661	28,145	15,175	9,671	149,064
1991	38,115	5,123	5,160	43,744	4,174	29,135	14,600	10,478	150,529
1992	37,227	4,536	5,464	45,114	4,533	31,232	14,857	11,486	154,449
1993	37,979	5,568	5,718	47,049	4,710	32,130	16,179	12,045	161,378
1994	41,588	7,142	6,067	50,419	4,928	31,120	17,772	12,518	171,554
1995	42,608	8,766	6,536	52,737	5,372	33,162	17,928	13,377	180,486
1996	45,896	10,014	6,395	54,071	5,327	28,996	19,496	14,049	184,244
1997	47,055	12,021	6,217	56,685	5,987	25,392	19,620	14,766	187,743
1998	48,892	11,384	6,180	60,262	6,617	26,399	19,000	16,216	194,950
1999	51,624	13,612	6,062	64,295	6,331	32,644	19,753	17,461	211,782
2000	53,731	16,412	6,076	67,715	6,404	32,404	28,183	18,201	229,126
2001	52,480	12,129	6,213	69,842	7,383	34,903	25,817	18,924	227,691
2002	51,171	11,488	6,563	73,218	8,042	33,294	23,192	20,321	227,289
2003	52,292	12,016	7,363	76,458	8,843	40,160	28,854	21,422	247,408
2004	56,421	14,500	8,145	80,357	9,294	39,553	29,679	22,822	260,771
2005	62,601	16,486	8,710	83,181	9,895	56,545	34,472	24,373	296,263
2006	68,532	18,768	10,186	86,108	10,241	51,133	37,899	25,612	308,479
2007	73,803	18,189	10,317	89,029	10,777	55,532	35,831	26,967	320,445
2008	73,545	19,458	10,587	89,988	10,730	61,896	40,693	28,442	335,339
2009	69,280	20,575	10,889	89,087	9,762	63,521	27,034	29,822	319,970
2010	70,541	21,742	11,149	93,755	10,026	72,614	31,636	31,293	342,756

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

Table 39

Provincial and territorial government outlay

National Economic and Financial Accounts

Year	Goods and services	Transfers to persons	Transfers to business	Transfers to other levels of government	Interest on the public debt	Total outlay
			(millions of dollars)			
1966	4,436	735	129	1,829	359	7,488
1967	5,423	959	89	2,072	435	8,978
1968	6,270	1,216	73	2,290	548	10,397
1969	7,212	1,365	98	2,541	710	11,926
1970	8,884	1,510	82	3,194	856	14,526
1971	9,934	1,782	222	3,605	1,049	16,592
1972	11,093	1,673	255	4,050	1,243	18,314
1973	12,619	1,886	314	4,544	1,534	20,897
1974	15,416	2,464	532	5,453	1,681	25,546
1975	19,461	3,139	669	6,957	1,992	32,218
1976	22,096	3,859	901	7,660	2,503	37,019
1977	24,793	4,452	1,147	9,502	2,888	42,782
1978	27,579	4,948	1,240	9,654	3,693	47,114
1979	31,034	5,483	1,719	10,673	4,196	53,105
1980	36,296	6,783	2,023	12,937	5,150	63,189
1981	41,393	7,693	2,479	13,751	6,534	71,850
1982	47,570	9,244	3,102	16,117	8,200	84,233
1983	52,145	10,439	3,857	16,887	9,558	92,886
1984	54,300	11,316	4,334	17,367	11,126	98,443
1985	58,278	12,111	4,459	18,346	12,549	105,743
1986	62,548	12,966	4,797	19,386	13,693	113,390
1987	66,499	14,111	4,090	20,361	15,056	120,117
1988	73,113	15,045	4,533	21,903	15,730	130,324
1989	79,643	16,530	4,465	23,049	17,366	141,053
1990	86,545	18,925	4,866	25,590	18,684	154,610
1991	93,956	20,937	5,307	27,979	19,587	167,766
1992	97,988	23,651	6,541	30,687	21,594	180,461
1993	98,567	24,603	5,553	30,653	23,337	182,713
1994	99,106	24,815	4,963	31,247	25,221	185,352
1995	100,835	25,406	4,264	32,233	26,957	189,695
1996	101,092	25,576	4,242	30,085	26,756	187,751
1997	103,936	25,945	4,025	29,594	26,679	190,179
1998	109,514	26,717	5,069	30,962	27,978	200,240
1999	114,799	27,170	5,171	31,594	27,986	206,720
2000	122,292	28,574	6,043	31,959	28,017	216,885
2001	131,201	29,662	10,289	33,459	28,044	232,655
2002	139,247	29,781	8,836	34,885	27,096	239,845
2003	148,120	30,066	11,651	35,808	27,048	252,693
2004	155,137	30,981	9,809	38,778	26,992	261,697
2005	162,800	33,297	10,498	42,305	27,275	276,175
2006	173,808	38,570	10,223	46,904	27,522	297,027
2007	187,864	39,446	10,813	48,691	28,588	315,402
2008	202,092	42,922	11,459	51,772	28,541	336,786
2009	214,664	45,030	11,325	54,203	27,996	353,218
2010	226,596	49,675	11,927	56,399	28,976	373,573

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

Table 40

Provincial and territorial government saving and capital and financial account

National Economic and Financial Accounts

Year	Saving	Capital consumption allowances	Net capital transfers	Non-financial capital acquisition	Net lending
			(millions of dollars)		
1966	1,162	518	-3	1,486	191
1967	945	559	-18	1,571	-85
1968	1,245	602	-22	1,519	306
1969	1,315	672	-22	1,612	353
1970	645	753	-26	1,622	-250
1971	1,014	833	-54	2,113	-320
1972	950	934	-64	2,137	-317
1973	1,765	1,094	-99	2,164	596
1974	2,637	1,420	-137	2,635	1,285
1975	31	1,668	-214	3,194	-1,709
1976	136	1,836	-221	2,991	-1,240
1977	1,093	2,033	-196	3,596	-666
1978	2,227	2,249	-181	3,537	758
1979	2,378	2,517	-236	4,053	606
1980	-881	2,879	-310	4,423	-2,735
1981	-824	3,458	-338	5,338	-3,042
1982	-5,612	3,846	-630	5,926	-8,322
1983	-5,444	4,087	-1,090	5,675	-8,122
1984	-1,846	4,359	-787	5,588	-3,862
1985	-2,956	4,668	-867	6,502	-5,657
1986	-7,212	4,842	-1,212	6,810	-10,392
1987	-4,187	5,099	-990	6,680	-6,758
1988	-558	5,472	-894	6,505	-2,485
1989	-2,292	5,888	-853	7,517	-4,774
1990	-5,546	6,302	-874	8,233	-8,351
1991	-17,237	6,288	-836	8,529	-20,314
1992	-26,012	6,466	-629	7,980	-28,155
1993	-21,335	6,670	-543	7,238	-22,446
1994	-13,798	6,982	-44	7,804	-14,664
1995	-9,209	7,267	-481	8,191	-10,614
1996	-3,507	7,450	-322	7,853	-4,232
1997	-2,436	7,626	-702	7,667	-3,179
1998	-5,290	7,779	-4,330	7,845	-9,686
1999	5,062	8,070	-3,650	6,646	2,836
2000	12,241	8,535	-1,623	11,004	8,149
2001	-4,964	8,919	-586	11,892	-8,523
2002	-12,556	9,246	-667	13,054	-17,031
2003	-5,285	9,436	-1,780	13,955	-11,584
2004	-926	9,856	-870	14,600	-6,540
2005	20,088	10,425	-1,002	16,548	12,963
2006	11,452	11,321	-1,697	18,497	2,579
2007	5,043	12,355	-918	20,823	-4,343
2008	-1,447	13,821	-622	23,670	-11,918
2009	-33,248	14,791	-1,152	26,078	-45,687
2010	-30,817	15,994	-951	32,154	-47,928

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

Table 41

Local government income

National Economic and Financial Accounts

Year	Indirect taxes	Transfers from persons	Transfers from other levels of government	Investment income	Sales of goods and services	Total income
			(millions of dollars)			
1966	2,467	43	1,881	95	392	4,878
1967	2,759	50	2,112	113	437	5,471
1968	3,085	42	2,326	131	446	6,030
1969	3,420	41	2,552	147	481	6,641
1970	3,726	44	3,199	163	545	7,677
1971	3,958	48	3,607	194	603	8,410
1972	4,284	51	4,098	207	670	9,310
1973	4,622	56	4,553	250	795	10,276
1974	5,156	58	5,453	320	954	11,941
1975	5,994	64	6,918	345	1,065	14,386
1976	7,160	78	7,626	432	1,301	16,597
1977	8,115	87	9,421	442	1,412	19,477
1978	8,953	98	9,538	527	1,795	20,911
1979	9,361	134	10,548	737	2,106	22,886
1980	10,771	142	12,827	935	2,499	27,174
1981	12,344	156	13,665	1,308	2,959	30,432
1982	13,189	167	15,975	1,421	3,270	34,022
1983	14,036	182	16,777	1,280	3,583	35,858
1984	15,006	188	17,281	1,485	4,016	37,976
1985	16,015	195	18,204	1,577	4,003	39,994
1986	17,456	217	19,230	1,615	4,539	43,057
1987	19,037	254	20,267	1,659	5,228	46,445
1988	20,686	307	21,797	1,877	5,679	50,346
1989	22,970	341	23,038	2,303	6,143	54,795
1990	24,848	356	25,793	2,543	6,742	60,282
1991	26,582	374	27,790	2,366	7,104	64,216
1992	28,565	395	30,573	2,251	7,348	69,132
1993	29,505	428	30,484	2,284	7,752	70,453
1994	29,607	466	31,289	2,331	8,062	71,755
1995	29,761	447	31,888	2,553	8,508	73,157
1996	30,422	453	30,056	2,482	8,448	71,861
1997	31,586	471	29,541	2,288	9,201	73,087
1998	31,519	516	30,787	2,514	10,012	75,348
1999	32,741	570	31,059	2,591	10,833	77,794
2000	32,944	684	31,397	2,977	10,679	78,681
2001	33,968	755	32,795	2,983	11,084	81,585
2002	34,979	771	34,096	2,759	11,569	84,174
2003	36,551	811	35,151	3,096	11,734	87,343
2004	38,576	853	37,925	3,192	12,519	93,065
2005	40,851	904	41,647	3,190	13,326	99,918
2006	42,693	987	46,756	3,380	14,365	108,181
2007	45,442	1,072	48,420	3,739	15,451	114,124
2008	47,869	1,069	51,456	3,598	16,391	120,383
2009	49,562	1,335	54,548	3,940	16,993	126,378
2010	51,881	1,397	56,855	4,022	18,222	132,377

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

Table 42

Local government outlay

National Economic and Financial Accounts

Year	Goods and services	Transfers to persons	Transfers to businessgove	Transfers to other levels of rnment	Interest on the public debt	Total outlay
			(millions of dollars)			
1966	3,949	67	35	41	373	4,465
1967	4,513	109	36	59	430	5,147
1968	5,140	146	39	42	476	5,843
1969	5,869	158	57	50	517	6,651
1970	6,662	231	68	46	591	7,598
1971	7,339	283	85	47	728	8,482
1972	8,041	271	90	53	748	9,203
1973	9,238	276	106	47	858	10,525
1974	10,860	254	135	44	846	12,139
1975	12,774	303	159	54	942	14,232
1976	15,031	345	185	54	1,220	16,835
1977	17,057	322	221	54	1,443	19,097
1978	18,562	368	266	69	1,638	20,903
1979	20,611	407	292	106	1,781	23,197
1980	23,034	469	412	119	1,986	26,020
1981	25,675	521	413	198	2,257	29,064
1982	28,958	610	538	147	2,544	32,797
1983	30,733	744	536	161	2,837	35,011
1984	32,721	802	571	143	3,015	37,252
1985	34,481	850	596	104	3,298	39,329
1986	36,266	939	636	123	3,313	41,277
1987	38,835	1,045	675	124	3,340	44,019
1988	41,971	1,129	721	127	3,365	47,313
1989	45,426	1,250	774	108	3,495	51,053
1990	49,764	1,713	893	138	3,722	56,230
1991	53,675	2,700	943	131	3,886	61,335
1992	56,740	3,410	1,195	145	4,089	65,579
1993	58,145	3,899	1,243	180	4,295	67,762
1994	59,018	3,949	1,206	172	4,219	68,564
1995	59,712	3,738	1,212	111	4,316	69,089
1996	60,187	2,950	1,216	185	4,176	68,714
1997	60,989	2,640	1,201	304	3,949	69,083
1998	63,692	3,523	1,006	484	3,588	72,293
1999	65,396	2,990	1,095	436	3,412	73,329
2000	68,705	3,248	1,078	342	3,175	76,548
2001	71,634	3,641	1,159	98	3,345	79,877
2002	75,006	2,637	1,566	95	3,218	82,522
2003	79,800	2,747	1,677	101	3,196	87,521
2004	82,976	2,940	1,770	101	3,357	91,144
2005	88,058	3,026	1,879	117	3,252	96,332
2006	94,775	2,976	2,012	132	3,327	103,222
2007	98,150	3,305	2,072	145	3,379	107,051
2008	103,713	3,827	2,285	154	3,466	113,445
2009	111,030	4,268	2,410	154	3,515	121,377
2010	116,425	4,510	2,482	155	3,690	127,262

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

Table 43

Local government saving and capital and financial account

National Economic and Financial Accounts

Year	Saving	Capital consumption allowances	Net capital transfers	Non-financial capital acquisition	Net lending
			(millions of dollars)		
1966	413	401	0	1,304	-490
1967	324	451	0	1,361	-586
1968	187	486	0	1,426	-753
1969	-10	545	0	1,425	-890
1970	79	605	0	1,534	-850
1971	-72	703	0	1,658	-1,027
1972	107	780	-50	1,680	-843
1973	-249	912	-39	1,785	-1,161
1974	-198	1,139	-32	2,299	-1,390
1975	154	1,321	-36	2,667	-1,228
1976	-238	1,471	-57	2,841	-1,665
1977	380	1,632	-66	3,117	-1,171
1978	8	1,805	-95	3,088	-1,370
1979	-311	2,032	-84	3,315	-1,678
1980	1,154	2,307	-92	3,888	-519
1981	1,368	2,663	-126	4,313	-408
1982	1,225	3,003	-174	4,889	-835
1983	847	3,222	-246	4,602	-779
1984	724	3,398	-236	4,563	-677
1985	665	3,618	-279	5,245	-1,241
1986	1,780	3,767	-318	5,624	-395
1987	2,426	4,018	-301	6,054	89
1988	3,033	4,361	-259	6,965	170
1989	3,742	4,765	-301	7,837	369
1990	4,052	5,145	-304	8,917	-24
1991	2,881	5,242	-295	8,908	-1,080
1992	3,553	5,452	-335	8,734	-64
1993	2,691	5,689	-320	8,364	-304
1994	3,191	6,020	-382	9,095	-266
1995	4,068	6,426	-488	9,845	161
1996	3,147	6,703	-472	9,424	-46
1997	4,004	7,047	-610	9,375	1,066
1998	3,055	7,361	2,912	9,370	3,958
1999	4,465	7,706	1,216	9,937	3,450
2000	2,133	8,159	-540	10,193	-441
2001	1,708	8,390	-388	11,607	-1,897
2002	1,652	8,744	-350	11,952	-1,906
2003	-178	9,074	670	12,626	-3,060
2004	1,921	9,718	-289	14,031	-2,681
2005	3,586	10,421	-421	16,571	-2,985
2006	4,959	11,307	-266	18,532	-2,532
2007	7,073	12,244	-317	20,528	-1,528
2008	6,938	13,606	-695	23,935	-4,086
2009	5,001	14,548	-693	26,218	-7,362
2010	5,115	15,454	-780	29,115	-9,326

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

Table 44

Total Canada Pension Plan and Québec Pension Plan

National Economic and Financial Accounts

Year	Income	Contributions to social insurance plans	Investment income	Outlay	Gross current expenditure on goods and services	Current transfers to persons	Current transfers to non-residents	Saving
				(millions of dollars)				
1966	729	719	10	15	15	0	0	714
1967	905	850	55	17	17	0	0	888
1968	1,037	922	115	37	22	15	0	1,000
1969	1,192	1,009	183	77	26	51	0	1,115
1970	1,330	1,057	273	134	30	104	0	1,196
1971	1,478	1,103	375	200	28	172	0	1,278
1972	1,656	1,190	466	282	34	248	0	1,374
1973	1,870	1,300	570	393	37	352	4	1,477
1974	2,313	1,608	705	542	43	495	4	1,771
1975	2,767	1,905	862	758	45	709	4	2,009
1976	3,272	2,204	1,068	1,099	58	1,036	5	2,173
1977	3,704	2,439	1,265	1,416	64	1,344	8	2,288
1978	4,218	2,726	1,492	1,766	68	1,689	9	2,452
1979	4,867	3,087	1,780	2,175	74	2,089	12	2,692
1980	5,668	3,539	2,129	2,656	90	2,553	13	3,012
1981	6,532	3,971	2,561	3,276	121	3,139	16	3,256
1982	7,810	4,744	3,066	4,005	117	3,868	20	3,805
1983	8,017	4,558	3,459	4,849	128	4,696	25	3,168
1984	9,017	5,143	3,874	5,758	141	5,589	28	3,259
1985	9,897	5,704	4,193	6,712	161	6,517	34	3,185
1986	10,728	6,245	4,483	7,613	158	7,415	40	3,115
1987	11,859	7,131	4,728	9,507	179	9,277	51	2,352
1988	12,990	7,936	5,054	10,955	193	10,701	61	2,035
1989	14,169	8,801	5,368	12,302	211	12,021	70	1,867
1990	15,719	10,117	5,602	13,668	217	13,369	82	2,051
1991	16,475	10,847	5,628	15,124	225	14,808	91	1,351
1992	17,117	11,625	5,492	17,039	235	16,699	105	78
1993	17,651	12,208	5,443	18,559	227	18,221	111	-908
1994	18,257	12,931	5,326	19,923	243	19,565	115	-1,666
1995	19,831	14,456	5,375	20,859	250	20,489	120	-1,028
1996	19,796	14,761	5,035	21,982	266	21,587	129	-2,186
1997	20,339	15,600	4,739	23,062	311	22,612	139	-2,723
1998	22,932	18,280	4,652	24,115	392	23,579	144	-1,183
1999	25,536	21,000	4,536	24,737	318	24,271	148	799
2000	29,676	24,921	4,755	25,707	364	25,186	157	3,969
2001	32,686	28,621	4,065	26,984	453	26,365	166	5,702
2002	36,835	32,527	4,308	28,382	435	27,772	175	8,453
2003	39,189	35,208	3,981	29,690	492	29,013	185	9,499
2004	40,943	36,805	4,138	31,406	481	30,629	296	9,537
2005	43,077	38,834	4,243	32,826	487	32,021	318	10,251
2006	45,776	40,987	4,789	34,521	517	33,661	343	11,255
2007	48,249	43,076	5,173	36,202	552	35,280	370	12,047
2008	49,883	44,645	5,238	38,175	544	37,233	398	11,708
2009	51,749	46,892	4,857	40,467	753	39,281	433	11,282
2010	51,685	46,743	4,942	42,090	883	40,746	461	9,595

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

Table 45

Actual, cyclically adjusted and primary-cyclically adjusted budget balances

National Economic and Financial Accounts

	Federal government			Total government		
Year	Actual	Cyclically adjusted[1]	Primary-cyclically adjusted[1]	Actual	Cyclically adjusted[1]	Primary-cyclically adjusted[1]
	(millions of dollars)					
1975	-5,215	-5,553	-3,020	-6,143	-6,570	-3,782
1976	-4,835	-5,840	-2,695	-5,567	-7,127	-3,508
1977	-9,505	-10,822	-7,249	-9,054	-11,199	-7,084
1978	-13,526	-15,186	-10,495	-11,686	-14,542	-9,118
1979	-11,162	-13,897	-7,541	-9,542	-13,931	-7,427
1980	-12,545	-14,446	-6,390	-12,787	-15,532	-7,606
1981	-10,001	-11,361	169	-10,195	-12,254	-1,252
1982	-21,341	-14,673	-159	-26,693	-15,175	-788
1983	-27,880	-19,009	-3,732	-33,613	-19,643	-3,572
1984	-33,677	-29,698	-10,808	-34,957	-29,090	-8,658
1985	-37,998	-38,214	-15,551	-41,711	-42,625	-17,815
1986	-28,933	-30,134	-5,920	-36,605	-38,628	-11,361
1987	-25,990	-29,972	-4,025	-30,307	-37,435	-7,308
1988	-26,292	-37,005	-7,082	-26,572	-43,978	-10,185
1989	-27,697	-39,497	-3,888	-30,235	-48,797	-9,227
1990	-33,309	-39,305	826	-39,633	-48,392	-3,432
1991	-37,214	-31,010	8,300	-57,257	-42,844	1,658
1992	-35,787	-25,531	12,267	-63,928	-41,256	4,164
1993	-39,696	-28,786	8,731	-63,354	-39,581	7,314
1994	-35,088	-28,603	9,903	-51,684	-37,907	12,086
1995	-31,700	-26,559	17,822	-43,181	-31,733	24,890
1996	-16,957	-7,767	35,920	-23,421	-3,891	52,214
1997	6,476	13,526	54,799	1,640	16,193	69,943
1998	7,676	14,558	56,522	765	16,111	71,375
1999	8,770	10,568	51,914	15,855	19,440	74,119
2000	20,028	14,852	57,242	31,705	19,763	73,657
2001	12,010	12,715	51,648	7,292	10,001	62,407
2002	9,396	13,463	47,825	-1,088	8,761	56,208
2003	4,121	8,138	40,582	-1,024	8,633	53,148
2004	10,830	12,051	43,021	11,146	12,824	55,725
2005	1,019	-1,677	27,536	21,248	14,286	54,320
2006	12,478	7,915	36,961	23,780	13,878	51,332
2007	15,375	12,503	39,083	21,551	14,357	48,946
2008	-2,021	298	23,299	-6,317	-1,385	30,621
2009	-32,957	9,383	31,252	-74,724	15,563	46,623
2010	-42,585	203	22,395	-90,244	-4,179	27,736

Sources: Statistics Canada, *Sector Accounts* (Table 380-0007); *Government of Canada Budgetary Revenues and Expenditures* (Table 183-0014); Department of Finance.

Estimates are based on an update of the methodology developed in the Department of Finance working paper "Fiscal Policy and the Business Cycle: A New Approach to Identifying the Interaction" (2003), Stephen Murchison and Janine Robbins. In particular, this update incorporates the effects from terms of trade in the calculation of the cyclical component.

[1] For 2009 and 2010, temporary counter-cyclical fiscal measures are included in the cyclical component of the balance and therefore excluded from the cyclically-adjusted budgetary balance.

Table 46

Actual, cyclically adjusted and primary-cyclically adjusted budget balances as a percentage of GDP at market prices

National Economic and Financial Accounts

	Federal government			Total government		
Year	Actual	Cyclically adjusted[1]	Primary-cyclically adjusted[1]	Actual	Cyclically adjusted[1]	Primary-cyclically adjusted[1]
	(per cent of potential GDP)					
1975	-3.0	-3.2	-1.7	-3.5	-3.8	-2.2
1976	-2.4	-2.9	-1.4	-2.8	-3.6	-1.8
1977	-4.4	-5.0	-3.3	-4.1	-5.1	-3.2
1978	-5.7	-6.4	-4.4	-4.9	-6.1	-3.8
1979	-4.1	-5.1	-2.8	-3.5	-5.1	-2.7
1980	-4.0	-4.7	-2.1	-4.1	-5.0	-2.5
1981	-2.8	-3.2	0.0	-2.8	-3.4	-0.4
1982	-5.3	-3.7	0.0	-6.6	-3.8	-0.2
1983	-6.5	-4.4	-0.9	-7.8	-4.5	-0.8
1984	-7.4	-6.5	-2.4	-7.6	-6.4	-1.9
1985	-7.9	-7.9	-3.2	-8.7	-8.8	-3.7
1986	-5.7	-5.9	-1.2	-7.2	-7.6	-2.2
1987	-4.8	-5.5	-0.7	-5.6	-6.9	-1.3
1988	-4.5	-6.3	-1.2	-4.5	-7.5	-1.7
1989	-4.4	-6.3	-0.6	-4.8	-7.7	-1.5
1990	-5.0	-5.9	0.1	-5.9	-7.2	-0.5
1991	-5.3	-4.4	1.2	-8.1	-6.1	0.2
1992	-4.9	-3.5	1.7	-8.7	-5.6	0.6
1993	-5.2	-3.8	1.2	-8.4	-5.2	1.0
1994	-4.5	-3.6	1.3	-6.6	-4.8	1.5
1995	-3.8	-3.2	2.1	-5.2	-3.8	3.0
1996	-2.0	-0.9	4.1	-2.7	-0.5	6.0
1997	0.7	1.5	6.1	0.2	1.8	7.7
1998	0.8	1.6	6.1	0.1	1.7	7.7
1999	0.9	1.1	5.3	1.6	2.0	7.5
2000	1.9	1.4	5.4	3.0	1.9	6.9
2001	1.1	1.1	4.6	0.7	0.9	5.6
2002	0.8	1.2	4.1	-0.1	0.8	4.9
2003	0.3	0.7	3.3	-0.1	0.7	4.3
2004	0.8	0.9	3.3	0.9	1.0	4.3
2005	0.1	-0.1	2.0	1.5	1.0	4.0
2006	0.9	0.5	2.6	1.6	1.0	3.6
2007	1.0	0.8	2.6	1.4	0.9	3.2
2008	-0.1	0.0	1.4	-0.4	-0.1	1.9
2009	-2.0	0.6	1.9	-4.6	1.0	2.9
2010	-2.5	0.0	1.3	-5.3	-0.2	1.6

Sources: Statistics Canada, *Sector Accounts* (Table 380-0007); *Government of Canada Budgetary Revenues and Expenditures* (Table 183-0014); Gross Domestic Product, Income Based (Table 380-0001); Department of Finance.

Estimates are based on an update of the methodology developed in the Department of Finance working paper "Fiscal Policy and the Business Cycle: A New Approach to Identifying the Interaction" (2003), Stephen Murchison and Janine Robbins. In particular, this update incorporates the effects from terms of trade in the calculation of the cyclical component.

[1] For 2009 and 2010, temporary counter-cyclical fiscal measures are included in the cyclical component of the balance and therefore excluded from the cyclically-adjusted budgetary balance.

Table 47

Change in actual, cyclically adjusted and primary-cyclically adjusted budget balances as a percentage of GDP at market prices

National Economic and Financial Accounts

	Federal government			Total government		
Year	Actual	Cyclically adjusted[1]	Primary-cyclically adjusted[1]	Actual	Cyclically adjusted[1]	Primary-cyclically adjusted[1]
	(per cent of potential GDP)					
1976	0.6	0.2	0.4	0.7	0.2	0.4
1977	-1.9	-2.0	-2.0	-1.3	-1.5	-1.5
1978	-1.3	-1.4	-1.1	-0.8	-1.0	-0.6
1979	1.5	1.3	1.6	1.4	1.0	1.1
1980	0.1	0.4	0.7	-0.6	0.1	0.3
1981	1.2	1.5	2.1	1.3	1.6	2.1
1982	-2.5	-0.5	-0.1	-3.8	-0.3	0.2
1983	-1.1	-0.7	-0.8	-1.1	-0.8	-0.6
1984	-0.9	-2.1	-1.5	0.1	-1.8	-1.1
1985	-0.5	-1.4	-0.9	-1.0	-2.5	-1.8
1986	2.2	2.0	2.1	1.5	1.2	1.5
1987	0.9	0.4	0.4	1.6	0.7	0.9
1988	0.3	-0.8	-0.5	1.0	-0.6	-0.4
1989	0.1	0.1	0.6	-0.3	-0.2	0.3
1990	-0.6	0.4	0.7	-1.1	0.5	1.0
1991	-0.3	1.5	1.0	-2.2	1.2	0.7
1992	0.4	0.9	0.5	-0.6	0.4	0.3
1993	-0.3	-0.3	-0.5	0.4	0.4	0.4
1994	0.8	0.2	0.1	1.8	0.4	0.6
1995	0.6	0.4	0.9	1.4	1.0	1.5
1996	1.9	2.3	2.0	2.5	3.4	3.0
1997	2.7	2.4	1.9	2.9	2.3	1.7
1998	0.1	0.1	0.0	-0.1	-0.1	-0.1
1999	0.1	-0.5	-0.8	1.5	0.2	-0.1
2000	1.0	0.3	0.1	1.4	-0.1	-0.6
2001	-0.8	-0.3	-0.7	-2.3	-1.0	-1.3
2002	-0.3	0.0	-0.5	-0.8	-0.1	-0.8
2003	-0.5	-0.5	-0.8	0.0	-0.1	-0.5
2004	0.5	0.3	0.0	0.9	0.3	0.0
2005	-0.8	-1.1	-1.3	0.7	0.1	-0.3
2006	0.8	0.7	0.6	0.1	-0.1	-0.4
2007	0.1	0.3	0.0	-0.2	0.0	-0.3
2008	-1.1	-0.8	-1.1	-1.8	-1.0	-1.3
2009	-1.9	0.6	0.5	-4.2	1.0	1.0
2010	-0.5	-0.6	-0.6	-0.7	-1.2	-1.2

Sources: Statistics Canada, *Sector Accounts* (Table 380-0007); *Government of Canada Budgetary Revenues and Expenditures* (Table 183-0014); Gross Domestic Product, Income Based (Table 380-0001); Department of Finance.

Estimates are based on an update of the methodology developed in the Department of Finance working paper "Fiscal Policy and the Business Cycle: A New Approach to Identifying the Interaction" (2003), Stephen Murchison and Janine Robbins. In particular, this update incorporates the effects from terms of trade in the calculation of the cyclical component.

A positive sign indicates a move towards smaller deficits or larger surpluses; a negative sign indicates a move towards larger deficits or smaller surpluses.

[1] For 2009 and 2010, temporary counter-cyclical fiscal measures are included in the cyclical component of the balance and therefore excluded from the cyclically-adjusted budgetary balance.

Table 48

Federal government liabilities and assets

National Accounts basis

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
					(millions of dollars)					
Liabilities										
Currency and bank deposits	3,901	4,118	4,189	4,293	4,509	4,728	4,900	5,081	5,190	5,320
Trade payables	486	573	854	583	811	750	359	359	879	1,590
Loans	101	101	103	100	101	101	154	55	164	206
Life insurance and pensions	119,903	129,075	130,355	132,141	134,180	136,758	140,541	142,978	145,238	147,942
Government claims	7,717	8,974	8,870	6,604	1,980	819	691	529	228	821
Other liabilities	51,986	33,866	34,784	39,997	56,796	58,425	57,882	61,999	73,978	75,551
Sub-total	184,094	176,707	179,155	183,718	198,377	201,581	204,527	211,001	225,677	231,430
Canada short-term paper	99,729	107,050	118,941	118,762	129,632	126,307	117,712	183,771	186,313	174,891
Canada bonds	339,262	331,079	315,027	295,423	285,530	278,641	267,330	274,235	358,993	409,538
Sub-total: Unmatured debt	438,991	438,129	433,968	414,185	415,162	404,948	385,042	458,006	545,306	584,429
Total liabilities	623,085	614,836	613,123	597,903	613,539	606,529	589,569	669,007	770,983	815,859
Financial assets										
Currency and deposits	8,929	5,325	4,291	3,770	3,785	4,528	4,441	28,554	14,279	4,176
Trade receivables	20	20	256	211	207	207	263	265	551	551
Loans	14,357	16,816	21,379	16,045	17,575	16,868	18,207	18,294	14,326	19,411
Short-term paper	590	590	603	2,001	2,255	2,255	2,289	2,224	1,771	1,771
Mortgages	360	360	497	609	686	686	499	431	533	533
Bonds	5,730	5,226	6,401	6,223	6,318	6,310	5,939	5,480	5,069	4,900
Government claims	76,338	80,011	71,531	64,983	66,499	72,022	73,110	132,958	190,063	196,634
Shares	1,320	1,320	1,351	117	134	260	211	205	123	123
Foreign investments	241	241	86	65	63	63	42	39	27	27
Other financial assets	10,598	3,690	9,571	7,733	18,515	19,324	6,946	13,051	25,062	29,652
Total financial assets	118,483	113,599	115,966	101,757	116,037	122,523	111,947	201,501	251,804	257,778
Net financial assets	-504,602	-501,237	-497,157	-496,146	-497,502	-484,006	-477,622	-467,506	-519,179	-558,081
Non-financial assets										
Non-residential structures	30,809	30,902	31,348	32,475	33,402	34,936	36,896	38,906	37,956	38,188
Machinery and equipment	9,309	10,158	9,324	9,006	8,805	8,709	9,149	9,684	10,556	10,527
Inventories	396	301	370	406	394	362	377	406	403	372
Land	8,010	8,065	8,245	8,671	8,985	9,502	10,183	10,894	10,742	10,922
Total non-financial assets	48,524	49,426	49,287	50,558	51,586	53,509	56,605	59,890	59,657	60,009
Total assets	167,007	163,025	165,253	152,315	167,623	176,032	168,552	261,391	311,461	317,787
Net worth	-456,078	-451,811	-447,870	-445,588	-445,916	-430,497	-421,017	-407,616	-459,522	-498,072

Source: Statistics Canada, *National Balance Sheet Accounts*.

Table 49

Provincial and local governments' liabilities and assets

National Accounts basis

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
	(millions of dollars)									
Liabilities										
Other deposits	2,620	2,606	0	0	0	0	0	0	0	0
Trade payables	14,993	14,669	16,005	15,549	22,587	26,334	30,287	31,921	33,548	43,748
Loans	14,115	14,885	15,685	18,842	20,613	19,526	20,364	20,810	21,785	24,082
Short-term paper	18,109	21,932	21,066	18,331	15,080	16,475	22,875	36,288	40,801	40,478
Mortgages	2,144	2,095	2,048	2,018	1,925	1,855	1,773	1,745	1,740	1,740
Bonds	344,599	362,934	360,175	376,806	388,447	407,628	410,067	434,363	462,241	501,406
Life insurance and pensions	48,275	50,572	52,511	54,805	56,974	59,921	62,486	65,354	68,171	72,740
Government claims	12,134	11,608	12,804	12,576	11,581	10,756	10,553	11,442	11,561	14,163
Other liabilities	125,394	129,655	140,292	145,586	166,247	194,984	211,941	221,106	233,536	243,976
Total liabilities	582,383	610,956	620,586	644,513	683,454	737,479	770,346	823,029	873,383	942,333
Financial assets										
Currency and deposits	16,162	17,273	18,381	19,819	23,105	25,259	28,102	29,132	29,846	30,329
Trade receivables	5,938	6,078	5,980	5,932	6,872	7,096	7,438	7,928	8,236	8,301
Loans	11,646	13,084	14,140	16,219	18,176	23,090	25,467	28,641	33,147	32,508
Short-term paper	24,405	30,733	27,368	36,980	44,773	47,213	50,909	61,000	62,174	72,370
Mortgages	5,511	5,533	6,761	7,170	9,298	11,264	10,435	10,791	10,568	10,604
Bonds	78,544	79,377	83,906	80,549	90,058	103,623	115,669	121,048	122,103	117,035
Government claims	87,397	86,850	93,757	96,177	103,387	99,306	104,549	121,394	122,113	125,187
Shares	49,162	49,661	51,491	51,048	57,548	67,337	69,968	56,545	65,013	71,525
Foreign investments	5,926	7,488	8,870	10,802	12,627	15,291	19,689	20,529	18,988	19,719
Other financial assets	62,993	56,823	56,574	65,514	74,594	93,874	100,897	102,967	100,938	105,708
Total financial assets	347,684	352,900	367,228	390,210	440,438	493,353	533,123	559,975	573,126	593,286
Net financial assets	-234,699	-258,056	-253,358	-254,303	-243,016	-244,126	-237,223	-263,054	-300,257	-349,047
Non-financial assets										
Residential structures	7,853	8,098	8,303	8,348	8,530	11,312	12,961	13,575	13,811	14,651
Non-residential structures	272,651	282,116	294,719	313,786	328,785	357,142	388,341	433,687	451,645	470,144
Machinery and equipment	18,326	20,094	20,615	21,299	20,539	22,466	24,328	27,187	30,830	30,514
Land	74,650	77,495	81,508	87,813	92,576	102,641	113,492	128,041	134,538	141,592
Total non-financial assets	373,480	387,803	405,145	431,246	450,430	493,561	539,122	602,490	630,824	656,901
Total assets	721,164	740,703	772,373	821,456	890,868	986,914	1,072,245	1,162,465	1,203,950	1,250,187
Net worth	138,781	129,747	151,787	176,943	207,414	249,435	301,899	339,436	330,567	307,854

Source: Statistics Canada, *National Balance Sheet Accounts*.

Table 50

Social security funds

National Accounts basis

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
	(millions of dollars)									
Liabilities										
Total liabilities	451	19	164	63	266	606	1,273	6,721	3,111	2,540
Financial assets										
Bonds:	28,525	26,840	25,238	24,823	25,897	26,066	28,851	26,145	28,430	30,609
Short-term paper	0	446	2,959	8,729	11,837	15,788	18,663	16,151	14,286	16,552
Foreign investments	0	6,737	8,144	11,488	21,617	36,379	34,640	39,937	50,820	51,733
Government claims	20,802	23,626	24,257	26,817	22,923	32,206	35,730	25,772	28,669	33,447
Corporate claims	0	0	0	0	2,821	6,298	10,141	12,880	15,145	22,166
Shares	14,038	13,653	18,256	19,465	18,928	14,553	13,678	13,642	9,954	9,830
Other financial assets	0	1,400	4,209	2,383	2,932	3,973	5,937	14,585	12,468	13,200
Total financial assets	63,365	72,702	83,063	93,705	106,955	135,263	147,640	149,112	159,772	177,537
Net worth	62,914	72,683	82,899	93,642	106,689	134,657	146,367	142,391	156,661	174,997

Source: Statistics Canada, *National Balance Sheet Accounts*.

Table 51

Total government liabilities and assets

National Accounts basis

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
	(millions of dollars)									
Liabilities										
Currency and deposits	6,521	6,724	4,189	4,293	4,509	4,728	4,900	5,081	5,190	5,320
Trade payables	15,479	15,242	16,859	16,132	23,398	27,084	30,646	32,280	34,427	45,338
Loans	14,216	14,986	15,788	18,942	20,714	19,627	20,518	20,865	21,949	24,288
Short-term paper	117,838	128,982	140,007	137,093	144,712	142,782	140,587	220,059	228,417	216,671
Mortgages	2,144	2,095	2,048	2,018	1,925	1,855	1,773	1,745	1,740	1,740
Bonds	683,861	694,013	675,202	672,229	673,977	686,269	677,397	708,598	821,234	910,944
Life insurance and pensions	168,178	179,647	182,866	186,946	191,154	196,679	203,027	208,332	213,409	220,682
Government claims	19,851	20,582	21,674	19,180	13,561	11,575	11,244	11,971	11,789	14,984
Other liabilities	177,831	163,540	175,240	185,646	223,309	254,015	271,096	289,826	309,322	320,765
Total liabilities	1,205,919	1,225,811	1,233,873	1,242,479	1,297,259	1,344,614	1,361,188	1,498,757	1,647,477	1,760,732
Financial assets										
Currency and deposits	25,091	22,598	22,672	23,589	26,890	29,787	32,543	57,686	44,125	34,505
Trade receivables	5,958	6,098	6,236	6,143	7,079	7,303	7,701	8,193	8,787	8,852
Loans	26,003	29,900	35,519	32,264	35,751	39,958	43,674	46,935	47,473	51,919
Short-term paper	24,995	31,769	30,930	47,710	58,865	65,256	71,861	79,375	78,231	90,693
Mortgages	5,871	5,893	7,258	7,779	9,984	11,950	10,934	11,222	11,101	11,137
Bonds	112,799	111,443	115,545	111,595	122,273	135,999	150,459	152,673	155,602	152,544
Government claims	184,537	190,487	189,545	187,977	192,809	203,534	213,389	280,124	340,845	355,268
Corporate claims	0	0	0	0	2,821	6,298	10,141	12,880	15,145	22,166
Shares	64,520	64,634	71,098	70,630	76,610	82,150	83,857	70,392	75,090	81,478
Foreign investments	6,167	14,466	17,100	22,355	34,307	51,733	54,371	60,505	69,835	71,479
Other financial assets	73,591	61,913	70,354	75,630	96,041	117,171	113,780	130,603	138,468	148,560
Total financial assets	529,532	539,201	566,257	585,672	663,430	751,139	792,710	910,588	984,702	1,028,601
Net financial assets	-676,387	-686,610	-667,616	-656,807	-633,829	-593,475	-568,478	-588,169	-662,775	-732,131
Non-financial assets										
Residential structures	7,853	8,098	8,303	8,348	8,530	11,312	12,961	13,575	13,811	14,651
Non-residential structures	303,460	313,018	326,067	346,261	362,187	392,078	425,237	472,593	489,601	508,332
Machinery and equipment	27,635	30,252	29,939	30,305	29,344	31,175	33,477	36,871	41,386	41,041
Inventories	396	301	370	406	394	362	377	406	403	372
Land	82,660	85,560	89,753	96,484	101,561	112,143	123,675	138,935	145,280	152,514
Total non-financial assets	422,004	437,229	454,432	481,804	502,016	547,070	595,727	662,380	690,481	716,910
Total assets	951,536	976,430	1,020,689	1,067,476	1,165,446	1,298,209	1,388,437	1,572,968	1,675,183	1,745,511
Net worth	-254,383	-249,381	-213,184	-175,003	-131,813	-46,405	27,249	74,211	27,706	-15,221

Source: Statistics Canada, *National Balance Sheet Accounts* .

Data in this table include Canada Pension Plan and Québec Pension Plan liabilities and assets.

International Fiscal Comparisons

Table 52

G-7 general government total tax and non-tax receipts

National Accounts basis

Year	Canada	United States	Japan	United Kingdom	Germany	France	Italy	G-7 average
				(per cent of GDP)				
1970	35.7	30.2	22.0	44.9	-	39.9	29.2	31.5
1971	36.3	29.7	23.0	42.9	-	39.3	29.8	31.2
1972	36.6	30.9	23.0	40.8	-	39.5	29.6	31.5
1973	36.6	31.1	23.8	39.4	-	39.5	29.0	31.6
1974	38.7	31.7	25.9	44.0	-	39.9	28.7	32.8
1975	37.6	29.8	25.6	44.3	-	41.2	29.0	31.9
1976	37.4	30.5	25.2	43.9	-	42.8	30.4	32.4
1977	37.3	30.8	26.4	42.6	-	42.9	31.7	32.7
1978	36.8	30.9	26.3	39.8	-	42.8	32.5	32.5
1979	36.6	31.3	28.2	39.6	-	44.4	32.0	33.1
1980	37.5	31.6	28.8	42.2	-	45.6	33.8	33.9
1981	39.6	32.3	29.9	44.4	-	46.2	33.8	34.7
1982	40.2	32.0	30.2	45.3	-	47.0	36.8	35.1
1983	39.7	31.4	30.4	44.4	-	47.8	38.8	34.9
1984	39.8	31.3	31.0	44.1	-	48.5	37.6	34.9
1985	39.5	31.8	31.3	43.4	-	48.7	37.4	35.0
1986	40.4	32.0	31.4	42.3	-	47.8	38.4	35.1
1987	40.6	32.8	32.9	41.1	-	48.3	38.3	35.7
1988	41.0	32.6	32.9	40.9	-	47.2	39.3	35.6
1989	41.2	32.9	32.7	40.7	-	46.9	40.1	35.8
1990	43.0	32.9	33.6	39.4	-	47.0	41.5	36.0
1991	43.9	32.9	33.3	39.8	43.3	47.6	42.6	37.0
1992	44.2	32.8	33.3	38.7	44.8	47.4	45.0	37.2
1993	43.5	33.0	32.0	37.3	45.3	48.5	46.3	37.1
1994	43.0	33.4	31.2	37.8	45.6	48.8	44.4	37.0
1995	43.2	33.8	31.2	38.2	45.1	48.9	45.1	37.3
1996	43.8	34.3	31.6	38.0	45.9	50.4	45.5	37.7
1997	44.5	34.6	31.7	38.4	45.7	50.8	47.6	38.1
1998	44.9	34.9	31.3	39.4	45.9	50.0	46.2	38.2
1999	44.3	34.9	31.2	39.8	46.7	50.8	46.5	38.3
2000	44.1	35.4	31.4	40.3	46.4	50.1	45.3	38.4
2001	42.6	34.4	32.2	40.6	44.7	50.0	44.9	37.9
2002	41.1	31.9	30.8	39.0	44.4	49.4	44.4	36.2
2003	41.1	31.3	30.5	38.7	44.4	49.1	44.7	35.8
2004	40.7	31.6	30.9	39.6	43.5	49.6	44.2	35.8
2005	40.8	33.0	31.7	40.8	43.6	50.5	43.8	36.8
2006	41.1	33.8	34.5	41.5	43.7	50.3	45.3	37.8
2007	40.8	33.9	33.5	41.2	43.8	49.6	46.4	37.7
2008	39.8	32.6	35.1	42.6	43.9	49.6	46.1	37.4
2009	38.5	30.9	33.3	40.3	44.5	48.7	46.5	36.1
2010	38.3	31.6	32.5	40.7	43.4	49.1	46.1	36.2

Source: *OECD Economic Outlook*, No. 89 (May 2011).

Table 53

G-7 general government total outlays

National Accounts basis

Year	Canada	United States	Japan	United Kingdom	Germany	France	Italy	G-7 average
				(per cent of GDP)				
1970	36.0	32.3	20.2	41.8	-	39.6	32.5	32.2
1971	37.3	32.5	21.8	41.2	-	39.2	34.5	32.7
1972	37.5	32.3	23.1	42.8	-	39.3	36.5	33.1
1973	36.0	31.3	23.3	43.6	-	39.1	35.4	32.5
1974	37.6	32.7	25.5	48.1	-	39.4	34.9	34.1
1975	41.1	35.1	28.5	49.4	-	42.8	39.3	36.8
1976	40.2	34.0	29.1	49.2	-	43.3	38.3	36.2
1977	41.4	33.1	30.4	46.4	-	43.4	38.6	35.8
1978	41.6	32.3	32.1	44.8	-	44.4	41.1	35.8
1979	40.0	32.3	33.2	43.6	-	44.6	40.3	35.7
1980	41.6	34.3	33.5	45.9	-	45.7	40.7	37.2
1981	42.5	34.7	34.0	49.4	-	48.4	44.6	38.4
1982	47.3	37.0	34.2	48.4	-	49.8	46.8	40.1
1983	47.9	37.1	34.5	48.2	-	50.3	48.9	40.4
1984	47.5	36.2	33.8	48.3	-	51.3	49.1	39.8
1985	48.0	36.9	32.7	46.6	-	51.7	49.8	39.9
1986	47.5	37.4	32.8	45.3	-	51.1	50.4	40.0
1987	46.1	37.2	33.2	43.2	-	50.3	49.8	39.6
1988	45.4	36.3	32.4	41.0	-	49.9	50.4	38.8
1989	45.8	36.2	31.4	40.4	-	48.7	51.5	38.5
1990	48.8	37.2	31.6	41.5	-	49.4	52.9	39.4
1991	52.3	38.0	31.6	43.2	46.1	50.5	54.0	40.9
1992	53.3	38.6	32.7	45.2	47.3	52.0	55.4	41.9
1993	52.2	38.1	34.5	45.3	48.3	55.0	56.4	42.3
1994	49.7	37.1	35.0	44.6	47.9	54.2	53.5	41.5
1995	48.5	37.1	36.0	44.1	54.8	54.4	52.5	42.2
1996	46.6	36.6	36.7	42.2	49.3	54.5	52.5	41.3
1997	44.3	35.4	35.7	40.6	48.3	54.1	50.2	40.0
1998	44.8	34.6	42.5	39.5	48.1	52.7	49.3	40.5
1999	42.7	34.2	38.6	38.8	48.2	52.6	48.2	39.4
2000	41.1	33.9	39.0	36.6	45.1	51.6	46.1	38.5
2001	42.0	35.0	38.6	39.9	47.5	51.6	48.0	39.7
2002	41.2	35.9	38.8	40.9	48.0	52.6	47.4	40.3
2003	41.2	36.3	38.4	42.4	48.4	53.2	48.3	40.6
2004	39.9	36.0	37.0	43.1	47.2	53.3	47.8	40.0
2005	39.3	36.2	38.4	44.0	46.9	53.4	48.1	40.4
2006	39.4	36.0	36.2	44.3	45.3	52.7	48.7	39.8
2007	39.4	36.8	35.9	44.1	43.5	52.4	47.9	39.9
2008	39.8	39.0	37.2	47.4	43.8	52.9	48.8	41.6
2009	44.1	42.2	42.0	51.2	47.5	56.2	51.8	45.2
2010	43.8	42.3	40.7	51.0	46.7	56.2	50.6	44.8

Source: *OECD Economic Outlook*, No. 89 (May 2011).

Table 54

G-7 general government financial balances

National Accounts basis

Year	Canada	United States	Japan	United Kingdom	Germany	France	Italy	G-7 average
				(per cent of GDP)				
1970	-0.4	-2.1	1.7	3.0	-	0.7	-3.2	-0.7
1971	-1.0	-2.8	1.2	1.7	-	0.5	-4.7	-1.5
1972	-1.0	-1.4	-0.1	-1.9	-	0.5	-6.9	-1.5
1973	0.6	-0.3	0.6	-4.2	-	0.5	-6.4	-0.9
1974	1.1	-1.1	0.4	-4.1	-	0.2	-6.3	-1.4
1975	-3.5	-5.3	-2.9	-5.2	-	-1.8	-10.3	-4.9
1976	-2.8	-3.4	-3.9	-5.3	-	-0.6	-7.9	-3.8
1977	-4.1	-2.3	-4.0	-3.8	-	-0.6	-7.0	-3.0
1978	-4.8	-1.4	-5.8	-5.0	-	-1.6	-8.5	-3.3
1979	-3.4	-1.0	-5.0	-4.1	-	-0.2	-8.3	-2.7
1980	-4.1	-2.7	-4.7	-3.7	-	-0.1	-7.0	-3.3
1981	-2.8	-2.3	-4.1	-5.0	-	-2.2	-10.9	-3.7
1982	-7.0	-5.0	-4.0	-3.0	-	-2.8	-10.0	-5.0
1983	-8.2	-5.7	-4.2	-3.9	-	-2.5	-10.1	-5.5
1984	-7.8	-4.8	-2.8	-4.1	-	-2.8	-11.5	-4.9
1985	-8.6	-5.1	-1.4	-3.2	-	-3.0	-12.4	-4.9
1986	-7.1	-5.3	-1.4	-3.0	-	-3.2	-11.9	-4.9
1987	-5.4	-4.4	-0.4	-2.1	-	-2.1	-11.5	-3.9
1988	-4.3	-3.7	0.5	-0.1	-	-2.6	-11.0	-3.1
1989	-4.6	-3.3	1.3	0.2	-	-1.8	-11.4	-2.7
1990	-5.8	-4.3	2.0	-2.0	-	-2.4	-11.4	-3.4
1991	-8.4	-5.0	1.8	-3.4	-2.8	-2.9	-11.4	-3.9
1992	-9.1	-5.9	0.6	-6.5	-2.5	-4.5	-10.4	-4.7
1993	-8.7	-5.1	-2.5	-8.0	-3.0	-6.4	-10.1	-5.2
1994	-6.7	-3.7	-3.8	-6.8	-2.3	-5.5	-9.1	-4.4
1995	-5.3	-3.3	-4.7	-5.8	-9.7	-5.5	-7.4	-5.0
1996	-2.8	-2.3	-5.1	-4.2	-3.3	-4.0	-7.0	-3.5
1997	0.2	-0.9	-4.0	-2.2	-2.6	-3.3	-2.7	-2.0
1998	0.1	0.3	-11.2	-0.1	-2.2	-2.6	-3.1	-2.3
1999	1.6	0.7	-7.4	0.9	-1.5	-1.8	-1.8	-1.1
2000	2.9	1.5	-7.6	3.7	1.3	-1.5	-0.9	-0.1
2001	0.7	-0.6	-6.3	0.6	-2.8	-1.6	-3.1	-1.8
2002	-0.1	-4.0	-8.0	-2.0	-3.6	-3.2	-3.0	-4.1
2003	-0.1	-5.0	-7.9	-3.7	-4.0	-4.1	-3.5	-4.8
2004	0.9	-4.4	-6.2	-3.6	-3.8	-3.6	-3.6	-4.2
2005	1.5	-3.3	-6.7	-3.3	-3.3	-3.0	-4.4	-3.6
2006	1.6	-2.2	-1.6	-2.7	-1.6	-2.3	-3.3	-2.0
2007	1.4	-2.9	-2.4	-2.8	0.3	-2.7	-1.5	-2.2
2008	0.0	-6.3	-2.2	-4.8	0.1	-3.3	-2.7	-4.2
2009	-5.5	-11.3	-8.7	-10.8	-3.0	-7.5	-5.3	-9.1
2010	-5.5	-10.6	-8.1	-10.3	-3.3	-7.0	-4.5	-8.6

Source: *OECD Economic Outlook,* No. 89 (May 2011).

Table 55

G-7 general government net financial liabilities

National Accounts basis

Year	Canada	United States	Japan	United Kingdom	Germany	France	Italy	G-7 average
				(per cent of GDP)				
1970	12.7	33.3	-6.5	47.2	-	0.8	31.4	24.3
1971	11.5	33.6	-7.2	46.3	-	1.0	35.3	24.4
1972	10.5	31.9	-6.3	41.4	-	2.1	40.3	23.5
1973	7.9	28.6	-5.9	38.0	-	1.1	41.6	21.3
1974	5.7	27.6	-5.1	34.6	-	0.2	39.0	20.2
1975	8.7	30.6	-1.7	32.8	-	0.9	47.6	22.9
1976	9.6	30.9	2.6	32.1	-	-0.6	48.3	23.8
1977	10.5	29.7	6.4	36.7	-	-1.2	48.0	24.2
1978	12.3	27.7	12.6	32.6	-	0.0	50.1	24.2
1979	13.7	25.4	16.4	29.2	-	-1.7	49.1	23.2
1980	14.5	25.6	15.5	29.8	-	-4.3	45.6	22.6
1981	13.5	25.4	19.2	23.9	-	-0.2	49.5	23.3
1982	19.1	29.5	23.5	29.5	-	1.6	53.2	27.4
1983	25.6	33.0	28.3	30.0	-	3.9	62.8	31.4
1984	29.6	34.2	30.5	25.3	-	6.7	66.5	32.9
1985	35.3	37.3	30.8	26.0	-	9.5	73.0	35.6
1986	39.6	40.8	33.0	26.0	-	12.2	77.7	38.6
1987	39.2	43.0	26.9	6.6	-	13.0	82.3	37.3
1988	38.1	44.1	22.4	-0.1	-	14.7	85.1	36.7
1989	41.1	44.2	15.7	-5.0	-	15.3	79.7	34.8
1990	43.7	45.4	13.4	-3.6	-	17.1	82.5	35.4
1991	50.5	49.1	11.7	-1.4	8.5	18.4	86.2	33.3
1992	59.1	52.5	13.8	6.7	14.9	20.0	93.2	36.9
1993	64.2	54.9	17.1	17.4	18.3	26.8	100.5	40.8
1994	67.9	54.4	19.6	19.7	19.1	29.7	104.5	41.9
1995	70.7	53.8	23.8	26.3	29.7	37.5	99.0	43.2
1996	70.0	51.9	29.2	27.9	32.7	41.8	104.5	44.2
1997	64.7	48.8	34.8	30.6	32.4	42.3	104.6	43.8
1998	60.8	44.9	46.2	32.6	36.2	40.5	107.0	43.9
1999	55.8	40.2	53.8	29.0	34.7	33.5	101.1	41.4
2000	46.2	35.3	60.4	26.8	33.9	35.1	95.6	39.3
2001	44.3	34.6	66.3	23.2	36.2	36.7	96.3	39.7
2002	42.6	37.2	72.6	23.7	40.3	41.8	95.7	42.1
2003	38.7	40.5	76.5	23.9	43.1	44.2	92.7	44.1
2004	35.2	42.1	82.7	25.9	47.2	45.3	92.5	45.9
2005	31.0	42.5	84.6	27.1	49.3	43.2	93.8	46.2
2006	26.3	41.7	84.3	27.5	47.4	37.2	90.7	44.9
2007	22.9	42.6	81.5	28.5	42.2	34.8	87.1	44.4
2008	22.4	48.2	96.5	33.0	43.9	42.7	89.9	50.3
2009	28.4	59.8	110.0	44.0	47.9	49.3	100.5	60.1
2010	30.4	67.3	116.3	56.3	50.1	56.6	99.1	66.2

Source: *OECD Economic Outlook*, No. 89 (May 2011).

Table 56

G-7 general government gross financial liabilities

National Accounts basis

Year	Canada	United States	Japan	United Kingdom	Germany	France	Italy	G-7 average
				(per cent of GDP)				
1970	54.3	46.4	11.2	69.5	-	40.4	55.2	43.7
1971	55.3	47.0	12.5	71.9	-	37.9	59.5	44.6
1972	53.5	45.4	16.6	63.2	-	35.5	65.9	43.6
1973	48.0	42.6	16.1	58.3	-	32.6	70.4	41.4
1974	45.8	41.4	12.7	54.5	-	30.6	70.0	39.7
1975	45.2	44.6	20.1	53.8	-	30.9	82.4	43.4
1976	43.6	44.8	27.0	51.8	-	29.3	82.1	44.2
1977	45.1	43.6	32.4	58.3	-	28.8	85.7	45.4
1978	48.0	42.5	41.0	51.9	-	29.9	90.9	46.4
1979	45.3	41.2	45.5	49.4	-	30.1	89.5	46.1
1980	45.6	41.9	47.1	48.7	-	29.7	86.8	46.5
1981	46.9	41.1	52.8	46.6	-	29.0	91.2	47.3
1982	52.7	45.9	58.8	50.8	-	32.9	95.0	52.2
1983	58.4	48.9	65.0	50.5	-	33.9	79.5	53.8
1984	61.7	50.6	67.0	50.6	-	35.6	82.4	55.5
1985	66.9	55.4	69.4	49.2	-	37.1	88.9	59.3
1986	71.0	58.9	75.1	48.6	-	37.9	92.8	62.6
1987	71.4	60.6	76.8	47.8	-	39.2	96.5	64.2
1988	71.1	61.3	72.8	41.8	-	39.0	98.8	63.5
1989	72.2	61.6	66.7	36.0	-	38.9	95.5	61.7
1990	75.2	63.1	63.9	32.3	-	38.6	97.6	62.0
1991	82.3	67.9	63.2	32.8	37.7	39.5	100.4	57.3
1992	90.2	70.3	67.6	39.0	40.8	43.9	106.9	60.8
1993	96.3	71.9	73.9	48.7	46.2	51.0	116.3	64.9
1994	98.0	71.1	79.0	46.8	46.5	60.2	120.9	66.4
1995	101.6	70.7	86.2	51.6	55.7	62.7	122.5	68.3
1996	101.7	69.9	93.8	51.2	58.8	66.3	128.9	70.0
1997	96.3	67.4	100.5	52.0	60.3	68.8	130.3	70.1
1998	95.2	64.2	113.2	52.5	62.2	70.3	132.6	70.7
1999	91.4	60.5	127.0	47.4	61.5	66.8	126.4	69.6
2000	82.1	54.5	135.4	45.1	60.4	65.6	121.6	67.0
2001	82.7	54.4	143.7	40.4	59.8	64.3	120.8	67.7
2002	80.6	56.8	152.3	40.8	62.2	67.3	119.4	70.1
2003	76.6	60.2	158.0	41.5	65.4	71.4	116.8	72.6
2004	72.6	61.2	165.5	43.8	68.8	73.9	117.3	74.5
2005	71.6	61.4	175.3	46.4	71.2	75.7	120.0	76.5
2006	70.3	60.8	172.1	46.1	69.3	70.9	117.4	74.9
2007	66.5	62.0	167.0	47.2	65.3	72.3	112.8	74.4
2008	71.3	71.0	174.1	57.0	69.3	77.8	115.2	81.2
2009	83.4	84.3	194.1	72.4	76.4	89.2	127.8	93.7
2010	84.2	93.6	199.7	82.4	87.0	94.1	126.8	100.3

Source: *OECD Economic Outlook*, No. 89 (May 2011).

TAB 18

THE 1994 YEAR BOOK

of
The Canadian Bar Association
and the
Minutes of Proceedings
of its

Seventy-Sixth Annual Meeting

held in
Toronto, Ontario
August 21-24, 1994

ANNUAIRE 1994

de
L'Association du Barreau canadien
et
procès-verbal
de sa

Soixante-seizième Assemblée annuelle

tenue à
Toronto (Ontario)
du 21 au 24 août 1994

CBA PROCEEDINGS 1994 PROCÈS-VERBAL-ABC
VOL. 77

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The other thing that I want to mention in particular is that you may have heard by now that we have the pleasure of the company of Janet Reno, the Attorney General of the United States, who will be joining us for lunch on Wednesday. So, if you do not have a ticket for that lunch, the awards lunch on Wednesday, or if you would like to bring a guest, a friend, a colleague from the office with you, there are special event tickets available. You can buy a ticket just for that lunch, they are available at the registration desk.

We are expecting a very large turnout. The media have indicated that they want to cover Ms. Reno's remarks to us, and we think that it is going to be one of the highlights of the week. So, if you have not made plans to be there and you would like to be there, please speak to the people upstairs at the registration desk.

Emile.

M. E. KRUZICK (Co-président du comité, Toronto): Merci, Michelle.

Bienvenue, encore une fois, à Toronto. C'est avec joie et fierté que la ville de Toronto et la province d'Ontario accueillent les délégués à l'Assemblée annuelle à Toronto.

We are indeed very happy to have you all here to join us in what we think and we hope will be a pleasurable experience for all of you. Michelle has already mentioned some of the things that we wanted to highlight. I simply wanted to add that our exhibitors are going to be on this floor starting on Monday and through to Wednesday.

N'oubliez pas de jouer Lotto ABC. This year, we are going to have CBA Lotto at the exhibitors. Nous avons plus de 10 000 $ en prix. The rules are in your kits and I invite all of you to play. The grand prize is two tickets anywhere that Air Canada flies in North America. Le grand tirage aura lieu mercredi. You do not have to be in attendance for the grand prize which will be drawn on Wednesday.

I also wanted to urge you to attend the CLE. Michelle had already alluded to the CLE. The CLE programs begin on Monday and go through until Wednesday. Brian Bucknall, Lynda Tanaka and Peter Cullen from the National Sections Council have put together what is perhaps one of the most ambitious programs that we have put on at an Annual Meeting. I urge you to attend. There are not only topical issues on that menu, but also programs that I think will be of benefit to all of us in the profession.

Enfin, avec Michelle et notre comité local, nous profiterons de cette occasion pour vous souhaiter une excellente assemblée et un séjour très agréable ici à Toronto. Merci.

CHAIRPERSON: Thank you both.

It is an honour for me to introduce our next speaker. As you know, we have a very, very busy but very accessible Chief Justice of Canada. He has blessed us with his presence at every one of our Council meetings. We are very fortunate and we will never take that for granted in terms of how he shares his message with us at this meeting. So, with great pride, I introduce the Chief Justice of Canada, the Right Honourable Antonio Lamer.

RAPPORT DU JUGE EN CHEF DU CANADA

LE TRÈS HON. A. LAMER (Juge en chef du Canada, Ottawa): Mes chers amis, pour le bénéfice de ceux qui voudraient suivre mes remarques en français, j'ai plusieurs copies de mes remarques en français qui sont sur la table en arrière. Vous pouvez me suivre et voir si je quitte mon texte ou pas. C'est ce que je fais d'habitude, mais je me console à la pensée que vous avez aussi la traduction simultanée. Alors, voilà.

Madam President, honoured guests, members of Council, I intend to depart from what has become my usual format. Instead of reviewing in some detail each of my areas of judicial responsibility, I will address one theme which, I believe, is timely and important: judicial independence. I know that you have heard about it very often, but from what I read in the press and from what I hear, I think it has to be reiterated and explained and explained and explained again, not only to the general public but to some judges also, what it is not.

But let me just very briefly speak of the Supreme Court of Canada. As you know, having been told so by myself in the past, the Court, for the last three years, has completely eliminated its backlog of cases to be heard. If you want delay, about the worst place to go is the Supreme Court of Canada because you cannot get any, it is impossible. Without the cooperation and dedication of my colleagues and indeed also my colleagues for the two or three years before I became Chief Justice, this would not have been achieved.

We have also reduced, in the vast majority of cases, the time between reserving judgments and the delivery of judgment. It is now, on the average, around three months. When considering these three months, you must remember that as a matter of law, save a few

exceptions where urgency may dictate otherwise, all of our judgments are in both official languages, and that included in this time, this average of about three months, one must realize that a minimum of six weeks is there for translation and revisions. So we are turning them out as fast, as decently as we can.

Some of you might have noticed that more frequently than a few years ago, we hand down a judgment immediately or very shortly after the hearing with reasons to follow. Now, this is something that I have encouraged. This is in order to accommodate one group of our two clients. We have two clients. We have the litigants. They do not care why they win; they just want to know if they win or lose. Then we have the other clients. It is the profession, the legal community. So the litigants, while taking a desirable time to pronounce upon the law adequately in order to fulfil our duty to the legal system, which is our other client.

We have now turned our minds to the delays in the leave process. It is taking too much time. Actually, it presently roughly takes as much time to get leave as it takes to be heard and, on average, get judgment. This, to me and to my colleagues, is to be remedied. There is no reason for this. It should not be so. We already enjoy an excellent relationship with a joint committee. We have a joint committee of the Bar and the Court. It works fine and I know that together we will find a solution.

However, we must realize the obvious. We judges and you lawyers are going to have to stop doing certain things that we are currently doing and do certain other things differently. Though I do not know what has to be done, we have already taken steps as regards our end of the thing so that we are shortening the process. As of the moment, everything is in. Starting September 1, we will be doing our end of things differently.

I think we are going to have to put in place mechanisms to sort of have the Bar meet the times that are set down. I think especially respondents are not putting in their materials in a timely fashion. While we do not want to dispose of a matter without reading or having the benefit of the views of the respondent, I do not know what the solution can be, but we will see.

So I will go no further today in this regard, but I will get back to you at your next meeting. By that time, I am sure that we will have a solution or maybe we will no longer have a problem.

Now, for judicial independence. As Chief Justice of Canada, I am concerned that the principle of judicial independence is not well understood and that its importance is not sufficiently appreciated. I am not just saying not understood by the general public or the Bar, I am saying that I get the impression that it is not really understood by some judges. I am not sure that the public and perhaps even the legal profession fully understand what is at stake.

Unfortunately, judicial independence is often linked with situations in which judges are seen as wanting something, and I cannot blame people for thinking that. I do not want to and in fact cannot address any specific situation; you can understand that. What I do want is to begin the process of reminding some of and for others explaining the basic principle of judicial independence, and then to touch on some important questions as examples of the complex and important issues involved.

One of the reasons that judicial independence is not well understood is that it is so fundamental. It is hard to imagine our system of government without it. Judicial independence is part of our culture, like the rule of law or the presumption of innocence, but, like all fundamental concepts, it is worthwhile, now and then, to go back to the root of the matter. We need to do this to keep our fundamental principles alive and current.

Judges must rule upon the important matters affecting people and sometimes the country as a whole. One person wishes to take another's property; the government takes away a licence necessary to earn a livelihood; the state wants to punish someone for a crime; one level of government seeks to exceed its legislative authority.

The rule of law, interpreted and applied by impartial judges, is the guarantee of everyone's rights and freedoms. We cannot expect judges to be superhuman; we can expect them to be as impartial as it is humanly possible to be and to allow them, indeed require them to work in institutions where the conditions promote and protect that impartiality.

Otherwise, how could the system work? How could the accused get a fair trial if the judge is not independent and seen to be independent of the prosecution? How could one government in a dispute with another have confidence in the absence of actual and perceived impartiality?

Judicial independence is, at its roots, concerned with impartiality, in appearance and in fact, and these of course are elements essential to an effective judiciary. Independence - and I have been saying this to judges to the point that they now hate me, I think - is not a perk of judicial office. It is a guarantee of the institutional conditions of impartiality.

We hear much about "accountability" - a buzzword these days, "accountability." But what is meant by accountability in the context of the judiciary? If what is meant is that an arm of the Executive Branch of government will tell a judge how to be a judge, you can count me out, and there will be a hell of a fight. If what is meant is that a judge's conduct should be subject to public scrutiny, I fully and wholeheartedly agree, provided that the scrutiny does not undercut the judge's capacity to be a judge.

I find it hard to think of any public servant whose official actions are more public than those of a judge. The judge presides at public hearings, makes rulings in public and gives reasons which are public. These reasons are subject to minute scrutiny by appellate courts, who similarly give public reasons for their decisions. The decision of courts stand or fall on their justice and wisdom. They are subject to intense public scrutiny and often media attention. A federally-appointed judge is ultimately responsible to the representatives of the people - Parliament - for his or her fitness to be a judge. I do not understand how any of this makes a judge unaccountable.

Put yourself in the position of a judge sentencing an accused after a conviction for a serious crime. On one side of the courtroom, you have the accused and his or her family; on the other, the victim. Perhaps there are members of support groups or special interest groups monitoring the hearing. The jury, which wrestled with the case and brought in a guilty verdict, may still be there. The press is present and members of the public, of your community. Your decision will be seen and known by all. It is not a committee decision; it is yours alone. It is subject to community discussion, media coverage, and appellate review. You, as this imaginary judge, may feel many things as you impose that sentence, but unaccountable is surely not one of them.

If everybody always thought that judges were right and always liked what they did, judicial independence would not be so important. But it is inherent in the job of the judge that at least half of the litigants will be disappointed or worse. But we need judges who conscientiously do their best to apply the law as they believe it to be. In fact, we do not need any other kind of judge.

So much for what is not controversial. But there is lots of evidence that judicial independence gives rise to difficult, practical questions which require very, very careful consideration. I know, I know, I have looked at your programs and I urge you to give some thought to that with some caution.

In what follows, I do not want to offer my opinion, but to explain what is at stake. We need to be open to change. God knows, if I have been accused of anything, it has been of being too open to too much change. So I am open to change, but we must be careful not to water down our fundamental principles.

Consider the area of judicial conduct. It is easy to say that judges need to be "accountable" - that buzzword - that they should be disciplined, that judicial conduct should not be the preserve of judges. Now, it is easy to say that. As I said to you last year, I can see merit in many proposals for change and I have not changed my mind about that. Sometimes, however, in our rush to be progressive, we overlook some important issues.

There must be a mechanism to review judicial conduct. I think that we all agree on that. Independence brings with it great responsibility. It is crucial that the judiciary be and be seen to be the most skilled and committed persons possible. The present system for federally-appointed judges leaves the ultimate decision about the judge's conduct to Parliament. The Canadian Judicial Council can make recommendations for removal of a judge, but the removal can be done only by Parliament. While there may be great merit in changing this approach, there are also some important questions.

There is a first and fundamental question: how do we ensure that the review of judicial conduct does not undermine the conditions of independent decision-making? This is not a philosophical or hypothetical question. Many complaints - I really can say most if not nearly all - about federally-appointed judges are in fact complaints about the judge's decision on the merits of the case, not about the conduct apart from that decision.

I have looked through them. They say "My case was an obvious case. This judge obviously is incompetent because I did not win." Now, that is the equation. When you read about 90 complaints against judges in Canada - we put it in our annual report - 87 or 86 of those complaints are that, in different forms or fashions, it is about that. So we are not dealing with a haemorrhage here, we are not dealing with a great big problem. We have 975 federally-appointed judges who, day in and day out, are handing out judgments and hearing cases and they are doing it very well. I do not have to tell you, you are there.

Obviously, the remedy for these complaints is appeal. Those are the letters that are being sent to these people, saying "Look, speak to your lawyer and go to appeal if you think he..."

Not an investigation of judicial conduct. Such investigation has the potential to undermine the independent decision-making which is the core of the judicial function.

Drawing the line between error and misconduct is not always easy. Sure, because there are certain situations where it is a hybrid, where the judge's conduct is involved, and where there is a perception that the judge, let us say, was biased. So it is an appeal problem, but it also maybe. It depends on how the bias has been conveyed. Drawing the line between error and misconduct, as I said, is not always easy, but drawing it is fundamentally important to the rule of law and the independent decision-making of the judge.

We had a case recently where the line was so difficult. We had a very, very irate judge, and I could understand his point of view. You know, "How the hell do you people dare interfere in my judicial independence?" I think he was right. We made a close call and I am not sure that we made the right one. So it is not easy. Do not forget, we are experts at it.

I throw this out because it is nice to say, "Let us bring in some lay person." I do not know, there is no virtue in not being trained for the job that you are going to do. And I should add that, upon becoming a chief justice, you do not appoint a chief justice by lobotomizing a judge - chief justices are judges - and say, "We will have a judge." Well, I am a judge and the other 36 chief justices in Canada are all judges. The only problem is that maybe we have been around long enough to know more about what we are doing than when we started. Some of us maybe have been around too long, but you will let me know when that happens.

A second question is more institutional or structural. Assuming that there is to be judicial discipline, that is that judges should be subject to sanctions short of removal, who is to do this?

I do not mean the identity of the people, but the nature of the institution. Is it problematic to have an arm of the Executive Branch carrying out such a role? Judicial independence is, in large part, to insulate the judiciary from pressure from the other branches of government. Are those who will be doing the disciplining an arm of the Executive? To whom and for what are those doing the disciplining to be accountable?

Right now, and I reminded my colleagues on the Canadian Judicial Council - some of them did not realize that because we are all chief justices, when we sit and we look at each other, we think we are in court - but we are a creation of the Executive. The Canadian Judicial Council is an arm of the Executive.

Right now, that is tolerable for two reasons. One, we are all judges. Secondly, we are not disciplining anybody, we are recommending; we are not removing, we are recommending removal to Parliament. But, as soon as you move away from that into disciplining, it is a different ball game.

Thirdly, I would note that there is a constitutional dimension to this discussion. Is discipline short of removal of a federally-appointed judge constitutional by any mechanism other than by both Houses of Parliament? I do not think that many people have thought about this. Is a judge who has been, say, suspended for 30 days removed from office for those 30 days? If so, how do you accomplish the suspension in view of Section 99 of the Constitution which says that a judge is removable by the Governor General on address of both Houses of Parliament? We may be looking at a constitutional amendment. I will be long retired before we can get an amendment to our Constitution, as far as I have experienced in the last few years.

Finally, quite apart from the legality of these ideas, is disciplining judges wise? Maybe it is; I am not saying it is not. Can parties legitimately complain that they do not wish their case heard by a judge who has been disciplined? While I can see considerable, practical merit and appeal - and I said that much a year ago - in having the power to impose sanctions short of removal, we must not turn a blind eye to the problems.

These are some of the examples of the practical issues of judicial independence which arise in the field of judicial conduct. I, for one, do not find them easy. I know in saying this that I run the risk of appearing to be a judge sticking up for judges. But I am most certainly not sticking up for judges in the sense of wanting to insulate them from criticism or, in the popular jargon, to make them "unaccountable." I am sticking up for the institution of an independent judiciary. I do so because an independent judiciary is a fundamental constitutional safeguard of the rights and liberties of everyone and an essential element in a federal democratic state. It is part of my job, that is what I am paid for, so that is why I am sticking up for it.

The field of judicial conduct, by no means, exhausts the practical issues of judicial independence. There is also the large question of how the judiciary and the Executive should interact on questions where each has its legitimate areas of responsibility and concern. For example, the elected representatives of the people justly exercise ultimate budgetary responsibility, but the resources made available to the judiciary also may touch on areas of

judicial independence. More significantly, the judiciary must be able to stay out of the political fray, but at the same time be assured that the public interest in a properly functioning judiciary is being fairly responded to by government.

In this regard, I think that we need to work much harder at finding acceptable mechanisms that keep judges out of the political process, while at the same time fairly and promptly dealing with the legitimate requirements of an effective judiciary. We have had many examples, over the last year or so, showing why such mechanisms are badly needed. Of course, ultimate budgetary authority, in the sense of making large policy decisions about society's priorities, must stay where it belongs: with the elected representatives.

An example of one such mechanism is the Federal Triennial Commission process established by the Judges Act. Its objective is to keep judicial compensation and benefits out of the political arena while preserving proper political accountability for the expenditure of public funds. It looks good on paper, but it has one problem: it just does not work. Why? Because the Executive and Parliament have never given it a fair chance.

While I favour giving it a fair chance - and the process will be repeated in 1995, so there will be an opportunity soon to make it work - maybe over the long term there are some other models that could be studied, and indeed this is an area where the Bar could be of great help. We need a mechanism that would have the confidence of the legislature, the judiciary and the public. It must be capable of meeting the legitimate and important expectations of each. This would be a tremendous achievement in the practical application of judicial independence to the day-to-day work of the judiciary.

The Canadian Judicial Council, which I chair, is concerned about these and many other issues related to judicial independence. Members of Council, as judges and chief justices, live with these issues. We understand their importance, we also understand their difficulty. That is why we have commissioned a detailed study of these matters. The study is only a step in what must be a painstaking and rigorous analysis. This must be done in the knowledge that we are working at the very heart of democracy based upon the rule of law. We must not take the easy way out and react in an ad hoc way to perceive problems with vague or careless solutions. The cure must not be worse than the disease.

Judicial independence is one of our core values. We must treat it with great care and enormous respect. We must not put judicial independence aside too easily. On the other hand - and this I have been telling some judges - we must not risk trivializing it by invoking it inappropriately. I will not say much more about that, given my position.

Let me turn to judicial education, because judicial education is linked in very practical ways to the notion of judicial independence. The independence conferred upon judges is a great responsibility. It requires that judges be as well trained as is possible. Moreover, judicial education, like the courts, requires resources. Government has to supply the money and legitimately wants it spent well, but there is also the need to ensure that judicial independence is respected. Judges need to have ultimate control over judicial education.

How would the defence lawyers here like judges being required to attend courses on sentencing put on by the Attorney General? This is not a farfetched, hypothetical situation. In 1962, the Attorney General of a province - I will not identify the province, but you will guess it - tried it. At the time, I was active in the Criminal Law Section of the Canadian Bar Association and I called a press conference. That was the end of that, but I am not sure the public really understood the danger of such an initiative.

The National Judicial Institute is the vehicle in Canada to take the lead in responding to the educational needs of the judiciary. It is an independent body, answerable to a Board of Governors, which I chair. Government funds the Institute and is kept up to date on its activities.

The Institute, in its relatively short existence, has accomplished a great deal. The Institute offers over 30 courses each year to both federally and provincially-appointed judges. Over 1,000 judge registrants participated last year in courses dealing with substantive law, judicial skills and sensitivity training.

One must add to that - and I said this at the Mid-Winter Meeting - there are other bodies giving training to judges. Some of them not only to judges, but to lawyers and judges; others have specific programs for judges. So when I say that there are 1,000, that is only at the Judicial Institute. But my guess would be that it is closer to 2,000 judges last year who attended courses at some point in time. As I said at your Mid-Winter Meeting, you know, the main job of a judge is to hear cases and sit. We cannot always be training. So there is training going on. When we say that we must train our judges, we are being trained.

The Institute has high-quality, training videos in the areas of family violence, child abuse, gender bias and race relations. Every newly-appointed judge in Canada receives an orientation

kit from the Institute which includes videos on gender equality and race relations. These topics are addressed in the Institute's courses on early orientation for newly-appointed judges. The Institute also offers programs on family violence and child sexual abuse which have been attended by a large number of judges at a variety of locations across Canada.

Over and above the material and training for newly-appointed judges, approximately two thirds of the federally-appointed judiciary have participated in gender equality training through programs organized by the Institute. More than half have participated in programs dealing with cultural awareness. These numbers are going up almost every month. Since 1990, race and/or gender issues have been dealt with in 20 courses offered by the Institute.

I recently announced the appointment of the new Associate Director of the Institute, a position that has been vacant since Judge Dolores Hansen left that position to become the Institute's Executive Director. The new Associate Director is Madam Justice Louise Charron of the Ontario Court, General Division, in Ottawa. She brings to the job extensive practice, academic and judicial experience. I believe that we have in place at the Institute a superb team, headed by our two very capable and committed leaders, Judge Hansen and Justice Charron. The judiciary and the public are very fortunate to have such fine leadership in the area of judicial education.

There are challenges though. One is the precarious financial arrangements for the institution. The help of the federal government and most provinces and territories has been exemplary. But there are exceptions. Indeed, two provinces do not contribute at all, although, surprisingly, they continue to send their judges to the courses. The level of funding is barely adequate. It is not guaranteed on a long-term basis, making planning very difficult.

As regards those two provinces, I have written to the Premier of each of those two provinces with the hope that we will solve the problem. I do not think we will, getting the response of one and the acknowledgement of receipt of the other. In fairness to all, I will identify the provinces: Quebec and Manitoba. It is on the agenda of the next meeting of the Board of Governors of the Institute, we will not see the other provinces subsidize these two provinces on legal education, as long as I am Chair. So we will settle that problem. It will not be a pleasant settlement, but at least we will settle it for the future.

I say this because it is unfortunate. Everybody is asking that judges be trained more and more, but yet our budgets are being cut. We are asked to cut by 10%, and some people are not coughing up, they are not paying at all. I do not know how you give more education with less money. It is just impossible. Unless people start making donations, I do not see any solution to the problem. We are going to have to reduce. We pay our bills, so we are going to have to find the money somewhere.

No doubt the public has trouble understanding the importance of the principle of judicial independence and the things that flow from it. What is happening in judicial education is probably not ever going to be the subject of discussion by most people at their office or plant coffee break, but these issues are vitally important to everyone. I believe the judiciary can do a better job of communicating on these sorts of issues.

I also believe that you, the Bar, could help. In fact, I raise these matters here not to complain. I could give a press conference. I raise them because I and my colleagues chief justices, we need your help, and it has always been that way. You can inform yourselves about these matters, share your considered views, and above all help your clients and the people in your communities to understand better what is at stake.

Judicial independence is not about money or power or privilege. I have said it until I am blue in the face, although some papers keep printing the contrary of what I say. I am in favour of the freeze. In fact, I go further, and the judges hate me for saying this: had we not been frozen, I would have invited the government to freeze us. Yet, they will still print that what I am talking about here is money, that I want a raise for judges. That is not what we are talking about. The vast majority of your judges in Canada accept the freeze, understand that there has to be one and understand the financial situation.

So I say it - I know it will not come out that way, but anyway - I will still say that we are not talking here about money. It is about justice under the law, the resolution of disputes through reasoned argument, and the respect of every person's rights. I would certainly not urge unquestioning acceptance of the status quo - it is not in my nature - but I would urge that all judges, lawyers and members of the public treat this fundamental principle with care and respect when considering change.

I wish you all the very best in your upcoming deliberations. It is always, Madam President, a pleasure for me to visit with you. I have been doing it now twice a year, Mid-Winter and Annual. I hope that I will be doing this for many years to come, as long as you keep inviting me, and I wish you a very good week.

I am sorry that I cannot stay with you, I have other duties awaiting me and I will be flying back this afternoon. But I wish you well and, as you know, you are always welcome into my chambers if and when you come to the Supreme Court of Canada. I usually have the losing side up with the winning side also whenever it is possible. So thank you, good luck.

CHAIRPERSON: Thank you, Chief Justice. Rest assured that the Canadian Bar stands ready, guarded to defend the vital issue and safeguard judicial independence.

I also, Chief Justice, want to advise you that we have also advised the Minister of Justice that we are poised to help and assist in terms of review of the Triennial Commission. In conjunction with that, we deliberated yesterday and have determined that the Standing Committee on Pensions and Judges' Salaries will review, as part of our submission, there will be a review of the Triennial Commission as we make our submission for the 1995 Triennial Commission.

So thank you very much indeed for your kind words.

I now have the honour of introducing the federal Minister of Justice, the Honourable Allan Rock Q.C.

I must thank him in advance of his speaking because he has been available to us on many fronts during the course of this meeting. He will attend the bear pit session tomorrow, he will be attending the Government Lawyers Conference. He has been very supportive of this initiative. He has been very supportive of the Canadian Bar this year. He has, as I told you over and over again, as I spoke across this country, been one of the most successful Ministers of Justice that we have encountered. He has set up biannual meetings with the President. His door is always open and, as a result of that, I believe that he is convincing the federal government of the importance of the priority of the administration of justice and justice issues in this country.

We are honoured and delighted to have him in attendance to address you today. Please warmly welcome the Minister of Justice and Attorney General of Canada, Allan Rock, Q.C.

REPORT OF THE MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA

THE HON. A. ROCK (Minister of Justice and Attorney General of Canada, Ottawa): Good morning. Thank you, Cecilia, for the very warm introduction. Good morning to all of you.

It is delightful to see so many old friends again and familiar faces. Just this morning, in the half hour that I was here and outside in the hall, I renewed acquaintances with a lot of people whom I had practised with and saw in court over the years. It is hard to believe that it is now a year since I left practice for my new line of work. In fact, I would not have believed it myself except that some of my former partners pointed out that my receivables are now in the 365-day column, so it must be right.

This summer has been a nice break from the session of Parliament that finished at the end of June. I am sure that it has been a great relief for everybody. Who was it who said that "the liberty of the subject is never in greater jeopardy than when the legislature is in session"?

For my part, I have spent the summer travelling across Canada. I have been, in fact, in nine of the provinces in the weeks since the House adjourned, speaking with members of the Liberal caucus, meeting Canadians directly on a variety of justice issues, including but not limited to gun control, although gun control has figured prominently in a lot of those public meetings. I must say that it is nice to come into a meeting without having to pass through a metal detector first. It is a nice change.

The meetings on gun control have produced sort of a mixed response. You know, people have strong feelings on that subject one way or the other. Coming back from the tour, I feel sort of like the coach of the team that came back from a road trip with a record of four and four and said, "Well, you know, it could just as easily have gone the other way."

But one thing about that trip and this job is that it does diminish the time available to spend at home with my family. I think in recent weeks there is accumulating evidence that I have to spend more time there. I came home about three weeks ago, went into the house and Debbie was there. The children were upstairs, so she said, "Kids, come and say hello to your father." So Andrew ran across the floor and picked up the phone. But I think that now that things are getting onto a more regular footing, that will sort itself out and we will get things organized for the fall.

I do want to congratulate Cecilia and the CBA for yet another extraordinary convention, and particularly Michelle Fuerst and Emile Kruzick whose hard work with the Organizing Committee has produced a really well-organized, interesting, thought-provoking week.

TAB 19

Supreme Court of Canada

Remarks of the Right Honourable Beverley McLachlin, P.C.
Presented at the Empire Club of Canada
Toronto, March 8, 2007

The Challenges We Face

Mr. President, distinguished guests, thank you for that welcome. I am delighted to be here again to address the Empire Club.

More than a quarter century ago, a Canadian Justice Minister, Pierre Elliott Trudeau, challenged Canadians to build "the just society". In the ensuing years, thousands of Canadians have worked to establish their visions of a just society. The centrepiece of Prime Minister Trudeau's vision of the just society was the Charter of Rights and Freedoms, adopted in 1982, and whose 25th anniversary we will celebrate on April 17, 2007. Whatever our political persuasion or our particular conception of justice, there can be no doubt that Canadians today expect a just society. They expect just laws and practices. And they expect justice in their courts.

Today, I would like to share with you my perspective on justice in our courts and the challenges we face in assuring Canadian men, women and children a just and efficacious justice process.

Let me begin by asserting that Canada has a strong and healthy justice system. Indeed, our courts and justice system are looked to by many countries as exemplary. We have well-appointed courtrooms, presided over by highly qualified judges. Our judges are independent and deliver impartial justice, free of fear and favour. The Canadian Judicial Council, which I head, recently issued an information note on the judicial appointments process in which it affirmed these long-standing principles on which our justice system is based. Canadians can have confidence that judges are committed to rendering judgment in accordance with the law and based on the evidence. Corruption and partisanship are non-issues. In all these things, we are fortunate indeed.

Yet, like every other human institutional endeavour, justice is an ongoing process. It is never done, never fully achieved. Each decade, each year, each month, indeed each day, brings new challenges. Canadian society is changing more rapidly than ever before. So is the technology by which we manage these changes. Thus it should not come as a surprise that Canada's justice system, in 2007, faces challenges. Some represent familiar problems with which we have yet to come to grips. Others arise from new developments, and require new answers.

In my comments today I will touch on four such challenges:

- the challenge of access to justice,
- the challenge of long trials,
- the challenge of delays in the justice system, and
- the challenge of dealing with deeply rooted, endemic social problems.

The Challenge of Access to Justice

The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve. Access to justice is therefore critical. Unfortunately, many Canadian men and women find themselves unable, mainly for financial reasons, to access the Canadian justice system. Some of them decide to become their own lawyers. Our courtrooms today are filled with litigants who are not represented by counsel, trying to navigate the sometimes complex demands of law and procedure. Others simply give up. Recently, the Chief Justice of Ontario stated that access to justice is the most important issue facing the legal system[1].

The Canadian legal system is sometimes said to be open to two groups – the wealthy and corporations at one end of the spectrum, and those charged with serious crimes at the other. The first have access to the courts and justice because they have deep pockets and can afford them. The second have access because, by and large, and with some notable deficiencies, legal aid is available to the poor who face serious charges that may lead to imprisonment. To the second group should be added people involved in serious family problems, where the welfare of children is at stake; in such cases the Supreme Court has ruled that legal aid may be a constitutional requirement[2].

It is obvious that these two groups leave out many Canadians. Hard hit are average middle-class Canadians. They have some income. They may have a few assets, perhaps a modest home. This makes them ineligible for legal aid. But at the same time, they quite reasonably may be unwilling to put a second

mortgage on the house or gamble with their child's college education or their retirement savings to pursue justice in the courts. Their options are grim: use up the family assets in litigation; become their own lawyers; or give up.

The result may be injustice. A person injured by the wrongful act of another may decide not to pursue compensation. A parent seeking custody of or access to the children of a broken relationship may decide he or she cannot afford to carry on the struggle – sometimes to the detriment not only of the parent but the children. When couples split up, assets that should go to the care of the children are used up in litigation; the family's financial resources are dissipated. Such outcomes can only with great difficulty be called "just".

To add to this, unrepresented litigants – or self-represented litigants as they are sometimes called – impose a burden on courts and work their own special forms of injustice. Trials and motions in court are conducted on the adversary system, under which each party presents its case and the judge acts as impartial decider. An unrepresented litigant may not know how to present his or her case. Putting the facts and the law before the court may be an insurmountable hurdle. The trial judge may try to assist, but this raises the possibility that the judge may be seen as "helping", or partial to, one of the parties. The proceedings adjourn or stretch out, adding to the public cost of running the court. In some courts, more than 44 per cent of cases involve a self-represented litigant[3]. Different, sometimes desperate, responses to the phenomenon of the self-represented litigant have emerged. Self-help clinics are set up. Legal services may be "unbundled", allowing people to hire lawyers for some of the work and do the rest themselves. The Associate Chief Justice of the British Columbia Provincial Court is quoted as saying this is "absurd", not unlike allowing a medical patient to administer their own anaesthetic[4].

It is not only the unrepresented litigants who are prejudiced. Lawyers on the other side may find the difficulty of their task greatly increased, driving up the costs to their clients. Judges are stressed and burned out, putting further pressures on the justice system. And so it goes.

The bar and the bench are attempting to improve the situation. Some modest progress is being made. Lawyers are organizing themselves to give free, or pro bono, service to needy clients. Clinics have been set up by governments, NGOs and legal groups to help self-represented litigants. Rule changes to permit contingency fees – the lawyer is paid out of the proceeds of the litigation, if any – and class actions provide ways for people of modest means to litigate some tort and consumer actions. Thought is being given to coverage for legal services within specified limits as an endorsement to home insurance policies. Justice groups are working to simplify procedures and thus reduce costs or assist the unrepresented litigant.

All this is good. Yet much more needs to be done if access to justice is to become a reality for ordinary Canadians.

The Challenge of Long Trials

A second challenge is the challenge of long trials, an increasingly urgent problem both in civil and criminal litigation. Not too many years ago, it was not uncommon for murder trials to be over in five to seven days. Now, they last five to seven months. Some go on for years[5]. The length of civil trials is also increasing. For example, in 1996, the average length of a trial at the Vancouver Law Courts was 12.9 hours. Six years later, the average length of a trial had doubled, to 25.7 hours[6]. This trend is consistent with developments in other jurisdictions throughout Canada.

There are a number of reasons why trials seem to have taken on a life of their own. On the criminal side, the Canadian Charter of Rights and Freedoms has had a significant impact on the criminal trial process. Charter pre-trial motions regularly last two to three times longer than the trial itself[7]. Changes in the law of evidence have also increased litigation and lengthened trials[8].

On the civil side, there are also a number of reasons why trials have become longer. Although Canadian rules of procedure impose limits on examinations for discovery, some argue that they are still too broad, allowing parties to canvass issues that are not relevant and material to the issues in the litigation. This results in longer, and more expensive discoveries, and a larger volume of evidence being placed before the trier of fact at trial. The expanded use of expert witnesses has also lengthened trials.

Efforts at reform are underway. On the criminal side, a recent report by the Ontario Superior Court of Justice makes a number of recommendations to improve the efficacy and effectiveness of judicial pre-trial conferences with a view to improving the efficiency of criminal trials[9]. The Ontario government recently launched a process to suggest reforms to the province's civil justice system[10]. A similar review is underway in British Columbia[11].

The Challenge of Delays in the Justice System

A third and related challenge is the problem of delays in the processing of cases. Here again, the problem afflicts both criminal and civil cases. On the criminal side, delays in proceedings may result in serious cases being stayed, since the Charter guarantees a trial within a reasonable time. Delays may also result in lengthy periods of incarceration for the accused person prior to trial. Even where the accused is out on bail, the stress of the ongoing proceedings and the upcoming, ever-deferred trial may be considerable. Witnesses are less likely to be reliable when testifying to events that transpired many months, or even years, before trial. Not only is there an erosion of the witnesses' memories with the passage of time, but

there is an increased risk that a witness may not be available to testify through ordinary occurrences of sickness or death. As the delay increases, swift, predictable justice, which is the most powerful deterrent of crime, vanishes. The personal and social costs are incalculable.

On the civil side, different but similar problems arise. Whether the litigation has to do with a business dispute or a family matter, people need prompt resolution so they can get on with their lives. Often, they cannot wait for years for an answer. When delay becomes too great, the courts are no longer an option. People look for other alternatives. Or they simply give up on justice.

Courts have been promoting various forms of out-of-court mediation and arbitration as a more effective way of achieving settlement and dealing with many civil cases. This is good. But the fact is, some cases should go to court. They raise legal issues that should be considered by the courts for the good of the litigants and the development of the law.

I do not want to give the impression that all is bleak. Ten years ago, in Ontario, civil appeals were taking two to three years from the date of perfection to be heard. Criminal appeals were not much better. They were being heard one and a half to two years from the date of perfection[12]. Today, the time required for bringing appeals on for hearing has been greatly reduced.

In a recent speech, Ontario Court of Appeal Justice Michael Moldaver noted that the solution to delays in the justice system was not to hire more judges, but for the court to take control of the process from the litigants and put it back in the hands of the judges. This is what happened in Ontario. Within a space of 18 months, the backlog was gone. Civil appeals in Ontario are now being heard within nine to 12 months of perfection. Criminal appeals are being heard within six to nine months.

The Challenge presented by Endemic Social Problems

The final justice challenge I wish to discuss is the challenge presented by intractable, endemic social problems, including drug addiction and mental illness.

A few years ago, I found myself at a dinner at government house. Next to me sat the chief of one of Toronto's downtown precincts. I asked him what his biggest problem was. I thought he would say the Charter and "all those judges who pronounce on rights". But he surprised me. "Mental illness", was his reply. He then told me a sad story, one I have heard throughout the country in the years since. Every night, his jails would fill up with minor offenders or persons who had created a nuisance – not because they are criminals, but because they are mentally ill. They would be kept overnight or for a few days, only to be released – the cycle inevitably to repeat itself.

Such people are not true criminals, not real wrong-doers in the traditional sense of those words. They become involved with the law because they are mentally ill, addicted or both. Today, a growing awareness of the extent and nature of mental illness and addiction is helping sensitize the public and those involved in the justice system. This sensitization and knowledge is leading to new, more appropriate responses to the problem.

One response has been the development of specialized courts – such as mental health courts and drug courts. As Brian Lennox, Chief Justice of the Ontario Court of Justice, said recently at the opening of the Mental Health Court in Ottawa:

> The Ottawa Mental Health Court is an example of a progressive movement within criminal justice systems in North America and elsewhere in the world to create "problem-solving courts". These courts, with collaborative interdisciplinary teams of professionals and community agencies, attempt to identify and to deal with some of the underlying factors contributing to criminal activity, which have often not been very well-addressed by the conventional criminal justice process. The goal is to satisfy the traditional criminal law function of protection of the public by addressing in individual cases the real rather than the apparent causes that lead to conflict with the law.

Mental health courts have opened in Ontario, New Brunswick and Newfoundland[13]. Many other jurisdictions, including British Columbia, Manitoba, Nunavut and Yukon, are in various stages of developing these courts. These courts can do much to alleviate the problems.

Other problem-solving courts within the Ontario Court of Justice include drug treatment courts and Gladue courts, the latter dealing with aboriginal offenders. Such courts are also being used in other Canadian jurisdictions.

This is just the beginning. I could go on. The point is this. In a variety of ways, throughout Canada we are adapting our criminal law court procedures to better meet the realities of endemic social problems and better serve the public.

Conclusion

I have shared with you four challenges faced by Canada's justice system in 2007 – challenges close to my heart, and that of justice workers, including judges, throughout Canada. I have also described the efforts which are being made to alleviate the problems and ultimately, with luck, perhaps solve them.

Let me close on this note. Nothing is more important than justice and the just society. It is essential to flourishing of men, women and children and to maintaining social stability and security. You need only open your newspaper to the international section to read about countries where the rule of law does not prevail, where the justice system is failing or non-existent.

In this country, we realize that without justice, we have no rights, no peace, no prosperity. We realize that, once lost, justice is difficult to reinstate. We in Canada are the inheritors of a good justice system, one that is the envy of the world. Let us face our challenges squarely and thus ensure that our justice system remains strong and effective.

Notes

1. Tracey Tyler, "The dark side of justice", Toronto Star, March 3, 2007.
2. New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46.
3. See André Gallant, "The Tax Court's Informal Procedure and Self-Represented Litigants: Problems and Solutions" (2005) 53 Canadian Tax Journal 2. In Anne-Marie Langan, "Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario" (2005) 30 Queen's L.J. 825, the author cites data compiled by the Ontario Ministry of the Attorney General, which show that in 2003, 43.2 percent of applicants in the Family Court Division of the Ontario Court of Justice were not represented by counsel when they first filed with the court. The average percentage of unrepresented litigants in Ontario family courts between 1998 and 2003 was 46 percent.
4. Tracey Tyler, "The dark side of justice", Toronto Star, March 3, 2007.
5. Hon. Justice Michael Moldaver, "Long Criminal Trials: Masters of a System They are Meant to Serve" (2005), 32 C.R. (6th) 316.
6. Supreme Court of British Columbia, Annual Report 2005 (Vancouver, B.C.: Supreme Court of British Columbia, 2005).
7. Ibid.
8. The changes include the expanded scope of the principled exception to the hearsay rule, increased use of previous disreputable conduct evidence, third party record applications, and applications to determine the admissibility of previous sexual conduct of the complainant.
9. Superior Court of Justice, "New Approaches to Criminal Trials: Report of the Chief Justice's Advisory Committee on Criminal Trials in the Superior Court of Justice" (May 2006), online: Superior Court of Justice.
10. Ministry of the Attorney General, News Release, "McGuinty Government Launches Civil Justice Reform" (June 28, 2006).
11. B.C. Justice Review Task Force, "Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force" (November 2006), online: B.C. Justice Review Task Force.
12. The Hon. Justice Michael Moldaver, "The State of the Criminal Justice System in 2006, An Appellate Judge's Perspective" (Remarks to the Justice Summit 2006, November 15, 2006).
13. "Court for Mentally Ill to Open" Kitchener-Waterloo Record (June 15, 2005), online: Canadian Mental Health Association.

Remarks of the Right Honourable Beverley McLachlin, P.C.
Chief Justice of Canada
Remarks delivered to the Empire Club of Canada
Toronto, Ontario
March 8, 2007

TAB 20

Department of Justice Canada
Ministère de la Justice Canada

REPORT AND RECOMMENDATIONS OF COMMISSION ON JUDGES' SALARIES AND BENEFITS

1983

Submitted to the Minister of Justice of Canada

Canada

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Pursuant to Section 19.3 of the *Judges Act*, I am now tabling the Report and Recommendations of the Commission on Judges' Salaries and Benefits, appointed on April 6, 1983 to inquire into the adequacy of salaries and other amounts payable under the *Act* and into the adequacy of judges' benefits generally. In accordance with Standing Order 46(4) of the House of Commons, this document shall be deemed to be referred to the Standing Committee on Justice and Legal Affairs.

The Honourable Mark MacGuigan
Minister of Justice and
Attorney General of Canada

REPORT AND RECOMMENDATIONS OF COMMISSION ON JUDGES' SALARIES AND BENEFITS

TABLE OF CONTENTS

REPORT AND RECOMMENDATIONS OF COMMISSION ON JUDGES' SALARIES AND BENEFITS

MEMBERS: The Honourable Otto Lang, P.C., Q.C.,
Chairman
Mr. E. Sydney Jackson
Mr. Paul E. Martin
Mrs. M.L. Basta, Secretary

TERMS OF REFERENCE

On April 6, 1983, the Minister of Justice, the Honourable Mark MacGuigan, appointed the members of the first triennial Commission on Judges' Salaries and Benefits, as required by a 1981 amendment to the *Judges Act*. The terms of reference of the Commission are as follows:

> The Commission shall, pursuant to Section 19.3 of the *Judges Act* inquire into the adequacy of the salaries and other amounts payable under the *Act* and into the adequacy of judges' benefits generally.
>
> Without restricting the generality of the foregoing, the Commission shall inquire into and report upon the following matters:
>
> 1. The adequacy of allowances paid under the *Act*, and their relationship to judges' salaries and benefits.
> 2. The adequacy of allowances paid under the *Act*, and more particularly
>   a) allowances for incidental expenditures and non-accountable allowances paid pursuant to Section 20 of the *Act*;
>   b) removal allowances paid pursuant to Section 21.1 of the *Act*; and
>   c) conference allowances paid pursuant to Section 22 of the *Act*.
> 3. Sabbatical or educational leaves of absence for judges.
> 4. The granting of annuities pursuant to Subsection 23(1) of the *Act*.
> 5. The adequacy of Section 20.3 of the *Act* pertaining to the election of a chief justice or chief judge to cease to perform the duties of a chief justice or chief judge as the case may be.
>
> The Commission shall report to the Minister of Justice upon the results of the inquiry in accordance with Subsection 19.3(2) of the *Act*.

Pursuant to the statutory conditions set out in Section 19.3, the Commission is required to report to the Minister of Justice within six months of its appointment. The Minister is thereafter required to place its report before Parliament within ten sitting days.

STATEMENT OF PRINCIPLES

The Commission believes the position of judge in our society and in our political framework to be unique and vital. A free and independent judiciary is the single greatest guarantee of our constitutional rights and liberties. Under the Canadian Constitution, the judiciary exercises its authority independently of the executive and the legislature. The *Constitution Act* itself evidences this intent, by fixing the power to appoint the judges of the superior, district and county courts of the provinces upon the Governor General, and by imposing the duty upon Parliament to fix and provide their salaries, pensions and allowances.

The place of the judiciary has increased in importance in the light of recent constitutional developments in Canada, particularly the enactment of a Charter of Rights and Freedoms. The judiciary also plays a greater role in shaping our lives because of the growing complexity of our social and economic relationships. The independence of the judiciary is part and parcel of their unique position. For this reason, the salaries and benefits of judges must continue to be dealt with by Parliament and only by Parliament, in a manner both as to amount and as to debate which respects judicial independence.

Parliament should fix judicial salaries and benefits in a manner and in an amount which ensures financial security for a judge and his family. The level of salary and benefits should also be such that the most able members of the practising bar may be induced to accept appointment to the bench without being expected to accept a major reduction in their standard of living. The office of judge has attached to it security, public service, the power to contribute to legal development and prestige. That prestige might not persist in full, however, should a marked difference in the level of remuneration of lawyers and judges continue, particularly if this were perceived to be a major factor in leading many able counsel to refuse appointment to the bench.

It must be remembered too, that the office of judge has constraints upon it in regard to many social and economic activities which the rest of us take for granted. The Dorfman Committee, reporting to the Minister of Justice in November 1978, said in this context:

> He must devote himself exclusively to his judicial duties. He may not, as may others, supplement his income by engaging directly or indirectly in any form of business activity or speculative venture. He is required to exercise self-imposed restraints in the market place, and must avoid all manner of extra-judicial private or public disputes or involvements. He is deprived of the right to vote. He must refrain from being a litigant. He may not participate in any tax shelter or other method of lessening the burden of taxation that is available to other members of the public. He should not be a landlord nor a lessor of goods. He may express no opinion concerning, nor endeavour to influence, the taxation or spending policies of any level of government. Even after retirement he will be precluded, for ethical reasons, from returning to practice as a barrister.

Clearly the office carries serious limitations upon it. It is against this background that the Commission has considered judges' salaries and benefits.

SUBMISSIONS TO THE COMMISSION

The Commission would here like to acknowledge the representations made to it by interested individuals and the formal submissions made by the Joint Committee on Judicial Benefits of the Conference of Chief Justices and the Canadian Judges Conference (supported by the Canadian Institute for the Administration of Justice), the Special Committee of the Canadian Bar Association, and Mr. Justice T.D. Marshall on behalf of the northern judges. The Commission also had available to it the reports of the Dorfman Committee in 1978, and of the de Grandpré Committee in 1981, both of which were valuable aids to the work of this Commission.

JUDICIAL SALARIES

The Commission accepts the principle that the salaries of the judiciary should be adequate to preserve the role, dignity and quality of Canada's judges, and to enable them to provide their families with a standard of living commensurate with their position in Canadian society. We wish to emphasize that the issue of judicial salaries should not be addressed as though judges were subject to the conditions of service of federal government employees. It is our view that the judiciary are public servants in the highest sense, and that their salaries, pensions and allowances should reflect the esteem in which they must be held.

We have considered a number of factors and bases for comparison in attempting to formulate what we feel is a proper level of remuneration for the judiciary. In so doing, we have had the assistance of extensive briefs and representations by the Joint Committee on Judicial Benefits of the Conference of Chief Justices and the Canadian Judges Conference, and by the Special Committee of the Canadian Bar Association. We have also examined current levels of compensation for senior public servants and members of Parliament, and the data available on the income levels of the Canadian legal profession. For further comparison, we have examined income data for the judiciary in the United States and in the United Kingdom, as it relates to the income of senior public servants and legal practitioners in both nations.

After examining this material, we have concluded that the most appropriate basis for comparison is with the salaries or incomes of members of the legal profession of comparable experience, and with the salaries of senior deputy ministers.

It is the Commission's view that the salary of a superior court judge should bear a reasonably close relationship to that of an above average lawyer, because it is the above average lawyer who should be attracted to the bench. This does not mean that we consider that judges should be totally recompensed for their notional loss of income from legal practice. While judges are precluded from obtaining the financial benefits and perquisites which they might expect as senior practitioners, they also avoid the problems, financial and managerial, involved in the operation of a modern law practice. What we do advocate is establishing a salary figure which is not totally disproportionate with that which senior members of the bar may reasonably expect to derive from their legal practices, while at the same time recognizing that the satisfaction to be derived from public service is both an incentive to judicial office and an incalculable part of judicial compensation.

The submission of the Canadian Bar Association also reminded us of the words of the Honourable R.B. Bennett, K.C. (as he then was) in a 1927 article in the Canadian Bar Review:

> "...it is important that judges should be appointed to the Bench who are first of all men of experience and learning, men of character and men of worth, because the administration of

justice has rightly been said once to be almost an attribute of the Godhead itself. Now if men enjoying large incomes have no ambition to go upon the Bench, it follows that you have to fall back upon the second line, and instead of appointing the best men to the judiciary, you have recourse to men of indifferent qualifications in their professions..."

We chose, therefore, to look at the third quartile income range of lawyers in Canada, as found in the *Economic Survey of Canadian Law Firms 1982*, commissioned by the Canadian Bar Association. We did not find this source fully satisfactory, since the response rate was only 6.32% and very few of the large firms participated, but it did appear clear that lawyers in the age group from 40 to 65, the prime years for judicial service, could also be expected to be earning their highest income in these years. Further, it appeared from statistics supplied by the Canadian Bar Association that lawyers' incomes in recent years have risen more rapidly than the Industrial Composite Index. Nor do these comparisons take into account the more stringent tax implications for a salaried person, as compared to the taxation of one who is self-employed.

Following is a table submitted to us by the Canadian Bar Association showing the 1981 income of lawyers by year of admission to the bar:

TABLE II

1981 Income of Lawyers in Private Practice by Year Admitted To the Bar

PARTNERS AND PROPRIETORS

Year admitted	No. positions	Average	First quartile	Median	Third quartile	No. firms
1935-39	14	$55,396	$28,983	$53,327	$82,875	14
1940-44	14	90,616	35,103	62,500	136,350	14
1945-49	61	92,720	50,000	69,800	134,500	50
1950-54	107	100,578	48,552	80,000	154,300	84
1955-59	153	99,744	51,596	84,500	142,700	116
1960-64	176	98,026	52,250	89,400	126,750	126
1965-69	298	88,687	58,300	79,000	120,036	176
1970	100	77,549	50,000	72,228	103,523	79
1971	108	71,990	42,297	65,700	95,269	94
1972	130	68,489	41,382	58,975	80,325	111
1973	113	59,963	35,350	59,000	78,900	93
1974	129	58,312	37,060	52,000	73,800	103
1975	147	53,722	35,000	48,684	68,000	122
1976	126	50,409	29,824	42,000	62,750	107
1977	99	43,855	25,000	40,000	55,000	83
1978	100	35,770	22,000	34,128	44,550	88
1979	88	29,444	15,000	29,000	40,000	73
1980	36	27,748	15,000	28,000	35,375	34
1981	14	25,205	14,000	20,000	35,000	14

Source: 1982 Altman & Weil Survey, at page 61

The minimum requirement for consideration for appointment to the bench is ten years of practice. According to this study, the average income of a lawyer in the third quartile, the standard we have adopted for purposes of comparison, was $95,269 for a practitioner who had just completed ten years at the bar. Judges are generally appointed from lawyers having 10 to 22 years at the bar. If reference is made to the more senior end of the scale in this quartile, reported income in 1981 was considerably higher. A superior court judge, in that same year, received a salary of $74,900. On the other hand, we are aware that the value of a judicial annuity must be weighed and that it constitutes a significant portion of total judicial compensation (See Appendix A). Nonetheless, the prospect of an annuity, which may or may not be realized for the reasons discussed later in this report, is not sufficient to compensate for salary deficiencies in the present. In any event, we know that the level of compensation has increasingly stood in the way of some top quality lawyers agreeing to become judges.

This view, and our opinion of the importance of the third quartile, would lead us to make recommendations for greater increases than we think can be made at one time. We are led to a more modest approach by the inadequacy of the statistical base (although we have received informal data on income levels which, if anything, would indicate that those set out in the Canadian Bar Association table err on the side of modesty), by the possibility that we may be looking at an income peak in 1981, in view of the economic recession and its impact upon at least some firms, and by the substantial value of judges' annuities.

In contrast, the salary situation up to 1975, particularly as brought up to date by Parliament in that year, was not considered a significant impediment to appointment. In its appearance before the Commission, the Joint Committee supported the conclusion that workable salary relationships had been achieved in that year. While we do not wish to relate judges' salaries to any in the public service on principle, it is worth noting that the historic relationship between the salaries of superior court judges and deputy ministers was restored in 1975, and has since deteriorated from the point of view of the judiciary: see Table 3, Brief of the Joint Committee, reproduced on page 6. The formula we propose to adopt would restore that relationship.

In the course of our inquiry, our attention was drawn to recent increases in the salary of the judiciary in the United Kingdom, which have provided British judges with substantial increments. In the U.K., the salaries of the higher judiciary are determined by the Lord Chancellor with the consent of the Minister for the Civil Service, pursuant to section 9 of the *Administration of Justice Act 1973*. Following is a comparison of the salaries of the judiciary with those of senior grades of the British civil service:

	Current Salary	Salary Aug.1/83	Salary Jan.1/84
Secretary of the Cabinet Permanent Secretary to Treasury	£42,000	45,000	48,000
Permanent Secretary	37,750	40,500	42,750
Second Permanent Secretary	35,000	37,500	39,500
Deputy Secretary	30,250	32,500	34,250
Under Secretary	25,000	26,750	27,750
Lord Chief Justice	52,500	56,500	60,000
Master of the Rolls Lord of Appeal	48,250	51,750	55,000
Vice Chancellor Lord Justice of Appeal	45,500	49,000	52,000
High Court Judge	42,500	45,500	48,000

We note that our recommendations, which would bring the salary of a superior court judge to approximately that of a DM3, are consistent with the salary scale adopted in the United Kingdom, by which it has been determined that a High Court Judge should be paid the same as the Secretary to the Cabinet.

We accept the 1975 level as satisfactory for that year and recommend that a new base be established in 1985 by applying the Industrial Composite Index to the 1975 figure for the years 1976-83, capped by a 6% and 5% increase for 1983 and 1984, respectively. The statutory increase provided by Section 19.2 of the *Judges Act* can then apply for 1986, at which time a further review will be undertaken.

TABLE III

Comparison of salaries of senior deputy ministers (DM3) and Superior Court judges (1969-1982)

		Annual Salary		
	Judges	Deputy Ministers (DM3's)		
Year		($Min)	($Mid)	($Max)
1967	$28,000		$28,750*	
1968	28,000		**	
1969	28,000		**	
1970	28,000	$40,000	$42,000	$44,000
1971	38,000	42,000	44,000	46,000
1972	38,000	45,000	45,000	50,000
1973	38,000	47,500	47,500	55,000
1974	45,500	50,500	51,250	60,500
1975	53,000	50,500	51,250	60,500***
1976	53,000	54,000	60,000	66,000
1977	55,000	56,400	64,100	70,800
1978	57,000	58,800	66,500	73,200
1979	57,000	63,100	70,900	78,700
1980	70,000	68,900	77,300	85,700
1981	74,900	84,300	91,750	99,200
1982	80,100	89,350	97,250	105,150

(Pay Research Bureau: Rates of Pay in the Public Service of Canada)

* In 1967, a Deputy Minister's salary was fixed without reference to a range

** No figures are available for 1968 and 1969

*** Deputy Ministers' salaries were frozen at the 1974 rate for 1975, due to Wage and Price Controls

The effect of this recommendation upon judicial salaries will be as follows:

Salaries	1975	1983[1]	1983[2]	1985[3]
Superior Court	$53,000	$84,900	$107,300	$119,000[4]
Chief Justice	58,000	92,100	117,430	131,000
Supreme Court of Canada	63,000	98,100	127,550	142,380
Chief Justice	68,000	106,600	137,670	153,680

[1] Actual
[2] Adjusted by ICI to 1982 plus 6%
[3] Based on an increase of 126% for the period 1975 to 1985, i.e., Industrial Composite with 6% and 5% maxima for 1983 and 1984
[4] As opposed to approximately $95,000, if legislation remained unchanged

We note that the merger of county and district courts with the superior courts of the provinces will shortly result in only three provinces — Ontario, British Columbia and Nova Scotia — retaining courts at this level. We also note that the jurisdiction of such county courts as remain is coming increasingly closer to that of the superior courts.

We recommend that the salaries of judges of the county and district courts should be calculated by reference to the same formula as has been applied with respect to the salaries of the judges of the superior courts, but that an absolute differential between the county and district courts and the superior courts be fixed at $5,000, such differential to be retained until review by the next triennial commission. Accordingly, a Chief Judge would receive the salary of a Chief Justice of a superior court less $5,000, while the other judges would receive $5,000 less than puisne judges.

At present, the judges of the Federal Court of Canada receive a taxable allowance of $2,000 to offset provincial subventions paid to members of the superior courts in four provinces. We believe that our recommendations represent a full salary proposal for federally-appointed judges. We also believe that it is undesirable for such judges to receive any extra compensation from the provinces. Federally-appointed judges should be entirely federally-paid. To deal with both points, **we recommend that the present taxable allowance paid to judges of the Federal Court be eliminated. We also recommend that the four provinces which pay similar allowances to federally-appointed judges be asked to discontinue the practice.**

We do this, even though we recognize that provincial payments might partly offset the high cost of living in some jurisdictions. We believe these variations from one part of the country to another do create difficulties. This is particularly obvious in the large urban centres, where there is the additional factor that judicial salaries cannot seriously compete with the incomes of lawyers in the major firms. On the whole, however, we have concluded that we should not recommend regional variations in judicial salaries, so as to avoid the creation of different classes within the judiciary. We also see a practical problem in determining the criteria which might justify such variations. We nonetheless recognize the difficulty of setting average salaries appropriate to all areas of the country, and **recommend that the next triennial commission address this issue further.**

THE TAXATION OF NEW JUDGES

In the course of its discussions with the Joint Committee on Judicial Benefits of the Conference of Chief Justices and the Canadian Judges Conference, and with the Special Committee of the Canadian Bar Association, the Commission was apprised of the disincentives to accepting judicial appointment brought about by our present system of taxation. If the newly-appointed judge is not aware of the tax implications of winding up his practice on accepting judicial office, he may find himself faced with a crippling tax bill in his first year as judge which may largely deplete the investment of his professional lifetime. If a practitioner approached to accept a judicial appointment is aware of the tax implications, he may determine that he cannot afford to become a judge. Either situation is undesirable. **We accordingly adopt the recommendation of the Dorfman Committee that alleviation of the current burden of taxation imposed upon a judge in his first year in office be effected by a specific amendment to the *Judges Act*.**

The income for tax purposes of a newly-appointed judge may include proceeds of the disposition of his practice, his 1971 receivable reserve at the end of the the preceeding year and the income from more than one year if the practice in which he was engaged had a fiscal year other than the calendar year. The first of these may include some capital gain, and all of these impacts of appointment occur in the nature of things rather peremptorily without much scope for tax planning.

In some cases the taxable income does not represent current cash flow and hence presents tax payment problems. We therefore believe a simple approach giving some tax relief to the newly appointed judge is desirable.

We recommend that, if possible by amending the *Judges Act*, a maximum tax rate for provincial and federal income taxes together of about 25% be imposed on the following types of income:

—1971 account receivable reserve

—unbilled work in progress calculated at the date of appointment

—depreciation recapture on disposition of business assets

—deferred practice income, i.e., practice income earned prior to January 1 of the year of appointment, but not taxed in a preceding year (determined on a proration basis)

Thus a new judge appointed in a year whose partnership year-end was January 31, would be entitled to the special rate on 11/12 of his practice income for the year ended January 31.

We believe the best way to achieve this nearly 25% rate would be to deem one-half of the forms of taxable income of the sort referred to above to be non-taxable, so as to bring into play Section 81(1) of the *Income Tax Act*. We recommend that Quebec be asked to make a similar provision in relation to its taxation of these forms of income.

We also believe that it would be useful for those considering appointment to have available to them a description of the tax and other implications of accepting an appointment. The nature of the judicial appointment process does not give the candidate much time for consideration of these matters, and hence **we recommend that the Minister have prepared and available for candidates such an information bulletin.**

JUDICIAL ANNUITIES

At present, Section 23 of the *Judges Act* authorizes the conferral of an annuity equal to two-thirds of the salary annexed to the office of a judge at the time of his resignation, removal or ceasing to hold office, upon any judge who

(a) has continued in office for fifteen years and has attained the age of 65, if he resigns his office;

(b) has continued in office for fifteen years but has not attained the age of 65, if his resignation is conducive to the better administration of justice or is in the national interest;

(c) resigns or is removed as a result of becoming afflicted with a permanent disability preventing him from executing his office; or

(d) has reached the age for mandatory retirement, if he has held office for at least ten years.

If a judge reaches mandatory retirement age without fulfilling the last condition, he is entitled to an annuity pro-rated on the basis of the number of years he has held office.

Section 29.1 of the *Judges Act*, enacted in 1975, initiated the imposition of contributions by the judiciary towards their annuities, which to that point had been wholly non-contributory. Although the measure did not receive Royal Assent until December 20, 1975, it was made retroactive to require all judges appointed from the date the bill was first introduced in Parliament (February 17, 1975) henceforth to contribute at the rate of 6% of salary towards their own annuities and at the rate of a further 1½% towards annuities for spouses and dependents. Judges appointed before February 16, 1975 were required to contribute only at the rate of 1½%.

The Commission views judges' annuities as an important part of their total compensation. We do not consider the issue of contributions to annuities as in any way affecting the independence of the judiciary. As has been the conclusion of previous advisory committees, however, we consider a long-standing differential between judges doing the same work to be inappropriate, and as leading to the creation of two classes of judges. **We therefore believe that all judges should contribute at a rate of 1½%, the rate now applicable to judges appointed prior to February 16, 1975.**

With the Dorfman and de Grandpré Committees, **we feel that those judges who have contributed at the higher rate since 1975 should be reimbursed the excess of their contributions over 1½% with interest at National Revenue tax refund rates compounded annually. We further recommend that the non-tax paid part of such contributions should be transferrable to a Registered Retirement Savings Plan** in order to minimize the negative tax effect of the lump sum payment, without otherwise affecting the rights a judge may have with regard to an R.R.S.P. in the year of refund.

We indicated earlier that the value of a judicial annuity was to be taken into consideration in any examination of total compensation for the judiciary. The table in Appendix A shows that in some cases the value of an annuity is very high, a factor which might have led us to suggest salaries at a level lower than we have recommended. However, it is our view that the emphasis in any consideration of judicial salaries and benefits should be on current salary, rather than on prospective benefits. For many judges, particularly those in the large urban centres and in areas with a high cost of living, cash flow is an increasing problem. We therefore feel that salaries should be significantly increased, while less emphasis should be placed upon the value of an annuity. We believe that some of the very high values of annuity should be modified accordingly, and that **15 years is a better minimum period than ten for entitlement to a full annuity. Similarly, we would recommend that the annuity of those who retire with fewer than 15 years of service should be based on the proportion of their years of service to the 15 year minimum.**

We have been made aware of at least one recent case in which a judge, after holding office for over ten years but less than fifteen, resigned his office and was thereby disentitled from receiving any benefit apart from the return of his contributions. We feel it is unfair that an individual who has performed dedicated service to the public in the execution of his office should not be entitled to some pension benefit with respect to his years of service.

We accordingly recommend that a judge with no final qualification for retirement should be entitled to a partial annuity after completing ten years of service on the bench, that annuity to be calculated on the basis of his number of years of service expressed as a fraction of the total number of years he would have served had he remained on the bench for a minimum of fifteen years or until age 65, whichever is the later. He would thereupon be entitled to a partial annuity at age 65 based upon the product obtained by applying that fraction to the annuity he would have been entitled to had he been eligible for retirement in the year he left the bench, with indexing commencing in the year in which he first receives payment of annuity benefits. Widow's and dependents' annuities would be calculated on the same basis.

Such a measure would prevent abuse of ss.23(1)(b), and at the same time provide an incentive to a judge to make a commitment to his office for a minimum term of ten years. We were impressed by submissions from the judiciary that a judgeship should be considered a lifetime career. We would not be in favour of vesting for judicial annuities after a period shorter than ten years, despite the current trend towards immediate vesting in both the public and the private sector, in order to discourage the possibility that a judgeship be viewed merely as a stepping-stone in a legal career. We feel that our recommendation for partial annuities is justified in light of the comparative youthfulness of many judges appointed over the past ten years. These appointments have resulted in the establishment of a cadre of young men and women on the bench who will still be far short of the usual age for retirement after completing fifteen years in office. The provision of a partial annuity would compensate them in some measure if, after serving a minimum of ten years as judge, they should determine to relinquish their judicial office. Despite our hope that these judges would remain until normal retirement, we feel that a judge ought not to be penalized unduly by reason of his age, nor should he be kept unwillingly in office.

Finally, we agree that a spouse's annuity should not be suspended in the event she remarries. **We accordingly adopt the recommendation of the de Grandpré Report that ss.25(3) of the *Judges Act* be repealed.**

REPRESENTATIONAL ALLOWANCES

An aggregate allowance for representational expenses incurred by the chief justice of a court or by a judge acting on his behalf, by a puisne judge of the Supreme Court of Canada, by a chief judge of a county court, and by the senior judges of the Supreme Court of the Yukon Territory and of the Supreme Court of the Northwest Territories is presently provided by subsections 20(4) and (5) of the *Judges Act*. The current aggregate permitted for each category is as follows:

(a)	the Chief Justice of Canada	$5,000
(b)	each puisne judge of the Supreme Court of Canada	2,500

(c)	the Chief Justice of the Federal Court of Canada, the chief justice of each province, and the Chief Justice of the Supreme Court of Prince Edward Island	3,500
(d)	each other chief justice of a court	2,500
(e)	the senior judge of the Supreme Court of the Yukon Territory and the senior judge of the Supreme Court of the Northwest Territories, each	2,500
(f)	each chief judge of a county or district court	2,500
(g)	the senior county court judge of a province	2,500

This allowance is designed to reimburse a judge for expenses actually incurred by him for travelling, hospitality and related amounts in connection with the extra-judicial obligations and responsibilities that devolve upon him by virtue of his office.

The Commission heard with considerable disquiet of the inadequacy of the present scale of allowances. We consider it unseemly that a chief justice should be required to absorb from his after-tax resources expenses he has incurred on behalf of his court or on behalf of the government of his province or country. In view of the wide regional variation in such expenditures, no further attempt should be made to establish a scale for such allowances. **It is our recommendation that in place of the present ceiling on representational allowances, actual expenses certified by the chief justice be reimbursed under this head. We further recommend that the Canadian Judicial Council be asked to develop guidelines for the use of the representational allowance.**

CONFERENCE ALLOWANCES

Section 22 of the *Judges Act* authorizes payment of the expenses incurred by judges for attendance at two kinds of conferences, meetings or seminars. With respect to the first category, those a judge is expressly authorized by law to attend, he is entitled to be reimbursed for his reasonable travelling and other expenses actually incurred in so attending. With respect to the second category, those a judge may attend with the approval of the chief justice or chief judge of the court, he is entitled to be reimbursed as above, subject to the imposition of an aggregate amount by court. In the case of judges of the provincial superior and county courts, the aggregate amount available as a conference allowance in any year is the greater of the product obtained by multiplying the number of judges of that court by the sum of $350, and $3,000.

In terms of the cost of transportation alone, the Commission feels that the present amount is inadequate. While it might logically be assumed that the current maximum would impose greater constraints upon the smaller courts, in fact the larger courts suffer at least equally by reason of having to establish individual priorities for attendance at such conferences among a greater number of judges. A judge in such circumstances may be prevented from attending a meeting from which both he and his court would benefit through lack of resources in the conference budget. **We recommend that the product be increased by establishing a multiplier of $500, and a minimum of $5,000 per court.**

REMOVAL ALLOWANCES

A removal allowance is payable to a judge under Section 21.1 of the *Judges Act* for moving and other expenses incurred in assuming his duties as judge or by reason of his being reassigned to a place other than that at which he resided prior to his reassignment. A certain measure of flexibility is afforded to this allowance by providing that the types of expenses contemplated shall be prescribed by regulation. Pursuant to this authority, the *Judges Act* (Removal Allowance) Order has been enacted. The Order deals in a comprehensive fashion with the expenditures which shall be reimbursable out of this allowance, and has the additional advantage of being readily amended, as required from time to time.

We are informed that the removal allowance is functioning adequately. **Accordingly, we have no general recommendations to make, apart from the suggestion that the terms of the Removal Allowance Order continue to be closely monitored, so that it may respond quickly to changing economic conditions.**

We do have a specific recommendation to make, however, with respect to its application to the judges appointed to the Yukon Territory and the Northwest Territories. Unlike all other members of the federally-appointed judiciary, the northern judges may normally expect to be reassigned after a number of years to the bench of another jurisdiction. In such a case, moving expenses incurred in taking up his new appointment would be reimbursable to a judge under the Removal Allowance Order. However, should a judge remain in the north until his retirement, there is presently no provision in the *Judges Act* which would permit him to be reimbursed for his expenses in returning to the south. Similarly, should a northern judge die in office, his widow and dependents are not entitled to assistance in relocating. **We recommend that these anomalies be removed by an appropriate amendment to the *Judges Act*.**

INCIDENTAL AND OTHER ALLOWANCES

The 1981 amendments to the *Judges Act* introduced, effective April 1, 1979 and for subsequent years, an accountable allowance in the amount of $1,000 "for reasonable incidental expenditures that the fit and proper execution of his office as judge may require". The allowance was originally intended to be applied against the cost of court attire, law books and periodicals, membership in legal and judicial organizations, and other like expenditures. These categories have now been broadened to include other expenses not recoverable under any other provision of the *Judges Act* and which may relate to the execution of judicial functions.

We approve the greater flexibility which is being addressed to the administration of this allowance. In view of the fact that it is a recent innovation, **we recommend no change in the base amount at this time.**

We received the benefit of separate representations by Mr. Justice T.D. Marshall of the Supreme Court of the Northwest Territories on behalf of himself and his northern colleagues as to the adequacy of the $4,000 non-accountable allowance provided by ss.20(2) of the *Judges Act*. In view of the higher cost of living in the north, and the difficulties northern judges and their families encounter as to transportation and housing, this allowance does not adequately compensate the judges for the increased level of their expenses. The most immediate problem appears to be the availability of adequate housing.

At present, judges in the north are entitled to rental accommodation in federally-owned housing on the same basis as civil servants posted to the north. We were unimpressed by the quality of housing made available to members of the judiciary in the north. We feel that it is important for the dignity of the office which they hold that the judges be given accommodation appropriate to their stature in the community. **We strongly recommend that the quality of housing made available to the judiciary be considerably upgraded,** and that it be reasonably comparable, by northern standards, to the housing of judges elsewhere in the country. If such accommodation cannot be obtained on a rental basis, we are prepared to recommend that the judges be permitted to obtain their own housing, and that the northern allowance be increased to offset the loss of any subsidy of which they may now have the benefit.

SABBATICAL OR EDUCATIONAL LEAVES

It is the understanding of the Commission that a system of periodic educational leaves is to be instituted on a trial basis, under the general supervision of the Canadian Judicial Council. We have studied the proposal made by the Conference of Chief Justices dated September 14, 1982, and agree with the Joint Commitee on Judicial Benefits of the Conference of Chief Justices and the Canadian Judges Conference that it would be premature to deal further with this issue at this time.

ELECTION OF CHIEF JUSTICE OR CHIEF JUDGE

Clause 5 of the itemization in the terms of reference of the Commission required that we inquire into the adequacy of Section 20.3 of the *Judges Act*, whereby the chief justice or associate chief justice of a provincial superior court, or the chief judge of a county or district court, could elect to relinquish his duties as such and thereafter assume only the duties of a puisne or ordinary judge of the court. At the time the Commission was appointed, a minimum term of ten years as chief justice or chief judge was required before this option could be exercised. However, Bill C-166, which became law in June 1983, contains an amendment reducing the term required under Section 20.3 to five years. The Commission accordingly feels that it is unnecessary at this time to make any recommendation on this item.

ALTERNATIVES FOR FIXING JUDICIAL COMPENSATION

We were greatly impressed by the procedure which has been adopted by the State of New South Wales in Australia, whereby an independent Remuneration Tribunal is empowered to address the issue of salaries for the judiciary, amongst others. The Tribunal thereafter makes its report, and unless there is specific objection to its recommendations by fifty per cent of the legislature, after the passage of a fixed time the recommendations become law. This procedure, known as proceeding by way of a negative resolution, would appear to be a desirable innovation in dealing with judicial salaries and benefits.

Section 100 of our *Constitution Act* states:

> The Salaries, Allowances and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

We are advised that the wording of this section precludes the adoption of the negative resolution procedure in Canada. The section is interpreted as requiring the active participation of Parliament in fixing the level of judicial salaries, allowances and pensions. We do not feel, however, that this should be a final barrier to the adoption of such a procedure. The New South Wales procedure appears to be an efficient way of dealing with judicial salaries. **We therefore recommend that the possibility be addressed of developing a similar formula for the adjustment of judicial remuneration, including the need for a constitutional amendment, which formula would in no way derogate from Parliament's overall control.**

All of which is respectfully submitted, this sixth day of October, 1983.

Otto Lang
Sydney Jackson
Paul Martin

SUMMARY OF RECOMMENDATIONS

1. That a new base for the salaries of superior court judges be established in 1985 by applying the Industrial Composite Index to 1975 salary levels for the years 1976-83, capped by 6% and 5% increases for 1983 and 1984, respectively.

2. That the salaries of county and district court judges be calculated by reference to the same formula as has been applied with respect to the salaries of judges of the superior courts, but with an absolute differential of $5,000.

3. That those provinces which continue to provide extra compensation to members of the federally-appointed judiciary be asked to discontinue this practice, and that the $2,000 allowance to Federal Court judges be removed.

4. That the next triennial commission address the issue of regional and cost of living variations for judicial salaries and allowances.

5. That one-half of the income additionally taxable in the year of appointment be deemed exempt from taxation for purposes of Section 81(1)(a) of the *Income Tax Act* and that the Province of Quebec be asked to make a similar provision in regard to its income tax law.

6. That the Minister of Justice have an information booklet prepared and distributed to all lawyers who may be approached to accept judicial appointment.

7. That judges who have contributed to annuities since 1975 be reimbursed the excess of their contributions over 1½% with interest at National Revenue tax refund rates compounded annually, and that the non-tax paid part of such contributions be transferrable to a Registered Retirement Savings Plan without otherwise affecting the rights a judge may have with regard to an R.R.S.P. in the year of refund.

8. That a judge be entitled to a full annuity only after serving a minimum of fifteen years in office.

9. That partial annuities be provided to any judge who leaves the bench after serving at least ten years, such annuities to be calculated by reference to his years of service expressed as a fraction of the total number of years he would have served had he remained on the bench for a minimum of fifteen years or until age 65, whichever is the later.

10. That subsection 25(3) of the *Judges Act*, which suspends a spouse's annuity in the event she remarries, be repealed.

11. That actual expenses certified by the chief justice be reimbursed from the representational allowance, and that the Canadian Judicial Council be asked to develop guidelines for the use of this allowance.

12. That the conference allowance be increased by establishing a multiplier of $500, and a minimum of $5,000 per court.

13. That the *Judges Act* be amended to provide for payment of a removal allowance to a northern judge upon retirement, and to the spouse and dependents of a northern judge who has died in office, to assist relocation.

14. That the quality of housing made available to northern judges be considerably upgraded, and that it be reasonably comparable, by northern standards, to the housing of judges elsewhere in the country.

15. That the possibility be addressed of developing a formula for the adjustment of judicial remuneration similar to that in effect in New South Wales, which formula would in no way derogate from Parliament's overall control.

TAB 21

REPORT AND RECOMMENDATIONS OF THE 1986 COMMISSION ON JUDGES' SALARIES AND BENEFITS

February 27, 1987

Submitted to the Minister of Justice of Canada

Cat. No. J2-69/1987

ISBN 0-662-55058-7

Pursuant to Section 19.3 of the *Judges Act*, I am now tabling the Report and Recommendations of the 1986 Commission on Judges' Salaries and Benefits, appointed as of September 1, 1986 to inquire into the adequacy of the salaries and other amounts payable under the *Act* and into the adequacy of judges' benefits generally. In accordance with Standing Order 67(4) of the House of Commons, this document shall be deemed to be referred to the Standing Committee on Justice and Solicitor General.

The Honourable Ray Hnatyshyn
Minister of Justice and
Attorney General of Canada

REPORT AND RECOMMENDATIONS OF THE 1986 COMMISSION ON JUDGES' SALARIES AND BENEFITS

TABLE OF CONTENTS

1986 COMMISSION ON JUDGES' SALARIES AND BENEFITS

I. Background

Members: Mr. H. Donald Guthrie, Q.C. (Chairman)
Mr. Edward H. Crawford
Mtre Jeannine M. Rousseau
Mr. Eldon M. Woolliams, Q.C.

Executive Secretary: Mr. Harold Sandell

Terms of Reference

The 1986 Commission on Judges' Salaries and Benefits was appointed as of September 1, 1986, by the Honourable Ray Hnatyshyn, Minister of Justice and Attorney General of Canada, pursuant to section 19.3 of the *Judges Act*, and was given the following terms of reference:

> "The Commission shall, pursuant to section 19.3 of the *Judges Act*, inquire into the adequacy of the salaries and other amounts payable under the *Act* and into the adequacy of judges' benefits generally.
>
> Without restricting the generality of the foregoing, the Commission shall inquire into and report upon the following matters:
>
> 1. The adequacy of salaries and allowances paid under the *Act*, having due regard for the adjustments made by S.C. 1985, c. 48.
> 2. The granting of annuities provided to judges and pursuant to subsection 23(1) of the *Act*, and more particularly
>   (a) the criteria for retirement with full benefits under the Act;
>   (b) the pro-rating of annuities for judges who resign without qualifying for full benefits under the *Act*;
>   (c) the contributions payable by judges towards annuities payable on the terms fixed by the *Act*.
> 3. The granting of annuities provided to surviving spouses and children pursuant to sections 25, 26 and 27 of the *Act*.
>
> The Commission shall report to the Minister of Justice upon the results of the inquiry in accordance with subsection 19.3(2) of the *Act*."

Further to these terms of reference, the Minister wrote to the Chairman on December 8, 1986 requesting that the Commission examine, as part of its statutory terms of reference, the matter of a removal allowance for judges of the Supreme Court of Canada, the Federal Court of Canada and the Tax Court of Canada who wish to leave Ottawa and live in another part of Canada on retirement.

The Commission held meetings and/or hearings as follows:

September 17, 1986 – Toronto
November 26, 27 and 28, 1986 – Ottawa
December 16, 1986 – Toronto
January 17 and 18, 1987 – Toronto
January 24 and 25, 1987 – Toronto
February 6, 7 and 8, 1987 – Toronto
February 17, 1987 – Telephone conference
February 18, 1987 – Telephone conference
February 24, 1987 – Telephone conference

Notice to the Public, Submissions and Hearings

The Commission published a Notice in 21 newspapers across Canada, during September and October, 1986, inviting written submissions and presentations at oral hearings, in either official language, concerning matters within the Commission's terms of reference. Notice was also given to a number of interested organizations and individuals. The Commission offered to conduct oral hearings in Halifax, Vancouver, Edmonton, Montreal and Ottawa during October and November, 1986.

Copies of the Notice in English and French are reproduced as Appendix "A". The Notice was published in the following newspapers:

St. John's Evening Telegram
Charlottetown Guardian
Halifax Chronicle-Herald
Le Courrier
Saint John Telegraph Journal
Le Soleil
La Presse
Montreal Gazette
Le Droit
Ottawa Citizen
The Globe and Mail
The Lawyers Weekly
Winnipeg Free Press
Regina Leader Post
Calgary Herald
Edmonton Journal
Le Franco-Albertain
Vancouver Province
Le Soleil de Colombie
The Yellowknifer
Whitehorse Star

Written submissions were received from the groups and individuals listed in Appendix "B".

The only requests for oral hearings were for Ottawa. These hearings took place on November 27 and 28, 1986, at the Canada Council Hearing Room, 99 Metcalfe Street. The following organizations, with the counsel indicated, made oral presentations to the Commission:

1. The Joint Committee on Judicial Benefits of the Conference of Chief Justices and Chief Judges and the Canadian Judges Conference

Counsel Appearing: John J. Robinette, Q.C., Toronto
Yves Fortier, Q.C., Montreal

2. Justices of the Supreme Court of Ontario

Counsel Appearing: John F. Howard, Q.C., Toronto

3. The Canadian Bar Association Standing Committee on Pensions for Judges' Spouses and Judges' Salaries

Counsel Appearing: Bryan Williams, Q.C., Vancouver
(President of the Association)
S.J. Safian, Q.C., Regina
(Chairman of the Standing Committee)
H.A.D. Oliver, Q.C., Vancouver
Thomas J. Walsh, Q.C., Calgary
Robert B. Goodwin, Winnipeg
John Fortier, Charlottetown
George A. Allison, Q.C., Montreal

Previous Committees and Commissions

The 1986 Commission on Judges' Salaries and Benefits is the fifth federal committee or commission established in recent years to inquire into and make recommendations to the Minister of Justice with respect to judicial salaries, allowances and benefits. It is the second commission appointed pursuant to section 19.3 of the *Judges Act*.

In September, 1974, a Special Advisory Committee, under the chairmanship of the Honourable Mr. Justice Emmett Hall, a retired member of the Supreme Court of Canada, reported to the Minister. The Dorfman Committee on Judicial Compensation and Related Matters, under the chairmanship of Irwin Dorfman, Q.C., (hereinafter, the "Dorfman Committee") reported to the Minister in November, 1978. The de Grandpré Committee on Judicial Annuities, under the chairmanship of Jean de Grandpré, Q.C. (hereinafter, the "de Grandpré Committee"), reported in December, 1981. The 1983 Commission on Judges' Salaries and Benefits, which was the first of the "Triennial Commissions" established pursuant to section 19.3 of the *Judges Act*, was chaired by the Honourable Otto Lang, P.C., Q.C. (hereinafter, the "Lang Commission") and it reported to the Minister in October, 1983.

Acknowledgements

The Commission wishes to thank Pierre Garceau, Q.C., Commissioner for Federal Judicial Affairs, and the members of his staff, in particular André Gareau and Louise Fox, for their support throughout the Commission's mandate.

We also thank Walter Riese, F.C.I.A., F.S.A., Chief Actuary of the Department of Insurance of Canada, and Claude Gagné, F.C.I.A., F.S.A., an Actuary on his staff, for their valuable assistance.

The Commission retained the services of Clarkson Gordon in connection with taxation matters discussed in this report and expresses its thanks to William E. Crawford, C.A. and Jennifer L. Shaw, C.A., for their excellent assistance.

The Commission was fortunate indeed to have had assigned to it as Executive Secretary, Harold Sandell of the Department of Justice in Ottawa. We wish to express our sincere appreciation for his enthusiastic, diligent and dedicated service, without which our task could not have been accomplished as effectively and expeditiously. His extensive knowledge of the Canadian legal and judicial systems and relevant statute law has been of immeasurable assistance.

II. Introduction

The principle that the judiciary exercises its authority independently of the executive and the legislature is fundamental to our democratic system.[1] The *Constitution Act, 1867* recognizes this principle by conferring on the Governor General, and not on the Governor in Council, the authority to appoint the judges of the provincial superior, district and county courts, as well as the authority to remove superior court judges, and then only following a joint address of the Senate and House of Commons. The *Constitution Act, 1867* further recognizes this fundamental principle by imposing on Parliament, and not on the executive, the duty to fix and provide the salaries, allowances and pensions of superior, district and county court judges. The concept of judicial independence is also implicit in the *Canadian Charter of Rights and Freedoms* and in the *Canadian Bill of Rights.* Furthermore, the law of Canada, in the form of doctrine and jurisprudence, has long recognized the concept of the independence of the judiciary, as have our inherited legal traditions. In addition, Canada is obligated to maintain an independent judiciary pursuant to the International Covenant on Civil and Political Rights[2], and the principle is further recognized in other international instruments.

One of the essential elements of judicial independence depends upon Parliament's duty to fix and provide judicial salaries, allowances and pensions. This remuneration should provide the element of financial security. The process and institutions whereby judicial compensation is fixed and provided must preclude the arbitrary interference of the executive in the determination and granting of judges' salaries and benefits. The actual monetary amounts involved must be sufficient to permit a judge and his or her family to be and to be perceived by society to be financially secure bearing in mind the statutory requirement that a judge not engage in any occupation or business, but rather devote himself or herself exclusively to judicial duties. Furthermore, the level of salaries and benefits should make appointment to the bench sufficiently attractive to the best qualified lawyers.

It is within this overall context that the Commission has inquired into the adequacy of judges' salaries and benefits.

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1. See *Her Majesty the Queen* v. *Marc Beauregard*, [1986] 2 S.C.R. 56, at pp. 69-76.
2. (1967), 61 A.J.I.L. 870.

III. The Review Process

Section 19.3 of the *Judges Act* provides for the appointment by the Minister of Justice, every third year, of not less than three and not more than five Commissioners "to inquire into the adequacy of the salaries and other amounts payable under [the *Judges Act*] and into the adequacy of judges' benefits generally". The section further provides that within six months of their appointment, the Commissioners must submit a report to the Minister of Justice "containing such recommendations as they consider appropriate". The Minister of Justice causes the report to be laid before Parliament "not later than the tenth sitting day of Parliament after he receives it".

Parliament has therefore legislated a time limit of six months from appointment for the Commissioners to report, as well as a time limit of ten days from receipt for the Minister to table the report in Parliament.

It is our understanding that the underlying purposes of the legislation providing for the review, by Triennial Commissions, of the adequacy of judges' salaries and other amounts payable under the *Judges Act* and of the adequacy of judges' benefits generally, are to reduce the element of partisan politics in the adjustment of judicial compensation and to reinforce the principle of judicial independence by obtaining the recommendations of "persons with experience and expertise after a full and independent review".

Delay in implementing or substantial disregard of the recommendations of a Triennial Commission threatens the integrity of the review process and materially reduces its effectiveness. Regrettable delays in coming to decisions concerning the reports of the Dorfman and de Grandpré Committees and the Lang Commission should be avoided in the future.

We therefore **recommend that Parliament either agree promptly with and implement quickly the individual recommendations of this and subsequent Triennial Commissions or, if necessary, indicate promptly its disagreement with any of such recommendations.**

IV. Judicial Salaries

In addition to a process of careful selection, a vital means of ensuring the competence and independence of the judiciary is the provision in our constitution requiring Parliament to fix and provide the salaries, allowances and pensions of judges. It is equally clear that the need for judicial independence, for attracting to the bench the best qualified lawyers, and for maintaining the morale and financial security of the judiciary means that judges are a distinct group with compensation requirements that set them apart from the public service, with which they are often erroneously compared.

Canada has been fortunate in the quality of its judges, a standard which it is most important to maintain.

Three quotations are as *à propos* today as when they were originally stated. The first, regarding the need for security and independence, is from a speech made by the Lord Chancellor, Viscount Sankey, to the House of Lords in 1933:

> "It is we think beyond question that the Judges are not in the position occupied by civil servants. They are appointed to hold particular offices of dignity and exceptional importance. They occupy a vital place in the constitution of this country. They stand equally between the Crown and the Executive, and between the Executive and the subject. They have to discharge the gravest and most responsible duties. It has for two centuries been considered essential that their security and independence should be maintained inviolate."[1]

The second, taken from the same speech by Viscount Sankey, pertains to the competence of the judiciary:

> "... we cannot avoid expressing a fear that if the salary and prestige of a High Court Judge are to remain as at present, those who will succeed us will probably not, as in the past, be drawn from the leaders of the Bar. There is now so little attraction to them to accept a seat upon the Bench, that it will be impossible to induce leading members of the Bar to make the necessary sacrifice.
>
> "The consequences ... will be far-reaching and detrimental to the true interests of the country."[2]

The third, also concerning competence on the bench, is from an often-quoted portion of a speech reprinted in the Canadian Bar Review of 1927, by the Honourable R.B. Bennett, K.C. (as he then was), later to be Prime Minister:

> "Now if men enjoying large incomes have no ambition to go upon the Bench it follows that you have to fall back upon the second line, and instead of appointing the best men to the judiciary you have recourse to men of indifferent qualifications in their profession ...".[3]

Recent constitutional changes have reinforced this need for our courts to remain attractive to men and women of the highest calibre. The role of the judiciary as a result of the *Canadian Charter of Rights and Freedoms* is of revolutionary significance in the legal history of Canada, and it has thrust our judiciary into the forefront of law-making, alongside Parliament itself.

We consequently reiterate and affirm the comment in the report of the Lang Commission (page 2) that:

> "The place of the judiciary has increased in importance in the light of recent constitutional developments in Canada, particularly the enactment of a Charter of Rights and Freedoms. The judiciary also plays a greater role in shaping our lives because of the growing complexity of our social and economic relationships. The independence of the judiciary is part and parcel of their unique position."

The Supreme Court of Canada, in the recent *Beauregard* decision, affirmed that since as far back as the *Act of Settlement* in 1700, independence of the judiciary has been predicated on both security of tenure and financial security.[4]

These considerations underlie the Commission's examination and conclusions with respect to judicial salaries.

As a result of 1975 amendments to the *Judges Act*, the salary level of superior court puisne judges was made roughly equivalent to the mid-point of the salary range of the most senior level (DM3) of federal deputy minister. This was not intended to suggest equivalence of factors to be considered in the salary determination process, for no other group shares with the judiciary the necessities of maintaining independence and of attracting recruits from among the best qualified individuals in a generally well-paid profession. In 1975, judicial salary equivalence to senior deputy ministers was generally regarded, however, as satisfying all of the criteria to be considered in determining judicial salaries. At that salary level, a sufficient degree of financial security was assured and there were few financial impediments to recruiting well-qualified lawyers for appointment to the bench.

Like the Lang Commission, we believe the 1975 judicial salary scale was satisfactory for that year and we **recommend that a new salary base be established as of April 1, 1986, by applying the Industrial Composite Index to the 1975 salary level for the years 1976 to 1986, capped by a 6% and 5% increase for 1983 and 1984, respectively** (while the *Public Sector Compensation Restraint Act* was in force). The annual salary adjustment provided for by section 19.2 of the *Judges Act*[5] would then apply for 1987 and 1988, to a maximum of 7% in each of those years, following which the 1989 Commission on Judges' Salaries and Benefits would again review salary levels.

Indexing is the only means yet devised to permit Parliament to discharge its constitutional duty under section 100 of the *Constitution Act, 1867* without the presentation of salary amendment bills on each occasion. In addition, it provides a relatively non-contentious means of adjusting judicial salaries between parliamentary action on Triennial Commission recommendations.

The income of judges has failed to keep pace with other groups in our society. The importance of calculating a base salary which is fair to judges cannot be over-emphasized, since successive annual shortfalls in income are built in and compounded if either the original or a subsequent base salary is lower than it should be. The Lang Commission made a calculation error in applying the Industrial Composite Index for the years 1976 to 1983 to the 1975 base salary of $53,000. The April 1, 1985, base salary figure for superior court puisne judges should have been $123,400, rather than $119,000 (see Appendix "C", submitted in evidence by the Joint Committee on Judicial Benefits, which states the accurate calculation for 1985 to be $123,500. This Commission arrives instead at a 1985 corrected figure of $123,400). On the basis of our recommendation to apply the Industrial Composite Index to the 1975 salary (of $53,000) for each of the years 1976 to 1986 (capped at 6% and 5% for 1983 and 1984), the salary calculations in Column 4 of the following table result.

1 Year	2 Actual	3 % change in industrial composite	4 Salary calculation[6] in accordance with industrial composite index
1975	$ 53,000[7]	—	—
1976	53,000	14.17	$ 60,500
1977	55,000	12.14	67,800
1978	57,000	9.61	74,300
1979	57,000	6.16	78,800
1980	70,000	8.65	85,600
1981	74,900	10.08	94,200
1982	80,100	11.93	105,400
1983	84,900	9.99 (6% cap)	111,700
1984	89,100	7.37 (5% cap)	117,200
1985	105,000	5.31	123,400
1986	108,700	3.53	127,700

The recommended levels of salary as of April 1, 1986 are therefore as follows:

Judges, Federal Court of Canada and Superior Courts – $127,700
Chief Justices and Associate Chief Justices, Federal Court of Canada and Superior Courts – $139,700
Judges, Supreme Court of Canada – $151,700
Chief Justice of Canada – $163,800

These recommended salaries for the Federal Court of Canada and superior court Chief Justices and Associate Chief Justices, and for the Judges and Chief Justice of the Supreme Court of Canada, would restore the relationships which existed in 1975 *vis-à-vis* the salary of Federal Court of Canada and superior court puisne judges (then $53,000, now recommended to be $127,700 as of April 1, 1986).

The Commission has independent knowledge of eminently qualified lawyers who have declined appointment to the bench due to the loss of income that would result. If implemented, these recommended salaries would satisfy to a much greater extent the dual requirements of ensuring financial security for the judiciary and attracting well-qualified lawyers to the bench. The Burns Report on Executive Compensation in the Public Service (May, 1985)[8], which dealt with rates of pay and conditions of service for managers in the federal public service, recommended salary ranges at the senior deputy minister level of between $106,500 (minimum) and $132,500 (maximum), effective April 1, 1985.

The Peat Marwick Compensation Study undertaken for the federal Department of Justice in 1985 (portions of which are reproduced below) surveyed associates and partners of law firms (75% of the

sample) and lawyers of corporations and municipal and provincial governments (25% of the sample). The Peat Marwick Study indicates that the average income (including salary, bonuses and the value of stock (for in-house corporate counsel) or share of profits (for law firm partners)) for lawyers called to the bar between 1960 and 1964 (the years of call of lawyers likely to be approached currently for appointment to the bench) was $124,548 in 1985:

Total Average Income by Year of Call to Bar for Associates/Partners for all Sectors

Year Admitted to the Bar	Average Income	(sample size)
1970-1974	$100,789	(457)
1965-1969	106,206	(194)
1960-1964	124,548	(140)
1955-1959	124,493	(125)
1954 and earlier	102,457	(117)

The Peat Marwick Study also shows that the average income for partners (called to the bar between 1960 and 1964) surveyed in large law firms (defined as 20 or more lawyers) was $155,056 in 1985, which is significantly more than we are recommending be paid to judges as of April 1, 1986:

Average Share of Profits per Partner by Year of Call to Bar for Large Law Firms (20 or more lawyers)

Year Admitted to the Bar	Share of Profits	(sample size)
1970-1974	$121,725	(63)
1965-1969	136,537	(34)
1960-1964	155,056	(30)
1955-1959	151,060	(22)
1954 and earlier	120,161	(30)

The Commission has considered the current salaries of judges in the United Kingdom, as well as the recently proposed (January, 1987) salary increases of federal judges in the United States. We feel that comparisons with British or American judicial salaries are not particularly helpful because of differences in economic and social conditions and fluctuating exchange rates.

The Lang Commission recommended that this Commission address the issue of regional and cost of living variations for judicial salaries. Having considered the matter, we are not disposed to recommend any changes.[9]

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1. Parliamentary Debates, Lords, 1932-33, Vol. 88, p.1209 (July 27, 1933).
2. *Ibid.*, p. 1211.
3. (1927) 5 Can. Bar Rev. 272, at p. 272.
4. *Supra.*, at pp. 74-75.
5. We note that the salary adjustment formula based on the Industrial Composite will have to be modified in view of the discontinuance of the publication of that index by Statistics Canada. We should mention that the Industrial Aggregate Index has already been adopted, by statutory amendment, in lieu of the Industrial Composite Index for purposes of adjusting benefits under the *Canada Pension Plan*, and salaries under the *Senate and House of Commons Act* and the *Salaries Act*.
6. Lowered to the closest multiple of one hundred dollars (see *Judges Act*, subsection 19.2(3)).
7. Includes the $3,000 additional salary provided under what was then subsection 20(1) of the *Judges Act* (since repealed).
8. The Advisory Group on Executive Compensation in the Public Service (Mr. James W. Burns, Chairman) presented its Eleventh Report to the Prime Minister on May 13, 1985.
9. Pursuant to subsection 20(2) of the *Judges Act*, the judges on the territorial Supreme Courts receive a non-accountable annual allowance of $4000 as compensation for the higher cost of living in the two territories.

V. Salary Differential between the County and District Courts and the Superior Courts

The Lang Commission recommended that the salaries of judges of the county and district courts "should be calculated by reference to the same formula as has been applied with respect to the salaries of the judges of the superior courts, but that an absolute differential between the county and district courts and the superior courts be fixed at $5,000, such differential to be retained until review by the next triennial commission". Bill C-78 (which received Royal Assent on December 12, 1985 as Chapter 48 of the Statutes of Canada, 1985) gave effect to that recommendation and established as at April 1, 1985, an absolute differential of $5,000 between the salaries of county and district courts and those of superior courts.

Only three provinces, Ontario, British Columbia and Nova Scotia, retain county or district courts. Although the jurisdictional differences between the two levels of courts continue to narrow, the responsibilities of the superior court judges in terms of the subject matter of their jurisdiction and the requirement for travel in the performance of their duties are nevertheless significantly heavier than in the county and district courts. It may be noted that the status of the District Court in Ontario is currently under review as part of Mr. Justice Thomas Zuber's study into the courts of that province, undertaken at the instance of the Attorney General of Ontario. There was no compelling evidence before us and we see no compelling reason to narrow the differential at this time. We therefore **recommend that the present differential of $5,000 be maintained.**

VI. Incidental Allowance

In 1981, subsection 20(1) of the *Judges Act* was amended to provide, with effect from April 1, 1979, an accountable annual allowance for judges in the amount of $1,000, separate from salary, "for reasonable incidental expenditures that the fit and proper execution of his office as judge may require". The allowance applies against the cost of repair and replacement of court attire, the purchase of law books and periodicals, membership in legal and judicial organizations and other similar expenses not recoverable under any other provision of the *Judges Act*.

The inadequacy of the present allowance and the effects of inflation have resulted in the $1,000 maximum being exhausted or even exceeded by many judges. For example, the cost of judicial robes alone (in those provinces where robes are not provided by the provincial authorities) in the first year in office, or periodically thereafter, would exhaust the allowance. Similarly, the purchase of legal texts required by a judge, particularly when the judge is sitting in an outlying judicial centre where the court house library may be less than adequate, could quickly consume a significant portion of the current allowance.

We recommend that the present incidental allowance be increased to $2,500 annually.

VII. Removal Allowances

In 1985, Bill C-78 extended to retiring judges of the Supreme Courts of the Yukon and Northwest Territories, and to the surviving spouse and children of judges of those courts who die in office, the benefit of the removal allowance in order to facilitate their relocation to one of the provinces (*Judges Act*, paragraphs 21.1(1)(c) and (d)). The concurrent addition of subsection 21.1(1.1) of the *Judges Act* placed a limitation upon eligibility for the use of the removal allowance by a judge of a northern Supreme Court. In order to qualify for the allowance, the judge must have been resident in one of the provinces before his or her appointment to the northern Court.

The 1985 amendments were designed to alleviate possible hardship for any judge, or the family of any judge, in the circumstances provided for therein. Substantially the same potential hardship could occur with respect to a judge (or the family of a judge) who is required to move to Ottawa upon appointment, and who does not want to remain in Ottawa after retirement (or after the judge's death). The judge and his or her family are currently entitled to a removal allowance upon appointment pursuant to section 21.1. However, they are not entitled to an allowance should they wish to leave Ottawa and live in another part of Canada upon retirement or death.

Federal legislation compels the judges of three section 101 [1] courts (the Supreme Court of Canada, the Federal Court of Canada and the Tax Court of Canada) to reside in or near the National Capital Region (with the exception of judges on the Tax Court of Canada who were formerly members of the Tax Review Board resident outside of the National Capital Region). In order to alleviate the potential hardship referred to above, we **recommend that the removal allowance be extended to retiring judges of the three section 101 courts who are required upon appointment to change their place of residence to the vicinity of the National Capital Region, and as well to the surviving spouses and eligible children of these judges who die in office.** We also **recommend that the removal allowance permit such retiring judges, and/or the family, to move to a place of residence in any one of the ten provinces or two territories.** We further **recommend that there be a requirement whereby all removal allowances must be utilized within a reasonable period following the relevant event.**

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1. *Constitution Act, 1867.*

VIII. Judicial Annuities

Section 23 of the *Judges Act* provides for the granting of an annuity equal to two-thirds of the salary annexed to the office of a judge at the time of his or her resignation, removal or ceasing to hold office, to a judge who

(a) has continued in office for fifteen years and has attained the age of 65, if he or she resigns his or her office;

(b) has continued in office for fifteen years but has not attained the age of 65, if his or her resignation is conducive to the better administration of justice or is in the national interest;

(c) resigns or is removed as a result of becoming afflicted with a permanent disability preventing him or her from executing his or her office; or

(d) has reached the age of mandatory retirement, if he or she has held office for at least ten years.

If a judge reaches mandatory retirement age without having served for ten years, he or she is entitled to an annuity pro-rated on the basis of years of completed service (to the nearest one-tenth of a year) as a proportion of ten years.

In addition, rather than leave the bench after attaining the minimum qualification for retirement, the option exists pursuant to sections 20.01, 20.1 and 20.2 of the *Judges Act*, for a judge to elect supernumerary status. Under this arrangement, a puisne judge who qualifies for non-mandatory retirement and who is entitled to an annuity may opt instead to continue in office (with a reduced caseload in most instances) while remaining entitled to full salary until the judge is mandatorily retired or otherwise leaves the bench, at which time he or she would receive the annuity. A Chief Justice or Associate Chief Justice who elects supernumerary status is entitled to receive only the salary of a puisne judge during his or her supernumerary service, although the subsequent annuity is based on the salary then in effect of a Chief Justice or Associate Chief Justice. The supernumerary programme promotes continuity on the bench, while making available positions which could not otherwise be filled until the mandatory retirement of the incumbents. All federally appointed judges except the members of the Supreme Court of Canada are entitled to opt for supernumerary status. Approximately 10% of the federally appointed bench are currently supernumerary judges.

A. Judges' Contributions towards Annuities

The *Beauregard* decision of the Supreme Court of Canada has settled the constitutional authority of Parliament to require reasonable contributions by judges towards their annuities. This authority is not unlimited, as the following passage from the reasons of the Chief Justice of Canada in the *Beauregard* judgment makes clear:

> "The power of Parliament to fix the salaries and pensions of superior court judges is not unlimited. If there were any hint that a federal law dealing with these matters was enacted for an improper or colourable purpose, or if there was discriminatory treatment of judges *vis-à-vis* other citizens, then serious issues relating to judicial independence would arise and the law might well be held to be *ultra vires* s.100 of the *Constitution Act, 1867*."[1]

Pursuant to section 29.1 of the *Judges Act*, enacted in 1975, judges appointed before February 17, 1975 contribute towards their statutory annuities (which include annuities for surviving spouses and

children) at a rate of 1½% of salary.[2] Judges appointed after February 16, 1975 contribute towards their statutory annuities at a rate of 6% of salary, and they contribute a further 1% of salary towards the cost of the indexation of their statutory annuities. The *Beauregard* decision also upheld the legality of this distinction in contribution rates which is based on date of appointment.

The Dorfman Committee recommended that judges should not be required to contribute towards their statutory annuities, and that all judges should be required to contribute towards the cost of supplementary retirement benefits (indexation) at a rate of 1% of salary. The de Grandpré Committee recommended that judicial annuities, including survivors' benefits, and supplementary retirement benefits should all be provided without any judicial contributions. The Lang Commission recommended that all judges should contribute at a rate of 1½% of their salaries towards their statutory annuities, and, one may assume, that they not contribute at all towards the cost of supplementary retirement benefits. Furthermore, the de Grandpré and Lang reports recommended the retroactive reimbursement (with interest) to judges of all (de Grandpré) or a portion (Lang) of the pension contributions theretofore paid. In their written and oral submissions to this Commission, both the Joint Committee on Judicial Benefits and the Canadian Bar Association recommended the repeal of the requirement for contributions to the cost of annuities and the retroactive reimbursement of contributions made since 1975.

We do not agree with the recommendations of the earlier Committees and Commission and the submissions made to us with respect to judges' contributions. Judicial pensions are not like ordinary pensions insofar as they are designed to enhance the independence and competence of the bench and to compensate in part for the high or potential earning power which lawyers forego upon acceptance of judicial appointment. The judicial annuity itself constitutes an important element in guaranteeing independence. However, the question of some judicial contribution to the costs of the pension is an entirely different matter, and we do not consider the issue of reasonable contributions to annuities as in any way affecting the independence of the judiciary. In the case of *The Judges* v. *Attorney-General for Saskatchewan*, the Judicial Committee of the Privy Council decided that a general income tax which charges the official incomes of judges on the same footing as the incomes of other citizens did not interfere with the "independence nor any other attribute of the judiciary".[3] We believe that the same principle applies with respect to contributions to judicial annuities.

The Commission is of the view that the unique character of the judiciary, and in particular the requirement for independence, is currently reflected in a number of aspects relating to judicial pensions. These include the relatively short qualifying period (as little as 10 years in some circumstances in order to qualify for full pension), the supernumerary option, the full indexation of benefits, the fact that the annuity is calculated on the basis of the salary at the time of retirement (and not on the basis of the average salary over a number of years of service immediately prior to retirement), and the disability provision in paragraph 23(1)(c) of the *Judges Act*. We feel that as this Commission is recommending judicial salaries which are more closely related to those earned by others of similar importance and stature, we must, in order to be consistent, also consider the non-salary benefits, which are unquestionably justified, in the same manner. We would emphasize that the Commission regards its recommendations with respect to salaries and pensions to be integrated components of a comprehensive compensation package. These components are seen by us to be interlinked, and the adoption of only part or parts would distort the philosophy and intent of the recommendations as a whole.

There appears to be little actuarial basis for the contribution rates presently in effect (see Appendix "D").[4] Their significance is essentially historical. The following table, prepared for the Commission in December, 1986 by the Chief Actuary of the Department of Insurance of Canada, shows, for annuities under the *Judges Act*, sample normal actuarial costs (consisting of the total of a judge's own contributions and the government contributions required to pay for that judge's pension)

expressed as a percentage of that judge's entire salary earned during his or her total years on the bench. The table is based on the actuarial assumptions set out below it.

Annuities pursuant to the Judges Act

Sample normal actuarial costs (contribution rates) expressed as a percentage of salary (payable from appointment to retirement)

Retirement Age		Years of Service 10	15	20	25	30	35
75	M	68.8	46.8	35.5	28.2	23.0	18.9
	F	70.2	46.0	33.7	26.2	21.0	17.3
70	M	79.6	53.1	39.3	30.6	24.5	20.1
	F	84.4	54.7	39.7	30.5	24.4	20.0
65	M	—	60.2	43.7	33.5	26.7	21.9
	F	—	63.0	45.3	34.7	27.6	22.6
60*	M	—	—	47.8	36.6	29.1	—
	F	—	—	50.3	38.4	30.5	—

* Illustrative of costs of retirement option not now available under the *Judges Act* but recommended in Item B below.

Actuarial Assumptions:

Rate of interest: 6.5%
Rate of increase in salaries: 5%
Rate of increase in Consumer Price Index (Indexing): 3.5%
Retirement Age: Age at which pension commences, provided a judge has survived in office to this age without becoming disabled
Mortality: 1983 GAM Table (rated up 3 years for disabled)
Disability: Probability assumed equal to rate of mortality
Proportion married: varying by age (e.g. 0.96 at 50 and 60, 0.73 at 70, 0.51 at 80 and 0.25 at 90)
Relative ages of spouses: Wife three years younger
Remarriage: Ignored
Children: Ignored
Withdrawal: 0.5% up to age 55 and 0.0% thereafter
Minimum (Return of Contributions) benefit: Ignored

Benefits Valued:

(a) annuity on disability or retirement equal to two-thirds final salary;

(b) annuity to surviving spouse equal to one half the annuity that was payable to a deceased judge or would have been payable if he or she had become entitled to a full annuity at the date of death;

(c) return of 7% contributions with interest at 4% on death without survivor prior to retirement age, or on resignation from office without entitlement to a pension.

The above table indicates, for example, that a male judge who retires at age 75 after 20 years of service will thereafter receive a full pension equal to two-thirds of his final salary, the full cost of which would have required a contribution of 35.5% of the salary he received in each of his 20 years on the bench. Of that 35.5% contribution required each year, the judge would have contributed 7% (assuming he was appointed after February 16, 1975) and the Crown would have contributed 28.5% in absolute terms.[5] In other words, even the higher judicial contribution rate of 7% of salary, while significant, is a modest contribution indeed in terms of the overall cost of the pension scheme, and seems eminently fair for newly-appointed judges.

We regret the impact which the imposition of judicial contributions has had on judges, yet any partial remedy is likely to create as many inequities as it cures. The unfortunate passage of time has probably rendered a simple solution impractical in any case. In November, 1986, there were 795 judges holding office, of whom 253 (32%) were appointed before February 17, 1975, and are therefore contributing 1½% of salary towards the costs of statutory annuities, and 542 (68%) were appointed after February 16, 1975, and are therefore contributing 6% of salary towards annuities and a further 1% towards supplementary benefits. When these statistics are related to the comparable figures at the time of the de Grandpré Report, when 360 judges (54%) contributed 1½% and 310 judges (46%) contributed 7%, it is evident that the inequities resulting from the "two classes of judges" is being remedied by the passage of time. It should also be mentioned that the present figure for judges contributing 1½% includes virtually all of the approximately 80 supernumerary judges. It is our view that the 1975 decision of Parliament to impose judicial contributions, whereby it created "two classes of judges", and the manner in which it was done, are now history. Parliament has not seen fit to act again notwithstanding the recommendations for change made in the Dorfman, de Grandpré and Lang reports and all things considered, maintenance of the *status quo*, as time removes the present anomaly, may well be the most realistic approach.

For the above reasons, we do not adopt the recommendations of the past with respect to lowering to 1½%, or to any other rate, or abolishing altogether, judicial contributions towards the cost of statutory annuities and supplementary benefits, or reimbursing contributions.

We therefore **recommend that the present rates of judicial contributions towards the costs of both statutory annuities and supplementary benefits (indexing) be maintained (including the February 16-17, 1975 contribution rate differential) and that contributions of the judiciary not be reimbursed.**

We note that significant future relief from the double taxation aspect of judicial contributions toward the cost of annuities has now been provided by amendment to the *Income Tax Act* (see Item G below).

B. "Rule of Eighty"

In the past, appointments of superior, district and county court judges were customarily made from the ranks of more senior members of the bar, i.e., in the age range of 50 years and upwards. However, commencing about 20 years ago, there began a practice of appointing on occasion younger men and women to judicial office, e.g., persons in their late 30's and early 40's. This has been well received and has produced a group of younger people who are able to give periods of long service to the judiciary and meet the increasing demands of the busy court systems. By all appearances, this practice has been successful but because of the longer period of service, some problems have appeared respecting supernumerary status and annuities. The present law was apparently premised on the expectation of more senior appointments and does not readily take into account those who accept an appointment to the bench in the early forties or younger. The Commission believes that

long periods of service, regardless of age, merit certain entitlements. The Commission also holds the view that age 60 should be the minimum age at which a judge qualifies for a full pension of two-thirds of salary.

We accept that professional "burnout" may manifest itself within the judiciary, and that retirement from the bench, but not election of supernumerary status, should be available as a solution for judicial "burnout".

We therefore **recommend that retirement at full pension, but not the election of supernumerary status, be permitted at the following combinations of age and years of service on the bench: 60 years of age and 20 years of service; 61 and 19; 62 and 18; 63 and 17; and 64 and 16.**

Age 75 is fixed by subsection 99(2) of the *Constitution Act, 1867* (as amended in 1960) for the retirement of judges of provincial superior courts, and a recent court decision[6] has held that the current requirement that judges of the Federal Court retire at age 70 was unconstitutional. We therefore **recommend that for the sake of equality and uniformity, the mandatory retirement age be standardized at 75 for all federally appointed judges, and that the mandatory retirement age of judges on the Federal Court of Canada, the Tax Court of Canada and the county and district courts be raised to 75.** We also **recommend that the supernumerary provisions be standardized for all federally appointed judges except the members of the Supreme Court of Canada.**

C. Adequacy of Pension Benefits

Paragraph 25(1)(a) of the *Judges Act* provides an annuity to the surviving spouse of a judge who dies, equal to one-third of the judge's salary, and paragraph 25(1)(b) of the Act provides an annuity to the surviving spouse of a retired judge who was in receipt of an annuity at the time of death, equal to 50% of the amount of the retired judge's annuity. Both these types of survivor's pensions are indexed pursuant to the provisions of the *Supplementary Retirement Benefits Act* (R.S.C. 1970, c. 43 (1st Supp.)).

In order to better reflect current values of survivors' benefits provided by many private pension plans and by recent federal and provincial pension benefits and standards legislative reforms, we **recommend that the surviving spouse of a judge who dies in office be entitled to an annuity equal to 40% (instead of one-third) of the judge's salary at the time of death.** We further **recommend that the surviving spouse of a retired judge who dies while in receipt of a pension be entitled to an annuity equal to 60% (instead of 50%) of the amount of the retired judge's pension at the time of death.** The benefits of eligible children should be adjusted accordingly. These increases in survivors' benefits should apply only with respect to survivors not in receipt of benefits upon the coming into force of the necessary amendments to the *Judges Act*.

There are provisions in the *Judges Act* (paragraphs 29.2(1),(2) and (3)) and in the *Supplementary Retirement Benefits Act* (section 6) for the return of pension contributions to a judge. Pursuant to paragraph 29.2(4)(b) of the *Judges Act*, interest is payable upon the return of contributions made under that Act, at 4% compounded annually. We believe this rate has been unfair and can be unrealistic. We **recommend that compound interest be payable upon the return of all contributions at a rate to be varied as and when necessary to reflect the "prescribed rates".**[7] If no prescribed rate was in effect, then a rate comparable to the average equivalent yield obtainable during each year on 90-day Government of Canada Treasury Bills should be used.

When a judge dies while in office, a lump sum "gratuity" equal to one-sixth of the judge's annual salary at the time of death is payable immediately to the surviving spouse pursuant to Treasury

Board Minute 757563 dated May 18, 1978. **We recommend that this gratuity be made a statutory entitlement by provision in the *Judges Act*.**

The Commission was invited to examine the proportion of salary (presently two-thirds) which forms the basis for the annuity. In view of the many favourable aspects of existing judicial annuities referred to previously, and of the recommendations we are making for several other improvements, we do not recommend an increase in the basic pension.

D. Early Retirement and Pro-rated Annuities

Judicial annuities are part of an overall compensation plan designed to reinforce the principle of judicial independence and to help make appointment to the bench attractive to the best qualified among lawyers. Notwithstanding that appointments at younger ages are now being made, appointment still generally comes later in life, often in the fifties (see Appendix "E"), and therefore a relatively short qualification period for full pension entitlement is necessary. All judges are precluded from receiving other salary or remuneration, or engaging in any occupation or business, while holding judicial office (section 36 and subsection 38(1) of the *Judges Act*). Moreover, it is considered inappropriate for a retired judge to return to active practice in the courts. Society, and particularly the bench and bar, have traditionally taken the view that appointment to the bench should continue to be regarded as the culmination of a lawyer's career, and not as a stepping stone to career advancement. For this reason, judicial pensions should provide sufficient income to obviate the need of a retired judge to return to full practice, but at the same time they should not have the effect of encouraging the early retirement of a serving judge. Furthermore, with respect to a lawyer who was appointed to the bench at a comparatively young age, he or she would probably not have had the opportunity, prior to appointment, to build up a retirement fund. Consequently, the eventual judicial pension must be sufficiently generous as it may be the only source of income upon retirement from the bench.

These considerations appear to be the foundation of the pension provisions presently contained in the *Judges Act*, and underlie the recommendations contained in this report.

It would not be inconsistent with these principles, and it would add an element of fairness to the situation, if the *Judges Act* were to entitle a judge to some benefit, other than the simple return with interest of accumulated pension contributions, should he or she choose to depart from the bench without otherwise qualifying for an annuity. Neither the Joint Committee on Judicial Benefits nor the Standing Committee of the Canadian Bar Association made submissions on this point, but it is specifically referred to in paragraph 2(b) of the Commission's Terms of Reference and was the subject of submissions by individuals.

We consequently **recommend that a judge who has held office for at least ten years and who retires without being entitled to an annuity should have the option of receiving an annuity, payable at age 65 should he or she retire before that age.** We further **recommend that the annuity of a judge who has served for ten or more but fewer than 15 years, when payable, should be pro-rated on the basis of years of service as a proportion of 15, with the resulting fraction being multiplied by two-thirds of the salary which the judge was earning when he or she retired.** We **recommend that in the case of this deferred annuity payable to a former judge at age 65, there be no "banking" or accumulation of indexing credits during the deferment, and that indexing commence only when the annuity becomes payable.** We **recommend that should the former judge die before attaining the age of 65, his or her surviving spouse should be entitled to an annuity equal to 60%** (consistent with our recommendation in Item C above) **of the annuity that the former judge would have received, payable when the former judge would have reached age 65.**

In our view, the deferral of the pension would discourage early retirement and the ten-year minimum qualifying period would provide an incentive for a judge to remain in office. The recommendations also reflect the spirit of recent federal and provincial legislative reforms with respect to pension benefits and standards.

E. Judges of the Supreme Court of Canada

Judges of the Supreme Court of Canada cannot elect to hold office as supernumerary judges. We appreciate that supernumerary status is inappropriate for the judges of our highest court, and inconsistent with the Court's unique role as the final arbiter of the country's legal values.

Nevertheless, we feel that by themselves, the retirement provisions of the *Judges Act* do not offer sufficient flexibility to the members of the Court, and that an additional retirement option should be made available. Because of the immense workload of Supreme Court judges combined with the heavy responsibility inherent in membership on that Court, we believe that a retirement option exercisable upon attaining the minimum age of 70, if the judge has served for at least ten years on the Supreme Court, is reasonable.

A Supreme Court judge who chooses to retire under this proposed provision should not be placed at a disadvantage in comparison to a judge on a lower court who elects to hold office as a supernumerary judge. Thus, a Supreme Court judge who takes up this option should be entitled to an income which is not significantly lower than what his or her salary would have been had he or she remained on the Supreme Court, and this income should continue until the judge reaches age 75, which would otherwise have been his or her mandatory retirement age.

The Commission therefore **recommends that a judge who has served on the Supreme Court of Canada for at least ten years and has attained the age of 70 years be eligible to retire and receive an income payable until age 75 equal to 90% of the salary that would have been received from time to time by that judge had he or she remained on the Supreme Court, and thereafter an indexed annuity equal to two-thirds of the salary annexed to the office formerly held by that judge at the time he or she attains the age of 75.**

In the event of the death of the retired judge before attaining age 75, 54% (60% of 90%, if our recommendation under Item C above is adopted) of the salary annexed to the office formerly held would be payable to the retired judge's surviving spouse, with the appropriate percentage for eligible children, until the time when the judge would have reached age 75, and thereafter the survivors' pensions would be in accordance with the applicable general rules.

F. Guaranteed Annuity Option

Should a judge in receipt of an annuity die, his or her surviving spouse is entitled to an annuity equal to one-half (or 60%, if our recommendation in Item C above is implemented) of the judge's annuity, pursuant to paragraph 25(1)(b) of the *Judges Act*. Thus, should the former judge die soon after commencing retirement, the retirement benefits to which he or she would have been entitled had he or she survived would be halved (or reduced by 40% under our recommendation) in the hands of the surviving spouse, with the former judge having received very little of what otherwise would have been payable. We believe this could result in unfair situations arising, particularly where the judge contributed towards the costs of the judicial annuity over very many years on the bench and then died shortly after retiring. We therefore **recommend that a retiring judge be given the one-time option of receiving an actuarially reduced annuity for a ten-year guaranteed period.** Following the expiry of the ten-year guaranteed period, a surviving spouse's pension would be reduced to 50% (or

60% pursuant to our recommendation in Item C above) of the initial (actuarially reduced) pension amount. The initial pension amount would continue for a ten-year period in favour of a surviving spouse, eligible children or the estate, as the case may be.

Our recommendation for a guaranteed annuity option is patterned after a benefit commonly available under private pension plans. There would be no additional cost to the public treasury for an option of this kind. A current sample of an actuarially reduced pension amount (based for illustration purposes on a purely hypothetical standard pension of $1,000 per month and assuming the adoption of our recommendation in Item C above), at different age levels, is shown below:

Age at Retirement and Monthly Amounts at Retirement

	Judge age 65 Spouse age 62	Judge age 70 Spouse age 67	Judge age 75 Spouse age 72
a) Joint Life reducing by 40% on judge's death	$1,000.00	$1,000.00	$1,000.00
b) Actuarial Equivalence of a joint life pension reducing by 40% at the later of the judge's death and the expiry of a 10-year guaranteed period	980.95	966.37	940.71

Note: The above figures are illustrative and based upon the 1983 Basic Mortality Table with projection scale G and 1983 year of purchase with interest at 10.75% for 20 years and 6% thereafter with a loading for expenses. This is an individual annuity purchase basis current at the time of our report. The figures also assume that the judge is a male with a spouse three years younger. The amounts will vary with assumptions used and ages and sex of the lives involved. The initial pension amount will continue for a 10-year period even if both lives die immediately.

G. Double Taxation

The salary deduction for a judge's contribution to judicial annuities and supplementary benefits is deemed to be contributed to or under a registered pension fund or plan, pursuant to subsection 29.1(3) of the *Judges Act*. For 1986 and subsequent taxation years, the entire contribution ($7,609 as of April 1, 1986, for a superior court judge appointed after February 16, 1975) is deductible in calculating federal income tax.[8]

Prior to 1986, only a portion of the contribution, namely $3,500, was deductible in calculating taxable income even though the annuity itself is fully taxable as income in the hands of the judge when received. Thus, the judge is potentially subject to double taxation on the amount of the contributions made in years prior to 1986 that exceeded $3,500 per annum; i.e., the amount is taxed as income as part of his or her salary in the year in which it was earned, despite the fact it was never received, and payments of the annuity are taxed again when received.

With the release of Interpretation Bulletin No. IT-167R5 in 1985, Revenue Canada's administrative practice was changed to permit a taxpayer to carry forward any registered pension plan contributions in excess of $3,500 made in respect of current service, and to deduct such excess in subsequent taxation years at the maximum rate of $3,500 per year, i.e., subject to the standard

$3,500 limit. Thus, over time, all pre-1986 pension contributions that were previously ineligible for deduction will be deductible from taxable income, as long as there are sufficient years in which actual contributions are less than $3,500.

This administrative position permitting a carry forward of excess contributions will be of assistance only where contributions for a subsequent year are less than $3,500. Thus, judges will not be able to avail themselves of this deduction for amounts carried forward from years prior to 1986 while they are making current contributions in excess of $3,500 to the pension plan, since both current service contributions and excess contributions carried forward must be aggregated for purposes of the $3,500 limit. It may therefore be some years after judges have been taxed on pre-1986 excess contributions before these contributions become fully deductible, i.e., only during retirement.[9] In fact, where death occurs before all amounts have been deducted, some amounts may never be deductible.

In view of the substantial measure of relief from double taxation afforded by the 1986 amendment for post-1985 contributions and the possibility of relief, though limited, pursuant to Interpretation Bulletin No. IT-167R5 for pre-1986 contributions, we do not feel it necessary to make any recommendation for further change in the *Income Tax Act* with respect to pension contributions at this time. We note however that provincial tax legislation may have to be amended where applicable to achieve the same result.

We understand that in addition to the above, judges are treated for certain income tax purposes as self-employed professionals, and consequently are now permitted to deduct up to $7,500[10] for contributions to their Registered Retirement Savings Plans, with no reduction for amounts contributed towards the cost of judicial annuities and supplementary benefits pursuant to subsections 29.1(1) and (2) of the *Judges Act*.

H. Indexation of Annuities

The indexing of judicial salaries is provided for in the *Judges Act*. On the other hand, judicial annuities, including those of surviving spouses and eligible children, are indexed pursuant to the *Supplementary Retirement Benefits Act*. That Act applies to many branches of the public service, as well as to judges, and it is administered by the President of the Treasury Board.

The separate status of the judiciary, the principle of judicial independence and the unique recruiting requirements of the judiciary, all suggest that the indexation of judicial annuities should likewise be provided for in the *Judges Act*, so that it be distinct from the indexation of other public service pensions and to place all legislative provisions relating to judges in the one statute. For the judiciary, and uniquely so, indexation of annuities is a factor that should be regarded within the overall constitutional guarantees of security of tenure and security of salary and pension. We therefore **recommend that the provisions for indexing judicial annuities, including those of surviving spouses and eligible children, and for the return of judges' contributions, should be transferred to the *Judges Act* from the *Supplementary Retirement Benefits Act***.

We do not accept the suggestion that judicial annuities be linked to the salary of a judge current from time to time, with the exception of the income which we recommend (in Item E above) be payable to former members of the Supreme Court of Canada between the ages of 70 and 75 who elect to retire following ten years of service on that Court.

I. Suspension of Surviving Spouse's Annuity on Remarriage

Subsection 25(3) of the *Judges Act* suspends the pension entitlement of a surviving spouse during his or her remarriage. In the event of a decree of nullity or divorce, or upon the death of the spouse of the remarriage, payment of the annuity would be resumed by virtue of subsection 25(3.1).

We feel, as did the de Grandpré Committee, that subsection 25(3) "underscores a socially inappropriate and invidious policy". Furthermore, failure to amend the *Judges Act* to permit continuation of survivors' benefits upon remarriage may raise serious legal questions involving equality rights. We therefore **recommend the repeal of subsections 25(3) and 25(3.1) of the *Judges Act*.**

We also **recommend the removal of the words "is unmarried" from paragraph 25(1.3)(b) of the *Judges Act*,** thereby eliminating the criterion of a child's marital status in the consideration of eligibility for benefits.

We further **recommend that consequential amendments be made in the terms of eligibility for applicable group insurance, medical and other benefit plans.**

---

1. *Supra.*, at p. 77. The *Beauregard* case dealt with the constitutionality of the *Judges Act* amendments requiring judges to contribute towards the costs of their pensions, and the legality of requiring higher contributions from judges appointed after the date of first reading of the amendments.

2. In a letter dated February 17, 1975, sent by the then Minister of Justice to inform all judges already in office of the decision of the Government to implement the new policy, he referred to their contribution of 1½% as being "in respect of the cost of the improved annuities for widowed spouses and other dependants". Subsection 29.2(2) of the *Judges Act* (which provides for the return of this (1½%) contribution to the judge should the spouse pre-decease him or her and should children (if any) no longer be eligible for annuities) confirms this limited purpose of the 1½% contribution made by judges appointed before February 17, 1975.

3. (1937), 53 T.L.R. 464, at p. 466.

4. The pension plan established by the *Judges Act* is among those of which the Chief Actuary is required to conduct periodic actuarial reviews and to file cost certificates and valuation reports pursuant to the *Public Pensions Reporting Act* (S.C. 1986, c. 16).

5. We have noted that in the *Beauregard* decision (*supra.*, at p. 95), the pleadings of the parties, as amended by the agreed statement of facts, are quoted as follows:

> "Upon his retirement, the Plaintiff's minimum contribution of $3,815.00 per annum with interest compounded annually using a rate of interest of ten per cent per annum will have established in the hands of the defendant a capital sum in the order of $400,000.00 an amount more than sufficient to take care of the Plaintiff's retirement annuities and the Plaintiff's supplementary retirement benefits."

Respectfully, we are curious as to whether the calculations and conclusion had ever been actuarially tested.

6. *Addy* v. *The Queen in Right of Canada* (1985), 22 D.L.R. (4th) 52 (F.C. (T.D.)).

7. See Part XLIII (sections 4300 - 4301) of the *Income Tax Regulations.*

8. Paragraph 8(1)(m) of the *Income Tax Act* permits a deduction for $3,500 of contributions to a registered pension plan. Paragraph 8(1)(m.1) of the *Act* permits the deduction of non-voluntary contributions in excess of $3,500 to a defined benefit registered pension plan, effective for 1986 and subsequent years.

9. Revenue Canada has stated in its Interpretation Bulletin that an excess contribution may be deducted in a subsequent year (subject to the $3,500 limit) even if employment ceases prior to that year.

10. The limit of $7,500 will increase for 1988 and subsequent years if current proposals to amend the *Income Tax Act* are enacted.

IX. An Alternative for Fixing Judicial Compensation

Both the Joint Committee on Judicial Benefits and the Canadian Bar Association recommended to the Commission that action be taken with a view to the adoption of a formula for fixing judicial compensation similar to that in place with respect to the federal judiciary in the Australian state of New South Wales. Under the "New South Wales formula", a remuneration tribunal is required to make an annual determination with respect to the remuneration to be paid to office-holders specified in the governing legislation, which includes judges. This determination takes effect after a fixed period unless either House of Parliament passes a resolution disallowing it. This procedure is known as proceeding by way of a negative resolution.

No evidence was submitted to the Commission on the experience, favourable or otherwise, of the "New South Wales formula", particularly as it applies to the judiciary. A particular concern we have is as to the nature of the relationship between the Houses of the New South Wales Parliament and the remuneration tribunal.

The Commission is of the view that to apply the formula in Canada would in any case quite likely require an amendment to section 100 of the *Constitution Act, 1867*, which requires Parliament to fix and provide the salaries, allowances and pensions of essentially all federally appointed judges. We are not convinced that the "New South Wales formula" would be such an improvement on the present system as to justify a constitutional amendment.

X. Taxation of New Judges

Identification of Problem

Newly appointed judges often face a serious cash flow problem in the two years following their appointment to the bench. The problem stems from the substantial income tax payments that may be required in those two years with respect to professional income earned prior to appointment. The problem is often compounded by actual or deemed dispositions that are unavoidable when a new judge withdraws from practice. Previously untaxed professional income would include not only professional income for the year, but also earnings from the last fiscal year-end to the date of appointment (" 'stub' period earnings"), unbilled work in progress ("WIP") and the 1971 accounts receivable reserve. Taxable capital gains and recaptured capital cost allowance on assets deemed disposed of and taxable capital gains on the disposition of the partnership interest may also result in a substantial income inclusion for tax purposes. Since these inclusions are added to judges' salaries, they are effectively taxed at the highest tax rate. The tax payments may, in some cases, exceed the net remuneration received by the judge. Appendix "F" illustrates this problem with an Ontario example that is not untypical.

Any solution must recognize that the problem is not strictly a taxation problem (although it does result in all previously untaxed amounts being taxed at the new judges' highest tax rate), but rather a cash flow problem arising from the acceleration of the recognition of income for tax purposes without a corresponding increase in cash flow. As a result, reducing the tax liability through tax shelters or Registered Retirement Savings Plans (RRSP) which require a cash outflow are not viable alternatives. While a reduction in the tax rate applicable to certain types of professional income which are included in taxable income in the year of or the year following appointment might mitigate the problem, the real solution would appear to lie in the deferment of the recognition of income to future taxation years.

Possible Solutions

Several possible solutions have been identified. The first three alternatives have been proposed in the past and may not address the real issue. These proposals together with their principal disadvantages are summarized below:

1. Tax Rate Reduction or Tax Credits

Proposal —

Certain types of deferred professional income which cause the "bunching up" of income in the year of or year following appointment would be subject to tax at one-half the normal rate of tax. Alternatively, the income would be subject to the normal rates of tax but a tax credit would be allowed to effectively reduce the tax to one-half of what would otherwise be payable on those sources of income.

Disadvantage —

While this will reduce the amount of tax payable and hence reduce the cash flow problem, it will not eliminate the problem altogether.

2. "Rollover" to RRSP

Proposal —

It has been suggested that certain amounts of deferred professional income be treated as a "retiring allowance" and therefore qualify for a transfer to a RRSP. Consequently, $3,500 per year of previous "employment" (partnership) could be transferred to a RRSP and escape immediate taxation.

Disadvantage —

Since the problem is normally one of cash flow, many newly appointed judges would not have sufficient funds to make a large RRSP contribution unless they had significant other capital.

3. Average the Tax Over the Previous Five Years

Proposal —

The aggregate of certain components of deferred professional income would be notionally added back to the incomes of the new judge for the five years prior to appointment and the additional taxes likewise aggregated as a tax liability. A variation on this proposal would be to compute the average rate of tax over the previous five years and apply this average to the previously untaxed professional income.

Disadvantage —

These proposals would not be of much benefit to most lawyers as they would likely be at the peak of their career during those years and would be taxed at the top marginal rate. Therefore averaging the income would not produce significant benefits and would do little or nothing to alleviate the cash flow problem. Also, those lawyers who had taken advantage of tax shelters might receive a benefit not available to others.

4. Permit Judges to Report Salary on a Fiscal-Year Basis

Proposal —

A new judge would have the option of reporting his or her salary income on a fiscal-year basis with the year-end corresponding to the fiscal period of the professional practice from which he or she retired. Assuming that the judge was a partner in a firm with a January 31 year-end, he or she would be allowed to report salary on that basis as well.

Disadvantage —

This would solve the major cash flow problem, but there would still be tax on unbilled WIP, 1971 receivable reserve and the other special inclusions which would come into income in the year following appointment to the bench. To be totally effective, this solution would have to be combined with a reserve, similar to that described below. This in turn might add undue complexity.

Recommended Solution — Tax Deferral over a Number of Years

The recognition of certain types of income could be deferred over a period of, say, 15 years. This could be accomplished by having all amounts included in income under the general rules and

allowing a judge to claim a special reserve for deferred professional income, 1/15th of which must be included in income each year. The balance of the reserve in the year of death or retirement from the bench would be included in income in that year, and in the case of death, subsection 159(5) of the *Income Tax Act* ("*ITA*") would be made applicable, allowing payment over a maximum period of ten years. This proposal would dramatically reduce the cash flow problems in the first few years and would spread the tax burden over 15 years. The structure could be as follows:

1. Income Inclusions

It is therefore **recommended that a judge be required to include in income in the year of appointment all of the following amounts relating to his or her professional practice:**

(i) professional income for the fiscal year (i.e., repeal s. 24.1 of the *ITA*)

(ii) professional income for the "stub" period (i.e., provide that s. 99(2) and s. 96(1.1) of the *ITA* not be applicable to judges in year of appointment)

(iii) unbilled work in progress (special rules would be required to include this in income in the year of appointment rather than in the subsequent year)

(iv) 1971 Accounts Receivable reserve (special rules would be required to include this in income in the year of appointment rather than in the subsequent year)

(v) taxable capital gains and recaptured capital cost allowance on professional assets deemed disposed of

(vi) taxable capital gain on disposition of partnership interest, and

(vii) judge's salary for calendar year.

2. Special Reserve

A special reserve could then be claimed for such of the above amounts as are listed below. 14/15ths of such amounts would qualify for a special reserve in the year of appointment, with 1/15th included in income in each of the following 14 years. The balance of the reserve would be included in income in the year of death or retirement should either occur within 15 years of appointment.

3. Qualifying Amounts for Reserve

The amounts which would qualify for the special reserve would be:

(i) a portion of the professional income for the fiscal year of the professional practice computed as follows:

$$\text{Income for fiscal year} \times \frac{\text{\# of months in calendar year while a judge}}{\text{\# of months in fiscal year}}$$

(This is similar to s. 24.1 of the *ITA*.)

(ii) professional income for the "stub" period

(iii) unbilled work in progress

(iv) 1971 Accounts Receivable reserve

(v) taxable capital gains and recaptured capital cost allowance on professional assets deemed disposed of, and

(vi) taxable capital gain on disposition of partnership interest.

Rationale

The solution recommended above would, as illustrated in Appendix "G", alleviate the cash flow problem in the early years and spread the tax burden over the 15 years following appointment, which is the usual minimum period in office before retirement at full pension. This solution would also ensure that over an extended period, all income is taxed at the judge's normal tax rates.

Information Booklet

We recommend that the Minister of Justice have prepared an information booklet outlining the tax treatment of lawyers' income on their appointment to the bench together with details of judges' salaries, allowances, pensions and other benefits, and that such booklet be provided to all those who are approached to accept judicial appointment.

XI. Conclusion

Judges are not in a position to make representations to or bargain with government for adjustments to their salaries, allowances and pensions. For this reason, Parliament has provided for the appointment of Triennial Commissions. Two of the purposes of Triennial Commissions are to reduce the element of partisan politics in the adjustment of judicial compensation and to reinforce the principle of judicial independence. The Commissions make recommendations to the Minister of Justice, not as it were on the judges' behalf, but certainly mindful of the needs of an independent judiciary.

It is in this context that we have made the recommendations contained herein, and we reiterate our concern that this report be read as a whole and that the main thrust of our recommendations not be so altered as to seriously compromise their interrelationships.

XII. Summary of Recommendations

1. That Parliament either agree promptly with and implement quickly the individual recommendations of this and subsequent Triennial Commissions or, if necessary, indicate promptly its disagreement with any of such recommendations (Chapter III).

2. That a new judicial salary base be established as of April 1, 1986, by applying the Industrial Composite Index to the 1975 salary level for the years 1976 to 1986, capped by a 6% and 5% increase for 1983 and 1984, respectively. The recommended salary levels as of April 1, 1986 are as follows (Chapter IV):

Judges, Federal Court of Canada and Superior Courts —	$127,700
Chief Justices and Associate Chief Justices, Federal Court of Canada and Superior Courts —	$139,700
Judges, Supreme Court of Canada —	$151,700
Chief Justice of Canada —	$163,800

3. That the differential of $5,000 between the salaries of judges of county and district courts and those of superior courts be maintained (Chapter V).

4. That the incidental allowance be increased to $2,500 annually (Chapter VI).

5. That the removal allowance be extended to retiring judges of the three section 101 courts who are required upon appointment to change their place of residence to the vicinity of the National Capital Region, and as well to the surviving spouses and eligibile children of these judges who die in office (Chapter VII).

6. That the removal allowance permit these retiring section 101 judges, and/or the family, to move to a place of residence in any one of the ten provinces or two territories (Chapter VII).

7. That there be a requirement whereby all removal allowances must be utilized within a reasonable period following the relevant event (Chapter VII).

8. That the present rates of judicial contributions towards the costs of both statutory annuities and supplementary benefits (indexing) be maintained (including the February 16-17, 1975 contribution rate differential) and that contributions of the judiciary not be reimbursed (Chapter VIII, Item A).

9. That retirement at full pension, but not the election of supernumerary status, be permitted at the following combinations of age and years of service on the bench: 60 years of age and 20 years of service; 61 and 19; 62 and 18; 63 and 17; and 64 and 16 (Chapter VIII, Item B).

10. That the mandatory retirement age be standardized at 75 for all federally appointed judges, and that the mandatory retirement age of judges on the Federal Court of Canada, the Tax Court of Canada and the county and district courts be raised to 75 (Chapter VIII, Item B).

11. That the supernumerary provisions be standardized for all federally appointed judges except the members of the Supreme Court of Canada (Chapter VIII, Item B).

12. That the surviving spouse of a judge who dies in office be entitled to an annuity equal to 40% of the judge's salary at the time of death (Chapter VIII, Item C).

13. That the surviving spouse of a retired judge who dies while in receipt of a pension be entitled to an annuity equal to 60% of the amount of the retired judge's pension at the time of death (Chapter VIII, Item C).

14. That compound interest be payable upon the return of all contributions at a rate to be varied as and when necessary to reflect the "prescribed rates", and that if no prescribed rate was in effect, then a rate comparable to the average yield obtainable during each year on 90-day Treasury Bills should be used (Chapter VIII, Item C).

15. That the lump sum gratuity payable to the surviving spouse of a judge who dies in office be made a statutory entitlement by provision in the *Judges Act* (Chapter VIII, Item C).

16. That a judge who has held office for at least ten years and who retires without being entitled to an annuity should have the option of receiving an annuity, payable at age 65 should the judge retire before that age (Chapter VIII, Item D).

17. That the annuity of a judge who has served for ten or more but fewer than 15 years, when payable, should be pro-rated on the basis of years of service as a proportion of 15, with the resulting fraction being multiplied by two-thirds of the salary which the judge was earning when he or she retired (Chapter VIII, Item D.)

18. That in the case of a deferred annuity payable to a former judge at age 65, there be no "banking" or accumulation of indexing credits during the deferment, and that indexing commence only when the annuity becomes payable (Chapter VIII, Item D).

19. That should the former judge die before attaining the age of 65, his or her surviving spouse should be entitled to an annuity equal to 60% of the annuity that the former judge would have received, payable when the former judge would have reached age 65 (Chapter VIII, Item D).

20. That a judge who has served on the Supreme Court of Canada for at least ten years and has attained the age of 70 years be eligible to retire and receive an income payable until age 75 equal to 90% of the salary that would have been received from time to time by that judge had he or she remained on the Supreme Court, and thereafter an indexed annuity equal to two-thirds of the salary annexed to the office formerly held by that judge at the time he or she attains the age of 75 (Chapter VIII, Item E).

21. That a retiring judge be given the one-time option of receiving an actuarially reduced annuity for a ten-year guaranteed period (Chapter VIII, Item F).

22. That the provisions for indexing judicial annuities, including those of surviving spouses and eligible children, and for the return of judges' contributions, should be transferred to the *Judges Act* from the *Supplementary Retirement Benefits Act* (Chapter VIII, Item H).

23. That subsection 25(3) of the *Judges Act*, which suspends a surviving spouse's annuity in the event of remarriage, and subsection 25(3.1) be repealed (Chapter VIII, Item I).

24. That the criterion of a child's marital status be eliminated in the consideration of eligibility for benefits (Chapter VIII, Item I).

25. That amendments consequential to the two recommendations immediately above be made in the terms of eligibility for applicable group insurance, medical and other benefit plans (Chapter VIII, Item I).

26. That a judge be required to include in income in the year of appointment certain amounts relating to his or her professional practice, and that a special reserve should then be claimable for 14/15ths of such amounts in the year of appointment with 1/15th included in income in each of the following 14 years (Chapter X).

27. That an information booklet be prepared and provided to all those who are approached to accept judicial appointment (Chapter X).

All of which is respectfully submitted this 27th day of February, 1987.

H. Donald Guthrie, Chairman

Edward H. Crawford

Jeannine M. Rousseau

Eldon M. Woolliams

APPENDIX "A"

Commission on Judges' Salaries and Benefits

CANADA

OTTAWA, K1A 1E3

Commission sur le traitement et les avantages des juges

1986 COMMISSION ON JUDGES' SALARIES AND BENEFITS

NOTICE

This Commission was appointed on September 1, 1986 by the Minister of Justice and Attorney General of Canada, pursuant to section 19.3 of the Judges Act, to inquire into the adequacy of the salaries and other amounts payable under the Act to federally-appointed judges and into the adequacy of federally-appointed judges' benefits generally, including the granting of annuities provided to judges and to their surviving spouses and children.

The Commission invites written submissions in either official language concerning the matters within the Commission's terms of reference. Written submissions must reach the Commission by October 20, 1986, in eight copies. A party intending to file a written submission with the Commission may also request an opportunity to make a presentation at an oral hearing. The Commission must be notified by October 10, 1986 of the party's desire to appear at an oral hearing and if so, of the city and official language in which the presentation will be made. A party filing a written submission need not request to appear at an oral hearing, and any such request will not be considered if the party has not filed a written submission by October 20, 1986.

The Commission proposes to conduct oral hearings, if required, in the following cities and on the following dates:

Halifax	October 23
Vancouver	October 29
Edmonton	October 30
Montreal	November 21
Ottawa	November 27 and 28

Copies of the Commission's terms of reference are available upon request.

1986 Commission on Judges' Salaries and Benefits,
110 O'Connor Street
Room 1114
Ottawa, Ontario
K1A 1E3

H. Donald Guthrie, Q.C.
Chairman

Commission on Judges' Salaries and Benefits

CANADA

Commission sur le traitement et les avantages des juges

OTTAWA K1A 1E3

COMMISSION DE 1986 SUR LE TRAITEMENT ET LES AVANTAGES DES JUGES

AVIS

La Commission de 1986 sur le traitement et les avantages des juges a été instituée le 1er septembre 1986 par le ministre de la Justice et procureur général du Canada, en application de l'article 19.3 de la Loi sur les juges. Elle a pour mandat de déterminer si le traitement et les avantages des juges nommés par le gouvernement fédéral, et plus spécialement si les pensions auxquelles ceux-ci, leur conjoint et leurs enfants ont droit, sont satisfaisants.

La Commission invite toute personne intéressée à lui soumettre par écrit ses vues sur les sujets qu'elle a reçu pour mission d'examiner. Ces interventions doivent prendre la forme d'un document écrit, établi dans l'une ou l'autre des deux langues officielles, et être déposées auprès de la Commission en huit exemplaires au plus tard le 20 octobre 1986. Quiconque dépose un tel document écrit peut en outre demander à la Commission d'être entendu par celle-ci. En pareil cas, il convient d'aviser la Commission au plus tard le 10 octobre 1986 du souhait de présenter des observations orales, ainsi que de la ville et de la langue officielle dans lesquels cette intervention aura lieu. Il convient de noter que le dépôt de documents écrits n'oblige nullement à présenter les observations orales. Quoi qu'il en soit, nul ne se verra accorder l'autorisation d'exposer verbalement ses vues à moins d'avoir remis un document écrit à la Commission avant la date limite du 20 octobre 1986.

La Commission, s'il y a lieu, tiendra des audiences dans les villes et aux dates qui suivent :

Halifax	23 octobre
Vancouver	29 octobre
Edmonton	30 octobre
Montréal	21 novembre
Ottawa	27 et 28 novembre

Il est possible d'obtenir le texte définissant le mandat de la Commission sur simple demande.

Commission de 1986 sur le traitement et les avantages des juges
110, rue O'Connor
Bureau 1114
Ottawa (Ontario)
K1A 1E3

Le président de la Commission

H. Donald Guthrie, c.r.

APPENDIX "B"

LIST OF WRITTEN SUBMISSIONS

1. The Joint Committee on Judicial Benefits of the Conference of Chief Justices and Chief Judges and the Canadian Judges Conference
2. Justices of the Supreme Court of Ontario
3. The Honourable Mr. Justice Patrick T. Galligan (Supreme Court of Ontario (High Court of Justice))
4. The Honourable Mr. Justice Doane Hallett (Supreme Court of Nova Scotia (Trial Division))
5. The Honourable Mr. Justice Donald S. Thorson (Supreme Court of Ontario (Court of Appeal))
6. The Honourable Mr. Justice Thomas G. Zuber (Supreme Court of Ontario (Court of Appeal))
7. The Honourable Judge Fernand L. Gratton (District Court of Ontario)
8. The Honourable Judge Hugh M. O'Connell (District Court of Ontario)
9. The Canadian Bar Association Standing Committee on Pensions for Judges' Spouses and Judges' Salaries
10. The Law Society of Alberta (R.P. Fraser, Q.C., President)
11. The Nova Scotia Barristers' Society (L.K. Evans, Q.C., President)
12. Le Barreau du Québec (Mtre Serge Ménard, Bâtonnier, and Mtre Louis-Philippe de Grandpré, Q.C.)
13. The Patent Examiners' Group of the Professional Institute of the Public Service of Canada
14. M.F. Murphy, Calgary, Alberta
15. Winnifred M. Rogalsky, Chilliwack, British Columbia

APPENDIX "C"

PIONEER GRAIN COMPANY, LIMITED

HONOURABLE OTTO LANG, P.C., Q.C.

THE PIONEER

RICHARDSON BUILDING
ONE LOMBARD PLACE, WINNIPEG, MANITOBA R3B 0X8
TELEPHONE (204) 986-5861 TELEX 075-7814

February 27, 1986

Mr. Justice A. R. Philp
Judges Chambers
Law Courts
WINNIPEG, Manitoba
R3C OV8

Dear Allen:

On the basis of your research and the information you have obtained about the calculations made for the Commission which I chaired, I am convinced that you are right in your conclusions. In short, the philosophy and logic which our Commission applied in its report should have led to a different base salary figure for 1985. It would appear that your figure based on revised and accurate calculations of $123,500 for 1985 is correct.

Yours sincerely,

Otto Lang
Executive Vice-President

/lb

APPENDIX "D"

Valuation Summary of Annuities under the Judges Act as of December 31, 1985 (Including Indexation Pursuant to SRBA)

ACTIVES

	Males		Females		Both Sexes	
Contributors	754		45		799	
Total Payroll	$ 77,372,560		$ 4,705,330		$ 82,077,890	
Judges' Contributions*	3,910,132	(5.1%)	288,734	(6.1%)	4,198,866	(5.1%)
Government Costs	17,425,957	(22.5%)	753,335	(16.0%)	18,179,292	(22.2%)
Normal Cost	21,336,089	(27.6%)	1,042,069	(22.1%)	22,378,158	(27.3%)
Actuarial Liability	145,333,135		5,237,699		150,570,834	

* Judges' contributions expressed as a percentage of payroll represent a weighted average of the 1.5% and 7.0% judicial contribution rates.

PENSIONERS

	Number	Annual Benefit	Actuarial Liability
Healthy Pensioners (all males)	131	$ 8,191,284	$ 67,703,045
Disabled Pensioners (" ")	25	1,554,240	18,405,266
Spouse Pensioners (all females)	224	6,114,180	62,909,410
Children Pensioners (both sexes)	13	86,280	141,615
Total Pensioners	393	15,945,984	149,159,336

	Total
Total Members	1,192
Total Actuarial Liability	$299,730,170

Summary of Methodology and Assumptions used for the above valuation of benefits:

A. *Valuation Method:*

The accrued benefit cost method (or the unit credit method) was used to value the benefits under the *Judges Act*.

However, in respect of the judges' disability and pre-retirement survivor benefits (available without any service requirement), only the current year cost of those benefits was included in the normal cost (on one-year term basis). Therefore, the actuarial liability ignores those benefits.

B. *Assumptions:*

1. Interest: 6.5%

2. Indexation: 3.5%

3. General Salary Increases: 5%

4. Promotional Salary Scale: None assumed, since the only promotions available are elevation to a higher court or to a position of Chief or Associate Chief.

5. Funding age: 75, or earlier for those judges retiring according to the assumed retirement incidence rates.

6. Rates of decrement for active contributors (derived from actual experience between 1981 and 1985, except for mortality):
   (a) Return of contributions: assumed at 0.005 from age 30 to 54 inclusive and at 0.0 thereafter
   (b) Disability: assumed at 0.001 from age 30 to 60, increasing by .002 each year up to 0.019 at age 69, and at 0.0 thereafter
   (c) Mortality: GAM83 (different for males and females)
   (d) Retirement: assumed at 0 from age 30 to 64, at 0.02 from age 65 to 69, at 0.12 at age 70 (reflecting this compulsory retirement age for some judges), and at 0.08 from age 71 to 74, all remaining judges retiring at 75. Since these rates are applied only to those judges with at least fifteen years of service, the experience rates derived from the entire population of judges were adjusted to be applicable to only those with this service qualification, in order to reproduce the same expected number of judges retiring.

7. Accrual period for retirement benefits: for purposes of the accrued benefit method, retirement benefits are assumed to accrue over the period from appointment age to assumed retirement age, varying according to the assumed retirement incidence rates (for entry age below 65, full 2/3 pensions accrue equally over each year of the applicable period; for entry age over 65, the same is true but for pro-rated benefits only).

8. Rates of decrement for pensioners:
   (a) Mortality: GAM 83 (rated up 3 years for disabled)
   (b) Remarriage of surviving spouses: rates varying by age at widowhood and duration since widowhood (e.g. in fifth year of widowhood that began at age 40: 0.023 for widows and .069 for widowers)

9. Proportions of deceased contributors leaving eligible spouse and/or children and average age of spouses and average duration of children's benefits: all varying by age at death, as shown in the following sample:

Age at Death	Proportion Leaving Eligible Spouse	Average Age of Spouse		Average Number of Eligible Children		Average Remaining Duration of Eligibility
		Female	Male	Male Contributor	Female Contributor	
40	0.919	38	42	1.385	2.103	17
50	0.963	47	52	0.893	1.635	12
60	0.964	56	62	0.210	0.866	8
70	0.729	65	72	0.032	0.040	0
80	0.513	73	82	0.003	0.000	0
90	0.251	78	92	0.000	0.000	0

10. Residual benefit: ignored (considered negligible).

APPENDIX "E"

Average Age of Judicial Appointees on Assuming Office

1970	—	47	1978	—	49
1971	—	48	1979	—	50
1972	—	47	1980	—	50
1973	—	49	1981	—	50
1974	—	50	1982	—	51
1975	—	48	1983	—	49
1976	—	50	1984	—	51
1977	—	47	1985	—	52

Source: Commissioner for Federal Judicial Affairs

APPENDIX "F"

Taxation of New Judges

Illustration of Cash Flow Problems

Assumptions:

1. Lawyer is a member of a partnership with a January 31 year-end. His or her share of the partnership income for the year ended January 31, 1987 is $150,000. Lawyer claimed a reserve for 1971 accounts receivable of $10,000 on January 31, 1986.

2. Lawyer is appointed to the bench on June 1, 1987, at a salary of $107,500 per annum. $7,500 per annum is deducted at source under section 29.1 of the *Judges Act* in respect of his or her pension and is fully deductible from taxable income. Tax deductions of $36,000 are also made. Lawyer retires from law firm as of May 31, 1987. The partnership agreement specifies that the partnership is not dissolved on the retirement or admission of partners.

3. Lawyer's income for the stub period of February 1 to May 31, 1987 is $50,000. Lawyer has $25,000 of unbilled work in progress (WIP) on May 31, 1987. The partners will elect to treat these items as income to the lawyer rather than as capital.

4. Lawyer has drawn against his or her partnership income in order to make the necessary income tax instalment payments and to meet living expenses.

5. Lawyer's capital account is $50,000 which is equal to its adjusted cost base. Lawyer has borrowed $40,000 against his or her other partnership interest and this loan must be repaid on withdrawal from the firm.

6. Lawyer requires after-tax income of $56,000 to meet living expenses.

Illustration of Cash Flow Problems of New Judges

	June 1 to December 31, 1987	1988	1989	1990 and thereafter
Cash Flow				
From partnership				
Unbilled WIP	$ 25,000			
Capital interest	50,000			
Less: Loan repayment	(40,000)			
	10,000			
Net from partnership	35,000	—	—	—
Salary, net of tax	$37,000	$64,000	$64,000	$64,000
	72,000	64,000	64,000	64,000
Less:				
Tax instalments and final tax payments (see next page)	(12,000)	(13,000)	(79,000)	—
Available for living expenses	$60,000	$51,000	$(15,000)	$64,000
Required for living expenses	$33,000	$56,000	$56,000	$56,000
Excess (Shortfall)	$27,000	$(5,000)	$(71,000)	$ 8,000
Cumulative excess (Shortfall)	$27,000	$22,000	$(49,000)	$(41,000)
				reducing by $8,000 per year

Calculation of Taxable Income

Taxes Payable and Timing of Taxes Payable

	In year of Appointment 1987	Following Year 1988
Taxable Income		
Income for year ended January 31 (election made under s. 24.1 of the *ITA*)	$ 62,500	$ 87,500
Income for "stub" period (s.96.(1.1) of the *ITA* applies)		$ 50,000
Unbilled WIP		$ 25,000
1971 Accounts Receivable Reserve		$ 10,000
Capital	—	—
Judge's salary (net after pension contributions)	58,000	100,000
	$120,500	$272,500
Tax	$ 49,000	$128,000
Tax withheld on salary	(21,000)	(36,000)
Tax instalment	(16,000)	—
Balance to be paid out of judge's salary	$ 12,000	$ 92,000
To be paid as instalments on		
June 30, 1987	$ 4,000	
September 30, 1987	4,000	
December 30, 1987	4,000	
March 30, 1988		$ 3,250
April 30, 1988	0	
June 30, 1988		3,250
September 30, 1988		3,250
December 30, 1988		3,250
April 30, 1989		79,000
	$ 12,000	$ 92,000

APPENDIX "G"

Taxation of New Judges

Illustration of Recommendation

	1987	1988	1989	1990
Cash Flow				
From partnership				
Unbilled WIP	$ 25,000			
Capital interest	50,000			
Less: Loan repayment	(40,000)			
	10,000			
Net from partnership	35,000			
Salary, net of tax	37,000	$ 64,000	$ 64,000	$ 64,000
	72,000	64,000	64,000	64,000
Less:				
Tax instalments	(18,000)	(8,000)	(8,000)	(8,000)
(see next page)				
Available for living expenses	54,000	56,000	56,000	56,000
Required for living expenses	33,000	56,000	56,000	56,000
Excess	$ 21,000	$ nil	$ nil	$ nil
Cumulative excess	$ 21,000	$ 21,000	$ 21,000	21,000

Taxation of New Judges
Illustration of Recommendation

	1987	1988 and thereafter
Taxable Income		
Professional income for year	$150,000	
Professional income for "stub" period	50,000	
Unbilled WIP	25,000	
1971 Accounts Receivable reserve	10,000	
	235,000	
Judge's salary	58,000	100,000
	293,000	100,000
Add: Judge's Reserve claimed in prior year	—	161,000
Deduct: Judge's Reserve end of year (note)	(161,000)	(149,500)
Taxable income	$132,000	$111,500
Tax, say	$ 55,000	$ 44,000
Tax withheld on salary	(21,000)	(36,000)
Tax instalment made	(16,000)	—
	$ 18,000	$ 8,000
To be paid as follows:		
June 30, 1987	$ 6,000	
September 30, 1987	6,000	
December 30, 1987	6,000	
March 30, 1988		$ 2,000
April 30, 1988	0	
June 30, 1988		2,000
September 30, 1988		2,000
December 30, 1988		2,000
April 30, 1989		0
	$ 18,000	$ 8,000

Note:
Amounts included in Judge's Reserve

○ Professional income for year	$ 87,500
○ Professional income for "stub" period	50,000
○ Unbilled WIP	25,000
○ 1971 Accounts Receivable reserve	10,000
	$172,500

Reserve in 1987 14/15 x $172,500 = $161,000
1988 13/15 x $172,500 = $149,500

TAB 22

Department of Justice Canada / Ministère de la Justice Canada

REPORT AND RECOMMENDATIONS OF THE 1989 COMMISSION ON JUDGES' SALARIES AND BENEFITS

March 5, 1990
Submitted to the Minister of Justice of Canada

Canada

REPORT AND RECOMMENDATIONS OF THE 1989 COMMISSION ON JUDGES' SALARIES AND BENEFITS

March 5, 1990

Submitted to the Minister of Justice of Canada

Cat. No. J42-4/1990

ISBN 0-662-57343-9

Pursuant to Section 26 of the *Judges Act*, I am now tabling the Report and Recommendations of the 1989 Commission on Judges' Salaries and Benefits, appointed on September 30, 1989 to inquire into the adequacy of the salaries and other amounts payable under the *Act* and into the adequacy of judges' benefits generally. In accordance with Standing Order 32(5) of the House of Commons, this document shall be deemed to be referred to the Standing Committee on Justice and Solicitor General.

The Honourable Kim Campbell
Minister of Justice and
Attorney General of Canada

REPORT AND RECOMMENDATIONS OF THE 1989 COMMISSION ON JUDGES' SALARIES AND BENEFITS

TABLE OF CONTENTS

1989 COMMISSION ON JUDGES' SALARIES AND BENEFITS

I. BACKGROUND

Members: E. Jacques Courtois, Q.C. (Chairman)
Laura Legge, Q.C.
David B. Orsborn, C.A., LL.B.

Executive Secretary: Harold Sandell

Terms of Reference

The 1989 Commission on Judges' Salaries and Benefits was appointed on September 30, 1989, by the Honourable Doug Lewis, then Minister of Justice and Attorney General of Canada, pursuant to subsection 26(1) of the *Judges Act*, and was given the following terms of reference:

> "The Commission shall, pursuant to section 26 of the *Judges Act*, inquire into the adequacy of the salaries and other amounts payable under the *Act* and into the adequacy of judges' benefits generally.
>
> Without restricting the generality of the foregoing, the Commission shall inquire into and report upon the following matters:
>
> 1. The adequacy of salaries and allowances paid under the *Act*, having due regard for the adjustments made by R.S.C. 1985, c. 39 (3rd Supp.) and S.C. 1989, c. 8.
> 2. The granting of annuities provided to judges pursuant to section 42 of the *Act*.
> 3. The granting of annuities and other payments provided to surviving spouses and children having due regard for the adjustments made by R.S.C. 1985, c. 39 (3rd Supp.) and S.C. 1989, c. 8.

The Commission shall report to the Minister of Justice upon the results of the inquiry in accordance with subsection 26(2) of the *Act*."

The Commission held meetings and/or hearings as follows:

October 19, 1989 — Montreal
November 9, 1989 — Montreal
November 21 and 22, 1989 — Ottawa
December 14, 1989 — Montreal
January 11, 1990 — Montreal
January 31, 1990 — Montreal
March 5, 1990 — Ottawa

Notice to the Public, Submissions and Hearings

The Commission published a Notice in newspapers across Canada, inviting written submissions and presentations at oral hearings, in either official language, concerning matters within the Commissions terms of reference. Specific notice was also sent to a number of interested organizations and individuals, including all of the provincial and territorial Ministers of Justice and Attorneys General.

Copies of the Notice in English and French are reproduced as Appendix "A". The Notice was published in the following newspapers:

St. John's Evening Telegram
Charlottetown Guardian
La Voix Acadienne
Halifax Chronicle-Herald
Le Courrier
Saint John Telegraph Journal
L'Acadie Nouvelle
Le Soleil
La Presse
Montreal Gazette
Le Droit
Ottawa Citizen
The Globe and Mail
The Lawyers Weekly
Winnipeg Free Press
La Liberté
Regina Leader Post
Saskatoon Star-Phoenix
Journal L'Eau vive

Calgary Herald
Edmonton Journal
Le Franco-Albertain
Vancouver Province
Le Soleil de Colombie
The Yellowknifer
Whitehorse Star

Written submissions were received from the groups and individuals listed in Appendix "B".

Hearings took place on November 21 and 22, 1989, at the Canada Council Hearing Room, 99 Metcalfe Street, Ottawa, and on January 31, 1990, at the offices of Stikeman, Elliott, 3900-1155 René-Lévesque Blvd. West, Montreal. The following organizations, with the counsel indicated, made oral presentations to the Commission:

1. The Joint Committee on Judicial Benefits of the Conference of Chief Justices and Chief Judges and the Canadian Judges Conference.

Counsel Appearing: D.M.M. Goldie, Q.C., Vancouver
Bernard A. Roy, Q.C., Montreal
Wilfrid Lefebvre, Q.C., Montreal

2. The Canadian Bar Association Standing Committee on Pensions for Judges' Spouses and Judges' Salaries.

Counsel Appearing: George A. Allison, Q.C., Montreal
(Chairman of the Standing Committee)
J. Patrick Peacock, Q.C., Calgary
(Immediate Past President of the Association)

Previous Committees and Commissions

The 1989 Commission on Judges' Salaries and Benefits is the sixth federal committee or commission established in recent years to inquire into and make recommendations to the Minister of Justice with respect to judicial salaries, allowances and benefits. It is the third "Triennial Commission" appointed pursuant to subsection 26(1) of the *Judges Act*.

In September, 1974, a Special Advisory Committee, under the chairmanship of the Honourable Mr. Justice Emmett Hall, a retired member of the Supreme Court of Canada, reported to the Minister. The Dorfman Committee on Judicial Compensation and Related Matters, under the chairmanship of Irwin Dorfman, Q.C., (hereinafter, the

"Dorfman Committee") reported to the Minister in November, 1978. The de Grandpré Committee on Judicial Annuities, under the chairmanship of Jean de Grandpré, Q.C. (hereinafter, the "de Grandpré Committee"), reported in December, 1981. The 1983 Commission on Judges' Salaries and Benefits, which was the first of the "Triennial Commissions" established pursuant to subsection 26(1) of the *Judges Act*, was chaired by the Honourable Otto Lang, P.C., Q.C. (hereinafter, the "Lang Commission") and it reported to the Minister in October, 1983. The 1986 Commission on Judges' Salaries and Benefits, which was the second "Triennial Commission", was chaired by H. Donald Guthrie, Q.C. (hereinafter, the "Guthrie Commission") and reported to the Minister in February, 1987.

Acknowledgements

The Commission wishes to thank Pierre Garceau, Q.C., Commissioner for Federal Judicial Affairs, and the members of his staff, in particular Louise Fox and Wayne Osborne, for their support throughout the Commission's mandate.

We also thank G.W. Poznanski, F.C.I.A., F.S.A., Chief Actuary, P. Treuil, F.C.I.A., F.S.A., Director, Government Services Division and L.M. Cornelis, F.C.I.A., F.S.A., Chief, Government Services Division, of the Office of the Superintendent of Financial Institutions, for their valuable actuarial assistance.

The Commission is most grateful to Harold Sandell of the Department of Justice in Ottawa who was assigned to it as Executive Secretary. Mr. Sandell's enthusiasm and dedicated service as well as encyclopedic knowledge of the Canadian legal and judicial systems rendered our task much easier and made it possible for us to complete our mandate ahead of schedule.

II. INTRODUCTION

The primary role of the judiciary is to safeguard the supremacy of the law and to uphold its rule. In recognition of that role, the authors of our Constitution, as well as the executive and legislative branches of government and the courts, have been conscious of the need to preserve and enhance the independence of judges. As a result, the principle of the independence of the judiciary is imbedded in the constitutional history of Canada. The *Constitution Act, 1867* specifically acknowledges the concept of judicial independence through the Judicature provisions respecting tenure and removal and the fixing and payment of salaries, annuities and allowances.

The seemingly ponderous process and elaborate institutions whereby judicial salaries, allowances and annuities are considered, determined, fixed, provided and paid, serve a very clear purpose. They are all designed to preclude the arbitrary interference of the executive branch in the matter of judicial compensation — a statutory and independent Triennial Commission to make recommendations to the Minister of Justice of Canada following its thorough examination of the subject; Parliament having to enact public statutes, as required by our Constitution, to fix and provide judges' salaries, allowances and annuities; and the Office of the Commissioner for Federal Judicial Affairs, another creature of statute, to administer to, and pay, the judges and their survivors. They all underscore and reflect the fundamental importance which both the principle and the manifestations of judicial independence hold in our free and democratic society.

This report and our recommendations to the Minister of Justice comprise the first step in the process. We have undertaken this task mindful of the important objective which it serves.

III. THE REVIEW PROCESS

Section 26 of the *Judges Act* requires the Minister of Justice of Canada in every third year to appoint not fewer than three and not more than five commissioners "to inquire into the adequacy of the salaries and other amounts payable under [the] Act and into the adequacy of judges' benefits generally." The commissioners are required within six months of their appointment to submit a report to the Minister "containing such recommendations as they consider appropriate". The Minister is required to "cause the report to be laid before Parliament not later than the tenth sitting day of Parliament after he receives it."

Parliament has seen fit to impose strict time limits on the entire Triennial Commission process. In our view this reflects Parliament's intentions with regard to the significance of that process and distinguishes it from non-statutory *ad hoc* commissions generally. The imposition of statutory time limits also underscores the critical importance of a prompt response to the recommendations of Triennial Commissions.

The acknowledged purpose of the Triennial Commission review process is to reduce the element of partisan politics in the determination and adjustment of judicial compensation and to reinforce the principle of judicial independence by obtaining the recommendations of persons with experience and expertise after a full and independent review. The process was instituted by Parliament in the public interest, which can only be fulfilled if the process functions effectively. Failure to adopt the recommendations of Triennial Commissions renders meaningless this independent review process and effectively thwarts the evident intention of Parliament.

The alternative to the Triennial Commission process would be to put the judiciary in the invidious position of having to engage in constant and ongoing discussions with the executive branch of government with regard to salaries and benefits. As that same branch of government also appears frequently in the courts, the mere appearance of the judges having to negotiate with the executive branch would only erode the public perception of judicial independence.

The Triennial Commission review process cannot prevent this highly undesirable result if the reports of the Commissions are not acted upon positively and with reasonable promptness. Otherwise, the integrity of the review process would be irreparably impaired, which not only would defeat the intentions of Parliament, but also would seriously attenuate the only means available to judges to provide meaningful input with regard to compensation and benefit issues.

We therefore **recommend that the Minister of the day promptly inform Parliament, following the tabling of the reports of this and subsequent Triennial Commissions, as to what action the Government proposes to take with regard to their individual recommendations or, if necessary, indicate promptly the Government's disagreement with any of such recommendations.**

We also **recommend that whenever legislation to implement Triennial Commission recommendations is introduced in Parliament, the Government should proceed to ensure its quick passage.**

IV. JUDICIAL SALARIES

The meaning of "judicial independence" is evolving. Traditionally, it has referred to the independence of the individual judge to decide an issue without interference, which implies that once a lawyer has been appointed to the bench he or she severs all professional and partisan connections and, dependent for a livelihood on his or her judicial salary alone, the judge dispenses justice with no other consideration than the facts as he or she finds them and the law as he or she interprets it.

Recently, the Supreme Court of Canada has broadened the meaning of the principle to include not only conditions which apply to judges as individuals, but conditions which must apply to the bench as a whole in its relationships to the other institutions of authority, in particular the executive and legislative branches of government.

The Court identified three objective criteria or conditions which it termed essential to the existence of an independent tribunal (in the context of paragraph 11(d) of the *Canadian Charter of Rights and Freedoms)*. These conditions are security of tenure, financial security and the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of the judicial function.[1] The Court proceeded to define the second of these conditions, financial security, to mean security of salary or other remuneration and, where appropriate, security of pension.[2]

It is clear that financial security is one of the substantive cornerstones of judicial independence and of the public's perception of that independence; and the perception, as we know, is no less important than the independence itself. The Supreme Court of Canada, in the more recent *Beauregard* decision, affirmed this essentiality of financial security to the concept of the independence of the judiciary, and traced its constitutional roots to the *Act of Settlement* of 1701.[3]

The requirement for financial security within the context of judicial independence is apparent in both the design and content of the

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[1] *Valente* v. *The Queen*, [1985] 2 S.C.R. 673.

[2] *Ibid.*, at 704.

[3] *The Queen* v. *Beauregard*, [1986] 2 S.C.R. 56, at 74-75.

compensation scheme for federally appointed judges. The entrenchment, in section 100 of the *Constitution Act, 1867*, of the requirement that Parliament fix and provide the salaries, allowances and pensions of judges, is the most discernible manifestation. Others include the Triennial Commission review process, the statutory annual salary adjustment (section 25 of the *Judges Act*) and the administration of Part I of the *Judges Act* by the Commissioner for Federal Judicial Affairs instead of by the Deputy Minister of Justice (who is also the Deputy Attorney General of Canada).

Another practical aspect of the reality and perception of judicial independence is that the actual monetary amounts involved should be sufficient to preserve the role, dignity and quality of our judges, and to reflect the esteem which the office deserves. A judge and his or her family are entitled to a standard of living commensurate with their position in Canadian society. They must be and be seen by society to be financially secure, particularly in view of the statutory requirement (at section 55 and subsection 57(1) of the *Judges Act*) that a judge devote himself or herself exclusively to judicial duties and not engage in any occupation or business.

Furthermore, the judicial salary and benefit package should serve to make appointment to the bench sufficiently attractive to the best qualified lawyers, and to enhance the morale of those who have accepted appointment.

Both the 1983 (Lang) and 1986 (Guthrie) Commissions recommended that the salary level established by amendments to the *Judges Act* in 1975 be restored by increasing salaries to allow for inflation since 1975, with a cap of 6% and 5% in 1983 and 1984, respectively, to reflect the limit on salary adjustments for all public servants during those two years under the *Public Sector Compensation Restraint Act*. (This salary level has been described as "1975 equivalence").

The salary increase granted by Parliament in 1985 (Bill C-78) as a result of the Lang Commission, went only part way to 1975 equivalence. The three-stage increase enacted in 1987 (Bill C-88), as a result of the Guthrie Commission, established salaries at the levels recommended by that Commission ($127,700 for superior court judges), but delayed full implementation to April 1, 1988, instead of making the entire increase effective on April 1, 1986, as recommended. The effect of that delay was that the salary of a superior court judge as of April 1, 1986 became $115,000, instead of the recommended $127,700; as of April 1, 1987 it became $121,300, instead of $131,200; and as of April 1, 1988 it became $127,700, instead of $135,500.

The present salary of $133,800, which became effective on April 1, 1989, is $8,200 below 1975 equivalence, which would be achieved at an April 1, 1989 salary level of $142,000. This shortfall resulted from delay in the face of continuing inflation, and the fact that the statutory salary indexing factor for 1987 and 1988 was subsumed in and superseded by the three-stage increase enacted by Bill C-88. Furthermore, the salary base level upon which the statutory indexing formula has been applied in other years was never raised sufficiently to reach 1975 equivalence.

The reasons given by the Lang and Guthrie Commissions for recommending 1975 equivalence are still very much applicable, and we fully subscribe to them. Both previous Triennial Commissions relied in part on the fact that the salary level being recommended for superior court judges would restore the historical relationship of rough equivalence between the salaries of judges and those of senior deputy ministers in the federal Public Service. The salary level established by the 1975 amendments to the *Judges Act* did not result in a new, historically high, salary level for judges, but simply allowed for inflation that had occurred in the years prior to 1975. The fairness of that level has not been disputed.

We note that 1975 equivalence would bring judges to within 2% of the mid-point of the salaries of the most senior level (DM-3) of federal deputy ministers. The DM-3 mid-point, we believe, reflects what the market place expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges.[4] The salaries of superior court judges are now materially below that mid-point and this situation should be rectified. It might be noted that failure to maintain 1975 equivalence from 1976 to 1989 has resulted in an accumulated shortfall for a superior court judge serving during those years of over $230,000.

The recommended levels of salary as of April 1, 1989 are therefore as follows:

- **Judges, Tax Court of Canada, Federal Court of Canada and Superior Courts— $142,000**

[4] The compensation and terms and conditions of employment for senior managers in the federal Public Service, including deputy ministers, are the subject of annual advisory reports prepared for the Prime Minister by the Advisory Group on Executive Compensation in the Public Service (Mr. James W. Burns, Chairman).

• **Chief Justices (Judge) and Associate Chief Justices (Judge), Tax Court of Canada, Federal Court of Canada and Superior Courts—**	**$155,300**
• **Judges, Supreme Court of Canada—**	**$168,600**
• **Chief Justice of Canada—**	**$182,100**

V. SALARY DIFFERENTIAL BETWEEN THE COUNTY AND DISTRICT COURTS AND THE SUPERIOR COURTS

Bill C-78 (which received Royal Assent on December 12, 1985 as Chapter 48 of the Statutes of Canada, 1985) established as at April 1, 1985, an absolute differential of $5,000 between the salaries of judges of the county and district courts and those of superior courts. The Guthrie Commission recommended that the differential of $5,000 be maintained.

The matter arises again but in somewhat changed circumstances. Merger of the section 96 (of the *Constitution Act, 1867)* trial courts has occurred or is imminent in all provinces except Nova Scotia.

Furthermore, the salaries of judges and chief judges of the Tax Court of Canada, which is not a superior court, were increased in 1988 to the same levels as those of judges and chief justices of the superior courts. The salaries in the Tax Court had previously been at the same levels as those for judges and chief judges of the county and district courts.

We believe that there is no justification for different salary levels as between federally-appointed trial judges in the different courts.

We therefore **recommend that the salaries of judges and chief judges of the county and district courts be increased to the salary levels of judges and chief justices of the superior courts.** The result of such a recommendation, effective April 1, 1989, should be:

- **Judges, county and district courts— $142,000**
- **Chief Judges and Associate Chief Judges, county and district courts— $155,300**

VI. INDEXATION OF JUDGES' SALARIES

Judges' salaries are indexed pursuant to section 25 of the *Judges Act*. Under the section 25 formula, judicial salaries are automatically increased on April 1 of each year by the percentage amount which is equal to the change in the Industrial Aggregate Index of the previous year in comparison to the year before the previous year, to a maximum of 7%.

The Industrial Aggregate Index is published by Statistics Canada under the authority of the *Statistics Act*, and was adopted by statutory amendment in 1987 in lieu of the Industrial Composite Index as the basis for the salary adjustment formula for judges. The Industrial Aggregate was already in use for purposes of adjusting benefits under the *Canada Pension Plan*, and salaries under the *Parliament of Canada Act* and the *Salaries Act*. We note that in January 1990, the identical salary adjustment formula that applies to judges, namely the percentage change in the Industrial Aggregate Index to a maximum of 7%, was adopted by statutory amendment as the salary adjustment formula for the Governor General.

We feel that the percentage change in the Industrial Aggregate serves as a better adjustment formula for judicial salaries than would the Consumer Price Index. That is the case regardless of whether the Consumer Price Index would be used alone or in conjunction with the Industrial Aggregate Index on an averaging basis. We feel it is fairer and more consistent to tie judicial salary increases to variations in Canadian wages and salaries generally, as represented by the Industrial Aggregate Index, than to variations in the cost of living or the purchasing power of the dollar, as represented by the Consumer Price Index. Furthermore, the Industrial Aggregate Index, used alone, serves as the basis for the statutory salary adjustment formulae that apply to the Governor General, Lieutenant Governors, Senators, Members of the House of Commons and members of the federal Cabinet. We do not see the need or the desirability of incorporating the Consumer Price Index into the judicial salary adjustment formula.

The salary adjustment formula for judges, as well as for all of the other offices referred to in the previous paragraph, includes a cap on

annual salary increases of 7%. We feel that there are sound public policy reasons for maintaining a cap as part of an adjustment formula that provides for automatic annual salary increases. To put it simply, removing the cap would complicate the government's efforts to combat the wage-price spiral that affects virtually all periods of high inflation. Therefore, we are opposed to removing the 7% cap from the salary adjustment formula in section 25 of the *Judges Act*.

For the same reasons, we do not support any form of "banking" or "carry-forward" or inflation adjustment credits in years when the percentage change in the Industrial Aggregate Index exceeds 7%, which credits could then be applied to the salary increase in a future year or years when the Index fell below 7%. Moreover, in view of the Triennial Commission review process which (according to section 26 of the *Judges Act*) includes an examination of the adequacy of judicial salaries, we feel that a "banking" or "carry-forward" provision would be somewhat redundant.

VII. ALLOWANCE FOR NORTHERN JUDGES

The *Judges Act* was amended in 1981 to provide a non-accountable yearly allowance of $4,000 to each of the judges of the Supreme Court of the Yukon Territory and the Supreme Court of the Northwest Territories, as compensation "for the higher cost of living" in the two territories.

Subsection 27(2) of the *Judges Act* was amended in 1989 to increase the allowance to $6,000, at the same time as the annual allowance for incidental expenditures for all judges was increased from $1,000 to $2,500 per judge.[5] The reason for both increases was inflation.

In view of the 1989 increase in the allowance for northern judges, we do not recommend a further increase in that allowance for the present.

We are also opposed to extending the northern allowance to judges who are resident in remote and/or isolated areas within the provinces. This is partly due to the difficulty of determining the appropriate cut-off point for such an extension, and partly from a sensibility that the section 96 judges within a province should be accorded equal treatment to avoid problems relating to their independence and morale.

[5] The Commission notes that on December 21, 1989, the Governor in Council approved an Order in Council (P.C. 1989-2560) to amend the *Judges Act (Removal Allowance) Order* to allow home sale assistance to be paid to federally appointed judges. The Order was approved under the authority of subsection 40(2) of the *Judges Act*. Home sale assistance provides for the payment of up to 10% of the fair market value of the principal residence of a judge who suffers a loss on its sale occasioned by the necessity that he or she move elsewhere in Canada as a consequence of the requirements of service on the bench. The Commission endorses this amendment.

VIII. REPRESENTATIONAL ALLOWANCE

Chief justices and chief judges of both the section 96 and section 101 courts perform a number of functions and obligations in a representative role on behalf of their respective courts. As titular head of a court, or as symbolic head of the judiciary at the federal or provincial level, a chief justice or chief judge is invited or expected to attend state and other official and semi-official functions both within and outside the court's jurisdiction, and may be requested or expected to host certain functions, particularly those involving visiting judicial dignitaries from other countries.

Prior to 1975, expenses incurred by a chief justice or chief judge in connection with such activities were either paid personally or recovered from the departmental budget with the express permission of the Minister of Justice. The former solution was unfair, the latter undignified at best.

As a result, by virtue of amendments to the *Judges Act* in 1975, and subsequent amendments, an allowance is provided for representational expenses actually incurred by the chief justice or chief judge of a section 96 or section 101 court or by a judge acting on his or her behalf, by a puisne judge of the Supreme Court of Canada, and by the senior judges of the Supreme Court of the Yukon Territory and of the Supreme Court of the Northwest Territories. The annual aggregate representational allowance permitted for each eligible judge pursuant to subsection 27(7) of the *Judges Act* is currently as follows:

(a)	the Chief Justice of Canada	$10,000
(b)	each puisne judge of the Supreme Court of Canada	$5,000
(c)	the Chief Justice of the Federal Court of Canada and the Chief Justice of each province	$7,000
(d)	each other chief justice or chief judge of a court	$5,000
(e)	each senior judge of a territorial supreme court	$5,000

The representational allowance therefore serves to reimburse a judge for expenses actually incurred by him or her for travelling,

hospitality and related amounts in connection with the extra-judicial obligations and responsibilities that devolve upon the judge by virtue of the office.

In 1985, the *Judges Act* was amended to permit the reimbursement of expenses incurred by or on behalf of a spouse, in accompanying a chief justice or other judge entitled to the benefit of the allowance, at certain official and semi-official events. The use of the judge's representational allowance to reimburse his or her spouse is envisaged to cover situations where the presence or active participation of the spouse is required or expected. Examples of such situations are opening of the legislatures, opening of the courts, state dinners, entertainment of foreign legal dignitaries and certain conferences and seminars. The spouse's expenses are subject to the overall representational allowance limit applicable to the judge.

The amounts provided for representational allowances have not been adjusted since 1985, when the allowance was extended to cover the spouse's expenses. The amounts provided under the allowance have become generally inadequate, and some chief justices are being required to absorb expenses incurred on behalf of the court or on behalf of the federal government or of a provincial government.

We therefore **recommend that the annual representational allowance be increased to $15,000 for the Chief Justice of Canada, to $10,000 for the Chief Justice of the Federal Court of Canada and the Chief Justice of each province, and to $8,000 for each other chief justice, chief judge, senior judge or judge presently entitled to receive it.** We further **recommend that the *Judges Act* be amended to authorize the Minister of Justice of Canada to approve the payment of additional amounts as representational allowance in any given year.**

IX. CONFERENCE ALLOWANCE

Members of the federally appointed judiciary are required by federal or provincial law to attend annually a number of meetings relating to the administration of justice on their courts. In addition, there are a number of meetings, conferences and seminars relating to the administration of justice which members of the judiciary may be authorized by law to attend. Expenses incurred in connection with such meetings are properly reimbursable as a conference allowance pursuant to subsection 41(1) of the *Judges Act*. No ceiling is placed upon the amounts which may be reimbursed in any one year.

A number of other seminars, conferences and meetings are arranged by the county, district or superior court judges on a regional and a national basis for the purpose of exchanging information on court procedures, new developments in the law, and judicial education generally. As well, universities, law reform commissions and other organizations, including the new Canadian Judicial Centre, schedule conferences or seminars on particular areas of the law where it is beneficial that members of the judiciary be permitted to participate or to act as panelists or resource persons. Until 1975, there was no provision for the payment of expenses in connection with the attendance by a judge at any of these categories of conferences. Since the participation of the judiciary would enhance the quality of judicial services, subsection 41(2) [as it now is] of the *Judges Act* was enacted in that year to permit the reimbursement of reasonable expenses incurred in attending such conferences, subject to the certification of such expenses by the chief justice of the court of which the judge was a member, and to a fixed maximum for each court. This maximum was established as $250 per judge per year, with provision, however, for the reimbursement of expenses in excess of this amount (payable as an aggregate per court) with the approval of the Minister of Justice of Canada.

The section 41(2) conference allowance was amended in 1977 to permit reimbursement of the cost of obtaining materials or proceedings of such meetings, conferences and seminars in lieu of actual attendance. Also in that year, a special conference allowance of $1,000 per judge per year was established for the judges of the Supreme Court of Canada.

In 1980, the annual allowance was increased with respect to judges of the county, district and superior courts from $250 per judge to $350 per judge, payable as an aggregate per court. In view of the disadvantage experienced by some of the smaller courts in having the allowance payable on the basis of the number of judges on the court, a minimum per court was established of $3,000 per year. This minimum permitted the smaller courts to send their members to conferences which they might otherwise have been unable to attend by reason of lack of funds.

In 1985, in view of the continuing increases in the costs of travel, the allowance was increased by establishing a multiplier of $500 per judge on a court, with a minimum of $5,000 per court per year.

The establishment of the conference allowance has undoubtedly enabled federally appointed judges to improve their legal skills and knowledge through attendance at court meetings, law conferences and seminars. Frequent changes in the law brought about by judicial decisions due in large part to the advent of the *Charter*, and by legislative enactments, make it incumbent on all federally appointed judges to attend and participate in conferences and seminars to remain abreast of the law and to exchange ideas with their colleagues and members of the bar across the country.

However, the cost of travel and hotel accommodation has increased dramatically in recent years. Due to the present limitation of $500 per judge on a court (with a minimum of $5,000 for any one court), the medium-sized and larger courts in particular have had to establish individual priorities for attendance at such conferences among a great number of judges.

In order that judges maintain their standard of excellence, we **recommend that the annual conference allowance for the Supreme Court of Canada be increased to $1,500 per judge and the annual allowance for all other courts be increased to $750 per judge with a minimum of $7,500 per court.**

X. JUDICIAL ANNUITIES

Annuities Granted to Judges

Section 42 of the Judges Act provides for the granting of an annuity equal to two-thirds of the salary annexed to the office of a judge at the time of his or her resignation, removal or ceasing to hold office, to a judge who

(a) has continued in office for fifteen years and has attained the age of 65, if he or she resigns his or her office;

(b) has continued in office for fifteen years but has not attained the age of 65, if his or her resignation is conducive to the better administration of justice or is in the national interest;

(c) resigns or is removed as a result of becoming afflicted with a permanent disability preventing him or her from executing his or her office; or

(d) has reached the mandatory retirement age of 75, if he or she has held office for at least ten years.

If a judge reaches the mandatory retirement age without having served for ten years, he or she is entitled to an annuity pro-rated on the basis of years of completed service (to the nearest one-tenth of a year) as a proportion of ten years.

Supernumerary Judges

In addition, the option exists pursuant to sections 28, 29 and 30 of the *Judges Act*, for a judge to elect supernumerary status. Under this arrangement, a puisne judge who is at least 65 years of age and has served as a federally appointed judge for a minimum of fifteen years, or has reached the age of 70 years and has held office for at least ten years, may opt to continue in office (with a reduced caseload in most instances) while remaining entitled to full salary until the judge is mandatorily retired or otherwise leaves the bench, at which time he or she would receive the annuity. A Chief Justice or Associate Chief Justice who elects supernumerary status is entitled to receive the salary of a puisne judge during his or her supernumerary service, although the subsequent annuity is based on the salary then in effect of a Chief

Justice or Associate Chief Justice. The supernumerary programme promotes continuity on the bench, while making available positions which could not otherwise be filled until the retirement of the incumbents. All federally appointed judges except the members of the Supreme Court of Canada are entitled to opt for supernumerary status. Approximately 12% of the federally appointed bench are currently supernumerary judges.

A. Judges' Contributions toward Annuities

In 1975, judges for the first time were required to contribute toward the cost of their statutory annuities. The 1975 amendments to the *Judges Act* (now section 50) require judges who were appointed before February 17, 1975 (the date of First Reading of the amendments) to contribute at a rate of 1½% of their annual salary to help defray the cost of improved annuities for their surviving spouses and other dependants. These judges are not required to contribute in respect of their own annuities or for indexing the pensions to the cost of living. Judges appointed on or after February 17, 1975 must contribute at a rate of 6% of annual salary toward the cost of their own annuities as well as those of their surviving spouses and other dependants. They also contribute a further 1% of salary to help pay for indexing the pensions to the cost of living. Pension indexing is provided for by the *Supplementary Retirement Benefits Act* (R.S.C. 1985, c. S-24).

The constitutional authority of Parliament to compel reasonable contributions by judges toward their annuities, as well as the legality of the differential in contribution rates which is based on date of appointment to the bench, were settled by the Supreme Court of Canada in the *Beauregard* decision.[6]

For more than a century following Confederation, and for many years prior to Confederation, annuities were paid to Canada's federally appointed judges who had retired, or who had resigned after suffering a permanent disabling infirmity. These annuities were paid out of the Consolidated Revenue Fund. Until the enactment of section 50 of the *Judges Act* in 1975, no contribution was required from the judges for the purpose of funding their annuities.

Reference has already been made to section 100 of the *Constitution Act, 1867*, under which Parliament is required to fix and provide the salaries, allowances and annuities for judges. By an Act which

[6] *Supra.*, chapter IV, footnote 3.

received Royal Assent on May 22, 1868, Parliament acted pursuant to section 100 of the *Constitution Act, 1867* by fixing and providing the salaries, allowances, annuities and other sums of money payable to the judiciary in the Provinces of Quebec, Ontario, Nova Scotia and New Brunswick, in accordance with the schedules annexed to that Act.

With reference to annuities, it was provided that in case any of the judges therein mentioned "has continued in the Office of Judge of one or more of the Superior Courts of Law or Equity or of the Court of Vice-Admiralty, in any of the said Provinces for fifteen years or upwards, or becomes afflicted with some permanent infirmity, disabling him from the due execution of his office, then, in case such Judge resigns his office, Her Majesty may, by letters patent under the Great Seal of Canada, reciting such period of office or permanent infirmity, grant unto such Chancellor, Vice-Chancellor or Judge an annuity equal to two-thirds of the salary annexed to the office he held at the time of his resignation, to commence immediately after his resignation, and to continue thenceforth during his natural life, and to be payable pro rata for any period less than a year, during such continuance, out of any unappropriated monies forming part of the Consolidated Revenue Fund of Canada."[7]

These salaries and annuities were to replace the salaries and retirement allowances which had been previously provided under Chapter 10 of the Consolidated Statutes of the former Province of Canada.

None of the enactments of the Parliament of Canada in pursuance of the provision of section 100 of the *Constitution Act, 1867*, in the years between 1868 and 1975, a period of 107 years, required any contribution from the judges for the purpose of funding their annuities. Neither was any contribution required from judges in respect of death benefits to spouses and dependent children.

Before March 1961, the judges of the superior and county courts were not subject to a compulsory retirement age. Compulsory retirement at age 75 was introduced by a constitutional amendment enacted by the United Kingdom Parliament on December 20, 1960, to take effect on March 1, 1961.[8] A decade later, the retirement age for county and district court judges was fixed at age 70 except for judges of the county and district courts who held office on October 6, 1971, for whom the retirement age remained at 75.

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[7] S.C. 1868, c.33, s.2 and 3. See also R.S.C. 1886, c.138, s.14 and 15; S.C. 1875, c.11, s.7; S.C. 1903, c.29; and S.C. 1944-45, c.45.

[8] 9 Eliz. II, c.2 (U.K).

All this changed with the introduction on February 17, 1975, of the *Superannuation Amendment, 1975*, which received Royal Assent on December 20, 1975.[9] The introduction of section 50 into the *Judges Act* in 1975 provided an unprecedented change in the remuneration of Canada's superior and county court judges. It provided that judges who had been appointed prior to February 17, 1975, would be required to contribute 1½% of salary to the Consolidated Revenue Fund. Judges appointed after February 16, 1975, would be required to contribute 6% of salary to the Consolidated Revenue Fund and, in addition, ½% to the Supplementary Retirement Benefits Account (to help pay for indexing the annuities to the cost of living), to be increased in January 1977 to 1%, making the total contribution for these judges 7% of salary.

By a letter from the then Minister of Justice dated February 17, 1975, judges then in office were informed that their contributions of 1½% were "in respect of the improved annuities for widowed spouses and other dependents". The letter also indicated that "with respect to a person appointed to judicial office after to-day" the annual contribution towards the annuities that may be paid subsequently to the judge as well as to his dependents would be fixed at 6½%, to rise to 7% on January 1, 1977.

This development has been the subject of criticism in the reports of two previous advisory committees and one Triennial Commission appointed by the Minister of Justice. In fact, the issue of judicial contributions toward the cost of annuities has been studied by every committee and commission appointed subsequent to the 1975 amendments to the *Judges Act*. The Dorfman Committee (1978), the de Grandpré Committee (1981) and the Lang Commission (1983) recommended either reducing (Dorfman and Lang) or eliminating (de Grandpré) contributions. The Guthrie Commission (1986) recommended that judicial contributions remain at their present levels.

We agree with the recommendation of the de Grandpré Committee that judicial contributions toward the cost of annuities, survivors' benefits and the indexing of annuities be eliminated, and in doing so we subcribe to the reasons given by that Committee.

We note that the effect of the 1975 change was to engender a disruption in the morale of the judges and disharmony between what was perceived by many as two categories of judges. Judges who carried the same workload and often occupied adjoining offices suddenly found

[9] S.C. 1974-75-76, c.81, s.100, amending the *Judges Act* by adding thereto the new section 29.1 (now section 50).

that the net salaries which they received were no longer the same. This malaise continues today, only now the difference in annual contributions is over $7300. As the Dorfman Committee stated at page 31 of its report:

> "The Committee is troubled by the effects of the amendments to the Judges Act in 1975, which required contributions to the Consolidated Revenue Fund from those appointed after the 16th day of February, 1975, of six per cent of total salary, and from those appointed prior to the 17th day of February, 1975, of one and one-half per cent of total salary. The amendment had the effect of reducing the salaries granted to judges and did so unevenly. The disparities thus created in the net income of judges presiding in the same courts has had a disquieting effect on a number of judges...".

In a letter dated December 20, 1979 (see Appendix "C"), the Minister of Justice at the time, Senator Jacques Flynn, advised the judges that the Government had earlier taken the decision to introduce on December 17, 1979, amendments to the *Judges Act* which would have implemented the recommendations of the Dorfman Committee. He expressed regret, however, that the dissolution of Parliament had intervened to prevent the implementation of that decision.

The de Grandpré Committee, at pages 14 and 15 of its report, stated that:

> "... it has resulted in two classes of judges, but for remuneration purposes alone. It is clear that these judges will frequently be doing not only the same *kind* of work, but indeed, the *same* work, hearing the same case. Their powers, prerogatives and status are identical. Until 1975, the compensation conditions of judges at the same level of court were identical. Now it is clear that on an appeal heard by a panel of three judges, one or two may be receiving 5.5% less in net compensation because they were more recently appointed and therefore contribute 7%, rather than 1.5%. Surely, judicial compensation should be on a footing of equal pay for equal work. Furthermore, this resulting differential has been destructive of morale."

The Lang Commission also referred to the disruptive nature of the uneven contributions required from judges based on the date of appointment to the bench. At page 9 of its report, the Lang Commission stated:

> "The Commission views judges' annuities as an important part of their total compensation. We do not consider the issue of contribu-

tions to annuities as in any way affecting the independence of the judiciary. As has been the conclusion of previous advisory committees, however, we consider a long-standing differential between judges doing the same work to be inappropriate, and as leading to the creation of two classes of judges."

We agree with the above noted comments from the Dorfman, de Grandpré and Lang reports. We would also emphasize that even the Guthrie Commission, which recommended maintenance of the *status quo* in so far as judicial contributions are concerned, predicated that recommendation on the totality of its recommendations being adopted, which they were not.

We believe that a further effect of the introduction in 1975 of judicial contributions toward the cost of annuities was that it detracted from the non-contributory annuity conditions which, before 1975, had served as an attractive inducement to accomplished and experienced lawyers to forego the most lucrative years of private practice and accept appointment to the bench.

In providing life-long security, the non-contributory annuity was a reasonable trade-off for a lawyer whose income from practice was virtually always higher than the salary of a judge. The value of the annuity as an inducement to judicial office was substantially reduced by the imposition of contributions.

The judges were never compensated for the loss of the contribution-free annuity benefit. It should not be thought that the increases in judicial salaries which took effect in 1975 had the effect of offsetting in part the requirement of deductions for the cost of annuities. The salary level for judges had been seriously eroded by inflation during the period from 1971 to 1975, and the salary increase to $53,000 in 1975 merely coincided almost exactly with that which would have resulted from adjusting the 1971 salary by the change in the Consumer Price Index. The result of the deduction for the cost of annuities, therefore, was to build into the salary structure a reduction of 1½% for the pre-1975 judges and 7% for those appointed after February 16, 1975, thereby reducing salaries below the level (as adjusted by the annual percentage change in the Industrial Aggregate Index) that had been accepted in 1975 as fair in order to allow for inflation since 1971.

There are further compelling reasons why judges' annuities should be non-contributory. These reasons lie in the nature of judicial annuities, which do not derive from a funded pension plan.

Judges in Canada, like their counterparts in other jurisdictions with the traditions of the English commmon law, are generally appointed from about the mid-point and beyond in their legal careers from those lawyers who have established reputations for professional ability (see Appendix "D"). They are not career judges, unlike the case in many civil law jurisdictions, and they do not serve in the office for a period long enough to provide, by their contributions, for a funded pension. Essentially, the size of annuities for judges and their surviving spouses does not depend upon length of service or the total contributions made by a judge. These contributions do not vest, and they are not and cannot be directed into a funded pool designed to pay for judicial annuities.

It is clear that the attributes of the payments made to retired judges or surviving spouses are more in the nature of annuities than pensions. As such, treating or even conceiving of these payments as pensions merely clouds the issue of responsibility for contributing to them. It follows that judicial annuities cannot and should not be equated with the pension plans of employees in the public and private sectors, and these differences would remove any valid reason for delaying the improvements in judges' annuities recommended by this report on the basis of the need to consider broader reforms of public service pension arrangements.

It might be noted that historically, federal Public Service pension plans have been contributory from at least as early as 1870 whereas judges, as we have seen, enjoyed non-contributory annuities until 1975. This historical difference is eminently reasonable and justifiable on the basis of the unique status of judges in our society and their position of independence from the other branches of government.

The Commission has also considered, within the context of contributions to judges' and survivors' annuities, the matter of contributions toward the cost of supplementary retirement benefits, commonly referred to as the indexing feature of annuities. Like the de Grandpré Committee, this Commission believes that the full package of retirement security benefits should be non-contributory and that as a matter of consistency, judges should not contribute towards the supplementary retirement benefits. We note that judges and the Governor General, alone out of all the groups whose pensions were indexed under the *Supplementary Retirement Benefits Act*, were not required to contribute towards indexing of annuities when the new benefit was introduced in 1970. Judges appointed prior to February 17, 1975, still do not contribute towards the cost of indexing yet they continue to be entitled to the indexing benefit. So the distinction between judges and other groups who have the indexing benefit under the *Supplementary Retirement Benefits Act* already exists.

A further reason why the Commission feels it is reasonable at this time to remove the requirement that judges contribute toward the cost of annuities is that upon the enactment and coming into force of Bill C-52, which comprises amendments to the *Income Tax Act* introduced in the House of Commons on December 13, 1989, judges would lose all but $600 of their tax deductible "contribution room" toward a Registered Retirement Savings Plan (R.R.S.P.). Judges are currently entitled to contribute toward an R.R.S.P., and deduct for income tax purposes, up to the limit applicable to self-employed taxpayers (currently $7,500, and expected to increase to $15,500 by 1995) and they have had this right since 1978. Pursuant to the proposed subsection 8308(9) of the Regulations under the new *Income Tax Act* amendments, the deductibility of their R.R.S.P. contribution would be limited to $600 a year.

There are a number of reasons why an R.R.S.P. has been attractive to a judge. The most important reason is to supplement the annuity of a surviving spouse of a judge who dies in office (where the annuity is one-third of the judge's salary) or to supplement the annuity of a surviving spouse on the death of a retired judge (where the annuity is reduced by 50%). The deductibility and flexibility in amount of the R.R.S.P. contribution is also a positive factor in attracting qualified lawyers to the bench.

For the individual judge who is now contributing to an R.R.S.P., the implementation of the Bill C-52 tax proposals would mean the virtual elimination of a benefit heretofore available to judges — the right to accumulate tax deferred benefits to supplement their annuities and the reduced annuities of their surviving spouses. We feel that the elimination of judicial contributions toward annuities would help to compensate judges for the imminent loss of almost all of their long-standing entitlement to tax deductible R.R.S.P. contributions.

The imposition of judicial contributions in 1975, which was contrary to the traditions of the common law judiciary, also sets our federally appointed judges apart from their counterparts in the United Kingdom, the United States and Australia, whose annuities are contribution free.

For all of these reasons, the Commission is of the view that the restoration of non-contributory annuities is correct from the point of view of pensions policy; as a matter of history and tradition; and from the unique perspective of judicial compensation, recruitment and retention, with respect to which it would serve as an inducement for lawyers to accept appointment to the bench and for serving judges to delay their retirement and continue to provide public service.

With regard to this latter point, delaying judicial retirement, we would point out that some judges who are entitled to resign with a full annuity of two-thirds of salary, but have not yet reached the mandatory retirement age of 75, continue to serve for a number of years, often until they reach age 75. (This service beyond initial pension entitlement is frequently undertaken as a supernumerary judge.) There is currently no provision in the *Judges Act* removing the obligation of these judges to continue to contribute toward the cost of their annuities, at the rate of either 7% or 1½% of salary, notwithstanding that they have reached the age and completed the service required to qualify for a full annuity. These judges receive no additional pension benefit for their continuing contributions, apart from the marginally higher annuities they will eventually receive when they do retire on two-thirds of their indexed salary.

The Commission **recommends that judicial contributions toward the cost of annuities, survivors' benefits and the indexing of annuities be eliminated**. We do not recommend the reimbursement to judges of the pension contributions heretofore paid.

B. "Rule of Eighty"

The "Rule of Eighty" is a measure that balances age and years of service in determining retirement eligibility. The *Judges Act* presently adopts the "Rule of Eighty" to a limited extent. A judge who has attained the age of 65 years and has continued in judicial office for at least fifteen years is eligible to retire, or elect supernumerary status. A judge who has attained the age of 70 years and has held office for at least ten years is entitled to elect supernumerary status (but not to retire).

The Guthrie Commission recommended that the "Rule of Eighty" be extended to permit retirement at full pension, but not the election of supernumerary status, at the following combinations of age and years of service on the bench: 60 years of age and 20 years of service; 61 and 19; 62 and 18; 63 and 17; and 64 and 16. The Joint Committee on Judicial Benefits and the Standing Committee of the Canadian Bar Association both suggested that this Committee extend the recommendation of the Guthrie Commission to include the election of supernumerary status.

We do not agree with the recommendation of the Guthrie Commission or with the submissions made to us with respect to the "Rule of Eighty". We accept that the present law was premised on the expectation of the appointment of the more senior members of the bar

and does not readily take into account those who accept an appointment to the bench in the early forties or younger. However, we view that expectation to be eminently reasonable and well-founded.

Furthermore, the young lawyer who applies for an appointment to the bench is mindful of the expectation, and the requirement, to serve until age 65 in order to be eligible for an annuity or election of supernumerary status. We feel that 65 years should remain as the age threshold for these benefits, and with the minimum service requirement of fifteen years, together reflect the important premise that a lawyer who accepts judicial appointment does so with the expectation that he or she is accepting a lifetime commitment. In addition, we would be opposed to a judge serving more than ten years on supernumerary status.

We therefore **recommend that the combination of 65 years of age and 15 years of service on the bench remain as the eligibility criteria for a judge's annuity or election to serve as a supernumerary judge, and that election of supernumerary status continue to be permitted at 70 years of age following 10 years of service.**

C. Annuities Granted to Surviving Spouses

Subsection 44(1) of the *Judges Act* provides an annuity to the surviving spouse of a judge who dies, equal to one-third of the judge's salary, and subsection 44(2) of the Act provides an annuity to the surviving spouse of a retired judge who was in receipt of an annuity at the time of death, equal to half of the amount of the retired judge's annuity. Both these types of survivor's annuities are indexed pursuant to the provisions of the *Supplementary Retirement Benefits Act*.

We feel, as did the Guthrie Commission, that survivors' benefits under the *Judges Act* should better reflect current values of survivors' benefits provided by many private pension plans and by federal and provincial pension benefits and standards legislation. We therefore **recommend that the surviving spouse of a judge who dies in office be entitled to an annuity equal to 40% (instead of one-third) of the judge's salary at the time of death.** We further **recommend that the surviving spouse of a retired judge who dies while in receipt of an annuity, be entitled to an annuity equal to 60% (instead of one-half) of the amount of the retired judge's annuity at the time of death.** The benefits of eligible children should be adjusted accordingly. These increases in survivors' benefits should apply only with respect to survivors not in receipt of annuities upon the coming into force of the necessary amendments to the *Judges Act*.

D. Return of Contributions toward Annuities

The *Judges Act* (at subsections 51(1), (2) and (3)) and the *Supplementary Retirement Benefits Act* (at section 6) provide for the return of a judge's contributions toward annuities in specified circumstances. Pursuant to subsection 51(4) of the *Judges Act*, interest is payable upon the return of contributions made under that Act, at the rate of 4% compounded annually.

Like the Guthrie Commission, we believe this rate is unfair and quite often unrealistic. Therefore, we **recommend that compound interest be payable upon the return of all contributions at a rate to be varied as and when necessary to reflect the "prescribed rates".**[10] If no prescribed rate was in effect, then a rate comparable to the average equivalent yield obtainable during each year on 90-day Government of Canada Treasury Bills should be used.

E. Judges of the Supreme Court of Canada

Judges of the Supreme Court of Canada cannot elect to hold office as supernumerary judges. We appreciate that extending the existing supernumerary scheme to members of the Supreme Court would create very real problems and would undoubtedly prove to be inappropriate. While to do so would make additional judges available to the Court, the finality of its decisions might be undermined to the extent they were made by supernumerary rather than "full" members of the Court. In addition, supernumerary status might upset the collegiality of the nine-member Court.

In view of the immense workload and heavy responsibility which are inherent in membership on the Supreme Court of Canada, a number of options have been advanced over the years which would inject additional flexibility into the retirement provisions of the *Judges Act* as they apply to members of the Supreme Court. The Guthrie Commission recommended a special provision for Supreme Court judges, given their ineligibility for supernumerary status. That Commission recommended that a Supreme Court judge who reached age 70, with at least ten years on the Court, be entitled to retire at 90% of salary until age 75, at which time the annuity would reduce to the standard two-thirds of salary.

We are not persuaded that the Guthrie Commission recommendation is necessarily the preferred means of dealing with the fact that Supreme Court judges cannot elect supernumerary status; accordingly, we do not recommend it at this time.

[10] See Part XLIII (sections 4300-4301) of the *Income Tax Regulations*.

F. Guaranteed Annuity Option

The Guthrie Commission recommended that a retiring judge be given the one-time option of receiving an actuarially reduced annuity for a ten-year guaranteed period. The recommendation was designed to mitigate the harshness of the consequences resulting from the death, shortly after commencing retirement, of a former judge. As matters now stand, the retirement annuity to which the deceased retiree would have been entitled would be halved (or reduced by 40% if our recommendation in Item C above is implemented) in the hands of the surviving spouse, with the former judge having received very little of what otherwise would have been payable over the years.

We agree with the Guthrie Commission that it would be desirable to proceed with a guaranteed annuity option for retired judges. We therefore **recommend that a retiring judge be given the one-time option of receiving an actuarially reduced annuity for a ten-year guaranteed period.** Following the expiry of the ten-year guaranteed period, the surviving spouse's annuity would be reduced to 50% (or 60% pursuant to our recommendation in Item C above) of the amount of the initial (actuarially reduced) annuity. The initial annuity amount would continue for a ten-year period in favour of the surviving spouse, eligible children or the estate, as the case may be. We note that there would be no additional cost for an option of this kind.

G. Indexation of Annuities

Judicial annuities, including those of surviving spouses and eligible children, are indexed pursuant to, and in accordance with a complex formula set out in, the *Supplementary Retirement Benefits Act*. That Act also applies to pensioners from many branches and groups of the public service, as well as to retired Members of Parliament, Lieutenant Governors and Governors General. The Act is administered by the President of the Treasury Board.

The Guthrie Commission recommended that the provisions for indexing judicial annuities should be transferred to the *Judges Act* from the *Supplementary Retirement Benefits Act*. We do not agree. We feel that the constitutional requirement for Parliament to fix and provide the "pensions" of judges, in so far as that obligation bears upon the indexation of annuities, is met regardless of whether indexing of judicial annuities is provided for by the *Supplementary Retirement Benefits Act* or by the *Judges Act*. The principle of indexing as it applies to judicial annuities is no more secure, or vulnerable to modification for that matter, in the one Act as in the other. We also note that the Standing

Committee on Justice and Solicitor General, which examined the report of the Guthrie Commission after its tabling in Parliament in 1987, did not accept the recommendation to transfer the judicial annuity indexing provisions to the *Judges Act*.

XI. FORMER CHIEF JUSTICES SERVING AS SUPERNUMERARY OR PUISNE JUDGES

The *Judges Act* provides at subsections 29(4) and 30(4) that a chief justice or chief judge, or an associate chief, who elects supernumerary status is entitled to receive the salary of a puisne judge during his or her supernumerary service. Subsections 31(4) and 32(4) provide that a chief justice or chief judge, or an associate chief, who has served in that position for at least five years and who reverts to the status of a puisne judge is also entitled to receive the salary of a puisne judge following the reversion. It has been suggested to this Commission that a former chief justice or chief judge who has elected to serve as a supernumerary judge or as a puisne judge should continue to receive the salary of a chief justice or chief judge. We do not agree. We feel that the salary should match the office, and the duties, then being performed.

We note that when these former chief justices or chief judges retire, pursuant to subsections 43(1) and (2) their annuities are based on the salaries then in effect of a chief justice or chief judge. This makes eminent sense because, by virtue of their having served as chiefs, they have earned the higher annuities.

XII. TAXATION OF NEW JUDGES

When a lawyer in the private practice of law is appointed to the bench, he or she is likely to be faced with an unusually large income tax burden in the year of appointment. This considerable tax burden results from the combination of professional income earned during the fiscal year prior to the appointment, taxable capital gains and recaptured capital cost allowance on assets deemed disposed of and taxable capital gains on the disposition of the partnership interest. In addition, earnings from the last fiscal year-end to the date of appointment ("stub period earnings"), unbilled work in progress and the 1971 accounts receivable reserve (if any) would also have to be included in taxable income.

It might be noted that lawyers appointed to the bench are, generally speaking, professionals of some standing in the legal community who are at or near the peak of their earning powers. As such, the aforementioned amounts are likely to represent substantial taxable items which must be added to the judicial salary itself. This results in an unusually high taxable income for that individual in the year of appointment and places the great proportion of that taxable income within the highest marginal tax bracket.

The tax situation confronting judges upon appointment used to be even more onerous. Section 24.1 of the *Income Tax Act*, enacted in 1984 following the Lang Commission report, provides some relief by way of permitting a newly appointed judge to defer the reporting of a portion of his or her income from the final year of practice until the year following the appointment to the bench. In other words, section 24.1 permits the tax burden arising in the year of appointment to the bench to be spread over that and the following taxation year.

Notwithstanding section 24.1, the lawyer considering an appointment may still be hesitant due to an unavoidable and extensive tax indebtedness in the first year or two on the bench if the offer of an appointment is accepted. In our view, an essential element in recruiting the best qualified lawyers to the bench is a comprehensive financial package which not only includes attractive salaries and benefits, but also avoids imposing financial or tax disincentives to accepting judicial appointment. We therefore **recommend that discussions between the Department of Justice and the Department of Finance continue with a view to alleviating the tax burden on newly appointed judges.**

XIII. CONCLUSION

The Triennial Commission review process was instituted by Parliament to reduce the factor of partisan politics in the determination and adjustment of judicial compensation and to reinforce the principle of judicial independence. Delay in implementing or substantial disregard of the recommendations of a Triennial Commission threatens the integrity of the review process and considerably reduces its effectiveness. For that to happen would be contrary to both the intentions of Parliament and the public interest.

XIV. SUMMARY OF RECOMMENDATIONS

1. That the Minister of the day promptly inform Parliament, following the tabling of the reports of this and subsequent Triennial Commissions, as to what action the Government proposes to take with regard to their individual recommendations or, if necessary, indicate promptly the Government's disagreement with any of such recommendations (Chapter III).

2. That whenever legislation to implement Triennial Commission recommendations is introduced in Parliament, the Government should proceed to ensure its quick passage (Chapter III).

3. The recommended levels of salary as of April 1, 1989, are as follows (Chapter IV):

   - **Judges, Tax Court of Canada, Federal Court of Canada and Superior Courts— $142,000**
   - **Chief Justices (Judge) and Associate Chief Justices (Judge), Tax Court of Canada, Federal Court of Canada and Superior Courts— $155,300**
   - **Judges, Supreme Court of Canada— $168,600**
   - **Chief Justice of Canada— $182,100**

4. That the salaries of judges and chief judges of the county and district courts be increased to the salary levels of judges and chief justices of the superior courts. The result, effective April 1, 1989, should be (Chapter V):

   - **Judges, county and district courts— $142,000**
   - **Chief Judges and Associate Chief Judges, county and district courts— $155,300**

5. That the annual representational allowance be increased to $15,000 for the Chief Justice of Canada, to $10,000 for the Chief Justice of the Federal Court of Canada and the Chief Justice of each province, and to $8,000 for each other chief justice, chief judge, senior judge or judge presently entitled to receive it (Chapter VIII).

6. That the *Judges Act* be amended to authorize the Minister of Justice of Canada to approve the payment of additional amounts as representational allowance in any given year (Chapter VIII).

7. That the annual conference allowance for the Supreme Court of Canada be increased to $1,500 per judge and the annual allowance for all other courts be increased to $750 per judge with a minimum of $7,500 per court (Chapter IX).

8. That judicial contributions toward the cost of annuities, survivors' benefits and the indexing of annuities be eliminated (Chapter X, Item A).

9. That the combination of 65 years of age and 15 years of service on the bench remain as the eligibility criteria for a judge's annuity or election to serve as a supernumerary judge, and that election of supernumerary status continue to be permitted at 70 years of age following 10 years of service (Chapter X, Item B).

10. That the surviving spouse of a judge who dies in office be entitled to an annuity equal to 40% (instead of one-third) of the judge's salary at the time of death (Chapter X, Item C).

11. That the surviving spouse of a retired judge who dies while in receipt of an annuity, be entitled to an annuity equal to 60% (instead of one-half) of the amount of the retired judge's annuity at the time of death (Chapter X, Item C).

12. That compound interest be payable upon the return of all contributions at a rate to be varied as and when necessary to reflect the "prescribed rates" (Chapter X, Item D).

13. That a retiring judge be given the one-time option of receiving an actuarially reduced annuity for a ten-year guaranteed period (Chapter X, Item F).

14. That discussions between the Department of Justice and the Department of Finance continue with a view to alleviating the tax burden on newly appointed judges (Chapter XII).

All of which is respectfully submitted this 5th day of March, 1990.

E. Jacques Courtois, Q.C., Chairman

Laura Legge, Q.C.

David B. Orsborn

APPENDIX "A"

Commission on Judges' Salaries and Benefits

OTTAWA, K1A 1E3

Commission sur le traitement et les avantages des juges

1989 COMMISSION ON JUDGES' SALARIES AND BENEFITS

NOTICE

This Commission was appointed on September 30, 1989 by the Minister of Justice and Attorney General of Canada, pursuant to section 26 of the *Judges Act*, to inquire into the adequacy of the salaries and other amounts payable under the Act to federally-appointed judges and into the adequacy of federally-appointed judges' benefits generally, including the granting of annuities provided to judges and to their surviving spouses and children.

The Commission invites written submissions in either official language concerning the matters within the Commission's terms of reference. Written submissions must reach the Commission by December 31, 1989, in eight copies. A party intending to file a written submission with the Commission may also request an opportunity to make a presentation at an oral hearing. The Commission must be notified by December 31, 1989 of the party's desire to appear at an oral hearing. A party filing a written submission need not request to appear at an oral hearing.

Copies of the Commission's terms of reference are available upon request.

1989 Commission on Judges'
Salaries and Benefits,
110 O'Connor Street
Room 1114
Ottawa, Ontario
K1A 1E3

E. Jacques Courtois, Q.C.
Chairman

Commission on Judges' Salaries and Benefits

Commission sur le traitement et les avantages des juges

OTTAWA, K1A 1E3

COMMISSION DE 1989 SUR LE TRAITEMENT ET LES AVANTAGES DES JUGES

AVIS

La Commission de 1989 sur le traitement et les avantages des juges a été instituée le 30 septembre 1989 par le ministre de la Justice et procureur général du Canada, en application de l'article 26 de la *Loi sur les juges*. Elle a pour mandat de déterminer si le traitement et les avantages des juges nommés par le gouvernement fédéral ainsi que les pensions auxquelles ceux-ci, leur conjoint et leurs enfants ont droit, sont satisfaisants.

La Commission invite toute personne intéressée à lui soumettre par écrit ses vues sur les sujets qu'elle a reçu pour mission d'examiner. Ces interventions doivent prendre la forme d'un document écrit, établi dans l'une ou l'autre des deux langues officielles, et être déposées auprès de la Commission en huit exemplaires au plus tard le 31 décembre 1989. Quiconque dépose un tel document écrit peut en outre demander à la Commission d'être entendu par celle-ci. En pareil cas, il convient d'aviser la Commission au plus tard le 31 décembre 1989 du souhait de présenter des observations orales. Il convient de noter que le dépôt de documents écrits n'oblige nullement à présenter les observations orales.

Il est possible d'obtenir le texte définissant le mandat de la Commission sur simple demande.

Commission de 1989 sur le
traitement et les avantages
des juges
110, rue O'Connor
Bureau 1114
Ottawa (Ontario)
K1A 1E3

Le président de la
Commission

E. Jacques Courtois, c.r.

APPENDIX "B"

LIST OF WRITTEN SUBMISSIONS

1. The Joint Committee on Judicial Benefits of the Conference of Chief Justices and Chief Judges and the Canadian Judges Conference.
2. The Honourable Judge Stephen Borins (District Court of Ontario).
3. The Honourable Judge Marie Corbett (District Court of Ontario).
4. The Canadian Bar Association Standing Committee on Pensions for Judges' Spouses and Judges' Salaries.
5. The Law Society of Alberta (Peter Freeman, Q.C., Secretary).
6. The Law Society of British Columbia (R. Paul Beckmann, Q.C., Treasurer).
7. The Nova Scotia Barristers' Society (Bruce T. MacIntosh, President).
8. Le Barreau du Québec (André Gauthier, Bâtonnier).
9. The Honourable Margaret Joe, Minister of Justice of the Yukon Territory.
10. Terry Billings, Hartland, New Brunswick.
11. James Thachuk, Barrhead, Alberta.

APPENDIX "C"

Minister of Justice and Attorney General of Canada

Ministre de la Justice et procureur général du Canada

December 20, 1979.

I am writing to inform you of the decision that the Government had reached on amendments to the *Judges Act* that were planned to be introduced in Parliament on Monday, December 17th. However, as you know, the dissolution of Parliament prevented this from being done. Nevertheless, I wanted you to be aware of the recommendations that the Government was about to make to Parliament for salary increases for all judges and to improve the overall compensation package provided for them and their dependants.

The Government had agreed on salary increases that would have been in line with those recommended in the *Dorfman Report on Judicial Compensation and Other Related Matters*, to be effective April 1, 1979 and again on April 1, 1980. It was also decided to rationalize the salary structure by removing the additional salary for "extra-judicial services" in subsection 20(1) of the Act and adding that amount to the basic judicial salary. I think you will agree that this would be a much more straightforward way of recording judicial salaries.

A further decision was to provide for each judge a new accountable allowance of up to $1,000 a year for expenses required for the fit and proper execution of the office of judge. This would be to ensure that the necessary expenditures for robes, books and the like are not borne by judges personally, but would be met out of specific funds provided by Parliament for this purpose. The recommendations made by the Dorfman Committee regarding conference expenses, representational allowances and an increase in the allowance for the judges in the Northwest Territories and the Yukon Territory were also adopted by the Government.

On the matter of a salary review mechanism for judicial salaries, the Government directed a comprehensive study of this issue, with the aim of legislation before April, 1981, to implement an effective method of reviewing judicial salaries, in keeping with the provisions of the *BNA*

Act and the independence of the judiciary, without having continually to resort to the legislative process.

The Government also directed the Minister of Finance to study the transitional income-tax problems frequently experienced by new appointees to the bench and others who leave self-employment or a profession for salaried office or employment, in order to develop a comprehensive approach to a rational and equitable solution to the problem so clearly outlined in the Dorfman Report.

The final issue of real significance in the Government's decisions related to annuities. The Government wished to ensure that the minimum annuity to be received by the spouse of a deceased judge would not be less than $13,900. This base figure would have been "indexed", and was adopted as being the group average received by all such spouses as of October 1, 1979.

There is finally the matter of contributions towards annuities. The Government decided to seek the abolition of the requirement that some judges contribute towards the cost of their basic annuities, while others contribute only towards annuities for their dependants. The Government's decision was that the abolition of basic contributions would be retroactive to the date of introduction in 1975 and the present system of contributions would be replaced by a uniform contribution, to be paid by all federally-appointed judges, for the "indexed" aspect of annuities, that is, the Supplementary Retirement Benefit. That contribution would be at the standard rate, now 1%, although it is expected that an increase in the contribution would be required before too long. The result of this decision would have been a refund of the excess contributions paid heretofore, with interest.

It is my view that this proposed overall package of improvements in judicial compensation would be most adequate, having regard to the need for financial restraint, and I am truly sorry that we have been unable to secure its enactment at this time.

Yours sincerely,

Jacques Flynn

Ministre de la Justice et
procureur général du Canada

Minister of Justice and
Attorney General of Canada

Le 20 décembre 1979

Monsieur le juge,

La présente a pour but de vous faire part des décisions prises par le gouvernement ayant trait aux amendements à la *Loi sur les juges* qui devaient être introduits au Parlement, lundi le 17 décembre. Toutefois, comme vous le savez, la dissolution du Parlement a empêché ceci d'être fait. Néanmoins, je voulais que vous preniez connaissance des recommandations que le gouvernement était sur le point de faire au Parlement pour augmenter le traitement de tous les juges et améliorer les avantages prévus pour eux et les personnes à leur charge.

Le gouvernement avait approuvé des augmentations de traitement qui auraient été conformes aux recommandations du *Rapport Dorfman sur la rémunération des juges et autres questions connexes*. Celles-ci seraient entrées en vigueur en deux étapes, soit le 1er avril 1979 et le 1er avril 1980. Il avait aussi été décidé de rationaliser la structure du traitement des juges en retranchant le traitement supplémentaire pour «services extrajudiciaires» visé au paragraphe 20(1) de la *Loi sur les juges* et en ajoutant ce montant au traitement de base. Je crois que vous conviendrez que ceci serait une façon plus juste de comptabiliser le traitement des juges.

En plus, la décision avait été prise d'accorder à chaque juge une nouvelle indemnité annuelle d'au plus 1 000 $, dont il serait tenu de rendre compte, en contrepartie des frais accessoires à la bonne exécution de ses fonctions. Cette mesure aurait visé à assurer que les juges n'auraient pas à payer eux-mêmes certaines dépenses entraînées par leur charge, comme par exemple l'achat de toges et de livres, ces dépenses devant être acquittées à même les fonds fournis par le Parlement. Les recommandations du Comité Dorfman sur les frais de représentation, les frais de déplacement pour assister à des conférences et l'indemnité de vie chère pour les juges des Territoires du Nord-Ouest et du Territoire du Yukon avaient aussi été adoptées par le gouvernement.

Le gouvernement a demandé qu'une étude en profondeur soit faite sur la possibilité de mettre en place un mécanisme de révision du traitement des juges en vue d'une législation qui serait prête avant avril 1981. Notre but était de mettre au point une loi efficace portant sur la révision du traitement des juges, qui aurait été conforme aux dispositions de l'A.A.N.B. et au principe de l'indépendance de la magistrature, sans avoir à faire continuellement appel au processus législatif.

Le gouvernement avait en outre donné instruction au ministre des Finances d'étudier les problèmes d'ordre fiscal auxquels font souvent face les nouveaux juges aussi bien que les personnes quittant la pratique privée ou leur profession pour accepter une charge ou un emploi rémunéré. Cette étude aurait permis d'apporter au problème si clairement exposé dans le rapport Dorfman une solution rationnelle et équitable.

La dernière question importante qui fut l'objet des décisions du gouvernement fut celle qui a trait à la pension. Le gouvernement tenait à s'assurer que la pension minimale versée au conjoint d'un juge décédé ne serait pas inférieure à 13 900 $. Ce chiffre de base aurait été «indexé». Ce montant fut adopté comme étant la moyenne des pensions reçues par les veuves, en date du 1er octobre 1979.

Pour terminer, j'en viens à la question des contributions des juges à leur pension. Le gouvernement avait décidé d'abroger la disposition portant que certains juges doivent participer à leur pension de base alors que d'autres ne contribuent qu'à la pension payable aux personnes dont ils ont la charge. Ainsi, il avait été décidé que l'abolition des contributions de base serait rétroactive à la date de leur entrée en vigueur en 1975, et que le présent système de participation serait remplacé par une contribution uniforme qu'auraient versé tous les juges nommés par le gouvernement fédéral relativement à l'«indexation» de leur pension, c'est-à-dire en ce qui concerne la prestation de retraite supplémentaire. Cette contribution aurait été au même taux de un pour cent qui est présentement versé par les autres personnes quoiqu'une augmentation du tarif de contribution est à prévoir.

En conséquence, les juges auraient reçu un remboursement des cotisations qu'ils ont versées en trop jusqu'à maintenant, avec intérêt.

J'estime que dans l'ensemble ces améliorations proposées pour la rémunération des juges auraient été très satisfaisantes, compte tenu des restrictions budgétaires auxquelles nous sommes tous soumis. Je suis navré que nous n'ayions pu obtenir l'adoption des ces propositions en ce moment.

Veuillez agréer l'expression de mes sentiments les meilleurs,

Jacques Flynn

APPENDIX "D"

AVERAGE AGE OF JUDICIAL APPOINTEES ON ASSUMING OFFICE

1970	—	47	**1980**	—	50
1971	—	48	**1981**	—	50
1972	—	47	**1982**	—	51
1973	—	49	**1983**	—	49
1974	—	50	**1984**	—	51
1975	—	48	**1985**	—	52
1976	—	50	**1986**	—	49
1977	—	47	**1987**	—	50
1978	—	49	**1988**	—	52
1979	—	50	**1989**	—	48

Source: Commissioner for Federal Judicial Affairs.

TAB 23

Department of Justice
Canada

Ministère de la Justice
Canada

REPORT AND RECOMMENDATIONS OF THE 1992 COMMISSION ON JUDGES' SALARIES AND BENEFITS

March 31, 1993

**Submitted to the
Minister of Justice of Canada**

Canada

Pursuant to Section 26 of the *Judges Act*, I am now tabling the Report and Recommendations of the 1992 Commission on Judges' Salaries and Benefits, appointed on September 30, 1992, to inquire into the adequacy of the salaries and other amounts payable under the Act and into the adequacy of judges' benefits generally. In accordance with Standing Order 32(5) of the House of Commons, this document shall be deemed to be referred to the Standing Committee on Justice and Solicitor General.

The Minister of Justice and
Attorney General of Canada

Pierre Blais

REPORT AND RECOMMENDATIONS OF THE 1992 COMMISSION ON JUDGES' SALARIES AND BENEFITS

Table of Contents

1992 COMMISSION ON JUDGES' SALARIES AND BENEFITS

I. BACKGROUND

Members: Purdy Crawford (Chairperson)
Jalynn H. Bennett
John G. Goodwin
Yves Guérard
Kitty Heller

Executive Secretary: Harold Sandell

Terms of Reference

The 1992 Commission on Judges' Salaries and Benefits was appointed on September 30, 1992, by the Honourable Kim Campbell, then Minister of Justice and Attorney General of Canada, pursuant to subsection 26(1) of the *Judges Act*, and was given the following terms of reference:

> "The Commission shall, pursuant to section 26 of the *Judges Act*, inquire into the adequacy of the salaries and other amounts payable under the Act and into the adequacy of judges' benefits generally.
>
> Without restricting the generality of the foregoing, the Commission shall inquire into and report on the following matters:
>
> 1. the adequacy of judges' salaries, allowances and benefits, taking into account the principle of judicial independence, comparative factors, the general Canadian economic situation and the ability to attract qualified candidates for judicial office;
>
> 2. how judicial annuities can be harmonized with the *Income Tax Act* with respect to the establishment of a registered pension plan and retirement compensation arrangement;

3. how judicial annuities can be harmonized with federal pension benefit standards;

4. how the current provisions respecting supernumerary judges might be modified to better ensure achievement of the benefits that supernumerary judges can provide;

5. the adequacy of existing provisions in the *Judges Act* regarding resignation on the basis of permanent infirmity; and

6. the projected costs of the Commission's recommendations.

The Commission shall report to the Minister of Justice by March 31, 1993."

Meetings and Conference Calls

The Commission held meetings and/or telephone conference calls as follows:

October 25, 1992 - Toronto
November 11, 1992 - Montreal
December 11, 1992 - Telephone conference
December 17, 1992 - Ottawa
December 18, 1992 - Ottawa
January 16, 1993 - Ottawa
February 6, 1993 - Montreal
February 21, 1993 - Toronto
March 12, 1993 - Toronto
March 18, 1993 - Telephone conference

Notice to the Public, Submissions and Hearings

The Commission published a Notice in newspapers across Canada, inviting written submissions and presentations at oral hearings, in either official language, concerning matters within the Commission's terms of reference. Specific notice was also sent to a number of interested organizations and individuals, including all of the provincial and territorial Ministers of Justice and Attorneys General.

Copies of the Notice in English and French are reproduced as Appendix A. The Notice was published in the following newspapers:

St. John's Evening Telegram
Charlottetown Guardian
La Voix Acadienne
Halifax Chronicle-Herald
Le Courrier
Saint John Telegraph Journal
L'Acadie Nouvelle
Le Soleil
La Presse
Montreal Gazette
Le Droit
Ottawa Citizen
The Globe and Mail
The Toronto Star
The Lawyers Weekly
Winnipeg Free Press
La Liberté
Regina Leader Post
Saskatoon Star-Phoenix
Journal L'Eau vive
Calgary Herald
Edmonton Journal
Le Franco-Albertain
Vancouver Province
Le Soleil de Colombie
The Yellowknifer
Whitehorse Star

Written submissions were received from the organizations, groups and individuals listed in Appendix B.

A public hearing took place on December 17, 1992, in the Centennial Room of the Government Conference Centre, 2 Rideau Street, Ottawa. The following groups and organizations, with the counsel indicated, made oral presentations to the Commission:

1. The Joint Committee on Judicial Benefits of the Canadian Judicial Council and the Canadian Judges' Conference.

Counsel Appearing: L. Yves Fortier, C.C., Q.C., Montreal
Wilfrid Lefebvre, Q.C., Montreal

2. The Ontario Superior Court Judges' Association.

Counsel Appearing: Brian P. Bellmore, Toronto

3. The Canadian Bar Association Standing Committee on Pensions for Judges' Spouses and Judges' Salaries.

Counsel Appearing: The Honourable Paule Gauthier, P.C., O.C., Q.C., Québec City
(President of the Association)
Donald R. Cranston, Edmonton
(Chairman of the Standing Committee)

Previous Committees and Commissions

The 1992 Commission on Judges' Salaries and Benefits is the seventh federal committee or commission established in recent years to inquire into and make recommendations to the Minister of Justice with respect to judicial salaries, allowances and benefits. It is the fourth Triennial Commission appointed pursuant to subsection 26(1) of the *Judges Act*.

In September 1974, a Special Advisory Committee, chaired by the Honourable Mr. Justice Emmett Hall, a retired member of the Supreme Court of Canada, reported to the Minister. The Dorfman Committee on Judicial Compensation and Related Matters was chaired by Irwin Dorfman, Q.C., and reported to the Minister in November 1978. The de Grandpré Committee on Judicial Annuities, chaired by Jean de Grandpré, Q.C., reported in December 1981. The 1983 Commission on Judges' Salaries and Benefits, which was the first of the Triennial Commissions established pursuant to subsection 26(1) of the *Judges Act*, was chaired by the Honourable Otto Lang, P.C., Q.C., and it reported to the Minister in October 1983. The 1986 Commission on Judges' Salaries and Benefits, which was the second Triennial Commission, was chaired by H. Donald Guthrie, Q.C., and reported to the Minister in February 1987. The 1989 Commission on Judges' Salaries and Benefits, which was the third Triennial Commission, was chaired by E. Jacques Courtois, Q.C., and reported to the Minister in March 1990.

Acknowledgements

The Commission wishes to thank Pierre Garceau, Q.C., Commissioner for Federal Judicial Affairs (Ottawa), and the members of his staff, in particular Ginette Beauparlant and Wayne Osborne, for their support throughout the Commission's mandate.

We also thank Bernard Dussault, F.S.A., F.C.I.A., Acting Chief Actuary; Claude Gagné, F.S.A., F.C.I.A., Director, Government Services Division; and L.M. Cornelis, F.S.A., F.C.I.A., Chief, Government Services Division, all of the Office of the Superintendent of Financial Institutions (Ottawa), as well as Marc-André Paradis, F.S.A., F.C.I.A., and Luc St.-Pierre, M.Sc.I.R., both of Sobeco Ernst & Young (Montreal), for their valuable actuarial and costing assistance.

The Commission was extremely fortunate to have had Harold Sandell of the Department of Justice in Ottawa assigned to it as Executive Secretary. Mr. Sandell's enthusiastic and dedicated service, together with his comprehensive knowledge of the Canadian legal and judicial systems, made it possible for us to complete our report within the legislated time limit. We are indeed grateful to Mr. Sandell for his able assistance.

II. INTRODUCTION

The Triennial Commission is a contributor to a process by which the remuneration of federally appointed judges is determined and implemented. The role of the Triennial Commission in that process is to examine the state of judicial salaries, pensions, allowances and benefits and then make recommendations to the Minister of Justice of Canada regarding the need or the desirability of changes in the judicial remuneration package. In order for the Commission's recommendations or any other changes in judicial remuneration to come into effect, Parliament must enact the necessary legislative amendments, usually to the *Judges Act*. Once this is done, the Office of the Commissioner for Federal Judicial Affairs can then administer the new benefits to the judges, retired judges and survivors entitled to them.

This complex process is designed to preclude arbitrary interference by the executive branch of government in the determination and granting of the judicial compensation package, thereby upholding the principle and strengthening the practical manifestations of judicial independence.

It is perhaps advisable for the Commission to state at the outset that it views its task as one of major importance. We have enormous respect for the judiciary and for the fundamental role which it plays in the functioning of our society. Canadians have been well served by our judges. We are pleased to make this contribution in support of such a worthy institution.

III. THE REVIEW PROCESS

The *Judges Act*, at section 26, imposes strict time limits on the Triennial Commission process. The Minister of Justice is required to appoint from three to five commissioners every third year "to inquire into the adequacy of the salaries and other amounts payable under [the *Judges Act*] and into the adequacy of judges' benefits generally". The commissioners are required within six months of their appointment to submit a report to the Minister of Justice "containing such recommendations as they consider appropriate", and the Minister must "cause the report to be laid before Parliament" within ten Parliamentary sitting days after he or she receives it.

Parliament had a clear purpose in legislating these obligatory time limits into every stage of the Triennial Commission process. Parliament recognized that the integrity of this full and independent review of judicial compensation matters would be seriously compromised without also compelling both the commissioners and the Minister to treat the review with the utmost resolve.

It stands to reason, therefore, that the Government of the day and Parliament must treat the Triennial Commission's report with similar deference. The exigencies of an independent judiciary, which is fundamental to our democratic society, demand nothing less. Long delays in the introduction of legislation in response to recommendations of the Commission and further long delays in the enactment of any such legislation — as have occurred in the past — can be very discouraging to the judiciary, and over time can negatively impact on the judges' independence, particularly if they have to become advocates for their own cause.

The respect shown for the concept of judicial independence in the design of the Triennial Commission process has been tainted by the business-as-usual attitude of successive Governments once the Commission reports have been presented to Ministers of Justice and tabled in Parliament. This failure to act with reasonable promptness cannot but lead to the entire review process losing credibility. This Commission notes, for example, that the legislation (Bill C-50) comprising the Government's response to the 1989 Commission on Judges' Salaries and Benefits (the Courtois Commission), was not introduced in Parliament until December 1991, and that by the end of the mandate of the current Commission, this relatively uncomplicated legislation had not yet been enacted.

We therefore **recommend that the Government of the day state its response to the recommendations of a Triennial Commission, and introduce its resultant legislation, as soon as feasible but in any event within 20 sitting days after the expiry of a nine-month period**

immediately following the submission of the Triennial Commission report to the Minister of Justice.

The Commission believes that it is neither desirable nor (in view of the requirement of section 100 of the *Constitution Act, 1867*) constitutional, for Triennial Commission recommendations to be binding on the Government. However, the process of independent review mandated by Parliament over a decade ago loses much of its effectiveness, and might even be rendered meaningless, if the Government's, or Parliament's, response to a Commission's recommendations is allowed to become part of the political agenda or the subject of partisan debate.

We believe that Triennial Commission members should be prepared to become advocates for their recommendations. To this end, we **recommend that Triennial Commission members be called as witnesses by parliamentary standing and legislative committees to elaborate on and support their recommendations**, both in proceedings where their report is being considered and in proceedings which are considering the Government's legislative response to the recommendations.

IV. THE COMMISSION'S HEARING PROCESS

Triennial Commission members, during the period of their mandate, should have access to the best information available concerning matters of relevance to the Commission's terms of reference. This Commission has benefited from having received very helpful documentation and background material provided by a number of federal government departments. This information was also provided to all the judicial organizations that made presentations at the oral hearing.

We feel that receiving information of this nature would prove equally useful to future Triennial Commissions as well as to the judges' organizations. We therefore **recommend that this briefing process, including the possibility of Department of Justice and other federal government officials appearing at Commission hearings to present departmental positions on relevant issues, be encouraged and even formalized.** We also **recommend that the practice of holding open hearings be continued by future Triennial Commissions.**

V. JUDICIAL SALARIES

Recognition of financial security as a fundamental component of the independence of the judiciary dates back almost three centuries, to the *Act of Settlement* of 1701. The *Constitution Act, 1867*, at section 100, acknowledges the essentiality of judges' financial security by conferring on Parliament the duty to fix and provide judicial salaries, allowances and pensions. Other legislated manifestations of the importance of financial security within the context of judicial independence are the Triennial Commission review process, the annual salary adjustment (section 25 of the *Judges Act*) and the administration of Part I of the *Judges Act* by the Commissioner for Federal Judicial Affairs, instead of by the Deputy Minister of Justice, who in his or her capacity of Deputy Attorney General of Canada is a frequent litigator before the judges. The Commissioner for Federal Judicial Affairs reports directly to the Minister of Justice.

The Supreme Court of Canada has twice underscored the necessity and importance of financial security within the context of judicial independence (*The Queen* v. *Beauregard*, [1986] 2 S.C.R. 56, at 74- 75; *Valente* v. *The Queen*, [1985] 2 S.C.R. 673, at 704). The Supreme Court understood financial security to include both the determinative source of judicial compensation — that is to say, the legislative authority for payment of judges' remuneration — and the level of compensation. The Court did not suggest at what level of salary financial security is achieved, but it is evident that the Court considered financial security to include a salary level that was not merely adequate, but commensurate with the status, dignity and responsibility of judicial office (*Beauregard*, p. 75). In addition to these criteria, one must consider the necessity, unique to the requirements of the bench, to attract recruits from among the best qualified and experienced individuals in the generally well-paid legal profession. Furthermore, the judicial salary must be sufficient to preserve and reflect the role and esteem which the office of judge deserves. The judge and his or her family must not only be, but be regarded by society to be financially secure, particularly in view of the statutory requirement (at section 55 and subsection 57(1) of the *Judges Act*) that a judge devote himself or herself exclusively to judicial duties and not engage in any occupation or business.

The 1983 (Lang), 1986 (Guthrie) and 1989 (Courtois) Triennial Commissions all recommended that the salary level established by amendments to the *Judges Act* in 1975 be restored in relative terms by increasing salaries in accordance with the "Industrial Composite [now Industrial Aggregate] Index formula", as per section 25 of the Act, for each year since 1975 to allow for inflation, with a cap of 6% and 5% in 1983 and 1984 respectively, to reflect the limit on salary adjustments for members of the public sector under the *Public Sector Compensation Restraint Act* (S.C. 1980-81-82-83, c. 122). The resultant salary level is commonly referred to as "1975 equivalence."

We are of the view that the concept of "1975 equivalence" is not particularly helpful as a determinant of judges' salaries today. The concept of "1975 equivalence" was developed under circumstances that existed 18 years ago in conjunction with the introduction of mandatory pension contributions and prior to the introduction of automatic annual indexing of judicial salaries. Much has changed since 1975, not the least of which has been the Canadian economy. The concept of "1975 equivalence" no longer relates to empirical realities, and is in serious danger of acquiring the status of arbitrariness.

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

There are presently only 20 DM-3s in the entire federal public service, and they hold positions which generally carry very onerous operational, policy, management and budgetary responsibilities. They are a group whose services are immensely valuable to the country as a whole, and to the extent that the value of their services might be quantified with accuracy on any objective scale, it would appear that the same scale could quite fairly apply to superior court judges as well. We say this without any intention of comparing or equating judges to public servants for any purpose whatsoever except the stated purpose of determining an appropriate salary benchmark for judges that would reflect the role and esteem which judicial office deserves and, most important, ensure financial security and thereby contribute to judicial independence. Rough parity of this nature between judges and top-level public servants finds support in the comparative salary figures from a number of other common law industrial democracies.

Disregarding other elements of total compensation, we note that superior court judges' salaries have been below the mid-point of the DM-3 salary range for all but 2 of the 18 years since 1975. Those judicial salaries ($155,800) are currently $500 above the DM-3 mid-point ($155,300), which is well within the scope of rough equivalence. Having determined what we feel is currently an appropriate benchmark for judicial salaries, subsequent Triennial Commissions might re-examine the judges/DM-3 relationship in light of the future salary levels of both groups, without prejudicing the judges' entitlement to receive, in intervening years, annual salary adjustments, to a maximum of 7%, calculated in accordance with section 25 of the *Judges Act*.

When the salary freeze announced by the Minister of Finance on December 2, 1992, ends on March 31, 1995 (which assumes clause 10 of Bill C-113, the freeze legislation, will be enacted as tabled), the Commission sees no reason for judicial salaries to "bounce back" to where they would have been without the freeze unless the same salary "catch-up" is given to the DM-3s.

We therefore **recommend that rough equivalence with the mid-point of the DM-3 salary range be the appropriate benchmark by which to gauge puisne judges' salaries.**

We have examined judges' salaries in conjunction with the many other elements of the entire judicial compensation package, and although we are recommending that rough equivalence with DM-3s serve as the benchmark only for judges' salaries, we note that judges' pensions, allowances and other benefits, when considered in the aggregate, are certainly no less generous than those of the DM-3s.

We have also examined the salaries of chief justices and of judges on the Supreme Court of Canada, and their relationship to the salaries of puisne judges. We do not favour fixed dollar differentials between the salaries of the puisne judges and these other groups of judges who are paid at a higher rate, but instead we are of the view that all judges should receive the same percentage increase whenever salaries are raised.

VI. CONTINUING THE SALARIES OF RETIRED JUDGES OF THE SUPREME COURT OF CANADA

Bill C-50, introduced on December 12, 1991, is the Government's response to the 1989 (Courtois) Triennial Commission. The Bill, which at the time of the submission of this report to the Minister of Justice had not gone beyond First Reading in the House of Commons, contains a provision which would entitle a judge of the Supreme Court of Canada to receive the incidental and representational allowances during the six-month period immediately following retirement while completing his or her judgments. The Commission fully endorses Bill C-50, including the above-mentioned provision.

However, we do not recommend acceptance of the proposal that a retired judge of the Supreme Court of Canada receive his or her salary during the six-month judgment-writing period immediately following retirement. Supreme Court judges in that position should receive whatever support facilities and staff are necessary to assist them in their judgment-writing, as well as the incidental and representational allowances which Bill C-50 would provide.

The significance of membership on the Supreme Court of Canada is recognized by the higher salary, and consequently the higher annuity, received by its judges. Furthermore, our recommendation, in Item F of Chapter X, for a 65/10 retirement option for the judges of the Supreme Court, recognizes the added responsibilities and workload inherent to the position. It seems to us that these responsibilities would normally include completing and/or contributing to the decisions in matters in which the judge sat in appeal.

VII. ANNOUNCEMENT OF THE SALARY FREEZE ON DECEMBER 2, 1992

On December 2, 1992, the Minister of Finance, the Honourable Don Mazankowski, delivered an economic and fiscal statement in the House of Commons which, among other things, announced the Government's intention to impose a two-year freeze on judicial salaries. The salary freeze also applied to the Governor General, the Lieutenant Governors, the Prime Minister, Ministers, Members of Parliament, Senators, public servants and the employees of non-commercial Crown corporations. Assuming the freeze legislation as it applies to judges (clause 10 of Bill C-113, introduced on February 17, 1993) is enacted as tabled, it would override the annual salary adjustment provision, section 25 of the *Judges Act*, in 1993 and 1994.

The Commission has no comments to make with respect to the appropriateness of the two-year salary freeze itself, since to do so would not be within our mandate. However, we believe that the manner in which the Government announced the imposition of the freeze on judges could have been more consistent with the procedures provided for in the *Judges Act* for maintaining the independence of the judiciary.

This Commission had been appointed and was in the midst of its six-month mandate at the time of the announcement of the freeze. Furthermore, the next statutory salary adjustment following the announcement would not have been payable until April 1, 1993. That being the case, the Government had the option of supporting the process for maintaining judicial independence by presenting its proposal to freeze judges' salaries to the Commission for consideration and comment instead of presenting the judges, and this Commission, with a fait accompli.

VIII. REGISTERED RETIREMENT SAVINGS PLAN CONTRIBUTION LIMITS

Since 1978, pension contributions made under the *Judges Act* have not been treated as reducing the amount which judges may contribute to a Registered Retirement Savings Plan (R.R.S.P.). Up to and including the 1991 taxation year, judges have been permitted to deduct from income for tax purposes not only their statutory pension contributions but also contributions toward an R.R.S.P. up to the self-employed limit ($11,500 for 1991).

As a result of the coming-into-force in 1990 of the amendments to the *Income Tax Act* contained in Bill C-52 (S.C. 1990, c. 35), and in 1991 of the new section 8309 of the *Income Tax Regulations*, as of the 1992 taxation year judges lost the benefit of the higher deduction which had been available to them since 1978. Judges will now have the same tax-deductible R.R.S.P. contribution room, $1,000, that is available to taxpayers who are members of a Registered Pension Plan providing the maximum permissible benefits. We note that a number of other taxpayers in similar situations have also had their tax-deductible R.R.S.P. contribution room reduced to $1,000.

The Commission is of the view that as a matter of general tax policy, all taxpayers should be placed on the same footing. Consequently, the unique and distinct status of judges should not extend to their standing as taxpayers, and their loss of the higher deduction for the 1992 and subsequent taxation years should be allowed to stand. We cannot say it better than Chief Justice Dickson did in *Beauregard*, at page 76:

> Canadian judges are Canadian citizens and must bear their fair share of the financial burden of administering the country.

Chief Justice Dickson recognized that Parliament can construct new, and change established, judicial remuneration schemes and provisions, but at page 77 he qualified Parliament's power in this way:

> I want to qualify what I have just said. The power of Parliament to fix the salaries and pensions of superior court judges is not unlimited. If there were any hint that a federal law dealing with these matters was enacted for an improper or colourable purpose, or if there was discriminatory treatment of judges vis-a-vis other citizens, then serious issues relating to judicial independence would arise and the law might well be held to be ultra vires s. 100 of the *Constitution Act, 1867*.

There is absolutely no reason to suggest that subjecting judges to the same R.R.S.P. contribution room and tax deduction rules as other taxpayers constitutes discriminatory treatment. The Commission finds no reason to make an exception for judges by continuing the higher deduction anomaly. Nor do we feel that judicial salaries should be adjusted to compensate judges for the changes in the deductibility rules.

We recommend that no exception be made for judges with respect to the changes in the R.R.S.P. deductibility rules implemented by the amendments to the *Income Tax Act* contained in S.C. 1990, c. 35 and the regulations thereunder.

IX. FORMER CHIEF JUSTICES SERVING AS SUPERNUMERARY OR PUISNE JUDGES

The *Judges Act*, at subsections 29(4) and 30(4), provides that a chief justice or chief judge, or an associate chief justice or associate chief judge, who elects supernumerary status receives the salary of a puisne judge during his or her supernumerary service. Pursuant to subsections 31(4) and 32(4), a chief justice who reverts to puisne status after serving as a chief justice then receives the salary of a puisne judge following the reversion.

During the public hearings, the Commission was asked to examine the feasibility of amending the *Judges Act* so that a former chief justice who has elected to serve as a supernumerary judge or has reverted to puisne status can continue to receive the salary of a chief justice.

In our view, the additional responsibilities which attach to the office of a chief justice justify the entitlement to the higher salary level. Should a chief justice relinquish that office by electing to serve as a supernumerary judge or by reverting to puisne judge status, we do not see why his or her salary should continue at the higher level. We therefore concur with the conclusion reached on this point by the 1989 (Courtois) Commission. We also concur with that Commission to the effect that former chief justices or chief judges who retire are justified in receiving, pursuant to subsections 43(1) and (2) of the *Judges Act*, pensions that are based on the salaries then in effect of a chief justice or chief judge, since they have earned the higher pensions by virtue of their having served as chief justices for at least 5 years.

X. JUDICIAL ANNUITIES

Section 42 of the *Judges Act* provides for the granting of an annuity equal to two-thirds of the salary annexed to the office of a judge at the time of his or her resignation, removal or ceasing to hold office, to a judge who

(a) has continued in office for 15 years and has attained the age of 65, if he or she resigns his or her office:

(b) has continued in office for 15 years but has not attained the age of 65, if his or her resignation is conducive to the better administration of justice or is in the national interest;

(c) resigns or is removed as a result of becoming afflicted with a permanent disability preventing him or her from executing his or her office; or

(d) has reached the mandatory retirement age of 75, if he or she has held office for at least 10 years.

If a judge reaches the mandatory retirement age without having served for 10 years, he or she is entitled to an annuity pro-rated on the basis of years of completed service (to the nearest one-tenth of a year) as a proportion of 10 years.

Like the 1986 (Guthrie) Triennial Commission, we are using the terms "annuity" and "pension" interchangeably, since as they apply to judges' benefits they mean essentially the same thing. We note that the *Judges Act* uses the term "annuity", while section 100 of the *Constitution Act, 1867* refers to "Pensions". We might also point out that in the French version of both the *Judges Act* and the Constitution, the single term "pension" is used exclusively, even though the French word "annuité" exists and means virtually the same as the English word "annuity". We also refer to the very à propos comment by Chief Justice Dickson in the footnote on page 62 of the *Beauregard* decision:

> In this judgment I have used the word "pension" because I think it corresponds more closely to the ordinary understanding of the benefits being considered.

A. Judges' Contributions toward Annuities

Prior to 1975, federally appointed judges did not contribute toward the cost of their statutory annuities. The 1975 amendments to the *Judges Act* (now section 50) require judges who were appointed before February 17, 1975 (the date of First Reading of the amendments), to contribute at a rate of 1.5% of their annual salary to help defray the cost of improved annuities for their surviving spouses and eligible children. These judges are not required to contribute in respect of their own annuities or for indexing the pensions to the cost of living. Judges appointed on or after February 17, 1975, must contribute at a rate of 6% of annual salary toward the cost of their own annuities as well as those of their surviving spouses and children. They also contribute a further 1% of salary to help pay for indexing the pensions to the cost of living. Pension indexing is provided for by the *Supplementary Retirement Benefits Act* (R.S.C. 1985, c. S-24).

The constitutional authority of Parliament to legislate reasonable contributions by judges toward their annuities, as well as the legality of the differential in contribution rates which is based on date of appointment to the bench, were settled by the Supreme Court of Canada in the *Beauregard* decision.

The Commission recognizes that annuities represent an important element in the overall judicial compensation scheme. Judicial compensation, as the Supreme Court of Canada affirmed in the *Valente* and *Beauregard* decisions, in turn constitutes an essential component in guaranteeing judicial independence. We are firmly of the view, however, and are supported in this contention by the *Beauregard* decision, that reasonable pension contributions do not affect judicial independence.

The "two classes of judges," each contributing at different rates, which resulted from the "grandfathering" of judges appointed before February 17, 1975, is inexorably losing practical significance with each passing year. We note in this regard that at the time of the writing of this report, only 155 judges, or less than 17% of all judges, are paying 1.5% of salary as pension contributions. Of those paying 1.5%, 95 judges, more than 61%, are supernumerary. That leaves 60 judges, less than 7% of all judges, who are full-time and paying pension contributions at the rate of 1.5%. In terms of the overall membership of the bench, therefore, the proportion paying contributions at the rate of 7% is overwhelming and growing, and those judges accepted appointment with the knowledge that pension contributions of that amount were mandatory.

We support the continuation of judges' contributions toward the cost of their pensions, including supernumerary judges and judges who are entitled to retire but who have not done so. In this connection, we note that even at the current rates of contribution, the judges are actually paying for about one-fifth of the overall cost of their pensions. About 80% of the cost is borne by Canadian taxpayers. (See Appendix D.)

B. Reporting and Accounting

At present, judges' contributions toward the costs of their pensions are paid into the Consolidated Revenue Fund. To better serve fiscal accountability, we **recommend that contributions, benefits, interest and liabilities for the judges' pension scheme be accounted for distinctly in the Pension Accounts**, as is already done, for example, for the public service superannuation plan.

C. Indexation of Annuities

Judicial annuities, including those of surviving spouses and eligible children, are indexed pursuant to the *Supplementary Retirement Benefits Act*. That Act applies to the pension plans of virtually all of the branches of the public service and to Members of Parliament, as well as to judges, and it is administered by the President of the Treasury Board.

The unique status of the judiciary, the principle of judicial independence, and the fact that the judicial compensation package (of which pension indexing is a part) is an essential element in the financial security of the judges, all suggest that the indexation of judicial annuities should be provided for in the *Judges Act*. The indexation of annuities is, for judges alone, a factor that should be regarded as coming within the constitutional guarantee of security of salary and pension. Consequently, we believe that the indexation of judges' pensions should be distinct from the indexation of public service pensions. We note that the provisions regarding the indexation of judges' salaries are already in the *Judges Act*. This is consistent with our view that all of the elements of the judges' remuneration package should be governed by the Minister of Justice and administered by the Commissioner for Federal Judicial Affairs pursuant to provisions contained in the *Judges Act*.

We therefore **recommend that the provisions for indexing judicial annuities, including those of surviving spouses and eligible children, should be transferred to the *Judges Act* from the *Supplementary Retirement Benefits Act*.**

D. "Rule of Eighty"

Traditionally, appointments to the superior courts (and when they existed, the county and district courts as well) were made from among the more senior members of the bar, that is, in the age range of 50 years and older. Commencing about a generation ago, a practice began of appointing on occasion younger men and women to the bench: for example, lawyers in their late 30s and early 40s.

This trend, almost imperceptible when it began but now evident, was welcomed. It produced a group of younger judges who are able to dedicate longer periods of service to the judiciary and help meet the increasing demands of the busy court systems. The practice of

appointing male and female judges at a younger age has undoubtedly been a successful one, but over the years it has affected the overall age profile of the judges. (Appendix C contains an outline of the average ages of male and female judges appointed to the bench during the years 1981 to 1992 inclusive.)

In view of this changing judicial age profile, we believe that the administration of justice would be better served by providing more flexible rules of retirement. Therefore, the Commission is of the view that 60 years should be the minimum age at which a judge qualifies for a full pension of two-thirds of salary. We are also of the view that 15 years' service on the bench should continue as the minimum required to be eligible for a full pension unless the provisions of subsection 42(2) of the *Judges Act*, regarding mandatory retirement, apply.

We therefore **recommend that retirement at full pension be permitted when a judge has reached at least 60 years of age and has served on the bench for a minimum of 15 years, provided the sum of age and years of service equals at least 80.**

The Commission considers a "Rule of 80" retirement option as particularly appropriate in view of the changing age profile of judges. By permitting retirement with a full pension at earlier ages, in a flexible and fair manner which recognizes the unique service conditions and requirements of the judiciary, the Rule of 80 would not be inconsistent with pension reform standards. We note, however, that certain pension reform standards are not relevant, due to the special characteristics of the judges' plan.

E. Disability

The *Judges Act*, at paragraph 42(1)(c), provides for the granting of a full pension of two-thirds of salary to a judge who resigns or is removed from the bench as a result of becoming afflicted with a permanent disability preventing him or her from executing his or her office.

The Commission has considered whether it is appropriate that a judge can resign pursuant to this provision after very short service and receive a full pension. This led the Commission to consider a number of options, such as the implementation of a pro-rated disability pension in circumstances where a full pension may appear to be overly generous.

The disability provision serves as the judges' long-term disability insurance plan.[1] Since 1982, an average of 3.5 judges per year have retired from the bench, and received a full pension, under the authority of paragraph 42(1)(c). We do not consider this number of disability retirements and the resulting additional years of pension payments to be unusual, given the age profile of judges. In other words, the statistics do not indicate significant problems with the disability provision. We note, in passing, that there are administrative measures that can be taken to resolve any problems that may be identified from time to time.

We consider the paragraph 42(1)(c) disability provision, with its certainty of financial security for the judge and his or her family in the event of the judge's permanent disability, to be an important aspect of his or her overall independence. We do not recommend that any changes be made to the disability provision at paragraph 42(1)(c) of the Act.

F. Retirement for Judges of the Supreme Court of Canada

It is universally recognized that acceptance of an appointment as a Justice of the Supreme Court of Canada brings with it an immense workload and heavy responsibility. In addition, judges of the Supreme Court cannot elect to hold office as supernumerary judges. Like the earlier Triennial Commissions, we appreciate that supernumerary status is inappropriate for the judges of our highest court, and inconsistent with the Court's unique role as the final arbiter of the country's legal values. The finality of the Supreme Court's decisions requires that they be handed down only by full-time members of the Court rather than by supernumerary judges. Furthermore, supernumerary status might impair the collegiality of the nine-member Court, and detract from the sense of permanence and the regional balance which add to its credibility and legitimacy.

In view of the unusually heavy burden inherent in membership on the Supreme Court of Canada, and the unavailability of supernumerary service, the Commission is of the view that an additional retirement option should be provided exclusively to the judges of that court. Therefore, in addition to the existing retirement entitlements and the recommended new Rule of 80 retirement option in Item D above, we **recommend that judges be permitted to retire with a full pension after serving for a minimum of 10 years on the Supreme Court of Canada and reaching the age of 65 years.**

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[1] Short-term illness requiring absence from judicial duties for a period in excess of 30 days can be accommodated by the judge obtaining a leave of absence from the Governor in Council under subsection 54(1) of the *Judges Act*. An average of 8 illness-related leaves of absence per year have been granted in each of the last six years under subsection 54(1). In any event, whenever a judge will be absent from his or her judicial duties for more than 30 days, the judge must report the absence and the reasons therefor to the Minister pursuant to subsection 54(3).

G. Credit Splitting on Marriage Breakdown

When the recently enacted *Pension Benefits Division Act* (S.C. 1992, c. 46) is brought into force, it will provide a scheme applicable to certain statutory pension plans which recognizes the right of a spouse to a share of the plan member's pension credits on the breakdown of a marriage or common-law relationship. The Act will enable the divorced or separated spouse of a plan member to apply for a division of the member's pension credits which have accrued during the period of cohabitation, as long as there is a court order or a spousal agreement which provides for the division of the credits. The *Pension Benefits Division Act* will apply to the pension plans of the federal public service, the Canadian Forces, the R.C.M.P., Members of Parliament, lieutenant governors, the Governor General and others. It will not apply to judges' pensions under the *Judges Act*. Consequently, there is currently no authority to split a judge's pension credits upon the breakdown of his or her marriage.

Credit splitting is another area of pension reform where harmonization of judicial pensions is a worthwhile objective. It is an accepted pension reform standard under both federal and provincial legislation. We believe as a matter of fairness and equity that credit splitting ought to be made applicable to the judiciary. Therefore, we **recommend that the *Judges Act* be amended to incorporate therein the relevant provisions of the *Pension Benefits Division Act*, with such changes as the circumstances require.** The regulations made thereunder to permit the valuation of judicial pensions for credit splitting purposes should be made by the Governor in Council on the recommendation of the Minister of Justice after consultation with the Commissioner for Federal Judicial Affairs.

It is important that the *Judges Act* actually contain the relevant provisions of the *Pension Benefits Division Act*, rather than merely being listed as one more statute to which the *Pension Benefits Division Act* applies, since as a compensation matter it impacts on the independence of the judiciary and, as we stated earlier with respect to the indexation of judges' pensions, it should be governed by the Minister of Justice and administered by the Commissioner for Federal Judicial Affairs.

This amendment would permit the payment of part of a judge's pension credits to his or her non-judge spouse or on the spouse's behalf. This transfer would be made directly out of the Consolidated Revenue Fund and would have the effect of reducing the amount of the pension that the judge would eventually receive. We are informed that a judge's pension credits may be actuarially valuated and quantified for these purposes at any time following appointment, notwithstanding that judges' pensions are the non-accrual type. (We note that the lieutenant governors', Governor General's and non-career diplomats' pensions are also the non-accrual type.) We do not regard the concept of credit splitting as interfering with the principle of judicial independence.

XI. SUPERNUMERARY STATUS

Rather than leave the bench after attaining the minimum qualification for retirement, a judge has the option pursuant to sections 28 and 29 of the *Judges Act* to elect to serve as a supernumerary judge. Under this arrangement, a puisne judge who is at least 65 years of age and has served as a federally appointed judge for a minimum of 15 years, or has reached the age of 70 years and has held office for at least 10 years, may opt to continue in office until age 75 as a supernumerary judge by so electing. A supernumerary judge holds himself or herself available to perform whatever judicial duties his or her chief justice requests of him or her.

A supernumerary judge remains entitled to a full judicial salary until the judge reaches mandatory retirement age or otherwise leaves the bench, at which time he or she would receive a full annuity. A chief justice or associate chief justice who elects supernumerary status is entitled to receive the salary of a puisne judge during his or her supernumerary service, although the subsequent annuity is based on the salary then in effect of a chief justice.

All federally appointed judges except the members of the Supreme Court of Canada are entitled to opt for supernumerary status. Approximately 18% of the federally appointed bench are currently supernumerary judges, and that proportion is anticipated to increase in the years ahead.

When a judge becomes a supernumerary judge, the judicial position held by that judge becomes vacant and a replacement might then be appointed (although not necessarily so). Consequently, the supernumerary programme lengthens judicial careers and promotes continuity on the bench, while making available positions which could not otherwise be filled until the retirement of the incumbents. Supernumerary status allows a judge who might not be able to carry a full workload, but who is otherwise able to work on a part-time basis, to continue to do so for the benefit of his or her court.

The judges, in their submissions, informed us that the workload of a supernumerary judge is expected to average, on a cross-Canada basis, 50% of the workload of a regular, full-time judge. On that basis, combined with the fact that the large majority of supernumerary judges are entitled to retire with a full pension by virtue of having reached the 65/15 age and service thresholds, we accept the judges' representations that from an economic standpoint, a supernumerary judge represents an efficient use of human resources, and that supernumerary service is quite conducive to the effective administration of the courts, including the reduction of court backlogs and delays.

The Commission regards supernumerary status for judges to be consistent with currently evolving views regarding gradual retirement. On the basis of the information given to us by the judges in their submissions before us, we support the supernumerary concept. The cost analysis in this report is predicated on the 50% workload factor.

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

A. The Rule of Eighty and Supernumerary Service

Predicated on the judges' representations, we consider the supernumerary programme to be providing a valuable contribution toward the effective and efficient administration of the courts. With that in mind, along with the changing age profile of judges referred to earlier, we consider it appropriate for judges to elect supernumerary status under a Rule of 80 formula, provided the judge has served a minimum of 15 years in office and is at least 60 years of age. We would, however, maintain the existing 70/10 supernumerary option.

We therefore **recommend that the election of supernumerary status be permitted when a judge has reached at least 60 years of age and has served on the bench for a minimum of 15 years, provided the sum of age and years of service equals at least 80.** This Rule of 80 recommendation is identical to our Rule of 80 recommendation regarding retirement which we made in Item D of Chapter X.

B. Ten-year Maximum Supernumerary Service

Concomitant with our recommendation for an extended eligibility to elect to serve as a supernumerary judge, we also **recommend that a judge not be permitted to serve for more than 10 years as a supernumerary judge.** Consequently, an eligible judge who would elect to serve as a supernumerary judge at younger than 65 years of age would forfeit his or her right to retire at age 75. Should this recommendation be considered to be unconstitutional or, once enacted, be so found, as a result of the 75 years mandatory retirement age in subsection 99(2) of the *Constitution Act, 1867*, then we would recommend that the minimum age for the election of supernumerary status remain, or be increased (as the case may be), to age 65. However, since we recognize the value of supernumerary service, and have concerns only with respect to the workload capacity of supernumerary judges who are approaching the mandatory retirement age of 75, we suggest that future Triennial Commissions may want to re-examine the 10-year supernumerary limit on the basis of information which might then be available regarding the 50% average workload of supernumerary judges.

XII. INCOME TAX HARMONIZATION

The income tax rules relating to retirement savings have been extensively revised over the past few years. The stated objectives of these income tax reforms were to ensure that all taxpayers are provided with a similar opportunity to save for retirement on a tax-assisted basis and to ensure that the costs of pension plans and benefits are measurable according to common standards.

The new pension rules are extremely complex. Simply put, the rules now restrict the benefits that may be provided under a defined benefit Registered Pension Plan (R.P.P.), and in this way limit the amount of tax assistance provided to such plans. (A defined benefit pension plan is a plan that provides a specified level of benefits, regardless of the cost of providing those benefits.) An employer who wants to provide pension benefits in excess of those permissible under an R.P.P. must establish a separate Retirement Compensation Arrangement (R.C.A.) for this purpose, which then becomes subject to rules of its own.

The Department of Finance assured the Commission that the restructuring of the judicial pension plan into a combination of an R.P.P. (that is to say, a base pension plan that is to be registered for income tax purposes) and an R.C.A. or supplementary plan, can take place without any change to the benefits payable to judges and their survivors. The Commission accepts this assurance, and recognizes that the R.P.P./R.C.A. regime would have no practical effect on the amount or administration of judges' pensions.

Judges' pensions are rooted in the constitution. This constitutional foundation, arising from the exigencies of judicial independence, marks the judicial pension plan as unique. The entire scheme, with the sole exception of pension indexing, is provided for and administered in accordance with the *Judges Act*. In view of the Department of Finance's assertion that the R.P.P./R.C.A. regime would have no practical impact on judges' pensions, we see no compelling reason to restructure or transform the *Judges Act* to embrace the entire R.P.P./R.C.A. regime.

We note that the *Judges Act*, at subsection 50(3), currently contains a clause which deems a judge's statutory pension contributions to be made to or under a registered pension plan or fund. The clear purpose of that deeming provision is to enable the judge to deduct those contributions from income for tax purposes; the provision essentially creates a legal fiction. The Commission believes that the R.P.P./R.C.A. restructuring should also be made applicable to judges by means of a deeming provision. We therefore **recommend that the *Judges Act* be amended to provide that the judges' pension scheme is deemed to be a Registered Pension**

Plan up to the limits provided therefor under the *Income Tax Act* and regulations, and is deemed to be a Retirement Compensation Arrangement for the excess.

In our view, a deeming provision of that nature would be entirely consistent with our belief, referred to at Chapter VIII with regard to judges' R.R.S.P. contribution limits, that as a matter of general tax policy all taxpayers should be placed on the same footing. The deeming clause would also conform to our belief, mentioned in Items C and G of Chapter X, and rooted in the understanding that judges' pensions are an essential component of their financial security and judicial independence, that all aspects of their pensions should be governed by the Minister of Justice and administered by the Commissioner for Federal Judicial Affairs pursuant to provisions contained in the *Judges Act*.

XIII. JUDICIAL ALLOWANCES

The Commission has examined the status of a number of the statutory allowances under the *Judges Act*. In particular, we have looked at the amount and adequacy of the incidental allowance (subsection 27(1)); the northern allowance (subsection 27(2)); the representational allowance (subsection 27(7)); the removal allowance (section 40); and the conference allowance (subsection 41(3)).

We note that in the case of every one of these allowances, statutory improvements have either been implemented following the recommendations of the 1986 (Guthrie) Triennial Commission or introduced (but not yet enacted) through Bill C-50 as a result of the recommendations of the 1989 (Courtois) Triennial Commission. We believe that once Bill C-50, or its successor legislation in the current or a new parliamentary session, is enacted, those allowances will be adequate and in any event may be examined again by the next Triennial Commission.

We also want to mention the submission made to this Commission on behalf of the superior court judges serving in the two territories. We appreciate the higher cost of living that comes with service in the north, and recognize that the current $6,000 northern allowance might not fully compensate for those increased costs. However, we do not believe that varying the northern allowance annually by tying it to increases in judicial salaries is the appropriate method of dealing with the higher cost of living. The judges' annual salary adjustment based on a statutory indexing formula serves a special purpose relating to judicial independence, and we do not believe it should be used for calculating the northern allowance as well.

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

XIV. NON-STATUTORY BENEFITS

The Commission considers the judges to have, in the aggregate, very good basic insurance and medical coverage. If a judge dies in office, his or her surviving spouse is entitled to an annuity equal to one-third of the judge's salary (to be increased to 40% under Bill C-50) and a lump-sum statutory payment of one-sixth of salary. The surviving spouse of a retired judge who dies is entitled to receive an annuity equal to half of the judge's annuity (to be increased to 60% under Bill C-50). Surviving minor children or those in full-time attendance at a school or university are also entitled to annuities. Under the *Judges Act*, a judge who is unable to continue on the bench due to a permanent infirmity is entitled to retire with a full pension of two-thirds of salary. A judge with a lesser disability, but lasting longer than 30 days, may apply for a leave of absence and continues to receive full salary while on leave. Of course, each judge is also covered by the public health insurance plan of his or her province or territory of residence. Bill C-50 would make judges eligible under the *Government Employees Compensation Act* (R.S.C. 1985, c. G-5) for the purposes of compensation for injuries.

In addition to their statutory allowances and entitlements, judges also receive a number of non-statutory benefits related to life, health and dental group insurance and accident insurance. For instance, judges can participate in both the Public Service Management Insurance Plan (P.S.M.I.P.) and the Public Service Health Care Plan (P.S.H.C.P.), taking advantage in both plans of the federal public service's highly competitive group rates. The judges also participate in the Public Service Dental Care Plan (P.S.D.C.P.) at no charge to either themselves or their dependents. We see no need to specifically augment these broad and comprehensive coverages for the judges alone.

The P.S.M.I.P coverage, which is optional, includes life insurance, accidental death and dismemberment insurance, and dependents' insurance. As an example, maximum life insurance coverage available under this plan could provide a lump sum benefit upon the judge's death of twice his or her salary, which is in addition to the survivor benefits under the judges' pension plan. Premiums vary with age, sex and coverage chosen; due to a partial premium holiday in effect at the time of writing our report, a 50-year-old male judge would pay less than $22 per month for the maximum coverage available.

The P.S.H.C.P. includes coverage for both the judge and his or her dependents, and consists of drug benefits (80% of costs paid); vision care benefits (including 80% of the costs of eyeglasses and contact lenses, to maximum annual limits); health practitioners benefits (including costs of private-care nurses, physiotherapists, psychologists, speech and language pathologists, and the like, to maximum annual limits); out-of-province benefits (including travel and emergency travel assistance benefits, to maximum limits); miscellaneous expense benefits

(including 80% of the costs of medically prescribed hearing aids, air and ground ambulance service, orthopaedic shoes, and so on, to maximum annual limits); benefits relating to hospital expenses incurred outside of Canada (subject to per-trip limits); and benefits relating to hospital care within Canada (including semi-private or private room accommodation, to maximum daily limits).

Judges, retired judges and surviving spouses in receipt of annuities under the *Judges Act* are all entitled to participate in the P.S.H.C.P. Family coverage to the highest level currently costs a judge less than $10 per month.

In addition to participating in the P.S.M.I.P., the P.S.H.C.P. and the P.S.D.C.P., judges are also eligible to participate in an optional supplementary catastrophic health insurance plan which has been arranged between the Canadian Judges' Conference and a private carrier. This optional plan is not subsidized, although the monthly premium of $105 (for family coverage) is deducted at source by the Office of the Commissioner for Federal Judicial Affairs.

XV. MATERNITY/PARENTAL LEAVE

Under section 54 of the *Judges Act*, a judge who is absent from his or her judicial duties for a period in excess of 30 days requires Governor in Council approval of the absence. The approval for this paid leave of absence is granted by order-in-council. The Commission notes that this leave of absence provision is sufficiently flexible, and has been so used in the past, to authorize maternity leave for a female judge during pregnancy or following the birth or adoption of a child.

Notwithstanding the availability of a section 54 leave of absence for maternity and possibly parental leave purposes, we believe that the social benefits attributable to allowing a parent to be with her or his newborn or newly adopted child are sufficiently evident to justify reducing the decision-making authority for judicial maternity/parental leave to the chief justice level from the Governor in Council. We therefore **recommend that the *Judges Act* be amended to permit a chief justice to authorize up to 6 months of maternity/parental leave: (i) for a female judge on his or her court who is pregnant, has recently given birth or has recently adopted a child; and (ii) for a male judge following the birth or adoption of his child.** This period of maternity/parental leave should have no effect on the judge's salary. An aggregate of 6 months of maternity/parental leave seems appropriate and is in accordance with federal unemployment insurance legislation. We would invite chief justices to take into account the amount of maternity/parental leave being taken by the other parent when considering how much maternity/parental leave to grant to the judge.

Whenever a judge is absent from his or her judicial duties for a period in excess of 30 days, the requirement in subsection 54(3) that he or she report the absence and the reasons therefor to the Minister of Justice should continue.

XVI. COSTING METHODOLOGY

The terms of reference of this Commission, unlike those of previous Triennial Commissions, specifically request that we cost our recommendations. We were therefore required to consider how best to discharge our duty in that regard within the limited time available.

We considered it advisable to develop a costing methodology that was sufficiently general yet comprehensive enough to apply to our recommendations as well as to the recommendations of future Triennial Commissions. We believe that the credibility and comparability of costings would be enhanced if this and subsequent Commissions use a consistent cost methodology.

We came to the conclusion that the best way to measure the costs of our recommendations was by determining the difference between the cost of the total compensation package enjoyed by judges before and after implementing our recommendations. This total compensation cost approach automatically accounts for the interactions between the various components of the judges' salary, allowance and benefits package. In addition, by providing a global value of judicial salaries and benefits, a standard of comparison is available between the judges' compensation package and that of public servants and the private sector.

The Commission considered the advisability of developing an independent set of assumptions for the purpose of the costing process. We noted that the cost of our recommendations is the difference between the cost of the total compensation package for judges before and after implementing our recommendations; therefore, the estimated costs are not too sensitive to variations in the assumptions used, if those variations are held within a reasonable range.

We concluded that it would be prudent to use the same assumptions that are used by the federal government in reporting its liabilities in the Public Accounts. These assumptions are not very different from those used by the Chief Actuary in the triennial actuarial reviews prescribed under the *Public Pensions Reporting Act* (R.S.C. 1985, c. P-31.4). The Public Account assumptions are deemed to represent best estimates from the point of view of the Government, which is the payor of judicial compensation. Furthermore, in our view these assumptions should be regarded by the judges as providing a reasonable estimate of the value of their salary and benefits package.

As the assumptions used for the Public Accounts will be updated from time to time to reflect current conditions, future Triennial Commissions could follow the same approach and

thereby avoid possible criticism for making what might appear to be arbitrary changes in the assumptions.

Appendix D describes more fully the Total Compensation concept and cost methodology, including the assumptions used. The Commission is satisfied that this total compensation cost approach is most appropriate for measuring and comparing total compensation costs for judges. As a matter of ease of reference, the Appendix terminology refers to "employer" and "employee", but these terms should be understood in the generic sense that judges are "employed" by the people of Canada. We recognize that judges hold an "office" which is based on the constitution and enshrined in the *Judges Act*. The independence of the judiciary requires this to be the case.

We have used the Level of Benefit Method, as described in Appendix D, because it allows for the comparison of hypothetical compensation packages while eliminating the distortions which would arise from a variation in the number of judges from year to year or from variations in the distribution by age, sex or years of service on the bench. This Method accommodates the prospective nature of our recommendations and enables us to measure their cost implications with an accuracy limited only by the availability of experience data and the necessity of relying on assumptions.

Of the actuarial cost methods that were considered, we have used the Level Entry Age Cost Method, described in Appendix D, to produce estimates of the pension costs because it automatically averages total compensation over the career of the judges. It avoids the necessity of making a number of assumptions as to the apportionment of benefits over successive periods and about blending costs while supernumerary with costs while fully active. This actuarial cost method is particularly suitable with respect to the judges' pension scheme where benefits are granted globally and not explicitly apportioned on a year-by-year basis.

One particular difficulty has been the determination of a rate of total compensation per period, since the work period for a judge can extend far beyond his or her sitting times. This is an important consideration because a change in working conditions which reduces the work period for a given amount of compensation results in a cost increase and vice versa. For the purpose of doing this costing, some workload assumptions had to be made, which are not meant to imply actual circumstances. After consideration of various alternatives, we have chosen to use as an estimate a work period of 1.5 times the work period that a judge is available for sitting on the bench. On the basis of judges being available for sitting 32 weeks per year, each is deemed to work approximately 48 weeks per year. This approximation can be extended to supernumerary judges, where wide variations in the work period can be expected, but where we have assumed a 50% workload. Assuming the availability of supernumerary status results in a higher average retirement age for judges, costs are affected in two opposite ways:

- pension costs are reduced by postponing the retirement age, and the cost per period is further reduced by an increase in the average period worked (since judges' pensions are not the accrual-type); and

- salary costs are increased because the full salary is paid for a shorter annual work period.

Similarly, some reduction in the average period effectively worked had to be made to take into account leaves of absence, maternity/parental leaves and short-term disabilities. In the absence of suitable data, an arbitrary estimate of one week per year has been used, which could be revised as experience data is accumulated. Although there are obviously some costs associated with our recommendations in Chapter XV, given this arbitrary approximation it is not captured by the calculations. However, we believe these costs to be quite marginal.

We strongly suggest that work be undertaken in advance of the next Triennial Commission to facilitate the full application of the Total Compensation Cost Method to all components of judicial compensation and to accumulate the experience data necessary to confirm or modify the assumptions which have been used.

Section 6 of Appendix D summarizes the cost of the components of Total Compensation for the general case of puisne judges. The various allowances provided for in the *Judges Act* have been treated as amounts paid in exchange for expenses assumed by the judges, not for work done, and have thus not been deemed a compensation component. Section 5 of Appendix D summarizes the calculations made to take into account the differentials for judges of the Supreme Court of Canada and for chief justices.

Assuming the salary freeze for the 2 years beginning April 1, 1993, proceeds in accordance with clause 10 of Bill C-113, it might be noted that the cost of our recommendations for that period is limited to the impact of the Rule of 80. However, for the third year, beginning April 1, 1995, our recommendations infer a judicial salary increase equal to the percentage increase in the Industrial Aggregate, as stipulated in section 25 of the *Judges Act*, and this increase has been reflected in the estimated costs.

The average compensation per week worked and the increase over the base year are estimated as follows:

	Average per week worked	Increase per week worked
Base year	$ 4,947	—
First year	$ 5,069	$ 122
Second year	$ 5,069	$ 122
Third year	$ 5,196	$ 249

In order to compare the cost of a constant amount of services, the calculation of the aggregate costs needs to be adjusted to take into account the reduction in the average number of weeks worked per year resulting from the introduction of the Rule of 80. As the expected average number of weeks worked before the change is 0.986% higher, the calculation reflects

the fact that to maintain the same level of services an increase of 0.986% in the number of judges would be required.

The increase in the accrued pension liabilities due to the introduction of the Rule of 80 is a non-recurring cost that could be deemed allocated to the first year. Since the change benefits the judges currently in office, we have considered it reasonable to allocate it over the Expected Average Remaining Service Life of these judges, estimated at 12.0 years. This results in an increase of $1,626,000 per year for the next 12 years rather than $12 million in the first year.

The aggregate costs of our recommendations are therefore estimated as follows, expressed as an increase over the base year:

	$ millions
01/04/93 - 31/03/94	6.1
01/04/94 - 31/03/95	6.1
01/04/95 - 31/03/96	10.8
Total	23.0

These estimates assume that our recommendations apply as of April 1, 1993.

More details are available in Appendix D.

XVII. CONCLUSION

Judges are not in a position to negotiate with the Government with respect to their salaries, pensions and benefits. According to constitutional law, doctrine and jurisprudence, the independence of the judiciary rests to a significant degree on the nature of their compensation package. Parliament has legislated the Triennial Commission process in recognition of this unique role and standing of the judiciary. The purpose of the Triennial Commission is to examine judges' remuneration in a non-partisan and objective manner, in the context of prevailing economic conditions, and to make recommendations to the Minister of Justice which would serve to reinforce the fundamental principle of judicial independence.

The worthy objectives of this process require the timely response of the Minister, the Government and Parliament to the recommendations contained in this report.

XVIII. SUMMARY OF RECOMMENDATIONS

1. That the Government of the day state its response to the recommendations of a Triennial Commission, and introduce its resultant legislation, as soon as feasible but in any event within 20 sitting days after the expiry of a nine-month period immediately following the submission of the Triennial Commission report to the Minister of Justice (Chapter III).

2. That Triennial Commission members be called as witnesses by parliamentary standing and legislative committees to elaborate on and support their recommendations (Chapter III).

3. That the process whereby federal government departments provide documentation and background materials to Triennial Commissions, including the possibility of Department of Justice and other federal government officials appearing at Commission hearings to present departmental positions on relevant issues, be encouraged and even formalized (Chapter IV).

4. That the practice of holding open hearings be continued by future Triennial Commissions (Chapter IV).

5. That rough equivalence with the mid-point of the DM-3 salary range be the appropriate benchmark by which to gauge puisne judges' salaries (Chapter V).

6. That no exception be made for judges with respect to the changes in the R.R.S.P. deductibility rules implemented by the amendments to the *Income Tax Act* contained in S.C. 1990, c. 35 and the regulations thereunder (Chapter VIII).

7. That contributions, benefits, interest and liabilities for the judges' pension scheme be accounted for distinctly in the Pension Accounts (Chapter X, Item B).

8. That the provisions for indexing judicial annuities, including those of surviving spouses and eligible children, should be transferred to the *Judges Act* from the *Supplementary Retirement Benefits Act* (Chapter X, Item C).

9. That retirement at full pension be permitted when a judge has reached at least 60 years of age and has served on the bench for a minimum of 15 years, provided the sum of age and years of service equals at least 80 (Chapter X, Item D).

10. That judges be permitted to retire with a full pension after serving for a minimum of 10 years on the Supreme Court of Canada and reaching the age of 65 years (Chapter X, Item F).

11. That the *Judges Act* be amended to incorporate therein the relevant credit splitting provisions of the *Pension Benefits Division Act*, with such changes as the circumstances require (Chapter X, Item G).

12. That the election of supernumerary status be permitted when a judge has reached at least 60 years of age and has served on the bench for a minimum of 15 years, provided the sum of age and years of service equals at least 80 (Chapter XI, Item A).

13. That a judge not be permitted to serve for more than 10 years as a supernumerary judge (Chapter XI, Item B).

14. That the *Judges Act* be amended to provide that the judges' pension scheme is deemed to be a Registered Pension Plan up to the limits provided therefor under the *Income Tax Act* and regulations, and is deemed to be a Retirement Compensation Arrangement for the excess (Chapter XII).

15. That the *Judges Act* be amended to permit a chief justice to authorize up to 6 months of maternity/parental leave: (i) for a female judge on his or her court who is pregnant, has recently given birth or has recently adopted a child; and (ii) for a male judge following the birth or adoption of his child (Chapter XV).

All of which is respectfully submitted this 31st day of March, 1993.

Purdy Crawford (Chairperson)
Jalynn H. Bennett
John G. Goodwin
Yves Guérard
Kitty Heller

Commission on Judges' Salaries and Benefits

CANADA

OTTAWA, K1A 1E3

APPENDIX A

Commission sur le traitement et les avantages des juges

1992 COMMISSION ON JUDGES' SALARIES AND BENEFITS

NOTICE

This Commission was appointed on September 30, 1992 by the Minister of Justice and Attorney General of Canada, pursuant to section 26 of the Judges Act, to inquire into the adequacy of the salaries and other amounts payable under the Act to federally appointed judges and into the adequacy of federally appointed judges' benefits generally, including the granting of annuities provided to judges and to their surviving spouses and children.

The Commission invites written submissions in either official language concerning the matters within the Commission's terms of reference. Written submissions must reach the Commission by November 30, 1992, in ten copies. A party intending to file a written submission with the Commission may also request an opportunity to make a presentation at an oral hearing. The Commission must be notified by November 20, 1992 of the party's desire to appear at an oral hearing. A party filing a written submission need not request to appear at an oral hearing.

Copies of the Commission's terms of reference are available upon request.

1992 Commission on Judges'
Salaries and Benefits
Room 1114
110 O'Connor Street
Ottawa, Ontario
K1A 1E3

Purdy Crawford, Q.C.
Chairman

Commission on Judges' Salaries and Benefits

CANADA

OTTAWA, K1A 1E3

Commission sur le traitement et les avantages des juges

COMMISSION DE 1992 SUR LE TRAITEMENT ET LES AVANTAGES DES JUGES

AVIS

La Commission de 1992 sur le traitement et les avantages des juges a été instituée le 30 septembre 1992 par la ministre de la Justice et procureure générale du Canada, en application de l'article 26 de la Loi sur les juges. Elle a pour mandat de déterminer si le traitement et les avantages des juges nommés par le gouvernement fédéral ainsi que les pensions auxquelles ceux-ci, leur conjoint et leurs enfants ont droit, sont satisfaisants.

La Commission invite toute personne intéressée à lui soumettre par écrit ses vues sur les sujets qu'elle a reçu pour mission d'examiner. Ces interventions doivent prendre la forme d'un document écrit, établi dans l'une ou l'autre des deux langues officielles, et être déposées auprès de la Commission en dix exemplaires au plus tard le 30 novembre 1992. Quiconque dépose un tel document écrit peut en outre demander à la Commission d'être entendu par celle-ci. En pareil cas, il convient d'aviser la Commission au plus tard le 20 novembre 1992 du souhait de présenter des observations orales. Il convient de noter que le dépôt de documents écrits n'oblige nullement à présenter les observations orales.

Il est possible d'obtenir le texte définissant le mandat de la Commission sur simple demande.

Commission de 1992 sur le
traitement et les avantages
des juges
110, rue O'Connor
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Le président de la
Commission

Purdy Crawford, c.r.

APPENDIX B

LIST OF WRITTEN SUBMISSIONS

1. The Joint Committee on Judicial Benefits of the Canadian Judicial Council and the Canadian Judges' Conference
2. The Ontario Superior Court Judges' Association
3. The Northern Federally Appointed Judges
4. The Honourable Mr. Justice John deP. Wright (Ontario Court of Justice (General Division))
5. The Canadian Bar Association Standing Committee on Pensions for Judges' Spouses and Judges' Salaries
6. The Law Society of Alberta (J. Patrick Peacock, Q.C., Counsel)
7. The Law Society of British Columbia (Peter Leask, Q.C., Treasurer)
8. Le Barreau du Québec (Paul P. Carrière, Bâtonnier)
9. The Federation of Law Societies of Canada (Claude Séguin, Executive Director)
10. Kirsten F. Connor, Charlottetown, Prince Edward Island
11. Frans F. Slatter, Edmonton, Alberta

APPENDIX C

AVERAGE AGES OF MALE AND FEMALE JUDGES ON ASSUMING OFFICE

Year	Male	Female	Combined
1981	50.99	43.95	50.17
1982	50.38	54.12	50.54
1983	50.09	44.31	49.39
1984	51.35	42.78	50.59
1985	53.58	42.68	52.26
1986	50.10	43.29	49.22
1987	52.16	44.46	50.12
1988	52.92	43.48	51.74
1989	50.74	40.30	48.31
1990	51.80	42.66	49.08
1991	52.46	43.00	50.40
1992	50.22	43.95	48.66

Source: Office of the Commissioner for Federal Judicial Affairs

APPENDIX D

TOTAL COMPENSATION COST METHODOLOGY

MARCH 1993

TOTAL COMPENSATION

INTRODUCTION

This document presents the concepts underlying a methodology for measuring and comparing total compensation costs.

First, the concept of total compensation is defined. This definition is then used as a framework to identify the various elements composing total compensation.

A specific method to assess and compare total compensation costs in an objective, valid and reliable manner is then presented.

The concept of total compensation has been developed and refined gradually over the years and there are variations both as to the definition of what should be part of compensation and how the cost on the value should be calculated. Essentially the differences arise from the benefit components, since the basic salary itself is unambiguous.

Studies have been published regularly in Canada and in the United States that report on Employee Benefit Costs (1). This concept is underlying studies published by the Pay Research Bureau of Canada (2) and the "Centre de recherche et de statistiques sur le marché du travail" of the Ministry of Labour of Quebec (3).

A more complete description of a Total Compensation Model as well as a discussion of the analytical issues appear in the Proceedings of the Conference on Public Sector Compensation - 1985 under the aegis of the Ontario Economic Council (4). It indicates in the introduction *"This model of total compensation was developed to assist the Federal Government (as employer) in understanding the compensation relativities between its employees and those performing comparable work in other sectors of the economy."*

The 8th Report of the IRIR(5) contains a description of two costs methodologies : the Cost of Benefit Method also known as Disbursement Method and the Level of Benefit Method also known as Simulated Cost Method. Variations of these methods are used by parties to the negotiations of labour agreements, to support representations made to arbitrators or to establish the cost of labour as part of production costs.

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(1) Employee Benefit Costs in Canada, Peat Marwick Stevenson & Kellogg
Employee Benefits, U.S. Chamber Research Center

(2) Benefits and Working Conditions, Public Service Staff Relations Board; Re. 118-90

(3) Fréquence et caractéristiques des avantages sociaux et des conditions de travail, Études et recherches du Ministère du Travail, ISBN 2-251-14598-8

(4) Total Compensation and Comparability, C.R. Horne, P. Mercier and G.J. Bourdeau, Treasury Board Secretariat

(5) Huitième rapport sur les constatations de l'IRIR (Institut de Recherche et d'Information sur la Rémunération), May 1992, ISBN 2-551-12864-1

1. OBJECTIVES IN ASSESSING AND COMPARING TOTAL COMPENSATION COSTS

The measurement of total compensation costs can be undertaken to serve a variety of objectives:

- Quantify total compensation costs in an objective, valid and reliable manner.
- Identify differences in total compensation that are related to conditions of employment only, avoiding artificial value differences resulting from factors such as work force characteristics or financing strategy.
- Determine the cost impact of compensation changes.
- Compare different total compensation packages.

The use of the term "costs" implies that the measurement is done from the point of view of the employer, i.e. the payor. However, it can equally be seen as a quantification of the value of the Total Compensation package from the point of view of an employee. The objectives can be similar and help an employee choose between different offers or between working and not working. It should be stressed however that, to the extent the measurement rests on assumptions, including probabilities, it measures an average value for an individual as a member of a group or what could be called a fair market value. Effective values or perceived values would depend on individual characteristics, preferences and other subjective factors.

The words "costs" and "value" implicitly exclude elements of compensation that, for practical purposes, do not have a calculable monetary value. It would therefore exclude intangibles such as the prestige of a function, the intellectual reward resulting from personal achievement or development, the quality of the environment including the human elements, etc. Although it could be debated, we exclude elements such as training which are less intangible but could be seen also as an investment by the employer.

We are also excluding the overhead costs of providing the elements of compensation, as it would confuse the relation between costs and value.

2. THE CONCEPT OF TOTAL COMPENSATION

Total compensation includes all the conditions, contractual or statutory which usually result in a financial commitment by the employer, in respect of employees or for their benefit which the employer meets in exchange for the work performed for a given period.

- Using the neutral term "conditions" rather than "benefits" indicates that it is not necessary for an employee to actually benefit from a provision for it to be considered as compensation. The employer's contributions to a provincial medical plan such as OHIP, for example, would be deemed compensation, even if the employee does not derive any particular benefit from them. This concept assumes that all the financial costs to the employer must be included.

- "Contractual or statutory": compensation conditions are "contractual" when they are agreed to between the employee and the employer and "statutory" when they arise from legislation or government programs (CQPP, unemployment insurance, workers compensation). It is not necessary for a condition to be the subject of a collective or written agreement for it to be considered as contractual. "Company" management practices may enter into this price (e.g. employee assistance programs).

- "Which result in a financial commitment": this statement restricts the definition of compensation to items which can be quantified in monetary terms. The definition is more conventional and operational than one which would include non-monetary benefits. There are no definite limits for compensation and, consequently, for its measurement if one looks beyond the financial framework. This does not mean that non-monetary items are not significant but that they are considered, not as items making up compensation, but as variables which must be taken into account in the analysis and that may explain the variances observed due to qualitative differences.

- The use of the term "commitment" rather than "payment" indicates that it is not necessary for the employer to make disbursements although the employer is committed to do so if the case arises. An indemnity to be paid related to a termination under specific conditions is an example of a case where a commitment is made which might never require disbursements, but it would nevertheless be considered as compensation.

- "By the employer" indicates that the benefits that the employee derives from his/her employment but which the employee pays for himself/herself (contributions to benefits, social club) are not considered to be compensation.

- "Usually" means that a benefit offered by an employer (e.g. job security) which usually incurs costs is considered as compensation even if, for a particular employer, no disbursements or contractual commitments are required if the employees are still entitled to the benefit because of the company's management policies. Conversely, a benefit which does not usually cost anything, and which for particular reasons would be costly for the employer, would not constitute a form of compensation (e.g. special transportation to bring the employees to work in an isolated area).

- "Respecting the employees or for their benefit" refers to direct compensation regarding all amounts paid to the employee as well as to indirect compensation paid to third parties in the employee's name. The amounts paid to third parties may be in the form of the purchase of services (e.g. insurance premiums) or operating expenditures (e.g. subsidized meals).

- "Which the employer meets" means that the employer who meets a condition in actual fact is considered to be paying compensation, even when there is no obligation to continue to do so.

- "In exchange for work performed" means that not all payments are included. The reimbursement of expenses incurred (use of equipment, automobile, traveling expenses) is done in exchange for the expenses assumed by the employee and not for the work done.

- "For a given period" means that compensation always applies to a period of time. The absolute value of the compensation is meaningless if we do not know whether it corresponds to a given annual, monthly, weekly, daily or hourly amount. The unit of measure must also be dated and thus define the period of reference.

3. COMPENSATION ELEMENTS

In assessing total compensation, the elements to be considered vary according to the situation reviewed and existing conditions of employment (as well as with data availability). Such elements may comprise:

1. Direct compensation

- 1.1 Base salary
- 1.2 Incentives (bonus, commissions, lump sums) linked to job content or performance
- 1.3 Premium pay
- 1.4 Overtime
- 1.5 Reimbursement of sick leave days
- 1.6 Allowances

2. Indirect compensation

- 2.1 Income protection
  - 2.1.1 Disability insurance premiums (short term and long term)
  - 2.1.2 Job security (including severance pay and supplemental unemployment benefit insurance)
  - 2.1.3 Pension plan contributions
- 2.2 Health, accident, liability protection
  - 2.2.1 Life insurance
  - 2.2.2 Supplementary health insurance
  - 2.2.3 Dental plan
  - 2.2.4 Additional protection (liability insurance, car insurance, etc.)
- 2.3 Legally required payments
  - 2.3.1 Unemployment insurance
  - 2.3.2 Basic health insurance
  - 2.3.3 Workers compensation
  - 2.3.4 Quebec / Canada pension plan
  - 2.3.5 Labour standards

2.4 Services and gratuities

- 2.4.1 Educational fees
- 2.4.2 Company car
- 2.4.3 Transportation and parking
- 2.4.4 Employer sponsored meals
- 2.4.5 Employee assistance program
- 2.4.6 Retirement counseling
- 2.4.7 Professional membership fees
- 2.4.8 Nursery
- 2.4.9 Others

3. Working days

- 3.1 Standard number of working days
- 3.2 Overtime hours (if applicable)

4. Pay for time not worked

- 4.1 Holidays
- 4.2 Vacations
- 4.3 Parental leave (paternity and maternity)
- 4.4 Funeral leave, jury duty, etc.
- 4.5 Education leave with pay
- 4.6 Sick days

When using a total compensation approach to compare the cost of a **different compensation package**, we also have to determine to what extent the jobs for which the compensation comparisons are made are comparable in terms of content. In this case, because of the types of comparison involved, this determination is not relevant.

4. METHODOLOGY

4.1 Total Compensation Valuation Method

Different approaches are available to assess total compensation costs.

One approach consists in assigning subjective values to each element of the compensation package. These values are then compared to values assigned to similar compensation elements offered to other employees. The result is more a qualitative assessment of the value of total compensation comparisons.

Under this approach, called the **Gross Comparison Method**, the cost of implementing new or modified compensation elements cannot be calculated. Hence this method only ranks benefits and distinguishes between the best, next to best or less acceptable ones. It only resolves that benefits are above, below or at par when compared with others.

At best, this method has the merit of simplicity but produces only a superficial comparison.

Another approach, the **Cost of Benefit Method**, compares actual disbursements made by different employers for employees in comparable job classifications. It has the advantage of being applicable on the basis of information available from financial statements. It is also promoted as more factual than calculations based on assumptions. This method compares only expenditures without determining the amount or quality of compensation being provided to employees. An equal dollar amount spent by two different employers does not necessarily amount to similar quality and quantity of compensation to employees because it may reflect a different financing method or a different work force distribution.

Hence we can question the effectiveness of this method as a means of comparing total compensation packages. Furthermore because it only uses information on expenditures, this method is not suitable to assess the cost impact of changing or modifying compensation elements in the current compensation package for a given group of employees until after the facts.

A third approach, the **Level of Benefit Method**, can be used to assess total compensation costs. This method involves calculating the costs incurred by the employer to provide its employees with a compensation package, current or simulated.

The level of benefits method allows for calculating the value of compensation in comparison to compensation offered to different employee groups working for the same employer or for similar employee groups working for other employers. This method allows for a calculation of the costs that would be incurred by an employer if it were to provide its employees with a modified compensation package.

This method avoids the artificial value differences resulting from such factors as funding, utilization experience, or work force characteristics. Further, this method requires only descriptive information on provisions and characteristics of compensation elements applicable to the employees for whom the assessment is to be made. No information is necessary on the actual expenditures being incurred.

Under this approach, the value of each element of compensation is first assessed individually and then all elements values are integrated into a composite measure of total compensation. For some elements, the valuation process is relatively straightforward (for example, number of paid holidays) but for others, like pension and insurance-type elements, the valuation process can be complex, involving actuarial methods.

Under this model, the term "value" (of compensation) is used to ensure that there is no confusion with actual expenditures. Since the analyses are based on models of benefits and their usage, it is important to make clear that figures used are not exactly the same as expenditures.

We recommend using this Level of Benefit Method for total compensation comparison purposes.

4.2 Total Compensation Formula

After the various compensation elements have been identified, and their value established under the level of benefits method, the issue of days of work and time off with pay arise.

Hence, the sum of the estimated or actual expenses from the various compensation elements only represents an incomplete measure of total compensation, since it does not take into consideration days of work and time off with pay.

The method presented incorporates these issues by presenting total compensation in the form of the monetary value of all compensation elements involving an expense in relation to weeks actually worked.

This measure best reconciles the net average value of compensation to a group of employees under a level-of-benefits approach with the cost of compensation to the employer. As a formula, the value of total compensation is expressed as:

$$\text{Total compensation per week worked} = \frac{\text{Direct compensation (annual)} + \text{Indirect compensation (annual)}}{\text{Regular weeks paid (annual)} - \text{Weeks paid but not worked (annual)}}$$

For some occupations, we may deal with days or hours: the denominator is then calculated in terms of net days or hours worked, producing the measure dollars-per-day or dollars-per-hour rather than dollars-per-week as the standard of comparison. In either case, the equation provides a common basis for comparing the value of compensation packages that might be quite different both in terms of benefits or work requirements.

By subtracting the paid time-off period rather than adding an equivalent monetary value, there is no systematic overstatement of the aggregate monetary value.

In the case of Federally Appointed Judges, we are not dealing with a conventional employer-employee relationship. The determination of the regular work period, for example, must reflect the special characteristics of judicial duties. The regular weeks worked have been estimated as 150 % of the number of weeks spent in the courtroom to allow for decision-writing weeks. On the basis of 32 weeks spent in the courtroom, the number of regular weeks worked is 48, leaving 4 weeks as an estimate for the vacation period paid but not worked.

For Supernumerary Judges, it is necessary to adjust the denominator to reflect the change in the weeks worked. As a first approximation, we have increased the weeks not worked by 50 % of the weeks worked to reflect a 50 % reduction in the regular workload. Hence the number of regular weeks worked is reduced to 24 weeks.

To take into account the reduced number of weeks, we have calculated the average number of regular weeks worked during the career of a judge using the Expected Average Service Life as an active Judge and the Expected Average Service Life as a Supernumerary Judge.

In either case, we also needed an estimate of the average number of days not worked pursuant to a leave of absence, maternity or parental leave or short-term disability. In the absence of more suitable data, an arbitrary estimate of one week has been used both before and after Recommendations. Therefore our calculations do not quantify the cost of this change which we consider marginal.

4.3 Reference Situation

When assessing the cost of total compensation packages, a reference situation is always used and should include the following elements:

- Reference period: compensation packages are in force at a given date for a given period; in the case of the present calculation, we refer to the compensation package in force as at April 1, 1992, and the reference period is April 1992 to March 1993.

- Reference population: to estimate costs resulting from the application of a set of conditions of employment and of associated working days, we need to define and use a reference population and experience that will be used to isolate changes in conditions of employment. The actual population of judges as at the beginning of the reference period is used as the standard for the purpose of the study.

4.4 Actuarial Valuation

An actuarial methodology is used to determine the cost of some of the elements of the compensation package being assessed.

These valuations forecast future expenditures related to the plans in effect, and then convert these future costs into a present value. This methodology requires the use of demographic and economic assumptions.

ASSUMPTIONS

Generally, when a pension plan is offered, it is considered convenient to use the same demographic and economic assumptions as the ones used in the valuation process for the pension plan because this plan represents a large proportion of the costs. In the present situation, the assumptions used in the actuarial valuations, as prepared by the Office of the Superintendent of Financial Institutions of Canada for reporting in the Public Accounts, have been selected. These assumptions are summarized in the Appendix.

METHODS

Different actuarial methods can be used.

Entry Age Method

This method calculates the present value of the projected benefits up to the date of termination, at the age the employees are hired or start participating in the plan.

This present value of benefits is then divided by the present value of salary for the period starting at the age of entry until the age at the date of termination. The cost of the benefit is then presented as a uniform percentage of salary during the career of the employee.

The cost, thus determined, does not vary with attained age or service but is stable over the career of the employees.

Unit Credit Method

Under this method, we calculate the present value at the present age of the projected benefits in respect of service in the following year. The cost of benefit can then be expressed as a percentage of the salary projected for that following year.

The cost is less stable because it varies according to age. But when applied to a group of employees, the average age is more stable and that method can be used to evaluate certain benefits (for reasons of simplicity) when we can assess that its use is not going to bring distortion in the valuation. For example, taking into account existing commercial practices to cover insurance, that approach could be suitable to evaluate health insurance costs even though it is known that the underlying costs vary by age.

To illustrate the difference between the two methods, let us take the following vacation schedule:

- 2 weeks after 1 year of service
- 3 weeks after 3 years of service
- 4 weeks after 10 years of service

Under the Entry Age Method, taking into consideration the overall career, we could determine, under the proper set of assumptions, that the schedule is equivalent in cost to a uniform 3.25 weeks per year.

Under the Unit Credit Method, the results would be 2 weeks between 1 and 3 years, 3 weeks between 3 and 10 years, and 4 weeks after.

The Unit Credit Method would be the average results taking into account the number of employees in each service group. In the case of an employer having currently no employees with more than 10 years of service, the advantage of the 4 weeks after 10 years would not be reflected in the calculation.

The Entry Age Method captures more faithfully all the features of a compensation package notwithstanding the current age and service distribution of the group under study. This method is thus more suitable to measure the value of Total Compensation averaged over a full career.

However, in the circumstances, given that the benefits other than pension are not modified and that the vacation period is deemed equal at all ages, we have deemed the one-year cost to be a satisfactory substitute for costs established under the Entry Age Method.

5. TOTAL COMPENSATION COSTS ESTIMATES

The number of judges is as at March 31, 1992, and the salary rate for the two years beginning April 1, 1993, is the rate applicable on April 1, 1992, while the salary rate for the third year incorporates the automatic indexing provided under Section 25 of the *Judges Act* projected at 2.5% on the basis of the actuarial assumptions used for the valuation of the Pension Plan. It is further assumed that the costs of the other components, on the average, remain constant as a percentage of salary.

In order to estimate the Total Compensation Costs we have first calculated the Total Compensation Costs on the basis of the estimates of Section 6 applicable to a Puisne Judge. This first total is then adjusted to take into account the salary differential for Supreme Court Judges and Chief Justices. Pension costs for the differential over the Puisne rate have been estimated on the basis of the same percentage as calculated for the all the Judges. For compensation components other than Pension, no adjustment to the differential over the Puisne rate is necessary because the total cost has been allocated already as a percentage of the Puisne rate.

These calculations are as follows :

	Prior to recommendations	First and second year	Third year
A. Total compensation at Puisne rate			
Total compensation	$ 201,559	$ 204,519	$ 209,632
Total number of judges	898	898	898
Total compensation at Puisne rate	$ 180,999,982	$ 183,658,062	$ 188,249,514
B. Differentials			
Chief Justices			
Base salary differential	$ 14,200	$ 14,200	$ 14,555
Number of Chief Justices	36	36	36
Subtotal for Chief Justices	$ 511,200	$ 511,200	$ 523,980
Supreme Court Judges			
Base salary differential			
Judges	$ 29,400	$ 29,400	$ 30,135
Chief Justice	$ 44,100	$ 44,100	$ 45,202
Number of Judges	8	8	8
Number of Chief Justices	1	1	1
Subtotal for Supreme Court	$ 279,300	$ 279,300	$ 286,282
TOTAL SALARY DIFFERENTIALS	$ 790,500	$ 790,500	$ 810,262
C. Pension differentials as per line 2.1.3 Section 6	$ 207,900	$ 222,921	$ 228,494
D. Total compensation costs	$ 181,998,382	$ 184,671,483	$ 189,288,270

The average compensation cost per week worked is obtained by dividing Total Compensation Costs by the number of weeks worked, taking into account the assumed duration of leaves of absence and the reduced regular workload during the Supernumerary period. With the introduction of the Rule of 80, the average number of weeks in the regular work year is reduced by the increased proportion of the period served as Supernumerary over the career of a judge. The weighted average is calculated by applying the expected number of years in each status to 24 weeks and 48 weeks respectively. The reduction is as follows:

	Current conditions	After Rule of 80
Expected average service life (years)		
As Supernumerary Judge	5.43	5.47
Other than as Supernumerary	16.17	14.96
Total number of years	21.60	20.43
Weighted expected average regular work load	41.97	41.57
Reduction from regular 48 weeks	6.03	6.43
Expected number of weeks worked	40.97	40.57

The average Total Compensation Cost per week worked is thus as follows:

Prior to recommendations	$ 4,947
First and second year	$ 5,069
Third year	$ 5,196

The average number of weeks worked by a judge is 0.986% higher before the change, that is 40.97 versus 40.57. Therefore, to produce the same number of weeks worked, the number of judges would need to be increased by 0.986%. The aggregate cost increases resulting from the recommendations can be obtained by multiplying the cost increase per week worked by the aggregate number of weeks worked as at 4/1/92 before change, that is 36,791 weeks (898 x 40.97) versus 36,432 weeks (898 x 40.57) after change.

The effect of the introduction of the Rule of 80 on the cost of the Pension Plan has been estimated on the basis of Entry Age Normal Cost. The entry ages assumed have been based on the 1989-91 experience. The retirement rates have been adjusted to take into account the shift in the age at which judges become eligible to retire and hence become eligible to Supernumerary status. The adjustment has been deemed sufficient, in aggregate, to cover the change in the retirement age for Supreme Court Judges.

The increase in the Normal Cost measures the effect on the cost as if the new rule had applied over the whole career of the judges, thus measuring the long term effect. In addition, the introduction of the Rule of 80 results in a non-recurring cost equal to the increase of the liabilities accrued with respect to prior service as the rule becomes applicable to all judges on the basis of their total service. The increase in the actuarial liability on the Unit Credit basis is estimated to $11.4 million on the basis of the 1991 year-end population. This estimate has been deemed an acceptable approximation for the increase on the Entry Age basis which could not be available within the required time period. The December 31, 1991, estimate covered 902 judges. It has been projected to April 1, 1992, in proportion to the increase in aggregate salaries for the population of 898 judges at that date.

This increase in liabilities can be amortized by equal annual installments over the Expected Average Remaining Service Lifetime of the judges, estimated at 12.0 years which result in a declining percentage cost over the 12-year period. The projected increase in liabilities is $ 12.0 millions and the annual installment is $ 1,626,000.

The cost increases are estimated as follows by comparison to total compensation costs as at 4/1/92 before change :

	Increase in accrued liability allocated to first year	Increase in accrued liability amortized over 12 years
4/1/93 - 3/31/94	16,488,502	6,114,502
4/1/94 - 3/31/95	4,488,502	6,114,502
4/1/95 - 3/31/96	9,160,959	10,786,959
Total	$ 30,137,963	$ 23,015,963

6. PUISNE JUDGES COMPENSATION ELEMENTS

Cost estimates for the Pension Plan (2.1.3) have been provided by the Office of the Superintendant of Financial Institutions (Ottawa). Other cost estimates are based on information provided by the Office of the Commissioner for Federal Judicial Affairs.

	1992	Recommendations
1. DIRECT COMPENSATION		
1.1 Base salary (*Judges Act*, Art. 9 to 23)	**$ 155,800**	**$ 155,800**
1.2 Allowances (*Judges Act*)	**Not included**	**Not included**
The allowances have been deemed a reimbursement of expenses.		

2. INDIRECT COMPENSATION

2.1 Income protection

	1992	Recommendations
	Included in Pension Costs (2.1.3) or leave of absence (4.2)	Included in Pension Costs (2.1.3) or leave of absence (4.2)
2.1.1 Disability, long term and short term:		
– Income protection with full salary	Not estimated	Not estimated
2.1.2 Job security		
2.1.3 Pension		
– Judicial annuities (*Judges Act*, Art. 42) (Employer share)	26.3 %	28.2 %
2.1.4 Insurance benefits available at retirement:		
– Health: - Provincial health insurance *	Not included	Not included
- Public Service Health Care Plan (Employer share)	0.13 %	0.13 %
- Health Plan (Canadian Judges Conference) *(optional)* (Employee paid)	0	0
– Life: - Public Service Management Insurance Plan *(optional)* (Employee paid)	0	0
- Canadian Judges Conference *(optional)* (Employee paid)	0	0

* **Applicable to B.C. only**

	1992	Recommendations
2.2 Health, accident, protection		
2.2.1 Life - dismemberment - dependents:		
— Public Service Management Insurance Plan (*optional*) (Employee paid)		
– Life insurance	0	0
– Accidental death and dismemberment insurance	0	0
– Dependent's insurance	0	0
2.2.2 Health:		
— Public Service Health Care Plan (Employer share):	0.26 %	0.26 %
– Drug benefit		
– Vision care benefit		
– Health practitioners benefit		
– Out of province benefit		
– Hospital expenses (outside Canada) benefit		
– Hospital benefit		
— Blue Cross (*optional*) (Employee paid)	0	0
— Health Plan (Canadian Judges Conference) (*optional*) (Employee paid)	0	0
— Dental (Public Service Dental Care Plan) (Employer paid)	0.29 %	0.29 %

3. LEGALLY REQUIRED PAYMENTS	1992	Recommendations
3.1 Unemployment insurance	Not eligible	Not eligible
3.2 Basic health insurance	1.94 %	1.94 %
3.3 Workers compensation	Not eligible	Not eligible
3.4 Quebec/Canada Pension Plan	0.45 %	0.45 %
• Total direct, indirect and legally required payments	$ 201,559	$ 204,519

	1992	Recommendations
4. TIME WORKED		
4.0 Average number of weeks	**52.00**	**52.00**
LESS		
4.1 Statutory holidays and vacation periods	**4.00**	**4.00**
4.2 Leave of absence (*Judges Act*, Art. 54)	**1.00**	**1.00**
4.3 Maternity leave (Treasury Board Manual)	**Included in 4.2**	**Included in 4.2**
4.4 Others (Funeral leave, sick days)	**Included in 4.2**	**Included in 4.2**
4.5 Reduction in number of weeks for average duration as a Supernumerary Judge	**6.03**	**6.43**
• **Average number of weeks worked**	**40.97**	**40.57**
5. TOTAL COMPENSATION PER WEEK	**$ 4,920**	**$ 5,041 ***

* **$ 5,167 for the third year after including projected indexation at 2.5 %**

ACTUARIAL ASSUMPTIONS

This section describes the actuarial assumptions used by the Chief Actuary of the Office of the Superintendant of Financial Institutions for valuing the liabilities of the Pension Plan for Federally Appointed Judges in the 1992 Public Accounts.

A. Economic Assumptions as for 1992 Public Accounts

The valuations assumptions are set at the Yield minus 1%, but no less than the New Money rate. The Fund Yield is derived through an iterative process based on investments in notional 20-year bonds.

	Rates of Interest				
Year	New Money %	Projected Fund Yield %	Valuation Assumption %	January 1 Pension Indexing %	Salary Increases %
1992	8.5	10.8	9.8	5.8	5.4
1993	8.3	10.7	9.7	2.1	0.0
1994	8.0	10.5	9.5	2.2	0.0
1995	7.6	10.4	9.4	2.1	2.5
1996	7.3	10.2	9.2	2.0	2.4
1997	6.9	10.0	9.0	1.9	2.3
1998	6.0	9.7	8.7	1.8	2.5
1999	5.0	9.4	8.4	2.0	2.5
2000	5.0	9.1	8.1	2.0	2.5
2001	5.0	8.7	7.7	2.0	2.5
2002	5.0	8.3	7.3	2.0	2.5
2003	5.0	7.9	6.9	2.0	2.5
2004	5.0	7.7	6.7	2.0	2.5
2005	5.0	7.8	6.4	2.0	2.5
2006	5.0	7.1	6.1	2.0	2.5
2007	5.0	6.9	5.9	2.0	2.5
2008	5.0	6.7	5.7	2.0	2.5
2009	5.0	6.5	5.5	2.0	2.5
2010	5.0	6.2	5.2	2.0	2.5
2015	5.0	5.2	5.0	2.0	2.5
Ultimate	5.0	5.0	5.0	2.0	2.5

B. Main Demographic Assumptions

The demographic assumptions are those expected to be used for the forthcoming statutory valuation as at December 31, 1991. In aggregate they are not materially different from the demographic assumptions used in the 1988 statutory valuation described more fully in the Actuarial Report signed by the Chief Actuary on June 20, 1990.

RETIREMENT RATES

Retirement rates are based on the smoothed experience of the plan. These unisex rates are applied only to active judges who qualify for pensionable retirement or must retire at age 75.

For those eligible under the Rule of 80, the statutory rates of retirement were extended down to age 60 and rates of retirement at ages 70 to 74 have been adjusted to reflect the 10-year limit on Supernumerary status as follows:

Age	Rate	Age	Rate
60	.0141	70	.9229
61	.0155	71	.5199
62	.0170	72	1.0000
63	.0187		
64	.0206		

NEW ENTRANTS FOR ENTRY AGE NORMAL COST

	Male	Female
Below 46	16%	82%
46 - 50	28%	10%
51 - 55	26%	8%
56 - 60	23%	0%
Over 60	7%	0%
Average Age	51.9	42.2

OTHER ASSUMPTIONS

Mortality rates for the year 1992 are based on the 1983 Group Annuity Mortality Table, adjusted to recognize the recent experience of the plan. Rates for 1993 and subsequent years are obtained by decreasing the 1992 rates by mortality improvement factors on the order of 1% per annum. For disability pensioners, levels of mortality are more than doubled. There are separate rates for males and females.

Disability rates are based on the smoothed experience of the plan. These unisex rates are applied only to active judges not yet eligible for pensionable retirement.

The *sex-distinct proportion-married, age of surviving spouse,* and *surviving offspring assumptions* are based largely on the plan's own experience and are applied to both active and retired plan members.

GLOSSARY

Actuarial Cost Method

A recognized technique for establishing the amount and incidence of the actuarial cost of pension or benefits programs, and the related actuarial liabilities.

Actuarial Present Value

The value of an amount or series of amounts payable or receivable at various times, determined as of a given date by the application of a particular set of actuarial assumptions.

Cost of Benefit Method

Total compensation valuation method that consists in comparing actual disbursements made by employers for employees, without any reference on the amount or quality of compensation being provided.

Entry Age Actuarial Cost Method

Also called *entry age normal actuarial cost method*. A method under which the actuarial present value of the projected benefits of each individual included in an actuarial valuation is allocated on a level basis over the earnings or service of the individual between entry age and assumed exit age(s). The portion of this actuarial present value allocated to a valuation year is called the *normal cost*. The portion of this actuarial present value not provided for at a valuation date by the actuarial present value of future normal costs is called the *actuarial accrued liability*. Under this method, the actuarial gains (losses) are reflected as they occur in a decrease (increase) in the unfunded actuarial accrued liability.

Expected Average Remaining Service Life (of an employee group)

Total number of years of future service expected to be rendered by that group divided by the number of employees in the group. The calculation of expected future service takes into account decrements based on actuarial assumptions but is not weighted by benefits or compensation.

Experience

Usually expressed as a ratio or percentage, it is the relationship of claims, or benefits of a plan over the expected amounts.

Funding Method

Any of the several techniques actuaries use in determining the amounts of contributions to provide for pension costs.

Gross Comparison Method

Total compensation valuation method that consists in assigning subjective values to each element of a compensation package and then comparing these values to values assigned to similar compensation elements offered to other employees.

Level of Benefit Method

Total compensation valuation method that involves calculating the costs incurred by the employer to provide its employees with a compensation package, current or simulated.

Simulated Cost Method

Different term used to refer to the level of benefit method.

Total Compensation

Includes all the conditions, contractual or statutory, which usually result in a financial commitment by the employer, in respect of employees or for their benefit, which the employer meets in exchange for the work performed for a given period.

Unit Credit Actuarial Cost Method

An actuarial cost method under which the plan's normal cost for a year is the present value of the benefit credited to all participants for service in that year and the accrued liability is the present value at the plan's inception of the units of benefits credited to participants for service before the plan's inception.

TAB 24

Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits

Submitted to the Minister of Justice Canada

September 30, 1996

Pursuant to Section 26 of the *Judges Act*, I am now tabling the Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits, appointed on September 30, 1995, to inquire into the adequacy of the salaries and other amounts payable under the Act and into the adequacy of judges' benefits generally. In accordance with Standing Order 32(5) of the House of Commons, this document shall be deemed to be referred to the Standing Committee on Justice and Legal Affairs.

The Minister of Justice and
Attorney General of Canada

Allan Rock

Table of Contents

I. Introduction

The undersigned were appointed pursuant to section 26 of the *Judges Act*, the Triennial Review Commission, to enquire into the salaries and benefits of Her Majesty's judges and to make recommendations to the Minister of Justice to be laid before Parliament in accordance with the statutory arrangement. We were appointed on the 6th day of October, 1995, and are the fifth such Commission since the institution was created in 1981.

Subsequent to our appointment, Bill C2 was introduced in Parliament extending the mandate of this and succeeding Commissions from 6 to 12 months. We were specifically invited at the time of our appointment to give particular consideration to problems associated with the process by which Triennial Commission Reports are received and ultimately tabled in Parliament and the extent to which the Constitutional responsibility of Parliament to fix and provide judicial salaries, allowances, and pensions is facilitated by the process. Our inquiry has confirmed that there is much legitimate cause for concern about the Triennial Review process and a very serious question as to whether it is, in practice, serving the system.

To the extent that the Triennial Commission's inquiry is intended to facilitate the discharge of Parliament's obligation pursuant to section 100 of the *Constitution Act, 1867*, there are germane and serious questions as to whether the process is functioning as intended. By the delivery of this Report, we invite the Government to address this aspect of the question as a matter of first priority in the interest of maintaining the integrity of the system for the future.

During the process of discharging our mandate and in the course of gathering the requisite information we have, not unexpectedly, been most impressed with the dignity and dedication of the members of the various courts who addressed us on their own behalf and on behalf of their colleagues. We are of the view that Canadians are well served by a committed, independent and impartial judiciary. In this respect, we enjoy the benefits of

an extraordinary resource which must be nurtured and supported in our own collective interest and the interest of those who follow.

II. Summary of Recommendations

1. That section 26(3) of the *Judges Act* be amended to require that the Minister, after a fixed period of time (three months), shall cause the Report of the Triennial Commission to be tabled in the House of Commons, together with the Government's response to the Report and a Government Bill incorporating those matters requiring legislative change as part of the process of implementing the same; both the Response and the Bill to be filed within a fixed number of sitting days (30 days) after the expiry of the initial period noted above.

2. That commencing April 1, 1997, the Government introduce an appropriately phased upward adjustment in judicial salaries such as to ensure that the erosion of the salary base caused by the elimination of statutory indexing is effectively corrected.

3. That retirement at full pension be permitted when a judge has served on the Bench for a minimum of 15 years and the sum of age and years of service equals at least 80.

4. That, in addition to the existing retirement provisions and our recommendation concerning the Rule of 80, judges of the Supreme Court of Canada be permitted to retire with a full pension after serving a minimum of ten years on the Court.

5. That provision be made in the *Judges Act* for a surviving spouse's annuity to be paid, in legally appropriate circumstances, to a common-law spouse.

6. That provision be made in the *Judges Act* to enable a retired judge who marries after retirement to provide for joint and survivor benefits.

7. That section 51(4)(b) of the *Judges Act* be amended to provide that interest be

payable upon the return of all pension contributions in respect of the 1996 contribution year, and each contribution year that is subsequent to 1996, calculated at the rates prescribed by the Income Tax Regulations, and compounded annually.

8. That the government paid life insurance coverage for judges be brought more closely into line with that provided to Deputy Ministers.

9. That section 54(1) of the *Judges Act* be amended to authorize Chief Justices to approve leaves of absence of up to six months, including maternity/parental leave and study leave.

III. The Review Process

A. INTRODUCTION

Section 26 of the *Judges Act* requires the Minister of Justice of Canada to appoint a Commission every third year "to inquire into the adequacy of the salaries and other amounts payable under the *Judges Act* and into the adequacy of judges' benefits generally." The Commissioners are required within twelve months of their appointment to submit a report to the Minister of Justice "containing such recommendations as they consider appropriate." The Minister is required by the Act to "cause the report to be laid before Parliament not later than the tenth sitting day of Parliament after the Minister receives it."

A reader of the past four Triennial Review Commission reports will note that the issue of process is the first item dealt with in every case. Successive Commissions have stressed that the process is flawed by reason of the failure of governments to act with reasonable dispatch to introduce and enact legislation in response to the recommendations of Triennial Commissions. Bill C-50, which died on the Order Paper, is the sole piece of legislation introduced in Parliament since the third Commission was held in 1989.

The Minister of Justice has recognized that there are serious problems with the present system. In an address to the Canadian Judicial Council in March 1994, he noted:

> **"...I regard it as unacceptable that two triennial commission reports have been received and not yet acted upon, that Bill C-50 died on the Order Paper, and that a third triennial commission exercise will soon be upon us. I know, I can sense strongly, that things are reaching the point where the very legitimacy of the system itself is in question, where confidence of judges is being seriously undermined. But there are implications for the morale of judges, for frayed relations with Government, and it is made all the worse and all the more damaging because of the very few ways that judges have for speaking out. There is a perception that I know is growing that the system which was designed to be non-political and above the fray is not working. This is where I come in."**

The Minister has specifically mandated this Commission through our terms of reference to include:

> **"...recommendations for improvements to the process by which judicial compensation is established."**

In his letter of August 1995 appointing each of us as Commissioners, he drew our attention to this specific responsibility:

> **"As the attached terms of reference indicate, I would like the Commission to deal with the issue of the process for establishing judicial compensation and to recommend any changes that could improve the process."**

What follows is our response to this aspect of our mandate.

B. THE PROCESS AND ITS REFORM

It has been repeatedly noted by past Triennial Review Commissions, and by students of the subject, that the matter of establishing judicial remuneration in a parliamentary democracy has much to do with the separation of powers in general, and the independence of the judiciary, in particular. Western democracies rooted in English constitutional tradition have been at pains to ensure that judicial independence, which ensures accountability on the part of the executive branch of Government, is uncontaminated by uncertainty (and thus preoccupation) on the part of the judges with their economic security. Under our Constitution the obligation is upon Parliament to "fix and provide" the salaries and benefits of judges. It is implicit in this constitutional imperative that the process be undertaken in an environment in which judicial independence is enhanced and the consequences of dependency eliminated.

Each parliamentary democracy has its own method of achieving these goals. In Canada, prior to the establishment of the Triennial Review Commission, the process was both

unstructured and unsatisfactory. It was characterized by the judiciary, in a supplicant's role, petitioning the Government through the responsible minister, usually with the support of related institutions in the judicial process, including the Bar, urging the Government to petition Parliament to do what was necessary to fulfil its constitutional obligation with respect to economic security for the judges. The imperfections in the system, largely dictated by dependence upon the commitment and goodwill of the Minister gave rise, in 1981, to the passage of section 26 of the *Judges Act* establishing the institution of the Triennial Review Commission.

The purpose of the Commission was to ensure that, through the creation of a body which would be independent both of the judiciary and Government, Parliament would be presented with an objective and fair set of recommendations dictated by the public interest, having the effect of maintaining the independence of the judiciary while at the same time attracting those preeminently suited for judicial office. The theory was that, by way of such recommendations, emanating from regularly convened independent commissions, the process would be de-politicized and judicial independence would be thus maintained.

While the idea was sound, the underlying assumptions appear to have been naïve. The result has been a failure in practice to meet the desired objectives. Since the first Triennial, there have been four Commissions (Lang (1983), Guthrie (1986), Courtois (1989) and Crawford (1992)). In spite of extensive inquiries and exhaustive research in each case, recommendations as to the establishment of judicial salaries and other benefits have fallen almost totally upon deaf ears. The reasons for this state of affairs have been largely political.

Prior to the establishment of the present process, the dictates of section 100 of the *Constitution Act* have required successive Ministers, on a regular basis, to ensure that Governments discharge their constitutional responsibilities. Success has frequently been mixed. An unanticipated and unintended result of the establishment of the present Triennial process has been the insulation of Ministers from the otherwise pressing requirements of the Constitution with respect to salaries and benefits. Upon delivery of successive reports,

political debate in Committee has followed with governments behaving as though, "having caused the Report to be laid before Parliament," they were thereby absolved from their constitutional responsibilities. This situation represents not only an unexpected, but a highly undesirable, result of the establishment of the Triennial Review Commission model. What was seen as a positive step has in many ways proved to have been negative. In spite of thorough recommendations by successive Commissions, Parliament has failed, in a proactive sense, to fix judicial salaries and benefits for many years. Furthermore, successive reports have failed to generate any meaningful response from Government. The whole subject of judicial salaries and benefits has, in spite of the best intentions, been politicized. The present Commission has detected in its hearings and consultations a very definite impact on judicial morale caused almost entirely by the fruitlessness of the present process.

When the *Act* was amended to establish Triennial Review Commissions in 1981, judicial expectations were elevated, in large measure, by prognostications on the part of Government as to improvements in judicial affairs which would flow from the creation of an independent Commission. The then-Minister of Justice noted:

> **"But there comes a time when the inaction on the salaries of judges in inflationary period begins to have profound effects, not only on the morale of those sitting on the Bench *but also on the attractiveness of judicial appointment to the more highly qualified lawyers who we would like to see appointed to the Bench.* At some stage, subtly and slowly, no doubt, a failure to maintain judicial compensation in line to some degree with inflationary tendencies must come to affect the quality of our judiciary. I have no doubt about the correctness of that proposition and I venture to suggest that there is a real concern about judicial compensation that underlies section 100 of the *British North America Act.***
>
> **That section, which deals with the provision of salaries, allowances and pensions of the federally appointed judiciary, is unique. It is the sole section of the B.N.A. Act which casts an affirmative obligation on Parliament to enact legislation. In recent economic circumstances, this obligation serves to secure not only the independence of the judiciary, *but also requires Parliament to take action to mitigate the debilitating effects on the judiciary that flow from undue delay or default in securing legislation on judicial compensation.* Bill C-34 seeks to fulfil that constitutional responsibility and to improve the structure of compensation for the**

> **federally appointed judiciary.**
>
> **...The Bill provides for the appointment of a commission made up of no more than five members which will be asked to examine every three years the adequacy of judicial compensation." [emphasis added]**

In effect, what judicial appointees since 1981 were promised by the establishment of the Triennial Commission was an independent, rational, depoliticized procedure for the determination of their compensation. The perception abounds that what they got was an abdication by the Government of its constitutional responsibilities. Furthermore, the ramifications of the failure to fulfil this promise will be significant and detrimental if the shortcomings in the process are not soon rectified.

The problem is not simply that the report of the Triennial Review Commission is laid before Parliament as the *Judges Act* requires but that the Government has, by the process of referral, excused itself from responding to its recommendations in the clear and nonpartisan way that was promised. One could argue that the establishment of the Commission has created an imperative obligation on the Government to consider Commission reports and make recommendations to Parliament thereupon, apart altogether from the adoption of any of the specific recommendations contained in the report. Continued indifference on the part of Governments (and through such Governments successive Parliaments) to recommendations made by Review Commissions has undermined the system and the expectations which accompanied its creation in 1981. Not only has inaction on the part of the Government disheartened the judges, but of greater concern is the fact that it will undoubtedly have a negative effect, over the course of time, upon candidates for the judiciary best suited for judicial appointment, candidates who are required almost inevitably to make significant economic sacrifice in order to accept appointment. Judicial despondency, interestingly, is not attributable so much to Parliament's failure to accept the recommendations of successive Commissions as it is to the Government's failure to react to such recommendations in advance of general debate or, indeed, at all. Regrettably, it would appear, the appointment of successive Commissions has simply served to distance the

Government from the performance of its obligations when it was thought that it would ensure a prompt and practical response to Parliament's constitutional obligations.

If evidence of the failure of the present system were required, it would come directly from the history of the work of successive Commissions. In each case, Triennial Review Commissions have made recommendations for change in the process to overcome the same obstacles identified in this report. In every case, the recommendations for change have equally fallen upon deaf ears. The utterances of successive Commissions have become like trees falling in the forest. The Lang Commission (1983) recommended a negative resolution solution such as exists in several Australian states. The Guthrie Commission (1986) recommended mechanisms to ensure prompt adoption of acceptable recommendations by the Government. The Courtois Commission (1989) proposed setting a time limit within which Government ought to respond. The Crawford Commission (1992) recommended obliging the Government to introduce legislation within a specific time frame as a reaction to the Commission's recommendations. The fact that none of these were accepted, nor even commented upon by Government, is compelling evidence of institutional indifference to the statutory process and its shortcomings.

Your Commissioners make their own recommendations hereunder with respect to procedural and structural changes designed to convert the Triennial Review process from a peculiar anomaly to a practical instrument for change as was originally intended. Failing change, this section of the Report is intended to forewarn our successors that by their appointment they will become instruments in a process which, far from ensuring an independent and positive response to constitutional obligations, will, in all probability, have the opposite effect.

Presently, after the report is laid before Parliament by the Minister of Justice, it is referred to the Standing Committee on Justice and Legal Affairs which conducts its own review of Commission recommendations prior to the Government formulating its position. The consequences of this are that a process that was designed to be "depoliticized" is not. The Government, upon receipt of the Standing Committee's report on judicial salaries and

benefits, is left in an awkward situation when inclined to take a different view. This in turn has a negative impact on the prospect of the introduction of any constructive legislation. In order to overcome this situation, we have concluded that the *Judges Act* should be amended to require that within a fixed time frame, consideration by Parliament of the Commission's report should coincide with the introduction of a government bill incorporating desired changes to the salaries and benefits of the judges. We are advised that this proposal can be accommodated within the existing standing orders of the House of Commons (ref. Standing Order 32(5)). If a regime along these lines were created, the public in general, and the judiciary in particular, could be confident that Commission recommendations would be responded to by Government and those recommendations considered desirable, of which there are surely many examples in the past, would thereby, and promptly, be the subject of legislative change.

Your Commission has also considered the possibility of recommending even more substantive change. Several suggestions emerged during the Commission's inquiry process. That most frequently repeated was the adoption of the so-called "negative resolution regime" which has been adopted in certain jurisdictions, notably by the Government of New South Wales. Under this regime, the Commission's recommendations would be by statute considered binding upon Government and, through Government, Parliament unless Parliament adopted a form of "negative resolution" within a specified period of time. This approach has substantial appeal in that it appears to resolve the irksome issue of failure on the part of Governments and Parliaments to act on the recommendations of successive Commissions. On the other hand, there is a down side in the form of a risk that if a negative resolution process were adopted, reports of future Triennial Commissions might well, by the passage of a negative resolution, be discarded in their entirety. In the final analysis, and while the negative resolution approach has much to recommend it, it is the impression of your Commission that it is not likely that this model would be considered seriously by the Government. Accordingly, we confine ourselves to the more modest proposal outlined above.

If these or similar corrective measures are not introduced, the statutory scheme will collapse of its own weight with the attendant damage to the institution of the judiciary which can be expected to occur.

It is therefore recommended that: section 26(3) of the *Judges Act* be amended to require that the Minister, after a fixed period of time (three months), shall cause the Report of the Triennial Commission to be tabled in the House of Commons, together with the Government's response to the Report and a Government Bill incorporating those matters requiring legislative change as part of the process of implementing the same; both the Response and the Bill to be filed within a fixed number of sitting days (30 days) after the expiry of the initial period noted above.

IV. Judicial Salaries

The independence of the judiciary, the attractions of the Bench for highly qualified and experienced men and women, financial security and the preservation of the enviable standards of our Courts are all important features of the judicial component of our system of administration of justice in Canada. The *Constitution Act, 1867*, confers on Parliament the duty to fix and provide judicial salaries, allowances and pensions. The *Judges Act* prescribes the Triennial Commission review process, the statutory annual salary adjustment plans and, pursuant to Part I, the administration of the *Act* by the Commissioner for Federal Judicial Affairs. A properly functioning system requires a high level of synergy between these inter-dependent elements.

As a result of amendments to the *Judges Act* in 1975, the salary level of superior court puisne judges was brought to within 2% of the mid-point of the salary range of the most senior level (DM-3) of federal deputy ministers. As the Guthrie (Commission 1986) reported:

> **"In 1975, judicial salary equivalence to senior deputy ministers was generally regarded, however, as satisfying all of the criteria to be considered in determining judicial salaries. At that level, a sufficient degree of financial security was assured and there were few financial impediments to recruiting well-qualified lawyers for appointment to the bench."**

At the present time the salaries of superior court puisne judges are $155,800 while the mid-point of the DM-3 salary range is $155,300 (there are currently nine deputy ministers at the DM-3 level which is the most senior level of federal public servant).

Triennial Commissions subsequent to the 1975 amendments to the *Judges Act* have endorsed this measure of equivalence, not as a precise measure of "value," but as one that appeared to them to:

> **"...reflect(s) what the market place expects to pay individuals of outstanding character and ability, which are attributes shared by**

deputy ministers and judges."

The Courtois Commission Report (1989)

Or, as stated in the Crawford Commission Report (1992):

> **"Rough parity of this nature between judges and top-level public servants finds support in the comparative salary figures from a number of other common law industrial democracies."**
>
> **The Crawford Commission Report** (1992)

A strong case can be made for the proposition that the comparison between DM-3's and judges' compensation is both imprecise and inappropriate. The Canadian Judicial Council and the Canadian Judges' Conference made extensive submissions in this connection. Your Commissioners choose not to focus on this aspect of the matter, but rather to address a far more significant aspect of judicial compensation, specifically the relationship between judicial income and income at the private Bar from which candidates for judicial office are largely drawn.

Section 25 of the *Judges Act* provides a statutory mechanism for the annual adjustment of judges salaries whereby they may be increased in accordance with the "Industrial Aggregate Index formula" to a maximum of 7%. However, salaries have been frozen since December 1992 and will remain so until March 31, 1997 as reflected in the *Public Sector Compensation Restraint Act.*

The provisions of s.25 of the *Judges Act* are reflective of much more than a mere indexing of judges' salaries. They are, more specifically, a statutory mechanism for ensuring that there will be, to the extent possible, a constant relationship, in terms of degree, between judges' salaries and the incomes of those members of the Bar most suited in experience and ability for appointment to the Bench. The importance of the maintenance of this constant cannot be overstated. It represents, in effect, a social contract between the state and the judiciary. By its statutory terms, the judges, who by acceptance of judicial office close the door, on a permanent basis, to any real prospect of a return to their previous lives at the

Bar, can at least be certain that their commitment in accepting a judicial appointment will not result over the years in a less favourable financial situation as between judicial service and practice at the Bar than that which prevailed at the moment of their appointment.

Seen in this light, the freezing of salaries, which has had the effect of neutralizing the operation of s.25 of the *Judges Act*, has, in the absence of corrective action, permanently altered the relationship described above. When the freeze is lifted, the section will have been inoperative for five years.

The judges in the Joint Brief noted, at page 39:

> **"It is accepted that as an aspect of judicial independence, judges must be financially secure. This can only be achieved if both the executive and legislative branches of Government respect the integrity of the provision of the *Judges Act*. It is indeed to be remembered that those provisions dealing with statutory indexation constituted an important part of the terms and conditions of appointment. It may be said that many judges would have refused an appointment to the Bench, had it not been for the security provided by the statutory indexation."**

Your Commission agrees with this submission.

What are the effects of the salary freeze? Over the four year period to April 1996, one year prior to the end of the freeze, judicial salaries, absent indexation, have been reduced by approximately 8%[1]. Furthermore, by reason of the failure of governments to introduce 1975 equivalency, notwithstanding recommendations of successive Triennial Commissions, judicial salaries have been further eroded. In terms of the clear intent to establish a

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[1] The percentage change for the Industrial Aggregate Index for the years 1993–1996 has been as follows:

to April 1, 1993	3.4%
to April 1, 1994	1.7%
to April 1, 1995	1.9%
to April 1, 1996	0.95%

Source: Office of the Commissioner for Federal Judicial Affairs

relationship between Bench and Bar, or even a relationship with DM-3's, the judiciary is in an accelerating backward slide. This has serious and troubling implications for the long term attraction of suitable candidates for office. Indeed, the removal of indexing has resulted in the anomalous situation in which judges retiring prior to the freeze in 1992 are enjoying a significantly higher annuity than that which can be expected for those who retire tomorrow.

Accordingly, your Commission, rather than engaging in an elaborate analysis of DM-3's and their comparability with judges, or indeed the available statistics with respect to earnings of candidates in the private sector at the Bar, chooses to focus on the most significant factor, the withdrawal of indexing. It is this government initiative which has been, and if not checked will continue to be, the most significant contributor to distancing judicial salaries from those of the practising Bar. Corrective action is clearly called for.

<u>It is recommended that</u>: commencing April 1, 1997, the Government introduce an appropriately phased upward adjustment in judicial salaries such as to ensure that the erosion of the salary base caused by the elimination of statutory indexing is effectively corrected.

V. Judicial Annuities

A. Rule of 80

There can be no doubt that the time has come for the Government to consider the need for some more contemporary form of retirement option for judges, such as the Rule of 80, the adoption of which is recommended in this report. This subject enjoys the highest priority in the view of the judiciary. Informed observers, including responsible members of the Bar, are unanimous in the view that the ability of ordinary mortals to function in the judicial mode is finite in terms of time. The judge's role is a unique one, as is the case with all fact-finders and dispute-resolvers. Their task, which is to sit, to listen and to decide, while sometimes appearing unremarkable, requires mental discipline of a kind which in most human beings has its limitations. Where the requisite mental discipline is lacking or exhausted, the result is, or can be, a tendency to undermine, in a serious way, public acceptance of judicial decision making in individual cases. Furthermore, in a changing world, there is a constant need for rejuvenation of the Bench by younger persons expressive of current views. Renewal must be systemic so as to ensure that the profile of the Bench is expressive of contemporary societal values. The result is, as has been recognized by successive Governments, that the appointments process can no longer be seen as a mere matter of finding suitable candidates for office who are at the end of their careers.

There is also the important question of gender balance. Your Commissioners were offered very strong representations on this subject from women judges, many of whom have been appointed at much younger ages. Under the present system, by reason of their age at appointment, they are being required to continue in office for what may, in some cases, be unacceptably lengthy periods of time before retirement. The notion, implicit in the present *Act*, that a period of 15 years service represents an appropriate judicial lifespan may be inapplicable for many women judges who are appointed at younger ages. We were provided with statistics which would suggest that well over 80% of women judges presently

sitting were appointed before age 50 and almost 25% before age 40. It is a matter of real concern on the part of many women judges and, no doubt, candidates for judicial office, that unreasonably long periods of service may be required before retirement with any pension is possible. This concern may seriously affect the already difficult task of attracting qualified women candidates from a pool whose numbers have yet to grow to that of male lawyers. Gender and age ranges have already broadened but the terms of the annuity are focused largely at males appointed to the Bench at or after age 50.

The Crawford Commission (1992) described the Rule of 80 retirement option:

> **"...as particularly appropriate in view of the changing age profile of judges. By permitting retirement with a full pension at earlier ages, in a flexible and fair manner which recognizes the unique service conditions and requirements of the judiciary, the Rule of 80 would not be inconsistent with pension reform standards."**

Early retirement plans are increasingly common in society. In many ways they are even more defensible in the case of the judiciary. As noted above, such plans could contribute to the overall quality and efficiency of the Bench by affording long-serving judges, who may be suffering from "burn-out," the opportunity to retire at a time when their judicial energy may have been sapped, thereby opening the way for renewal with younger, more representative judges many of whom will, logically, be women.

It should also be noted that judicial responsibilities are not amenable to constructive change during a judge's tenure on the Bench. The institution affords no opportunity to assume an alternative role as a basis for maintaining one's usefulness such as is the case in almost all other institutional and business settings.

Furthermore, as pointed out elsewhere, a serious concern which was raised before the Crawford Commission was the impact of the changes in the RRSP arrangements disentitling the judiciary to plan for retirement by investments in RRSPs. In particular, women members of the Bench who are generally appointed at a younger age, make the point that during their

most productive years, and as young judges, they are no longer able to contribute to RRSPs even though they cannot be certain that they will be able to continue to occupy the Bench to age 65. The present regime deprives them of the opportunity to make arrangements to forestall disaster in the event of premature retirement. It is argued, with some force, that the decision on the part of the Government to withdraw the right to invest in RRSPs was, in all probability, made without consideration of the impact on younger, and in most cases, female appointees.

No data was presented in the Crawford Commission report (1992) to illustrate the magnitude of this "loss." In their submission to the present Commission, the judges presented a report from William M. Mercer Limited, a consulting actuarial firm (tabled with the Commission on May 15, 1996), which provided estimates of this loss. Prior to 1992, judges could contribute to a personal RRSP in the maximum allowable amount, but are now restricted to a $1,000 annual maximum. The differences in tax savings and investment accumulations taken together or separately over a 30 year period were obviously quite staggering whatever actuarial assumptions are utilized. Mercers estimated that the difference in accumulation over 30 years before tax was in the amount of $1.7 million but the loss due to the elimination of tax benefits on an after tax basis was in the neighbourhood of $437,000.

We have sympathy with these concerns, nonetheless, we are of the view that if the Government reacts rapidly and introduces the Rule of 80, much of the negative impact of the RRSP changes, particularly on younger judges, will be minimized.

These are some of the reasons why modified criteria for retirement, in general, and the Rule of 80 in particular, have been considered and offered broad support for a number of years. In assessing the Rule of 80 itself and how it might be implemented, it was noted that various formulae might be utilized to achieve the combination of years of service and age totalling 80. The judges, and the Canadian Bar Association, in their submissions argued that the Rule of 80 should not be encumbered by a minimum age or service requirement. Others argue that a judge should be required to serve a minimum of 15 years on the Bench in order to

qualify for retirement under the Rule of 80. This would be consistent with the prescribed minimum of 15 years of service for retirement at age 65 pursuant to section 42 of the *Judges Act*.

Interestingly, present incumbents who are somewhat older and largely male would argue that an unencumbered Rule of 80 is desirable in order to ensure that judges who are appointed after age 50 can retire at age 65. Women judges, on the other hand, and in particular younger women, have argued that shorter minimum periods than the traditional 15 years in the present legislation ought to be considered having in mind the situation confronted by women who are appointed in the early years of their careers. It has been argued on behalf of younger women judges that fairness is better served with more weighting for length of service and less for age.

There have been extensive discussions with successive Ministers and other interested groups with respect to the Rule of 80 and support for its adoption is virtually universal. In addition, studies have been conducted by the Superintendent of Financial Institutions Canada. It has been concluded that the cost associated with the introduction of this scheme would be negligible. More specifically, it was noted that:

> **"...the increase in the pension plan's accrued liability and normal cost caused by the Rule of 80 would in practice be almost entirely offset by the payroll decrease arising from the removal of partially-productive judges from the bench."**
>
> **Correspondence from L.M. Cornelis (OSFIC) to H. Sandell (Department of Justice) dated June 16, 1995**

We are of the view that on balance a Rule of 80 with a 15 year period of service best meets the requirements of the public interest in the present profile and state of maturity of the Bench. For most younger women, a 15 year minimum will still enable those who have reached their limit of useful service to retire at an appropriate age.

The adoption of this reform was eloquently defended and recommended in the Crawford

Report. We cannot but believe that the failure of the Government to implement this constructive recommendation was more likely due to process deficiencies referred to elsewhere in this report than to substantive reservations or objections.

<u>It is recommended that</u>: retirement at full pension be permitted when a judge has served on the Bench for a minimum of 15 years and the sum of age and years of service equals at least 80.

B. PENSION CONTRIBUTIONS BY JUDGES WHO ARE ELIGIBLE TO RETIRE ON FULL PENSION

Section 42 of the *Judges Act* provides for the granting of an annuity equal to two-thirds of the salary annexed to the office of a judge. Judges are eligible to proceed to pension at age 65 if they have accumulated 15 years service. The majority (about 75%) do not retire but opt to continue as supernumerary judges at full pay until they leave office either before or at the mandatory retirement age of 75. All judges are expected to make pension contributions at the rate of 7% of salary until they take their retirement.

The requirement to continue pension contributions after eligibility for retirement is the source of much disquiet on the part of the judiciary. The Conference and the Council consider this requirement a levy for which there is no corresponding benefit; inconsistent with other pension plans which provide for discontinuance of contributions when pensions are paid up and actuarially inappropriate in requiring continued contributions beyond the age of eligibility for retirement. Essentially it is argued that contributions beyond retirement entitlement provide no corresponding benefit.

It is important to remember in weighing these considerations that there is a marked difference between the pension scheme for public servants and the annuity for the judiciary. The pension of a judge is two-thirds of the final years' salary following 15 years service. On

the other hand, a career public servant must accumulate 35 years of pensionable service and reach the age of 55 in order to receive the maximum pension. Quantum is based on 70% of the individual's average salary for the best six consecutive years. A Deputy Minister who qualifies as a career public servant is entitled to an additional 2% pension income per year for each year served as a Deputy Minister to a maximum of ten years. Differences between pension and annuities are important.

Information derived from the Office of the Superintendent of Financial Institutions Canada in December 1995 demonstrates that the sum of the annual pension contributions of 7% made by judges to retirement are modest relative to the final costs borne by the Crown. For example, the cost to provide an annuity to a judge at age 75 with 20 years of service would require an annual contribution by the state of 36.9% of his or her salary. Based upon the judge's contributions of 7%, it follows that the Crown bears the remainder of the burden which, in this example, would be 29.9%. This is illustrative of the distinction between an annuity and a funded pension.

We therefore agree with the conclusions of the Crawford Commission (1992) which supported the continuation of judges' contributions toward the cost of their pensions until those who are entitled to retire, do so. Any perception of inequitable treatment is surely tempered by the benefits afforded the annuitant under the present arrangement.

C. Retirement for Judges of the Supreme Court of Canada

Successive Triennial Commissions have all recommended a special regime for the retirement of judges of the Supreme Court of Canada. Notwithstanding the retirement regime which we are recommending by the adoption of the Rule of 80, we are also persuaded that judges of the Supreme Court of Canada ought to be permitted to retire with full annuity after 10 years service.

Judicial service on the Supreme Court of Canada, is of course, unique, not so much in terms of the prestige associated with the office, as with the depth of responsibility and onerous workload which is peculiar to the Court of last resort in our system. Review of cases emanating from the highest appellate courts in the provinces and the Federal Court of Appeal is an enormous burden. The criteria for leave to appeal to the Court defines this responsibility. Only those cases involving issues of national importance reach the Court, thus each case that the members of the Court consider is a matter of special significance. There are no routine matters on the Court's calendar.

It is well to reflect on the capacity of individuals, other than the most extraordinary, to cope with the relentless intellectual self-discipline associated with the work of the Court. There are surely limits as to the capacity of the judges to maintain the requisite focus over many years. Furthermore, the responsibilities associated with the *Charter* militate in favour of an atmosphere of renewal on the Court. All of these circumstances lead to the conclusion that, insofar as the Supreme Court is concerned, in particular circumstances, 10 years of service may be all that can reasonably be expected. Thus, this period ought to represent the threshold for retirement. Flexibility at this level is clearly in the public interest.

It is recommended that: in addition to the existing retirement provisions and our recommendation concerning the Rule of 80, judges of the Supreme Court of Canada be permitted to retire with a full pension after serving a minimum of ten years on the Court.

D. SPOUSAL SURVIVOR BENEFITS

Pursuant to section 44 of the *Judges Act*, the surviving spouse of a deceased judge is provided with an annuity equal to one-third of the judge's salary and the surviving spouse of a retired judge, who was in receipt of an annuity at the time of death, is provided with an annuity equal to half of the amount of the retired judge's annuity. These annuities are

indexed pursuant to the provisions of the *Supplementary Retirement Benefits Act.*

There has been a long-standing effort on the part of the judiciary to have each of these annuities increased to 40% and 60% respectively. These higher values, it is argued, would better reflect present federal, provincial, and many private sector pension benefits. However, judges' annuities, unlike the provisions of other pension plans, are based on the salary for the last year in office and not on the average salary for the best six years of employment. There are many features of the benefits currently in place which are equal to, if not better than, those afforded most others.

We are advised that the cost to implement this reform would be in the neighbourhood of $2 million over five years escalating accordingly thereafter. Changes along these lines have been recommended by previous Triennial Commissions. We consider that while these increases may be warranted, the reestablishment of an appropriate salary base for the judiciary is of greater importance. If priorities are being set, we would locate the reestablishment of this salary base of the highest level of importance and, accordingly, for the present, would recommend that there be no change in spousal survivor benefits.

E. COMMON-LAW SPOUSES

Section 44 of the *Judges Act* does not currently contemplate that the surviving spouse's annuity will be paid to common-law spouses. This is no longer a reflection of contemporary values. Furthermore, this deficiency is inconsistent with most provincial family law regimes. In addition, we have been advised that it is inconsistent with public sector policy. Reform is clearly indicated. Presumably, statutory change would be no more elaborate than definitional amendment to include a common-law spouse in the definition of spouse in the *Act* with entitlement to be dictated by conventional family law principles.

<u>It is recommended that</u>: provision be made in the *Judges Act* for a surviving spouse's annuity to be paid, in legally appropriate circumstances, to a common-law spouse.

F. JOINT AND SURVIVOR PENSIONS

There is currently no provision in the *Judges Act* to allow a retired judge who marries after retirement to elect to have his or her annuity paid on a joint-and-survivor basis. Again, this is an issue about which there is no contention from any quarter. Statutory reform is clearly indicated.

<u>It is recommended that</u>: provision be made in the *Judges Act* to enable a retired judge who marries after retirement to provide for joint and survivor benefits.

G. INTEREST ON JUDGES' PENSION CONTRIBUTIONS

Pursuant to section 51 of the *Judges Act* and section 6 of the *Supplementary Retirement Benefits Act*, under certain conditions a judge's contributions toward his or her pension (annuity) may be returned to the judge upon retirement from the Bench where payment of the annuity is not otherwise triggered. In the event interest is payable, it is presently calculated at the rate of 4% compounded annually. This is the rate applicable under the circumstances for the return of pension contributions for all federal public servants.

Your Commissioners fail to appreciate the logic in utilizing a fixed rate of interest when calculating the amount of money to be returned to an individual who has made contributions to a pension plan and is about to withdraw those contributions. As the judges pointed out, this arrangement is "manifestly inequitable." Both the Guthrie Commission (1986) and the Courtois Commission (1989) recommended the adoption of "...a rate to be varied as and when necessary to reflect the 'prescribed rates'." The Government of the day

recognized the necessity for this reform by including in Bill C-50 a provision which would have amended section 51 of the *Judges Act* to allow for a rate "prescribed by the Income Tax Regulations." This method of dealing with the anomaly in question is fair and appropriate and we would recommend its adoption.

It is therefore recommended that: section 51(4)(b) of the *Judges Act* be amended to provide that interest be payable upon the return of all pension contributions in respect of the 1996 contribution year, and each contribution year that is subsequent to 1996, calculated at the rates prescribed by the Income Tax Regulations, and compounded annually.

VI. Insurance

This is a non-statutory benefit. Federally appointed judges are covered for life insurance under the Public Service Management Insurance Plan in contrast to Deputy Ministers who are covered by what is described as an "Executive" plan. Essentially, Deputy Ministers receive basic coverage at twice their salaries, while judges only qualify for insurance equal to one- times their salaries. Supplementary insurance coverage at the individual's cost and at one-times salary is available to both groups.

It is the position of the judiciary that they should have equivalent insurance coverage, particularly if the utilization of Deputy Ministers as the comparable group for judges is to continue. If the judges were afforded equivalency of coverage, they would have coverage at two times salary in the form of group term life insurance with coverage to continue until retirement without reduction. Furthermore, the judiciary argues that this enhanced coverage is of even greater importance bearing in mind the removal of the right to make full RRSP contributions, in addition to what are described as the "relatively low" survivor benefits under the *Judges Act*.

These suggestions have much to recommend them. Economics aside, there is no reason why judges should be treated less favourably than the comparator group in question. We are advised that government officials have recognized this disparity and that a great deal of work has been undertaken to ascertain what might be done to address this situation. One of the difficulties is that the age profile of the judges is so vastly different from that of the five thousand or so senior public servants who are covered by the "Executive" plan, that it is, in the first place, not possible to incorporate them into this group, and in the second, a very expensive proposition to create an independent plan to provide like coverage. For example, because of the age profile of senior public servants, insurance for Deputy Ministers costs approximately 25 cents per month per $1000 units of insurance coverage. By reason of their present age profile, comparable insurance for the judges is estimated to be about

four times as costly. However, implementation of the Rule of 80 and gender balancing will both serve to normalize the age of active judges over a relatively short time period.

Notwithstanding these cost considerations, it is clearly inequitable to continue in the present mode indefinitely. It is premature to make a detailed recommendation presently, but we are of the view that even if it must be a staged program based on manageable age criteria, efforts should be made to offer equivalent life insurance coverage for the judiciary.

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

VII. Leaves of Absence

Under section 54 of the *Judges Act*, leaves of absence in excess of 30 days require the approval of the Governor in Council. The Crawford Commission (1992) recommended that in every Superior or Appellate Court the Chief Justice be permitted to grant maternity or parental leave of up to six months. This is essentially a "management" issue and delegation of authority ought to have occurred long before this. There also appears to be an opportunity to broaden the scope of the study leave program and this we would encourage.

It is recommended that: section 54(1) of the *Judges Act* be amended to authorize Chief Justices to approve leaves of absence of up to six months, including maternity/parental leave and study leave.

VIII. Salary Differential Between Trial and Appellate Judges

As our report was in the final stages of preparation, a submission was received from the judges of the Court of Appeal of the Province of Quebec. In substance, the members of the Court urged the Commission to recommend that the existing system of remuneration for judges be fundamentally altered by striking salaries which would differentiate between those federally appointed judges who sit on Provincial Courts of Appeal and those who sit in the Trial Divisions. Higher pay for appellate judges, lower for trial judges. We are firmly of the view that the submission comes too late in the day for this Triennial Commission to address it. The notion of differential salaries requires very careful assessment. While some interesting points, in substance, in favour of the concept are advanced, a very persuasive case would have to be made to depart from the present regime which assumes that the burden of judicial office, while different in nature as between the trial and appellate levels of our courts, nonetheless requires an equivalent discipline and dedication on the part of the judges at both court levels. The cultural impact on the system in the event of such differentiation would have to be very carefully weighed. The submission, while welcome, simply came too late to be given the attention that this subject deserves.

IX. Conclusion

As has been noted by a succession of our predecessors, the Triennial Commission review process was instituted by Parliament to reduce the presence of political partisanship in the course of determining judicial salaries and benefits. To date, the process has been a failure. Your Commissioners are of the view that the principal reasons for this state of affairs are outlined in this Report. There is an opportunity, nonetheless, to rescue the statutory scheme and to restore it to the stature originally envisioned. The public interest in the effective administration of justice would be well served by modest, but meaningful, reform to achieve this objective.

All of which is respectfully submitted this 30th day of September 1996.

David W. Scott, Q.C.
Michel Vennat, Q.C.
Barbara Rae

Appendix A

Background

1. **Members:** Mr. David W. Scott, Q.C. (Chairperson)
Ms. Barbara Rae, Order of Canada
Maitre Michel Vennat, Q.C., c.r., Order of Canada

Executive Secretary: Charles G. Watt

2. **Terms of Reference**

The Commission shall, pursuant to s.26 of the *Judges Act*, inquire into the adequacy of the salaries and other amounts payable under the *Act* and into the adequacy of judges' benefits generally.

The Commission shall report to the Minister of Justice within six months of the Commission's appointment, with such recommendations as the commission considers appropriate, including recommendations for improvements to the process by which judicial compensation is established.

The same Commissioners will make a second report to the Minister by November 30, 1996, recommending specific changes that should be made when economic circumstances allow. The report would be given by the Minister to the Canadian Judicial Council and the Canadian Judges Conference, and made public.

In carrying out its mandate, the Commissioners should:

1. **Take into account:**
   - (a) **the principle of judicial independence, and in particular the constitutional requirement of financial security for judges**
   - (b) **the overall economic and fiscal situation, including the compensation freeze reflected in the *Public Sector Compensation Restraint Act***
   - (c) **comparative factors, including the relative compensation of judges in other jurisdictions, lawyers, persons paid out of public funds, and Canadians generally**
   - (d) **the need to attract strong candidates for judicial appointment.**

2. **Seek the views of judges and judicial organizations, the legal profession, and the Canadian public.**

NOTE: The mandate of the 1995 Commission was formally extended to September 30, 1996 with the enactment of Bill C-2 in March 1996. Subsection 26 (2) of the *Judges Act* was amended to provide that the report of this and all future Commissions shall be submitted to the Minister within 12 months of their appointment.

3. Meetings and Conference Calls

The Commission held meetings and/or telephone conference calls as follows:

December 6, 1995 – Toronto
January 10, 1996 – Ottawa
January 26, 1996 – telephone conference
February 12, 1996 – Toronto
May 15, 1996 – Ottawa
June 27, 1996 – Toronto
July 20, 1996 – telephone conference
August 13, 1996 – Calgary
September 5, 1996 – Toronto

4. Notice to the Public

The Commission published a Notice in newspapers across Canada, inviting written submissions and presentations at an oral hearing, in either official language, concerning matters within the Commission's terms of reference. Specific notices were also sent to a number of interested organizations and individuals, including all of the provincial and territorial Ministers of Justice and Attorneys General. Copies of the Notice in English and

French and a listing of the newspapers in which they were placed are reproduced at annex "A" to this Appendix.

5. Written Submissions and Public Hearing

Written submissions were received from the organizations, groups and individuals listed in Appendix "B". A public hearing took place on January 11, 1996, in Hearing Room Three, of the Canadian International Trade Tribunal, 333 Laurier Avenue West, Ottawa. The following organizations appeared before the Commission:

- the Canadian Judges' Conference and the Canadian Judicial Council[2]; and
- the Canadian Bar Association[3]

The Commission held two other meetings with delegates from the Conference and Council; Mr. Andy Watt of the Department of Justice also attended. These meetings were held in Ottawa and Toronto on May 15, and June 27, 1996 respectively. Additionally, the Commissioners met with Chief Justice C.A. Fraser and a group of women judges in Alberta on August 13, 1996.

6. Previous Committees and Commissions

The 1995 Commission on Judges' Salaries and Benefits is the eighth federal committee or commission established in recent years to inquire into and make recommendations to the Minister of Justice with respect to judicial compensation. It is the fifth Triennial Commission appointed pursuant to subsection 26(1) of the *Judges Act*.

For the Conference and Council: The Hon.Mr. Justice Guy Kroft, Chief Justice Constance Glube, The Hon. Mr. Justice Coulter Osborne, The Hon. Mr. Justice Douglas Lambert, The Hon. Madam Justice Susan Lang, L'hon.juge André Brossard, The Hon. Mr. Justice Stuart Leggatt and Chief Judge Jean-Claude Couture

For the Canadian Bar Association: Mr. Ronald Pink, Q.C., and Ms. Joan Berkovitch

7. Acknowledgments

The Commission wishes to thank Guy Goulard, Q.C., Commissioner for Federal Judicial Affairs (Ottawa), and members of his staff, in particular Denis Guay, Joan Lamoureux, Marie Burgher, and the Finance Office for their cooperation and support. We also thank Andy Watt, Senior General Counsel and Harold Sandell, Legal Counsel of the Department of Justice; L. M. Cornelis Office of the Superintendent Financial Institutions Canada; and Charles Watt who served as the Executive Secretary to the Commission.

Annex A

Notices to the Public

List of Newspapers

1. St. John's Evening Telegram
2. Charlottetown Guardian
3. La Voix Acadiene
4. Halifax Chronical-Herald
5. Le Courrier
6. Saint John Telegraph Journal
7. L'Acadie Nouvelle
8. Le Soleil
9. La Press
10. Montreal Gazette
11. Le Droit
12. Ottawa Citizen
13. The Globe and Mail
14. The Toronto Star
15. The Lawyers Weekly
16. Winnipeg Free Press
17. La Liberté
18. Regina Leader Post
19. Saskatoon Star-Phoenix
20. Journal L'Eau Vive
21. Calgary Herald
22. Edmonton Journal
23. Le Franco-Albertain
24. Vancouver Province
25. Le Soleil de Colombie
26. The Yellowknifer
27. Whitehorse Star

Commission on Judges' Salaries and Benefits

CANADA

OTTAWA, K1A 1E3

Commission sur le traitement et les avantages des juges

1995 COMMISSION ON JUDGES' SALARIES AND BENEFITS

NOTICE

This Commission was appointed on September 30, 1995, by the Minister of Justice and Attorney General of Canada, pursuant to section 26 of the Judges Act, to inquire into the adequacy of the salaries and other amounts payable under the Act to federally appointed judges and into the adequacy of federally appointed judges' benefits generally, including the process by which judicial compensation is established.

The Commission invites written submissions in either official language concerning the matters within the Commission's terms of reference. Written submissions must reach the Commission by December 20, 1995, in ten copies. A party intending to file a written submission with the Commission may also request an opportunity to make a presentation at an oral hearing. The Commission must be notified by December 8, 1995, of the party's desire to appear at an oral hearing. A party filing a written submission need not request to appear at an oral hearing.

Copies of the Commission's terms of reference are available upon request.

David W. Scott, Q.C.
Chairman

1995 Commission on Judges'
Salaries and Benefits
Room 1114
110 O'Connor Street
Ottawa, Ontario
K1A 1E3

Commission on Judges' Salaries and Benefits

CANADA

OTTAWA, K1A 1E3

Commission sur le traitement et les avantages des juges

COMMISSION DE 1995 SUR LE TRAITEMENT ET LES AVANTAGES DES JUGES

AVIS

La Commission de 1995 sur le traitement et les avantages des juges a été instituée le 30 septembre 1995 par le ministre de la Justice et procureur général du Canada, en application de l'article 26 de la Loi sur les juges. Elle a pour mandat de déterminer si le traitement et les avantages des juges nommés par le gouvernement fédéral incluant le processus d'établissement du traitement des juges sont satisfaisants.

La Commission invite toute personne intéressée à lui soumettre par écrit ses vues sur les sujets qu'elle a reçu pour mission d'examiner. Ces interventions doivent prendre la forme d'un document écrit, établi dans l'une ou l'autre des deux langues officielles, et être déposées auprès de la Commission en dix exemplaires au plus tard le 20 décembre 1995. Quiconque dépose un tel document écrit peut en outre demander à la Commission d'être entendu par celle-ci. En pareil cas, il convient d'aviser la Commission au plus tard le 8 décembre 1995 du souhait de présenter des observations orales. Il convient de noter que le dépôt de documents écrits n'oblige nullement à présenter les observations orales.

Il est possible d'obtenir le texte définissant le mandat de la Commission sur simple demande.

Commission de 1995 sur le
traitement et les avantages
des juges
110, rue O'Connor
Bureau 1114
Ottawa (Ontario)
K1A 1E3

Le président de la Commission

David W. Scott, c.r.

Appendix B

List of Submissions

1. The Canadian Bar Association
2. The Canadian Judges Conference
3. The Canadian Judicial Council
4. The Law Society of Alberta
5. The Law Society of British Columbia
6. The Law Society of Manitoba
7. The Ontario Superior Court Judges Association
8. The Hon. Edward D. Bayda, Chief Justice (Saskatchewan)
9. The Hon. Marie Corbett (Ontario)
10. The Hon. N.A. Drossos (British Columbia)
11. The Hon. C.A. Fraser, on her own behalf and on behalf of a group of women judges (Alberta)
12. The Hon. Elizabeth A. McFadyen (Alberta)
13. The Hon. Margaret J. Trussler (Alberta)
14. The Hon. Rosemary Vodrey, Minister of Justice and Attorney General (Manitoba)
15. Colin L. Campbell (Ontario)
16. Mr. W. Chapman (Prince Edward Island)
17. Mr. W. T. Metzger (Ontario)
18. Mr. John T. Nilson, Minister of Justice & Attorney General (Saskatchewan)
19. Mr. & Mrs. E. Toker (Manitoba)
20. Mr. R. Walker (Saskatchewan)

TAB 25

Office of the Commissioner for Federal Judicial Affairs Canada
Commissariat à la magistrature fédérale Canada

Ottawa, Canada
K1A 1E3

DATE: April 1, 2020

TO: ALL JUDGES, as well as FEDERAL COURT PROTHONOTARIES

GUIDELINES ON THE INCIDENTAL ALLOWANCE (subsections 27(1) and (1.1) of the *Judges Act*)

Introduction

The purpose of these Guidelines is to provide guidance and clarification to judges, as well as to prothonotaries of the Federal Court, who claim reimbursements respectively under subsections 27(1) and (1.1) of the *Judges Act*, for reasonable incidental expenses that their office may require. These Guidelines cannot be fully exhaustive or provide for every circumstance, and judges and prothonotaries should contact the Commissioner's Office in advance if they are uncertain as to whether an expense may be claimed.

Subsections 27(1) and (1.1) of the *Act*

These subsections stipulate the following:

Allowance for incidental expenditures actually incurred

27 (1) *On and after April 1, 2000, every judge in receipt of a salary under this Act is entitled to be paid, up to a maximum of $5,000 for each year, for reasonable incidental expenditures that the fit and*

DATE : Le 1er avril 2020

À : TOUS LES JUGES, ainsi qu'aux PROTONOTAIRES DE LA COUR FÉDÉRALE

LIGNES DIRECTRICES POUR L'INDEMNITÉ DES FRAIS ACCESSOIRES OU FAUX FRAIS (paragraphes 27(1) et (1.1) de la *Loi sur les juges*)

Introduction

Les présentes lignes directrices visent à fournir des clarifications et à servir de guide aux juges, ainsi qu'aux protonotaires de la Cour fédérale, qui demandent des remboursements en vertu des paragraphes 27 (1) et (1.1) respectivement de la *Loi sur les juges*, pour les dépenses encourues des frais accessoires raisonnables dans l'accomplissement de leurs fonctions. Ces lignes directrices ne peuvent être pleinement exhaustives ni prévoir toutes les circonstances, et les juges et protonotaires devraient communiquer avec le commissariat à l'avance s'ils sont incertains de l'admissibilité d'une dépense.

Paragraphes 27(1) et (1.1) de la *Loi*

Ces paragraphes stipulent ce qui suit :

Indemnisation des faux frais

27 (1) *À compter du 1er avril 2000, les juges rémunérés aux termes de la présente loi ont droit à une indemnité annuelle maximale de 5 000 $ pour les faux frais non remboursables en vertu d'une*

proper execution of the office of judge may require, to the extent that the judge has actually incurred the expenditures and is not entitled to be reimbursed for them under any other provision of this Act.

Allowance for incidental expenditures by prothonotaries

***(1.1)** On and after April 1, 2016, every prothonotary in receipt of a salary under this Act is entitled to be paid, up to a maximum of $3,000 for each year, for reasonable incidental expenditures that the fit and proper execution of the office of prothonotary may require, to the extent that the prothonotary has actually incurred the expenditures and is not entitled to be reimbursed for them under any other provision of this Act.*

In essence, the incidental allowance is meant to reimburse judges and prothonotaries for expenses they incur because of their functions as judges or prothonotaries. By law, expenses reimbursed under these subsections must be:

- reasonable,
- incurred by the judge or the prothonotary only (expenses paid on behalf of others may not be claimed),
- incidental to the fit and proper execution of the judicial position,
- up to a maximum of $5000.00 per judge, or $3000 per prothonotary per fiscal year (April 1 to March 31).

The allowance is not cumulative, unexpended portions lapse and cannot be carried forward. Expenses exceeding the allowance's maximums of $5000.00 (or $3000.00 per prothonotary) may be claimed in the subsequent fiscal year. No hospitality is reimbursed.

autre disposition de la présente loi, qu'ils exposent dans l'accomplissement de leurs fonctions.

Indemnisation des faux frais : protonotaires de la Cour fédérale

***(1.1)** À compter du 1er avril 2016, les protonotaires de la Cour fédérale ont droit à une indemnité annuelle maximale de 3 000 $ pour les faux frais non remboursables en vertu d'une autre disposition de la présente loi, qu'ils exposent dans l'accomplissement de leurs fonctions.*

Essentiellement, l'indemnité des frais accessoires vise à rembourser aux juges et aux protonotaires les dépenses qu'ils engagent en raison de leurs fonctions de juge ou de protonotaire. Selon la loi, les dépenses remboursées aux termes de ces paragraphes doivent être :

- raisonnables,
- être engagées par le juge ou le protonotaire seulement (les dépenses payées au nom d'autres personnes ne peuvent pas être réclamées),
- liées à l'accomplissement des fonctions du poste,
- d'un montant maximal de 5 000 $ par juge ou de 3 000$ par protonotaire par exercice financier (1er avril au 31 mars).

L'indemnité n'est pas cumulative; les portions inutilisées ne peuvent pas être reportées. Les dépenses excédant les indemnités maximales de 5 000$ (ou de 3 000$ par protonotaire) peuvent être réclamées au cours de l'exercice subséquent. Les frais d'accueil ne sont pas remboursables.

General principles

The Office of the Commissioner for Federal Judicial Affairs administers allowances provided to judges under the *Judges Act*, and audits every claim. Reimbursements made under the incidental allowance must adhere to the following principles:

- value for money,
- accountability,
- transparency,
- respect for judicial independence.

Principes généraux

Le commissariat à la magistrature fédérale administre les indemnités versées aux juges en vertu de la *Loi sur les juges* et effectue une vérification de chaque demande. Les remboursements effectués en vertu de l'indemnité des frais accessoires doivent respecter les principes suivants :

- l'optimisation des ressources;
- l'imputabilité;
- la transparence;
- le respect de l'indépendance judiciaire.

Classes or categories of reimbursable expenses

Electronic and other office equipment

The purchase and repair of a computer, printer, scanner, shredder, laptop, cell phone, tablet, and accessories for same, may be claimed.

The purchase of software and office supplies may be claimed.

Telecommunications

Monthly costs of cell phone usage and internet required for research and writing decisions at home may be claimed under the incidental allowance.

Memberships and Legal publications

Membership fees paid to law and judicial related professional associations, such as the Canadian Bar Association, the Canadian Superior Courts Judges Association, the

Classes ou catégories de dépenses remboursables

Appareils électroniques et autres équipements de bureau

Les dépenses liées à l'achat et à la réparation d'un ordinateur, d'une imprimante, d'un numériseur, d'une déchiqueteuse, d'un ordinateur portatif, d'un téléphone cellulaire, d'une tablette et d'accessoires pour ces appareils peuvent être réclamées.

Les dépenses liées à l'achat de logiciels et de fournitures de bureau peuvent être réclamées.

Télécommunications

Les coûts mensuels liés à l'utilisation d'un téléphone cellulaire et d'internet requis à des fins de recherches et de rédaction de décisions à la maison peuvent être réclamés en vertu de l'indemnité des frais accessoires.

Adhésions et publications juridiques

Les frais d'adhésion payés à des associations juridiques et à des associations professionnelles liées à l'appareil judiciaire, comme l'Association du Barreau canadien,

International Women Judges Association and other similar organisations, may be claimed.

l'Association canadienne des juges des cours supérieures, l'Association internationale des femmes juges et d'autres organisations similaires, peuvent être réclamés.

The purchase of books or subscriptions to publications for the purpose of legal research and writing may be claimed.

Les frais liés à l'achat de livres et à des abonnements à des publications à des fins de recherche et de rédaction juridiques peuvent être réclamés.

Formal court attire

The cost of formal judicial court attire, such as judicial robes, waistcoat, wing collar shirts or blouses, black or grey trousers or skirts, tabs, and studs may be claimed. The repair and dry-cleaning of judicial court attire may also be claimed.

Tenue de rigueur en cour

Le coût de la tenue de rigueur en cour, comme les toges, les vestons pour juges et protonotaires, les chemises ou chemisiers à col cassé, les jupes ou pantalons noirs ou gris, les rabats et les boutons de col, peut être réclamé. Les frais liés à la réparation et au nettoyage à sec de la tenue de rigueur pour les juges et protonotaires peuvent également être réclamés.

Judicial education and judicial outreach functions

The costs of attending judicial and legal conferences or seminars, and of obtaining judicial education materials, may be claimed under the incidental allowance if they are not otherwise reimbursed under section 41 of the *Judges Act*. In such instances, expenses shall be paid in accordance with the *Guidelines on the Conference Allowance*.

Formation des juges et activités de conscientisation ou d'information judiciaire

Les frais de participation à des conférences ou à des séminaires judiciaires et juridiques et les frais liés à l'obtention d'outils pédagogiques pour la formation des juges peuvent être réclamés en vertu de l'indemnité des frais accessoires s'ils ne sont pas autrement remboursés en vertu de l'article 41 de la *Loi sur les juges*. Dans ce cas, les dépenses sont remboursées conformément aux *Lignes directrices pour l'indemnité de conférence*.

The costs related to judicial outreach or public education, such as speaking at a school or university, attending meetings of the Bar, attending judicial ceremonies such as swearing-in or swearing-out of judges, judging a moot-court, or attending a law clerk recruitment event may be claimed. In such cases, expenses shall be paid in accordance with the *Guidelines on the Travel Allowance*.

Les coûts liés à des activités de conscientisation ou d'information judiciaire ou à l'éducation du public, comme prononcer des discours ou des allocutions dans une école ou une université, participer à des réunions du Barreau, participer à des cérémonies judiciaires comme l'assermentation et le départ de juges, être juge à un tribunal-école ou participer à un événement de recrutement d'auxiliaires juridiques, peuvent être réclamés. Dans ces cas, les dépenses sont remboursées conformément aux *Lignes directrices pour*

l'indemnité de déplacement.

Other reasonable incidental expenses

Additional expenses that may be claimed include: the purchase, installation and monitoring fees of home security systems; the reasonable costs of briefcases and suitcase because of judges' requirement to travel to attend sitting; framing of official documents; hearing aids and glasses if not covered under the insurance plan; and parking at the courthouse.

Autres frais accessoires raisonnables

D'autres demandes de remboursement qui peuvent être faites comprennent : les frais liés à l'achat, à l'installation et à la surveillance de systèmes de sécurité résidentielle; les coûts raisonnables liés aux porte-documents et aux valises en raison de l'obligation de voyager pour présider à une audience; l'encadrement de documents officiels; les appareils auditifs et les lunettes s'ils ne sont pas couverts par le régime d'assurance; et le stationnement au palais de justice.

Receipts

All expenses claimed must be supported by an original, detailed receipt for each transaction (a credit card slip is not sufficient if it does not set out the details of the purchase/payment). Exceptionally, when a detailed receipt is lost or otherwise unavailable, a credit card payment slip or the monthly credit card statement (or a copy of a cheque, if paid by cheque), is acceptable.

Reçus

Toutes les dépenses réclamées doivent être étayées par un reçu original détaillé de chaque transaction (un bordereau de carte de crédit ne suffit pas s'il ne comprend aucun détail sur l'achat/le paiement). Exceptionnellement, lorsqu'un reçu détaillé est perdu ou autrement non disponible, un bordereau de paiement par carte de crédit ou le relevé mensuel de carte de crédit (ou une copie d'un chèque, si payé par chèque) peut être accepté.

Claiming an expense

To make a claim, judges should submit the form attached as Appendix A to these Guidelines. The form includes a certification bearing the original signature of the judge.

Réclamation d'une dépense

Pour présenter une demande de remboursement, les juges devraient soumettre le formulaire qui se trouve à l'annexe A des présentes lignes directrices. Le formulaire comprend une accréditation portant la signature originale du juge.

Claims should be sent to:

Office of the Commissioner for Federal Judicial Affairs Canada
99 Metcalfe Street, 8th floor
Ottawa ON KIA 1E3
Attention: Accounts Payable

Les demandes doivent être envoyées au :

Commissariat à la magistrature fédérale Canada
99, rue Metcalfe, 8e étage
Ottawa (Ontario) KIA 1E3
À l'attention de : Comptes payables

Judges may access their incidental allowance balance in real-time through JUDICOM.

Contact Information

Judges who have any question about these Guidelines or an incidental allowance claim should contact the Executive Director, Finance and Operations.

Les juges peuvent consulter le solde de leur indemnité des frais accessoires en temps réel au moyen de JUDICOM.

Coordonnées de la personne-ressource

Les juges qui ont des questions au sujet de ces lignes directrices ou d'une réclamation d'indemnité des frais accessoires devraient communiquer avec la directrice exécutive, Finances et opérations.

Le commissaire,

Marc A. Giroux
Commissioner

TAB 26

Office of the Commissioner for Federal Judicial Affairs Canada
Commissariat à la magistrature fédérale Canada

Ottawa, Canada
K1A 1E3

DATE: April 1, 2020

DATE : Le 1er avril 2020

TO: ALL CHIEF JUSTICES, ASSOCIATE CHIEF JUSTICES, AND REGIONAL SENIOR JUDGES AND SENIOR FAMILY JUDGE IN ONTARIO

À : TOUS LES JUGES EN CHEF, LES JUGES EN CHEF ADJOINTS, AINSI QUE LES JUGES PRINCIPAUX RÉGIONAUX ET LE JUGE PRINCIPAL DE LA COUR DE LA FAMILLE EN ONTARIO

GUIDELINES ON THE REPRESENTATIONAL ALLOWANCE (Subsection 27(6) of the *Judges Act*)

LIGNES DIRECTRICES POUR L'INDEMNITÉ DES FRAIS DE REPRÉSENTATION (Paragraphe 27(6) de la *Loi sur les juges*)

Introduction

The purpose of these Guidelines is to provide guidance and clarification to judges entitled to a representational allowance under subsection 27(6) of the *Judges Act*. The allowance is provided to chief justices in recognition of the special extra-judicial obligations of their position. These Guidelines cannot be fully exhaustive or provide for every circumstance, and judges should contact the Commissioner's Office in advance if they are uncertain as to whether an expense may be claimed.

Introduction

Les présentes lignes directrices visent à fournir des clarifications et à servir de guide aux juges qui ont droit à une indemnité des frais de représentation en vertu du paragraphe 27 (6) de la *Loi sur les* juges. L'indemnité est accordée aux juges en chef et elle reconnaît les fonctions extrajudiciaires liées à leur fonction. Ces lignes directrices ne peuvent être exhaustives ni prévoir toutes les circonstances, et les juges devraient communiquer avec le commissariat à l'avance s'ils sont incertains de l'admissibilité d'une dépense.

Subsection 27(6) of the *Act*

Subsection 27(6) stipulates the following:

Representational allowance

27(6) *On and after April 1, 2004, each of the following judges is entitled to be paid, as a representational allowance, reasonable travel and other expenses actually incurred by the judge or the spouse or common-law partner of the judge in*

Paragraphe 27 (6) de la *Loi*

Le paragraphe 27 (6) stipule ce qui suit :

Frais de représentation

27(6) *À compter du 1er avril 2004, les juges ci-après ont droit, à titre de frais de représentation et pour les dépenses de déplacement ou autres entraînées, pour eux ou leur époux ou conjoint de fait, par l'accomplissement de leurs fonctions*

discharging the special extra-judicial obligations and responsibilities that devolve on the judge, to the extent that those expenses may not be reimbursed under any other provision of this Act and their aggregate amount does not exceed in any year the maximum amount indicated below in respect of the judge:

***(a)** the Chief Justice of Canada, $18,750;*

***(b)** each puisne judge of the Supreme Court of Canada, $10,000;*

***(c)** the Chief Justice of the Federal Court of Appeal and each chief justice described in sections 12 to 21 as the chief justice of a province, $12,500;*

***(d)** each other chief justice referred to in sections 10 to 21, $10,000;*

***(e)** the Chief Justices of the Court of Appeal of Yukon, the Court of Appeal of the Northwest Territories, the Court of Appeal of Nunavut, the Supreme Court of Yukon, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice, $10,000 each;*

***(f)** the Chief Justice of the Court Martial Appeal Court of Canada, $10,000; and*

***(g)** the Senior Judge of the Family Court, and each regional senior judge, of the Superior Court of Justice in and for the Province of Ontario, $5,000.*

extrajudiciaires et qui ne sont pas remboursables aux termes d'une autre disposition de la présente loi, aux indemnités maximales annuelles suivantes :

***a)** le juge en chef du Canada : 18 750 $;*

***b)** les autres juges de la Cour suprême du Canada : 10 000 $;*

***c)** le juge en chef de la Cour d'appel fédérale et les juges en chef des provinces, mentionnés aux articles 12 à 21 : 12 500 $;*

***d)** les autres juges en chef mentionnés aux articles 10 à 21 : 10 000 $;*

***e)** les juges en chef des cours d'appel du Yukon, des Territoires du Nord-Ouest et du Nunavut et le juge en chef de la Cour suprême du Yukon, celui de la Cour suprême des Territoires du Nord-Ouest et celui de la Cour de justice du Nunavut : 10 000 $;*

***f)** le juge en chef de la Cour d'appel de la cour martiale du Canada : 10 000 $;*

***g)** les juges principaux régionaux de la Cour supérieure de justice de l'Ontario, ainsi que le juge principal de la Cour de la famille de la Cour supérieure de justice de l'Ontario : 5 000 $.*

In essence, a representational allowance is provided to chief justices, associate chief justices, and regional senior justices as well as the Senior Judge of the Family Court in Ontario, ranging between $5,000 and $12,500 annually (with the exception of the Chief Justice of Canada, whose allowance is administered by the Registrar of the Supreme Court of Canada). It recognizes that chief justices will incur some expenses as part of

Essentiellement, l'indemnité des frais de représentation est accordée aux juges en chef et aux juges en chef adjoints ainsi qu'aux juges principaux régionaux et au juge principal de la Cour de la famille en Ontario. Elle varie entre 5 000$ et 12 500$ annuellement (à l'exception de celle du juge en chef du Canada qui est administrée par le registraire de la Cour suprême du Canada). Elle prévoit que les juges en chef engageront

their particular role and responsibilities in representing their court. By law, expenses reimbursed under this subsection must be:

- reasonable, meaning both the item as well as its cost,
- incurred by the chief justice, or in some cases their spouse or common-law partner, or a judge delegated by the chief justice to represent him or her, and
- because of the special extra-judicial obligations and responsibilities of the chief justice.

General principles

The Office of the Commissioner for Federal Judicial Affairs administers allowances provided to judges under the *Judges Act*, and audits every claim. Reimbursements made under the representational allowance must adhere to the following principles:

- value for money,
- accountability,
- transparency,
- respect for judicial independence and appreciation for the special extra-judicial obligations of chief justices.

Classes or categories of reimbursable expenses

Reasonable travel expenses for the attendance at functions

Because of the position they hold, chief justices are required to attend certain functions which may include but are not limited to: representing the Lieutenant-Governor; speaking engagements; legal and community

certaines dépenses en raison de leur rôle et de leurs responsabilités particuliers de représentation de leur cour. Selon la loi, les dépenses remboursées au titre de cet article doivent :

- être raisonnables, ce qui comprend autant l'item et son coût;
- avoir été engagées par le juge en chef, ou dans certains cas leur époux(se) ou conjoint(e) de fait, ou par un juge délégué par le juge en chef pour le/la représenter;
- avoir été engagées en raison des obligations et responsabilités extrajudiciaires du juge en chef.

Principes généraux

Le commissariat à la magistrature fédérale administre les indemnités versées aux juges en vertu de la *Loi sur les juges* et effectue une vérification de chaque demande. Les remboursements effectués sous l'indemnité des frais de représentation doivent respecter les principes suivants :

- l'optimisation des ressources;
- l'imputabilité;
- la transparence;
- le respect de l'indépendance judiciaire et la reconnaissance des obligations extrajudiciaires des juges en chef.

Classes ou catégories de dépenses remboursables

Frais de voyage raisonnables pour la participation aux fonctions

En raison du poste qu'ils occupent, les juges en chef sont tenus d'assister à certaines fonctions qui peuvent comprendre, sans s'y limiter : représenter le ou la lieutenant-gouverneur; prononcer des discours ou des

organisations conferences and dinners; swearing-in and swearing-out ceremonies; opening of the courts events; and others.

allocutions; participer à des conférences et à des dîners d'organisations juridiques et communautaires; participer à des cérémonies d'assermentation et de départ de juges, ainsi qu'à des évènements d'ouverture des cours; et autres.

In attending such functions, chief justices may claim reasonable travel expenses such as transportation, accommodations and meals in accordance with what is allowed and described in the *Guidelines on the Travel Allowance*.

En assistant à ces fonctions, les juges en chef peuvent réclamer des frais de voyage raisonnables tels que le transport, l'hébergement et les repas conformément à ce qui est autorisé et décrit dans les *Lignes directrices pour l'indemnité de déplacement*.

Reasonable travel expenses incurred by the spouse or common-law partner to attend protocol or formal functions

Frais de voyage raisonnables encourus par l'époux(se) ou conjoint(e) de fait pour assister aux fonctions officielles ou protocolaires

Subsection 27(6) of the *Judges Act* provides under the representational allowance the reimbursement of reasonable expenses "incurred by the judge or the spouse or common-law partner of the judge in discharging the special extra-judicial obligations and responsibilities that devolve on the judge".

Le paragraphe 27 (6) de la *Loi sur les juges* prévoit sous l'indemnité des frais de représentation le remboursement des dépenses raisonnables « encourus par le juge ou l'époux(se) ou conjoint(e) de fait du juge pour s'acquitter des obligations et responsabilités extrajudiciaires qui incombent au juge ».

Reasonable travel costs incurred by the chief justice's spouse or common-law partner to attend protocol or formal functions may therefore be claimed under this allowance.

Des frais de voyage raisonnables encourus par l'époux(se) ou conjoint(e) de fait du juge en chef pour assister à des fonctions officielles ou protocolaires peuvent donc être réclamés au titre de cette indemnité.

Hospitality expenses

Frais d'accueil

Reasonable hospitality expenses incurred by chief justices in discharging their special extra-judicial obligations and responsibilities may be claimed for judicial and legal related matters. Such expenses may, for example, be for: working meals with government officials, legal organisations representatives, community leaders, law deans or professors, and other judges; hosting foreign delegations; receptions on behalf of the court, such as at swearing-in or swearing-out ceremonies, with

Des frais d'accueil raisonnables encourus par les juges en chef pour s'acquitter de leurs obligations et responsabilités extrajudiciaires peuvent être réclamés pour des questions judiciaires et juridiques. Ces dépenses peuvent être, par exemple, pour : des repas de travail avec des représentants du gouvernement, des représentants d'organisations juridiques, des dirigeants communautaires, des doyens ou professeurs de droit et d'autres juges; l'accueil de délégations étrangères; des réceptions au

the law society, and with bench and bar committees.

Gifts for diplomatic, protocol or representational purposes

The reasonable purchase of gifts for international delegations of judges visiting the court, guest speakers at court events, or for acknowledgement on behalf of the court, may be claimed.

Other reasonable representational expenses

Such may include, for example, court outreach in schools and in the legal and broader community, moot courts, and the purchase of court related items not otherwise provided by government. Expenses that are an integral part of the judicial role, as opposed to being related to special extra-judicial obligations and responsibilities of chief justices, should be claimed under the incidental allowance (at ss. 27(1) of the *Judges Act*, see the *Guidelines on the Incidental Allowance*. Some expenses may nonetheless fall under either allowance.)

Receipts

With the exception of the daily per diem that may be used by judges, all expenses claimed must be supported by an original, detailed receipt for each transaction (a credit card slip is not sufficient if it does not set out the details of the purchase/payment). Exceptionally, when a detailed receipt is lost or otherwise unavailable, a credit card payment slip or the monthly credit card statement (or a copy of a cheque, if paid by cheque), is acceptable.

nom de la cour, comme lors de cérémonies d'assermentation ou de départ de juge, avec le barreau et des comités de liaison entre la magistrature et le barreau.

Cadeaux à des fins diplomatiques, protocolaires ou de représentation

Le coût raisonnable de l'achat de cadeaux pour des délégations internationales de juges visitant la cour, des conférenciers invités lors d'événements judiciaires ou une reconnaissance au nom de la cour, peut être réclamé.

Autres frais de représentation raisonnables

Ceux-ci peuvent inclure, par exemple, des activités de conscientisation ou d'information dans les écoles ainsi que dans la communauté juridique et dans son ensemble, des tribunaux-écoles, et l'achat d'articles liés aux tribunaux qui ne sont autrement pas fournis par le gouvernement. Les dépenses qui font partie intégrante du rôle judiciaire, contrairement à celles pour les obligations et les responsabilités extrajudiciaires des juges en chef, doivent être réclamées en vertu de l'indemnité des faux frais (au par. 27 (1) de la *Loi sur les juges*, prière de consulter les *Lignes directrices pour l'indemnité des faux frais*. Certaines dépenses peuvent néanmoins relever de l'une ou l'autre indemnité.)

Reçus

À l'exception du per diem quotidien qui peut être utilisé par les juges, toutes les dépenses réclamées doivent être étayées par un reçu original détaillé de chaque transaction (un bordereau de carte de crédit ne suffit pas s'il ne comprend aucun détail sur l'achat/le paiement). Exceptionnellement, lorsqu'un reçu détaillé est perdu ou autrement non disponible, un bordereau de paiement par carte de crédit ou le relevé mensuel de carte

de crédit (ou une copie d'un chèque, si payé par chèque) peut être accepté.

Claiming an expense

To make a claim, judges should submit the form attached as Appendix A to these Guidelines. The form includes certification by the judge of the expense, the purpose or nature of the event, and the number and names of guests where applicable, such as in the case of hospitality.

Claims should be sent to:

Office of the Commissioner for Federal Judicial Affairs Canada
99 Metcalfe Street, 8th floor
Ottawa ON KIA 1E3
Attention: Accounts Payable

The claim form must bear the original signature of the judge.

Contact Information

Judges who have any question about these Guidelines or a representational allowance claim should contact the Executive Director, Finance and Operations.

Réclamation d'une dépense

Pour présenter une demande de remboursement, les juges devraient soumettre le formulaire qui se trouve à l'annexe A des présentes lignes directrices. Le formulaire comprend une attestation par le juge des frais, du but ou de la nature de l'évènement, ainsi que du nombre et des noms des invités, le cas échéant, comme dans le cas de l'accueil.

Les demandes doivent être envoyées au :

Commissariat à la magistrature fédérale Canada
99, rue Metcalfe, 8e étage
Ottawa (Ontario) KIA 1E3
À l'attention de : Comptes payables

Le formulaire de réclamation doit porter la signature originale du juge.

Personne-ressource

Les juges qui ont des questions au sujet de ces lignes directrices ou des frais de représentation devraient communiquer avec la directrice exécutive, Finances et opérations.

Le commissaire,

Marc A. Giroux
Commissioner

TAB 27

Precedent
The new rules of law and style

First-year salaries on Bay Street reach new heights // On the Record

After more than a decade of stagnation, rookie associates on Bay Street get a raise

BY DANIEL FISH

ON TUESDAY DECEMBER 4TH, 2018

It was bound to happen eventually. Over the past year, as the downtown legal market continues to thrive, the largest firms in Toronto have increased the starting salary for first-year associates for the first time in more than a decade.

When the 2008 financial crisis throttled the global economy, it dealt the legal market a major blow. As a result, associate compensation on Bay Street flatlined. At most large firms, first-year associates earned either $100,000 or $105,000. With the new increase, they now take home, almost uniformly, $110,000.

The first firm to hit that number was McCarthy Tétrault LLP. In late 2017, the firm adjusted its salary grid (along with most of Bay Street) in response to Fasken, which gave its mid-level associates a raise that summer. McCarthys increased the base salaries for its mid-level associates, but it *also* gave its rookie associates a raise from $100,000 to $110,000. In short order, that became the standard starting salary on Bay Street. (There is one notable outlier: at Davies Ward Phillips & Vineberg LLP, first years earn $130,000.)

The rationale for the latest batch of pay hikes? “The market is booming,” says Emily Lee, a co-founder at Alt Recruitment Partners. “There’s been an uptick in the number of associates taking in-house roles and moving to competitors. It’s purely a retention play.”

Christopher McKenna, the manager of student-recruitment programs at Bennett Jones LLP, has seen this phenomenon firsthand. “It’s no secret that when firms lose first- and second-year lawyers, they’re disappointed,” he says. “That has started to happen more often.” Bay Street had no choice but to respond. “I think

firms have had to raise salaries to remain competitive with the opportunities in the market. We want to continue to retain our best talent."

It's certainly true that when firms lose their most junior associates, it is particularly painful. "Associates are long-term investments," says Jordan Furlong, the principal of the legal-consultancy firm Law21. "In their first couple years of practice, they can't really bill clients for half of the work that they perform. If associates were paid in direct relation to the amount of money they bring into the firm, they wouldn't earn much more than $50,000." Once they reach their third year, explains Furlong, their billings take off and they start to bring in real money. But if they don't stick around to that point, the firm will never see a return on their initial investment.

Turning to the future, will associates have to wait another decade for their next raise? "That would surprise me," says McKenna. "I foresee firms constantly reassessing their compensation structure."

This story is from our Winter 2018 Issue (http://lawandstyle.ca/category/issue-12-4-winter-2018/).

Illustration by Sara Wong (https://www.sarawong.ca/)

TAB 28


LEGAL
SALARY
GUIDE
2021
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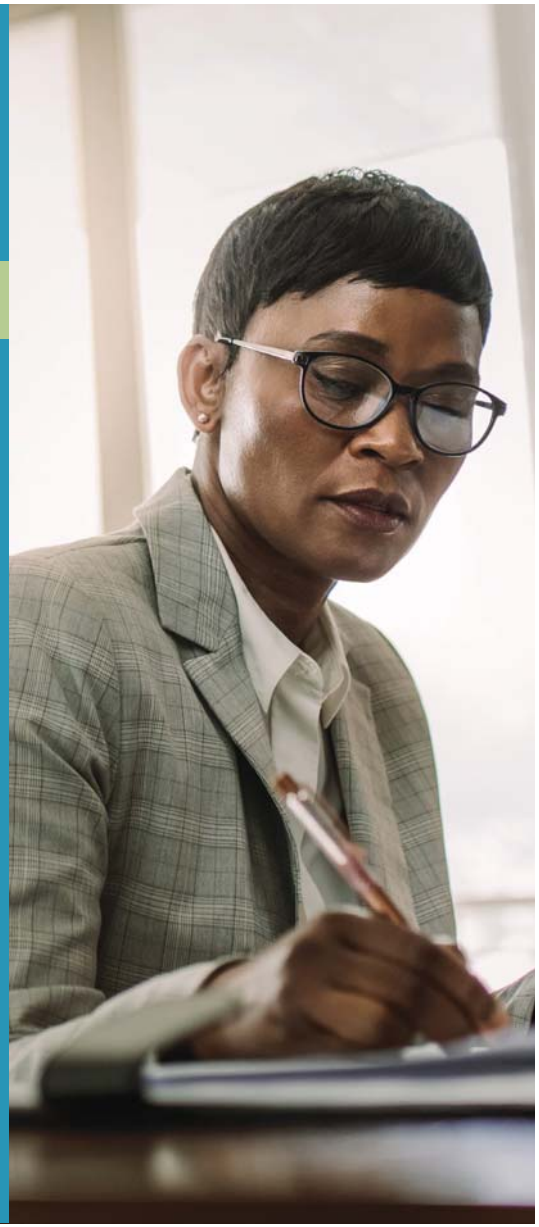
Legal

Contents



Hiring Trends in the United States

Law firms and corporate legal departments are adjusting to new business realities brought on by the COVID-19 crisis, with changes to the way they operate, recruit and offer services.

Robert Half has been reporting on hiring trends and salary forecasts for 70 years. As the world's leading specialized staffing firm, we are an authority on hiring in the legal profession. This guide covers industry trends our recruiters have identified and the starting salaries we expect to see for legal positions in 2021.

Hiring for critical roles

Law firms and corporate legal departments that reduced staffing levels are reevaluating hiring plans and recruiting for business-critical roles. They seek candidates who possess the specific skills and experience required for the position and can make immediate contributions with minimal training.

Some hiring managers remain cautious, taking a wait-and-see approach while business conditions remain uncertain. To address gaps in the workflow, they are bringing on more temporary workers.

6 in 10 professionals are more motivated to work at an organization that values its staff during unpredictable times.

Source: Robert Half survey of 573 U.S. workers who said they've had career reconsiderations due to the COVID-19 pandemic

Compensation holding steady

While salary levels are not expected to change significantly, in-demand roles may see a modest increase in the year ahead. But even in an uncertain economy, legal employers will still need to offer competitive compensation since top candidates continue to entertain multiple offers.

Some firms are using benefits to help offset lower or stagnant wages. This includes wellness perks and more paid time off. A deciding factor for many job seekers is whether they will be allowed to work off-site.

Larger number of remote workers

Due to the COVID-19 pandemic, remote work has become a widespread practice within the legal profession. Both employers and employees are benefitting from these arrangements, with reduced office expenses and improved work-life balance, for example.

Another advantage for employers is they can find candidates with in-demand skills who are not available in the organization's primary geographic location. Some companies and law firms are reevaluating pay for remote workers who live in less-expensive areas, though reducing wages can raise potentially thorny issues, such as different labor and taxation laws, and the overall fairness of the policy.

of senior managers say maintaining morale has been challenging during the pandemic.

Source: Robert Half survey of more than 2,800 senior managers in the U.S.

Sectors Driving Hiring

- Banking/finance
- Education
- Healthcare/pharmaceutical
- Insurance
- Technology/software

Widening use of digital tools

Law firms are adopting software tools such as Bill4Time, MyCase, ProLaw, Relativity and other applications to facilitate client intake, document review and management, timekeeping, and billing processes. As firms increasingly depend on these systems to ensure the seamless delivery of legal services, they require more stringent data security measures. Job candidates who are proficient with these applications are highly marketable.

Improving agility through flexible staffing

Legal managers recognize that a flexible staffing model is essential to business continuity. When budgets for full-time hires are limited, employers can examine short- and long-term needs to determine the appropriate blend of full-time, temporary and project employees. Staffing levels can then be expanded to address peak caseloads and special projects such as document review and research. Temporary and project professionals also can support internal teams during staff absences and personnel transitions.

Not only does bringing in interim legal expertise help keep the business moving forward, it also allows employers to evaluate these specialists for future full-time roles.

Hiring more time-consuming

With an attractive job posting now inviting a flood of resumes, many legal employers may find hiring more time-consuming. And with unemployment rates for lawyers and other legal professionals lower than the national average, hiring managers are still competing for top candidates with in-demand skills.

33%

of workers want to pursue a more meaningful or fulfilling position.

Source: Robert Half survey of 573 U.S. workers who said they've had career reconsiderations due to the COVID-19 pandemic

With so many legal positions remote today, law firms and corporate legal departments are conducting virtual job interviews. To streamline and expedite the hiring process, employers also are turning to specialized staffing agencies to find highly skilled personnel.

Growing focus on specialization

With leaner operations in place, law firms need experienced associates with business development skills and expertise in high-growth specialties. The most marketable candidates have bankruptcy, labor and employment, litigation, healthcare, intellectual property, or insurance law backgrounds; these attorneys are commanding higher salaries and multiple offers in certain markets. In response to the pandemic, many companies repositioned or launched entirely new products and services. This has heightened demand for experienced corporate counsel to offer legal advice related to business strategy, operations and regulatory compliance.

Seeking experienced legal support

The most sought-after legal support roles require considerable experience. Contract administration, estate planning and intellectual property expertise are in high demand. Law firms are seeking paralegals with specialized litigation knowledge, such as eDiscovery, class-action lawsuits, patent prosecution and Chapter 11 bankruptcy. Companies are looking for legal support staff with backgrounds in corporate governance, compliance and contracts.

74%

of workers want to work remotely more often after the pandemic.

Source: Robert Half survey of more than 1,000 workers in the U.S.

Top Skills & Experience

Paralegals & Legal Support Staff

- Bachelor's degree
- Communication skills
- eDiscovery and trial preparation
- English/Spanish bilingualism
- Legal research
- Microsoft 365 tools and case management software

Lawyers

- 3+ years of experience
- Business development
- Clinical trials experience
- Cybersecurity and data privacy
- Technical proficiency

In-Demand Practice Areas

Bankruptcy, restructuring and insolvency — Financially distressed companies are turning to lawyers for assistance with restructuring or other financial protections, and consumers are seeking legal counsel for bankruptcies and foreclosures.

Contracts — Contract specialists are helping businesses review agreements, determine obligations, renegotiate leases and reduce risk. With financial institutions transitioning from the London Interbank Offered Rate to a new baseline rate by Dec. 31, 2021, legal teams are needed to help companies revise client contracts.

Healthcare — Hospitals, medical providers, insurance companies and drug manufacturers are seeking legal counsel as they tackle litigation, compliance, insurance defense, payment disputes and patient privacy matters.

Labor and employment — Businesses need legal advice related to employee health, safety and privacy, office reentry, workplace discrimination, and wrongful terminations, among other issues.

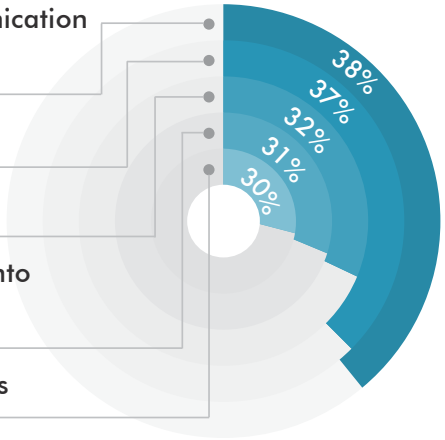
Litigation — Many companies are seeking clarification and guidance from outside law firms in areas related to the COVID-19 crisis, such as employment, general liability and insurance matters. Courts that closed during the pandemic are reopening and processing backlogged cases and new filings. Legal professionals with expertise in commercial litigation, labor and employment, family law, insurance defense, and intellectual property are in demand.

Privacy, data security and information law — The EU's General Data Protection Regulation and U.S. state-specific laws, such as the California Consumer Privacy Act, have led to a greater demand for specialists who can help companies navigate these complex regulations. Data security experts are needed to safeguard corporate assets and proprietary information as more employees work remotely.

Top 5 Changes Prompted by Working During COVID-19

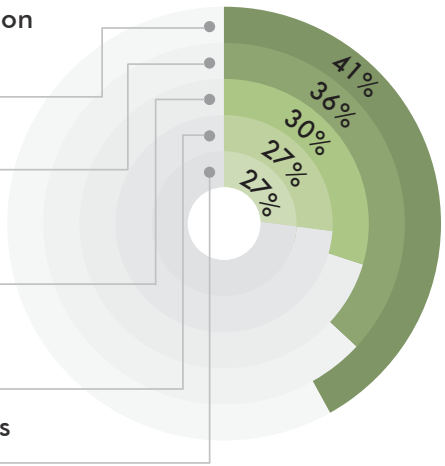
United States

1. More frequent communication from leadership
2. Improved collaboration
3. More innovation
4. Greater transparency into business priorities
5. More efficient processes



Canada

1. More frequent communication from leadership
2. Improved collaboration
3. Better rapport between managers and staff
4. (tie) Greater transparency into business priorities
4. (tie) More efficient processes



Multiple responses were permitted. Top responses are shown.
Source: Robert Half survey of more than 2,800 senior managers in the U.S. and 600 senior managers in Canada

Top 3 Hiring Changes Companies Made Because of COVID-19

Conducted remote interviews and onboarding

U.S.	54%
CANADA	50%

Shortened the hiring process

U.S.	42%
CANADA	33%

Advertised fully remote jobs

U.S.	42%
CANADA	32%

Multiple responses were permitted. Top responses are shown.
Source: Robert Half survey of more than 2,400 senior managers in the U.S. and more than 500 senior managers in Canada

Why Companies Work With Interim Professionals

Scale the team as needed

U.S. 40%
CANADA 33%

Evaluate for a full-time role

U.S. 39%
CANADA 46%

Access specialized skills

U.S. 37%
CANADA 33%

Alleviate burden on full-time staff

U.S. 32%
CANADA 33%

Add flexibility during changing economic conditions

U.S. 34%
CANADA 28%

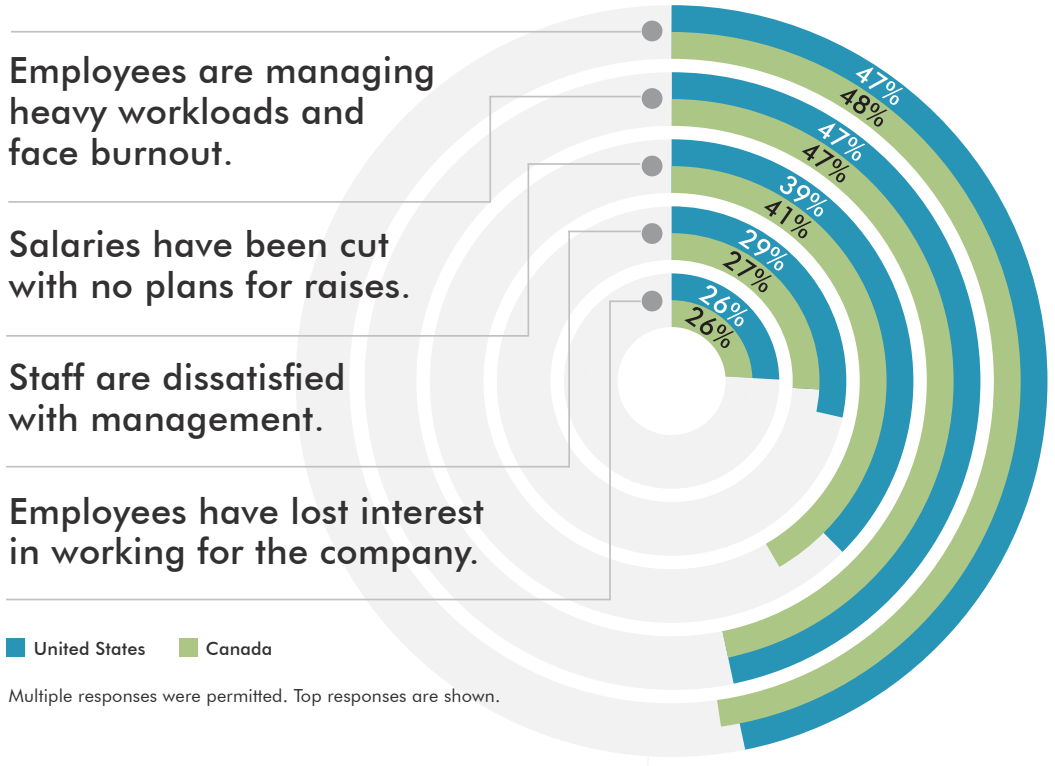
Access support for special projects

U.S. 34%
CANADA 29%

Multiple responses were permitted. Top responses are shown.
Source: Robert Half survey of more than 160 HR managers in the U.S. and more than 100 HR managers in Canada who planned to increase their use of interim professionals

More than 8 in 10 managers in the U.S. and in Canada are concerned about retaining valued employees.

Why managers say they are concerned



Multiple responses were permitted. Top responses are shown.

Source: Robert Half survey of more than 2,800 senior managers in the U.S. and 600 senior managers in Canada

How to Use Our Salary Tables

Starting salaries for the positions listed in this guide do not include bonuses, benefits and other forms of compensation. We break down starting pay rates into four percentiles to help you customize salary offers for each role. The percentiles account for differences in a candidate's level of experience and skills, professional certifications, demand for the role, and the size and complexity of the company that's hiring.

The 50th percentile represents the midpoint salary. The 95th percentile is typically reserved for candidates who are extremely difficult to find. A Robert Half Legal staffing professional can help you determine where exactly a particular role should fall within the salary percentiles stated in the guide.

25th

Candidate: Little or no prior experience in the position; still developing relevant skills

Demand: Low

50th

Candidate: Average experience; has the majority of the necessary skills

Demand: Moderate

75th

Candidate: Above-average experience; has most or all of the necessary skills; may have specialized certifications

Demand: High

95th

Candidate: Exceptionally strong skills, expertise and experience, often over and above what is necessary; has specialized certifications

Demand: Very high

	TITLE	25th	50th	75th	95th
Law Firm	Lawyer (10+ years' exp.)	110,750	136,250	157,000	235,000
	Lawyer (4-9 years' exp.)	88,500	113,750	137,500	206,250

Legal Salaries

UNITED STATES

	TITLE	25th	50th	75th	95th
Law Firm	Lawyer (10+ years' exp.)	110,750	136,250	157,000	235,000
	Lawyer (4-9 years' exp.)	88,500	113,750	137,500	206,250
	Lawyer (2-3 years' exp.)	76,500	94,000	116,250	167,000
	First-Year Associate	60,750	72,500	93,000	134,000
Corporate (In-House)	General Counsel	140,500	175,250	221,500	321,750
	Associate General Counsel/In-House Counsel (10+ years' exp.)	120,750	146,250	179,750	268,500
	In-House Counsel (4-9 years' exp.)	81,000	115,750	142,000	202,000
	In-House Counsel (0-3 years' exp.)	68,000	95,250	117,500	179,750
Law Firm Administration	Legal Administrator	65,000	79,500	99,250	146,500
	Office Manager	54,500	58,000	66,250	89,250
Legal Support	Paralegal Manager	79,500	87,750	96,500	108,500
	Senior/Supervising Paralegal (7+ years' exp.)	62,000	70,000	87,500	105,000
	Midlevel Paralegal (4-6 years' exp.)	54,500	61,750	71,250	78,750

Legal Salaries

UNITED STATES

	TITLE	25th	50th	75th	95th
Legal Support (continued)	Paralegal (2-3 years' exp.)	41,500	46,250	56,000	67,500
	Case Clerk (0-2 years' exp.)	40,250	44,000	48,750	58,000
	Senior Paralegal/Legal Assistant (Hybrid)	64,500	71,000	77,250	92,500
	Paralegal/Legal Assistant (Hybrid)	43,000	52,000	60,750	75,250
	Senior/Executive Legal Secretary (12+ years' exp.)	61,250	69,500	75,000	85,500
	Legal Secretary (7-11 years' exp.)	51,000	62,250	70,250	74,250
	Legal Secretary (3-6 years' exp.)	47,000	53,000	61,250	69,750
	Legal Secretary (1-2 years' exp.)	36,500	41,500	47,250	57,500
	Administrative Assistant	40,250	48,500	55,750	59,750
Legal Specialist	Law Librarian	53,500	65,750	80,500	116,750
	Patent Agent	69,500	84,250	97,500	145,250
	Records Manager	67,000	76,500	88,250	115,750
	Records Clerk	35,250	40,750	45,000	50,250
	Docket/Calendar Clerk	41,250	47,000	60,000	68,750
	File Clerk	38,500	43,500	50,750	55,000
	Time & Billing Clerk	38,250	43,000	52,750	55,500

Legal Salaries

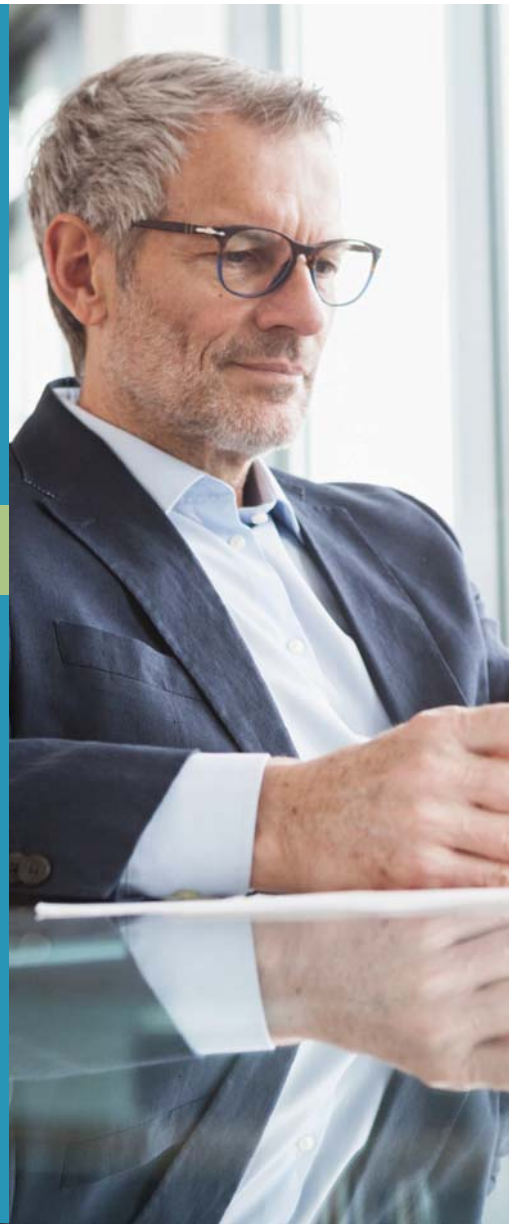
UNITED STATES

	TITLE	25th	50th	75th	95th
Compliance Administration	Compliance Director (10+ years' exp.)	90,750	126,250	147,500	195,750
	Compliance Manager (7-9 years' exp.)	83,250	98,500	122,000	164,250
	Compliance Analyst (4-6 years' exp.)	67,000	79,250	99,750	121,500
	Compliance Analyst (1-3 years' exp.)	60,000	74,500	80,250	91,000
Contract Administration	Contract Manager (7+ years' exp.)	66,000	79,250	97,500	137,250
	Contract Administrator (4-6 years' exp.)	57,500	71,750	87,250	122,750
	Contract Administrator (1-3 years' exp.)	51,500	62,000	75,750	92,500
Lease Administration	Lease Manager	65,250	79,750	95,000	119,250
	Lease Administrator	54,000	64,750	80,500	96,750
	Lease Assistant	43,500	52,000	56,750	65,250
	Title Closer	33,750	43,000	48,250	52,500

Legal Salaries

UNITED STATES

	TITLE	25th	50th	75th	95th
Litigation Support/ eDiscovery	Litigation Support/eDiscovery Director (10+ years' exp.)	108,000	132,500	162,750	225,500
	Litigation Support/eDiscovery Manager (7-9 years' exp.)	95,000	115,750	131,750	153,250
	Litigation Support/eDiscovery Manager (3-6 years' exp.)	68,750	93,250	114,000	143,500
	Litigation Support/eDiscovery Specialist/Analyst (1-2 years' exp.)	53,000	65,250	81,250	94,000
	Document Coder	35,500	40,000	50,250	69,500
General Administrative	Legal Word Processor	39,750	51,250	63,250	69,500
	Office Clerk	33,750	35,500	41,000	46,000
	Legal Receptionist	35,250	39,500	45,750	50,500



Adjusting Salaries for U.S. Cities

Due to cost of living, the availability of talent and other factors, starting salaries vary by market. We place candidates in cities across the United States, and we use what we learn each year to set regional variances to help guide you in determining pay in your area. Simply increase or decrease the national starting salary by the percentage listed for your city.

Alabama
Birmingham ..... -5%
Huntsville..... -5%
Mobile..... -14%

Arizona
Phoenix ..... +17%
Tucson..... +7%

Arkansas
Fayetteville ..... -5%
Little Rock ..... -5%

California
Fresno ..... -8%
Irvine..... +30%
Los Angeles ..... +32%
Monterey ..... +15%
Oakland..... +34%
Ontario ..... +20%
Sacramento ..... +8%
San Diego ..... +29%
San Francisco..... +41%
San Jose..... +40%
San Rafael ..... +32%
Santa Barbara..... +27%
Santa Rosa ..... +22%
Stockton ..... -13%

Colorado
Boulder ..... +19%
Colorado Springs ... +0%
Denver ..... +11%
Fort Collins ..... +0%
Greeley ..... -11%
Loveland..... -5%
Pueblo..... -15%

Connecticut
Hartford ..... +17%
New Haven..... +12%
Stamford..... +31%

Delaware
Wilmington ..... +5%

District of Columbia
Washington..... +33%

Florida
Fort Myers ..... -8%
Jacksonville..... -3.5%
Melbourne..... -9%
Miami/
Fort Lauderdale.... +6%
Orlando ..... +1%
St. Petersburg .....-1.5%
Tampa..... +0.5%
West Palm Beach.... +4%

Georgia
Atlanta ..... +6%
Macon .....-18%
Savannah .....-13%

Hawaii
Honolulu ..... +7%

Idaho
Boise..... -11%

Illinois
Chicago ..... +24%
Hoffman Estates ... +12%
Naperville..... +12%
Rockford.....-15%

Indiana
Fort Wayne .....-16%
Indianapolis ..... -3%

Iowa
Cedar Rapids ..... -5%
Davenport ..... -4%
Des Moines..... +2%
Sioux City .....-16%
Waterloo/
Cedar Falls.....-12%

Kansas
Overland Park..... +1%

Kentucky
Lexington ..... -8.5%
Louisville..... -8%

Louisiana
Baton Rouge .....-1%
New Orleans .....-1%

Maine
Portland..... -5%

Maryland
Baltimore..... +3%

Massachusetts
Boston..... +34%
Springfield ..... +1%

Michigan
Ann Arbor..... +1%
Detroit..... +0%
Grand Rapids.....-14%
Kalamazoo ..... -20%
Lansing.....-15%

Minnesota
Bloomington ..... +6.5%
Duluth .....-20.4%
Minneapolis ..... +7%
Rochester..... +2%
St. Cloud .....-14%
St. Paul ..... +4%

Missouri
Kansas City..... -0.5%
St. Joseph .....-10%
St. Louis..... +0.5%

Nebraska
Omaha .....+0%

Nevada
Las Vegas ..... +2%
Reno ..... +1%

New Hampshire
Manchester..... +12%
Nashua ..... +14%

New Jersey
Mount Laurel..... +15%
Paramus .....+30%
Princeton ..... +25%
Woodbridge..... +26.5%

New Mexico
Albuquerque ..... -8.5%

New York
Albany..... -4%
Buffalo ..... -6.5%
Long Island..... +25%
New York..... +40.5%
Rochester..... -6.5%
Syracuse .....-9.7%

North Carolina
Charlotte ..... +3.5%
Greensboro .....+0%
Raleigh ..... +4%

Ohio
Akron ..... -11%
Canton.....-18%
Cincinnati .....-2.5%
Cleveland ..... -4%
Columbus..... -2%
Dayton .....-13%
Toledo.....-14%
Youngstown .....-24%

Oklahoma
Oklahoma City ..... -7%
Tulsa ..... -7%

Oregon
Portland..... +11%

Pennsylvania
Harrisburg ..... -5%
Lehigh Valley..... +0%
Philadelphia ..... +15%
Pittsburgh ..... -2%
Reading ..... -5%

Rhode Island
Providence ..... +1.5%

South Carolina
Charleston..... -4%
Columbia ..... -6%
Greenville..... -4%

South Dakota
Sioux Falls.....-16%

Tennessee
Chattanooga ..... -11%
Cool Springs..... +1%
Knoxville..... -11%
Memphis ..... -4.5%
Nashville ..... +2%

Texas
Austin .....+9%
Dallas .....+11%
El Paso ..... -28%
Fort Worth ..... +10%
Houston ..... +9.5%
Midland/Odessa ....+8%
San Antonio ..... +1%

Utah
Salt Lake City ..... +9%

Virginia
Norfolk/
Hampton Roads..-1.5%
Richmond .....-1%
Tysons Corner ..... +32%

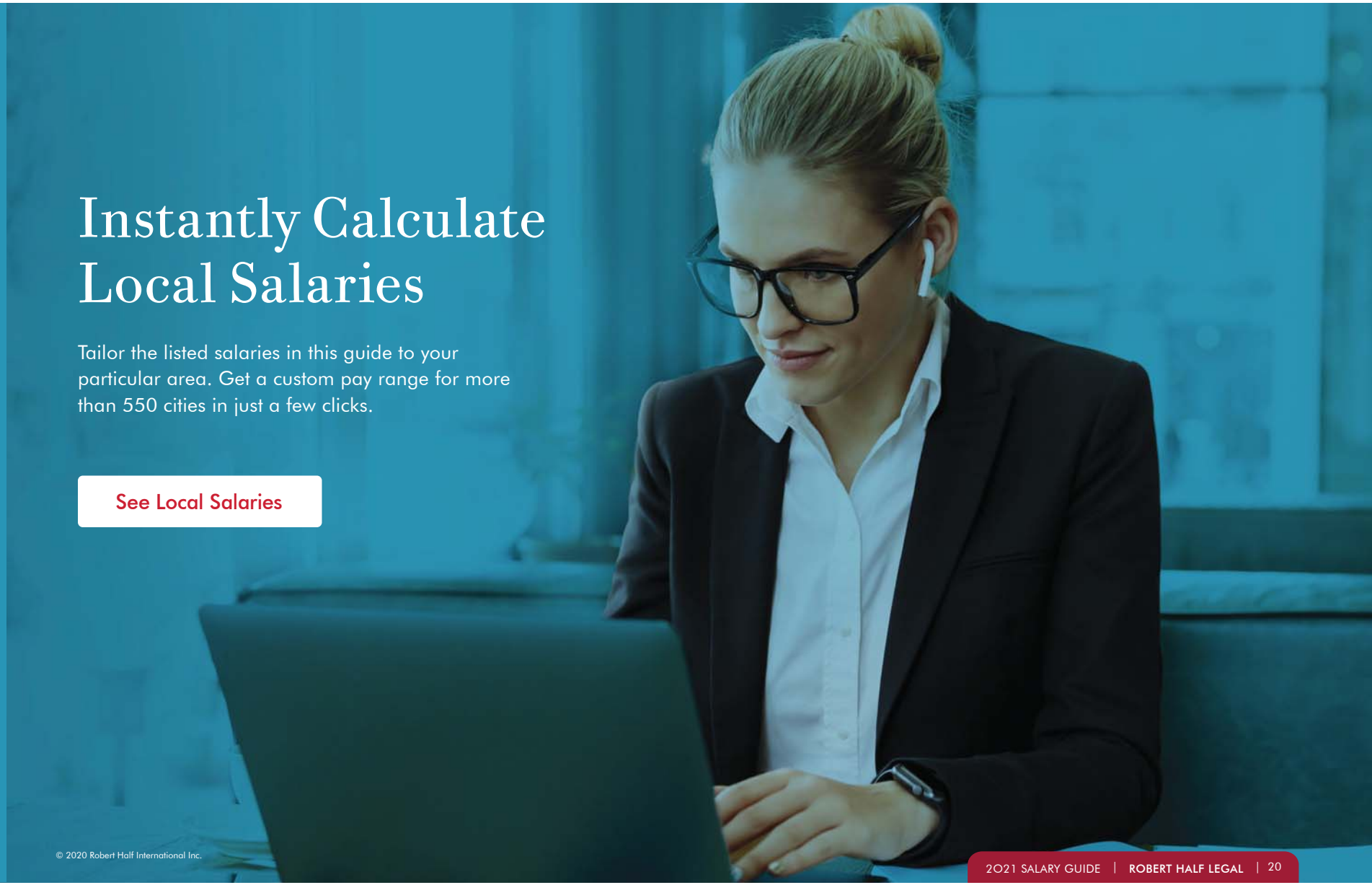
Washington
Seattle..... +27%
Spokane .....-18%

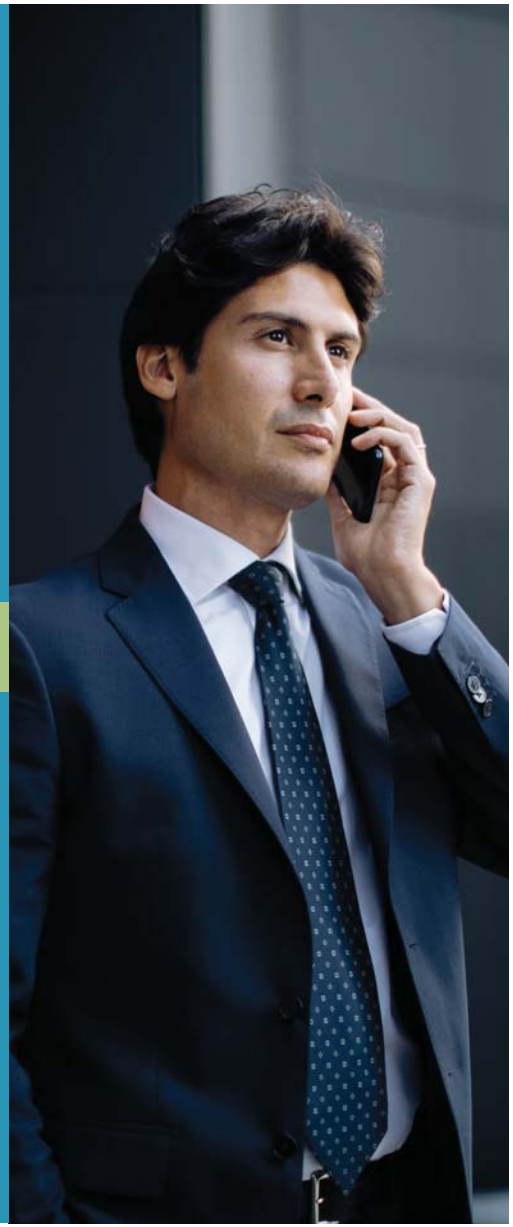
Wisconsin
Appleton.....-15%
Green Bay .....-13.5%
Madison ..... +1%
Milwaukee ..... +2%
Waukesha..... +1%

Instantly Calculate Local Salaries

Tailor the listed salaries in this guide to your particular area. Get a custom pay range for more than 550 cities in just a few clicks.

See Local Salaries





Hiring Trends in Canada

Law firms and legal departments are taking a cautious approach to expanding teams in 2021. But even in a conservative environment, employers need skilled legal professionals to support high-demand specialties.

Specialization driving hiring

Some of the bright spots for employment include commercial real estate and litigation. Lawyers with at least three years of experience are sought by law firms and corporate legal departments. Tech-savvy bilingual law clerks with backgrounds in family, labor and employment, or real estate law have a competitive edge.

Many larger corporate legal departments are bringing due diligence, contract review and other transactions in-house to control costs, while retaining law firms for highly specialized matters. As a result, small to midsize law firms and legal departments are doing much of the hiring.

Managing a remote legal workforce

Given the success of remote work arrangements amid the COVID-19 pandemic, many law firms and corporate legal departments are managing a mix of off- and on-site teams. They also are upgrading legal software to improve collaboration, case management and client relations, as well as bolstering data protection measures.

Employers are leveraging a flexible staffing model of full-time and interim legal professionals to adjust staffing levels more easily and respond nimbly to changing business conditions, caseloads and client demands. To save time and hiring costs, many managers are working with a specialized staffing firm to bring in the talent they need.

Legal Salaries

CANADA

	TITLE	25th	50th	75th	95th
Law Firm	Lawyer (10+ years' exp.)	106,500	130,750	161,000	234,500
	Lawyer (4-9 years' exp.)	85,250	102,250	125,750	189,750
	Lawyer (2-3 years' exp.)	74,500	90,250	110,250	161,000
	First-Year Associate	55,750	67,250	81,000	121,500
Corporate (In-House)	General Counsel	141,000	175,500	219,000	309,750
	Associate General Counsel/In-House Counsel (10+ years' exp.)	117,000	141,500	171,250	259,500
	In-House Counsel (4-9 years' exp.)	97,250	119,500	148,000	216,750
	In-House Counsel (0-3 years' exp.)	83,750	101,250	125,250	185,000
Law Firm Administration	Legal Administrator/Office Manager	63,000	76,250	92,750	119,000
Legal Support	Law Clerk Manager	61,250	74,750	91,000	116,500
	Senior/Supervising Law Clerk (7+ years' exp.)	60,750	72,500	85,250	115,000
	Midlevel Law Clerk (4-6 years' exp.)	56,250	63,500	74,250	87,500

All salaries listed on Pages 22-24 are in Canadian dollars.

Legal Salaries

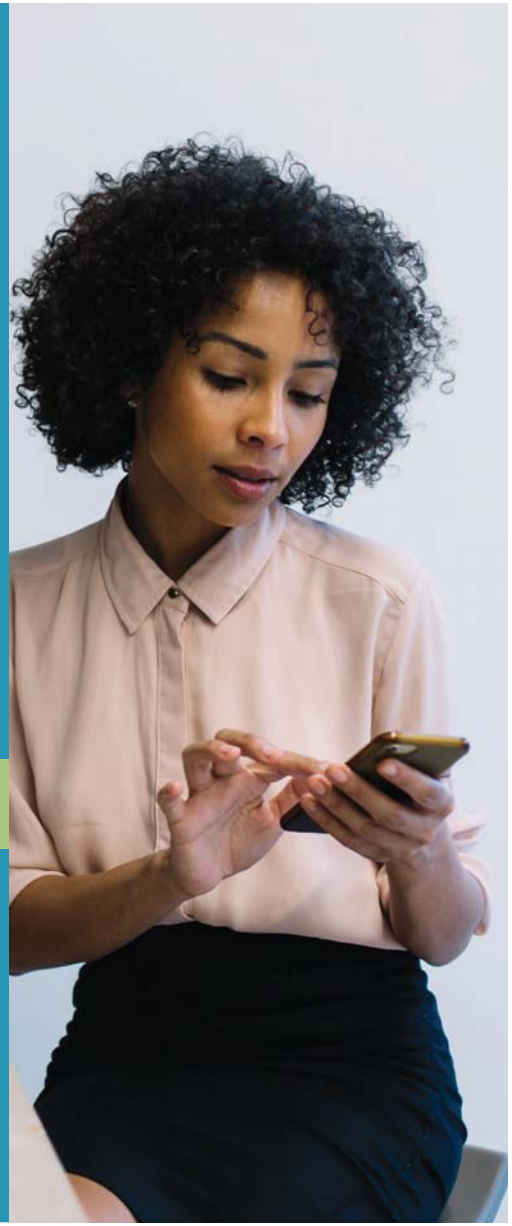
CANADA

	TITLE	25th	50th	75th	95th
Legal Support (continued)	Law Clerk (2-3 years' exp.)	46,250	51,000	56,750	73,250
	Law Clerk (0-1 years' exp.)	36,000	43,250	52,500	59,750
	Senior Law Clerk/Legal Assistant (Hybrid)	59,500	69,250	74,000	94,000
	Law Clerk/Legal Assistant (Hybrid)	41,000	50,000	59,000	80,500
	Senior/Executive Legal Assistant (12+ years' exp.)	47,250	57,250	69,750	87,000
	Legal Assistant (7-11 years' exp.)	40,750	48,000	57,250	75,250
	Legal Assistant (3-6 years' exp.)	37,500	43,250	50,500	65,750
	Legal Assistant (1-2 years' exp.)	34,000	38,750	45,000	59,000
	Administrative Assistant	36,250	42,750	48,500	58,000
Legal Specialist/ Administrative	Patent Agent	71,250	77,500	104,250	149,750
	File/Records Clerk	26,750	31,500	34,000	48,000
	Time & Billing Clerk	32,250	38,750	46,000	58,750
	Legal Word Processor	31,750	47,500	53,750	62,000
	Office Clerk	31,250	36,500	41,750	46,500
	Legal Receptionist	32,500	35,000	39,500	50,750

Legal Salaries

CANADA

	TITLE	25th	50th	75th	95th
Compliance Administration	Compliance Director (10+ years' exp.)	103,750	114,750	143,250	211,250
	Compliance Manager (7-9 years' exp.)	75,750	83,000	94,250	145,000
	Compliance Analyst (4-6 years' exp.)	64,000	70,500	83,000	126,000
	Compliance Analyst (1-3 years' exp.)	51,750	61,500	75,250	90,000
Contract Administration	Contract Manager (7+ years' exp.)	73,750	89,000	102,750	146,000
	Contract Administrator (4-6 years' exp.)	59,000	71,000	87,250	124,250
	Contract Administrator (1-3 years' exp.)	52,250	62,500	78,000	95,250
Lease Administration	Lease Manager	54,500	63,250	75,000	113,250
	Lease Administrator	50,000	59,500	72,750	97,500
	Lease Assistant	39,750	46,250	56,500	70,750
	Title Closer	37,000	44,000	52,000	57,500
Litigation Support/ eDiscovery	Litigation Support/eDiscovery Director (10+ years' exp.)	110,000	131,500	158,000	220,250
	Litigation Support/eDiscovery Manager (7-9 years' exp.)	90,250	109,250	135,250	162,750
	Litigation Support/eDiscovery Manager (3-6 years' exp.)	74,500	89,500	109,000	140,750
	Litigation Support/eDiscovery Specialist/Analyst (1-2 years' exp.)	54,000	65,000	80,000	99,500
	Document Coder	34,000	38,250	47,000	69,750



Adjusting Salaries for Canadian Cities

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Alberta
Calgary ..... +3.2%
Edmonton ..... +1.5%

British Columbia
Fraser Valley ..... +0.5%
Vancouver..... +3%
Victoria..... -1%

Manitoba
Winnipeg..... -2.5%

Ontario
Kitchener/
Waterloo ..... +0%
Ottawa..... +0.5%
Toronto..... +3%

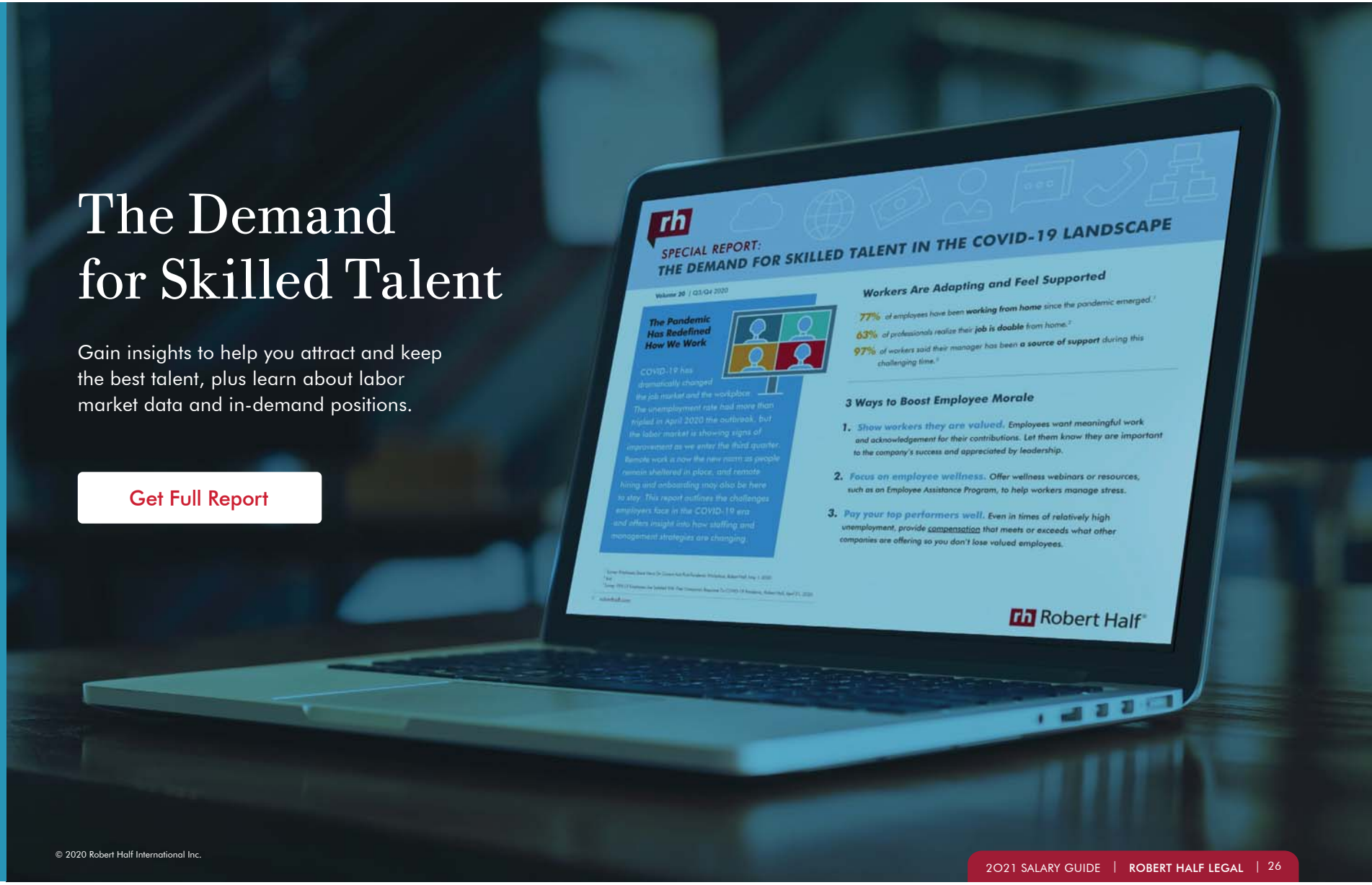
Quebec
Montreal..... +2%
Quebec City ..... -4%

Saskatchewan
Regina..... -4%
Saskatoon..... -3%

The Demand for Skilled Talent

Gain insights to help you attract and keep the best talent, plus learn about labor market data and in-demand positions.

Get Full Report



Trends in Benefits and Perks

Benefits and perks can play as significant a role as salary in your ability to attract and retain top talent. See what other firms offer, and what workers want, so you can keep pace.

Health insurance tops workers' benefits wish list*

Most wanted benefits | Percentage of companies offering

- Health insurance (U.S.)/extended health insurance (Canada) — 68%
- Paid time off** — 63%
- Dental insurance — 59%
- Retirement savings plan — 55%
- Life insurance and AD&D insurance — 54%
- Vision insurance — 52%
- Disability insurance (short-term and/or long-term) — 46%
- Employee assistance program — 42%
- Leave of absence/ sabbatical — 34%
- Tuition assistance or reimbursement — 33%
- Pretax programs*** — 26%

Footnotes and survey details are on Page 29.

Employees want to work from home more

Average number of days per week employees prefer to work from home after stay-at-home advisories are lifted

Flexible schedules most valued perk*

Most wanted perks

Percentage of companies offering

Flexible work schedules	46%
Remote work options (separate from stay-at-home orders)	44%
Paid parental leave	33%
Employee discounts	26%
Paid time off for volunteer activities	24%
Company-subsidized meals or snacks	21%
Matching-gifts program for employee donations/fundraising	19%
Unpaid sabbatical	15%

Footnotes and survey details are on Page 29.

Employees' preferred flexible work options*

- Flextime/nontraditional eight-hour day — 45%
- Completely flexible (40 hours, any time during workweek and weekend) — 44%
- Compressed workweek (e.g., four 10-hour shifts/week) — 32%
- Windowed work (eight hours/day, any time during workweek) — 16%

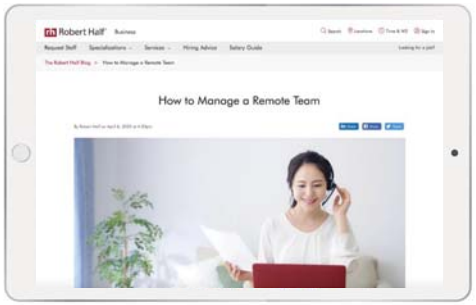
* Multiple responses were permitted. Top responses are shown.
** Paid time off includes vacation, sick days and paid holidays.
*** Examples of pretax programs include commuter benefits, flexible spending accounts and health savings accounts.
Source: Robert Half survey of 500 HR managers and more than 1,500 workers in the U.S. and Canada

Resources

10 Lessons for Managing Your Staff in the COVID-19 Era

Explore 10 of the most important things we've learned about business, the workforce and adapting to change during the pandemic.

Get the Report →



Robert Half Legal Blog

Visit our blog for hiring and management tips and for advice that legal professionals can use to find a job or advance professionally.

Read the Blog →

A Guide to Business Continuity Management

Protiviti, a Robert Half subsidiary, answers the 15 most frequently asked questions about keeping your business running through unexpected events.

Get the Report →

About Robert Half Legal

Robert Half Legal is an invaluable resource as law firms and legal departments strive to be more agile during periods of uncertainty. We offer tailored staffing services for firms of any size, but especially smaller organizations that lack the internal resources for recruitment.

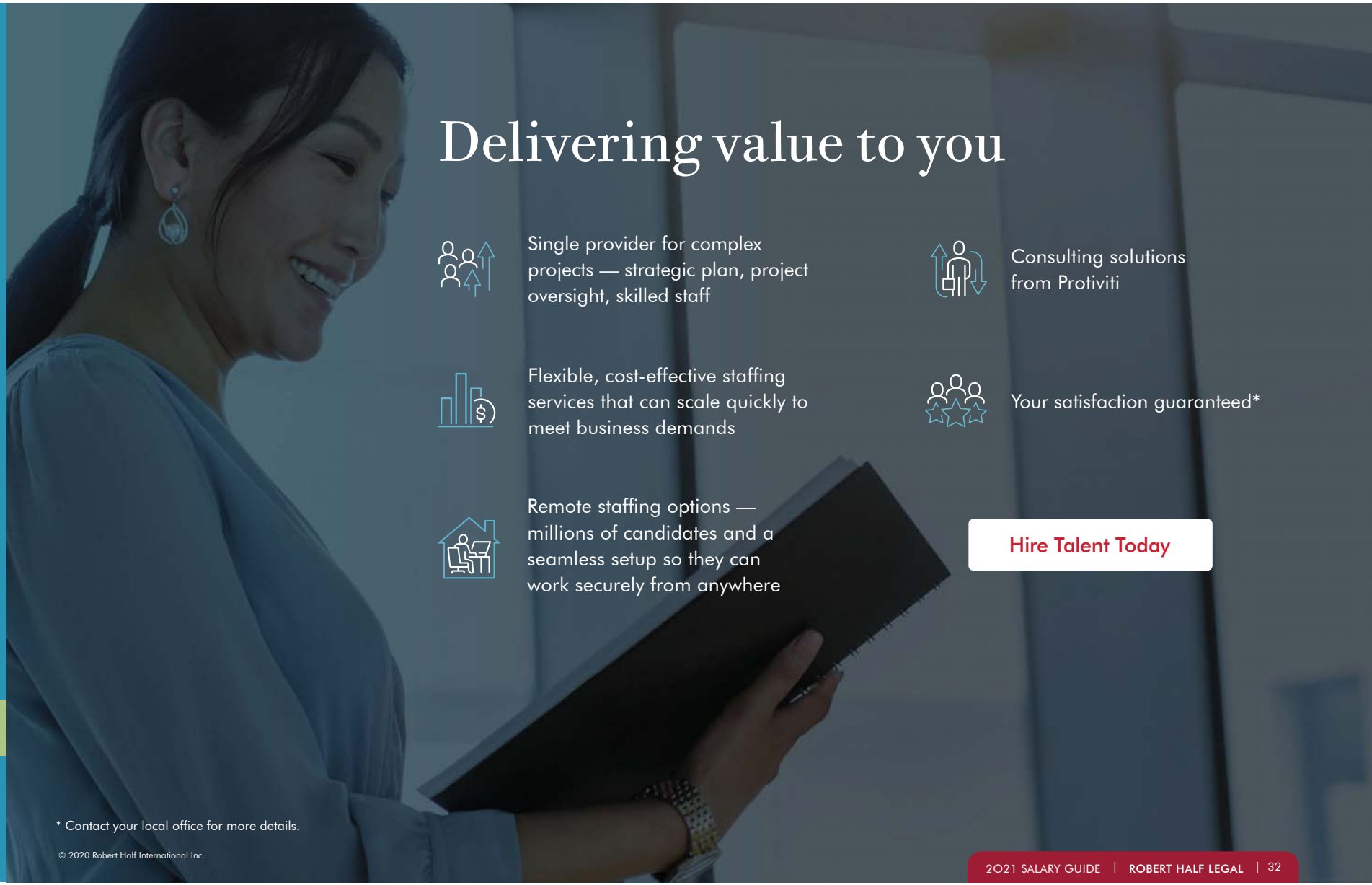
It's our business to match legal specialists with companies needing their expertise — wherever each may be located — on a project, temporary or full-time basis. Interim staff are ideal for leave coverage, eDiscovery support and peak seasons, as well as projects for which your organization might not have the niche experience, such as patents or contracts.

Contact your local office or call **1.877.862.2689** for assistance.

In addition, Robert Half Legal offers:

- **Salaried Professional Service** — highly skilled legal specialists for recurring or cyclical projects, where staffing continuity is critical.
- **Legal Consulting Solutions** — top-notch consulting and project management with custom-built teams, data hosting capabilities, clean rooms and the latest technology for eDiscovery and document review. We offer additional technical expertise and consulting proficiency through Protiviti, a subsidiary of Robert Half.

With our ability to place on-site or remote candidates, we can draw from a vast, global pool of talent. Our staffing managers blend their industry experience and personalized service with our AI-based matching technology to find the legal professionals with skills to meet your needs.



Delivering value to you

Single provider for complex projects — strategic plan, project oversight, skilled staff

Consulting solutions from Protiviti

Flexible, cost-effective staffing services that can scale quickly to meet business demands

Your satisfaction guaranteed*

Remote staffing options — millions of candidates and a seamless setup so they can work securely from anywhere

Hire Talent Today

* Contact your local office for more details.

Locations

United States

Arizona
Phoenix

California
Irvine
Los Angeles
Oakland
Palo Alto
San Diego
San Francisco
San Jose
Westwood

Colorado
Denver

District of Columbia
Washington

Florida
Miami/
Coral Gables

Georgia
Atlanta

Illinois
Chicago

Maryland
Baltimore

Massachusetts
Boston

Michigan
Detroit/Southfield

Minnesota
Minneapolis

Missouri
St. Louis

New York
New York

Ohio
Columbus

Pennsylvania
Philadelphia

Texas
Dallas
Houston

Washington
Seattle

International

Belgium
Brussels

Brazil
São Paulo

Canada
Toronto

France
Paris La Défense

United Arab Emirates
Abu Dhabi
Dubai

United Kingdom
London

Robert Half® Legal

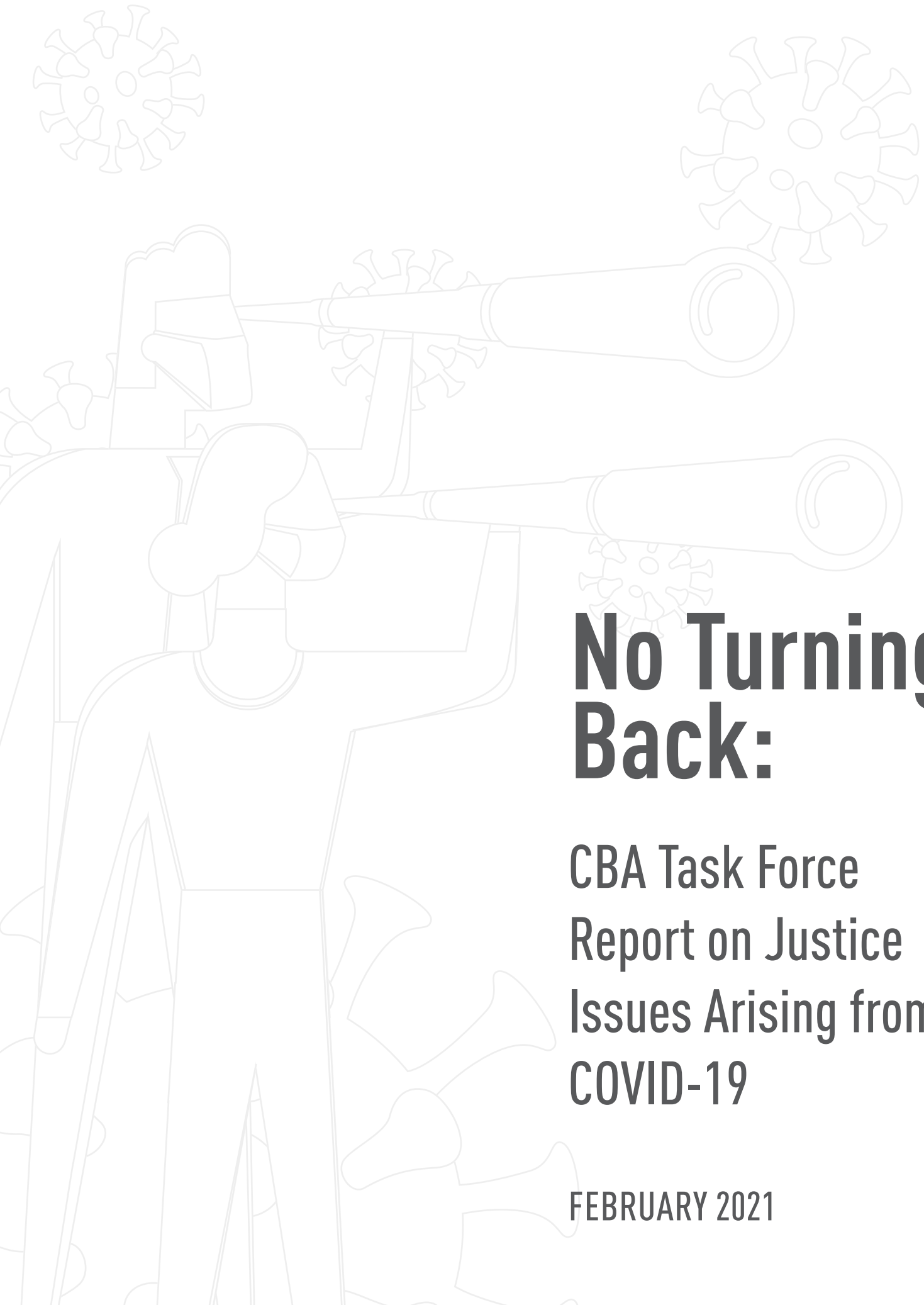
TAB 29

THE CANADIAN
BAR ASSOCIATION

No Turning Back:

CBA Task Force Report on Justice Issues Arising from COVID-19

FEBRUARY 2021



No Turning Back:

CBA Task Force Report on Justice Issues Arising from COVID-19

FEBRUARY 2021

PREFACE

The Canadian Bar Association launched its Task Force on Justice Issues Arising from COVID-19 – with thought leaders from across Canada's federal justice system – to assess the immediate and evolving issues for the delivery of legal services resulting from the COVID-19 pandemic.

After many months of fact finding, consultations and research, the Task Force is pleased to present its report. Our recommendations focus on how courts, tribunals and other dispute resolution bodies can adapt to meet the needs of justice system participants, including, most importantly, individuals seeking justice, both during and after the pandemic.

We thank all Task Force members for their kind participation:

Justice System Partners
Rt. Hon. Richard Wagner, Chief Justice of Canada, in his capacity as Chair of the Canadian Judicial Council
Hon. Marc Noël, Chief Justice, Federal Court of Appeal
Hon. Paul Crampton, Chief Justice, Federal Court
Hon. Eugene Rossiter, Chief Justice, Tax Court of Canada
François Daigle, Associate Deputy Minister, Justice Canada
Owen Rees, Deputy Assistant Deputy Attorney General, Justice Canada
Morgan Cooper, President, Federation of Law Societies of Canada
Daniel Gosselin, Chief Administrator (former), Courts Administration Service
Francine Côté, Chief Administrator (interim), Courts Administration Service
Orlando da Silva, Chief Administrator, Administrative Tribunals Support Service of Canada
Robert Leckey, President, Council of Canadian Law Deans
Catherine Dauvergne, Past President, Council of Canadian Law Deans

These members partners participated in the Task Force's information sessions and made valuable contributions to inform the report.

The report and the proposals and recommendations in it are from the CBA participants in the Task Force alone. They have not been adopted as official CBA policy.

CBA Members
Brad Regehr, CBA President 2020-2021 and Co-chair
Vivene Salmon, CBA President 2019-2020 and Co-chair
Steeves Bujold and Tom Laughlin, Policy Committee
John Gillis, Access to Justice Subcommittee
Martine Boucher, Legal Futures Subcommittee
Lisa Hynes and Christopher Wirth, Administrative Law Section
Stuart Zacharias, Civil Litigation Section
Jody Berkes and Kathryn Pentz, Criminal Justice Section

Erin Brook and Sharon Kravetsky, Family Law Section
Daniel Bourque, Canadian Corporate Counsel Association
Steve Pengelly, Chief Executive Officer (interim)

In addition, several CBA sections and committees other than those officially represented on the Task Force contributed helpful information on their areas of practice. Thanks to the following Sections and Subcommittees:

Alternative Dispute Resolution Section
Child and Youth Law Section
Elder Law Section
French Speaking Common Law Members Section
Health Law Section
Immigration Law Section
Intellectual Property Section
Labour and Employment Law Section
Law Students Section
Municipal Law Section
Public Sector Lawyers Section
Women Lawyers Forum
Access to Justice Subcommittee
Ethics and Professional Responsibility Subcommittee

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We trust that our efforts will contribute to repositioning Canada's justice system to be more accessible, modern and focused on the needs of individuals seeking justice.

Vivene Salmon
President, 2019-2020

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President, 2020-2021

Table of Contents

No Turning Back: CBA Task Force Report on Justice Issues Arising from COVID-19

> In my view, the simplest answer to this issue is, 'It's 2020'. We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is far more efficient and far less costly than personal attendance. We should not be going back.
>
> — **Justice Frederick L. Myers**, *Ontario Superior Court of Justice*[1]

I. INTRODUCTION

The precipitous advent of the novel coronavirus pandemic known as COVID-19 in March 2020 brought into focus the urgency of forging an accessible, modern and user-centered justice system. The pandemic forced all justice system participants to adjust to a new environment. It fast-tracked the adoption of different measures and technologies to deliver justice remotely. It further dispelled the notion that justice (and the legal profession), was somehow nobly removed from the fourth industrial revolution.[2]

These rapid and significant changes are occurring against a challenging backdrop: public confidence in the justice system is fragilized by a belief that access to justice is beyond the grasp of most individuals, an increasing number of self-representatives, and even individuals abstaining from seeking justice altogether — with costs deemed prohibitive or disproportionate to the actual value of the sought-after outcome.[3]

The CBA Task Force on Justice Issues Arising from COVID-19 was established to assess the immediate and evolving issues for the delivery of legal services resulting from the COVID-19 pandemic. The Task Force was mandated to report on changes to the justice system and to make recommendations on how courts, tribunals and other dispute resolution processes can deliver their services differently to meet the needs of stakeholders both during and after the pandemic.

The Task Force adopted the following Statement of Principles to guide its work:

> **Access to justice:** The focus of the task force is on the people who seek justice and the ability of the legal and justice systems to advise and serve them in resolving their issues.

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[1] Arconti v Smith, (2020) ONSC 2782. at para 19.

[2] The *"fourth industrial revolution" is characterized by the growing use of artificial intelligence, big data, cloud computing, robotics, 3D printing, etc. See* online.

[3] See Birnbaum, R., Bala, N., & Bertrand, L "The rise of self-representation in Canada's family courts: The complex picture revealed in surveys of judges, lawyers and litigants", *Canadian Bar Review,* 91 (2013), 67-95.

Impact on self-represented litigants: New measures and practices should address the needs, concerns, safety and security of self-represented litigants while also avoiding negative impacts on them. Wherever possible, judicial and tribunal procedures, technology, and decisions, should be easier to access, use, and read, to remove barriers to justice otherwise faced by self-represented litigants.

Health and safety: The health and safety of all justice system participants is paramount, and compliance with all applicable public health restrictions is essential.

Innovative, effective and efficient: The justice system has been stretched to its limit for years (backlog, unreasonable delays, etc.). This crisis has shown that the system needs meaningful reforms — short and long term — that emphasize innovation, effectiveness and efficiency.

Sustainable (post pandemic) measures: The Task Force has a particular focus on the opportunity to identify new and innovative measures and practices that are sustainable and can be permanently implemented to modernize and address long-standing challenges in the legal and justice system's ability to better serve the people who need to access it.

Open courts: All measures must maintain the transparency of the judicial process in accordance with the open courts principle recognized under section 2(b) of the Canadian Charter of Rights and Freedoms. Open courts are essential to a well-functioning democracy and judiciary and must be safeguarded against threats that would weaken its proper functioning.

Coordination and communication among justice system partners: All justice stakeholders have a role to play and must work together to identify and implement all measures as soon as possible. Effective communication among all stakeholders and jurisdictions is essential to share and maximize best practices.

Investments and resources: The Task Force will address investments and resources required to implement new measures, practices, and technologies. Investments and resources are required to address immediate needs, medium term issues and longer-term systemic changes to deliver justice more effectively.

The objective of this report is to assist in repositioning Canada's justice system to be concretely accessible, modern and focused on the individuals seeking justice. This in the anticipated aftermath — and current throes — of the protracted COVID-19 pandemic.

This report builds on lessons and recommendations of previous CBA initiatives. Reaching Equal Justice: An Invitation to Envision and Act *(Equal Justice Report)* sets out a strategic framework for reaching equal justice. It outlines the type of changes necessary to overcome barriers to equal justice. Many of its recommended actions remain unfilled and are eerily still relevant today. Futures: Transforming the Delivery of Legal Services in Canada *(Legal Futures Report)* is a comprehensive examination of the future

of the legal profession in Canada. It examines business structures and innovations, legal education, and ethics and regulation of the profession. The Legal Futures Report identifies access to justice as a foundational value underlying its work and offers some lessons for us today.

With an eye towards harnessing the promise of change for a more resilient, accessible and modern system beyond the pandemic, this report discusses how different Canadian jurisdictions and sister democracies are adapting their justice systems to address the pandemic. It then examines how best to properly implement new measures to avoid their main risks or unintended side-effects — paying particular attention to access to justice and confidence in the justice system, judicial independence, self-represented litigants and the open courts principle. The report also discusses the importance of sustainable investment in the justice system.

The report then makes recommendations on how the justice system can become more responsive to meet the needs of, first and foremost, individuals who rely on the justice system to resolve their legal problems.

Two principal themes underlie this report. First, there is no turning back. The pandemic propelled the justice system into a long-awaited modernization. We must continue forward and build on the measures, procedures and innovations implemented in response to the pandemic and focus on the needs of the users of the justice system. Second, new measures and technology must be deployed in a manner that enhances access to justice — rather than unintentionally inhibit it.

II. HOW CANADIAN JURISDICTIONS AND SISTER DEMOCRACIES ARE ADAPTING THEIR JUSTICE SYSTEMS TO ADDRESS THE PANDEMIC

Delivering justice remotely — generally

Given the nature of the pandemic and its restrictions on in-person gatherings, many changes were implemented to deliver justice remotely. In Canada and around the world, courts, administrative tribunals, other dispute resolution bodies, mediators and arbitrators are conducting their operations and proceedings by teleconference, videoconference, online/virtual hearings, various online dispute resolution mechanisms and other emerging technologies.

Information from the field

To cast as wide a net as possible, we consulted all CBA Sections and policy-oriented Subcommittees to identify measures, procedures and technologies implemented in their area of law. We also asked them what is working and what is not. Here is a snapshot of what we heard.

What is working?

Generally, there is a recognition that remote proceedings have been successful — especially for appeals, matters with lesser monetary value and less complex matters. Videoconference platforms for remote mediations, arbitrations and hearings, while not always ideal because of technical challenges, ensure

some level of continuity for the justice system. Working remotely also increases access to justice by eliminating geographical and financial constraints for some parties (income loss for time off work, travel costs, etc.).

Electronic filing of court documents (via secure drop box, online portals, email, etc.) as well as payment of court fees by telephone are widely seen by lawyers as major steps forward. Virtual witnessing of wills and powers of attorney was also a welcome change.

What is not working?

A common concern is that complex, sensitive matters with many witnesses and experts are more difficult to conduct remotely. This is largely because counsel cannot support their client in person and credibility assessments can be less amenable to online proceedings.

For family law matters, halting in-person hearings and restricting remote hearings to only urgent matters at the beginning of the pandemic meant that parties and often their children were caught in the middle of a dispute with no mechanism to protect their interests. Unfortunately, the justice system was slow to regain its footing and adopt remote measures to address access, child support and preservation orders.

The Health Law Section reported that e-hearings by professional regulatory bodies were effective for certain types of disciplinary matters but not as effective for complex ones involving allegations of physical or sexual assault.

For criminal matters normally held in a courtroom, counsel can walk to the prisoner's dock for a short, discrete conversation with their client. This is not possible in a remote hearing. Last minute Crown disclosures are problematic when working remotely because it is difficult to arrange a quick meeting with a client to discuss the new information.

The Family Law Section noted that online platforms make it harder for bullied, abused or less outspoken individuals to speak up. It is also more difficult to observe body language or intimidating influences.

The Elder Law Section described use of technology as bittersweet. It reduces the risk of spreading COVID-19 and makes it easier for meetings to occur despite geographical hindrances. However, seniors can struggle with technology. Lawyers may have difficulty visiting a hospital with an outbreak to see a dying client (not from COVID-19) to sign a will. While virtual signings are permitted in some jurisdictions, it is not always possible in urgent situations. Public health measures and measures taken by hospitals and care facilities restrict people's access to lawyers and the justice system in general in some cases.

The Immigration Law Section raised security, privacy and confidentiality concerns with the web-based document delivery system to communicate with the Immigration and Refugee Board.

The Family Law Section commented on the risk that informal remote proceedings can create a lack of appreciation for the seriousness and decorum of the justice system. Appropriate screen backgrounds and

camera angles are not trivial and are important to maintain decorum. Formality and respect for the rules are important to ensure fairness and trust in the process.

Areas to monitor

Electronic Judicial Dispute Resolution Pilot Project: On October 1, 2020, the Alberta Court of Appeal expanded its Judicial Dispute Resolution (JDR) Program as part of its continuing efforts to encourage early resolution.[4] The Court increased the number of JDR dates in Calgary and Edmonton. Electronic JDRs could be binding or non-binding and involve self-represented parties. The pilot project includes early intervention Appeal Conferences for Family Fast Track Appeals to increase access to justice and encourage resolution to reduce family conflicts and expenses.[5] The pilot project will run for a year and its effectiveness will be evaluated.

Official languages: As justice continues to be delivered through online platforms, it is important to fully protect a participant's choice of official language as guaranteed by the *Canadian Charter of Rights and Freedoms*. The recent report[6] of the Commissioner of Official Languages of Canada reiterates official languages must not be an afterthought even in times of crisis.

A look elsewhere

In New York State, the emergence of virtual proceedings created an opportunity to improve a previously piloted program: Centralized Arraignment Parts (CAPs). CAPs operate on evenings and weekends to facilitate the right to counsel and the ability to arraign criminal defendants expeditiously. Several New York districts proposed CAP plans where judges could hold remote arraignments to increase access to justice.[7]

In the UK, the HM Courts and Tribunal Service (HMCTS) response for criminal courts targeted four pillars of recovery:[8]

1. Maximizing HMCTS' existing space by introducing plexiglass screens to separate jury members to safely use more courtrooms
2. Additional capacity through Nightingale (temporary) courts by using a variety of buildings (former courts, conference venues, etc.)
3. Using technology to continue remote or video hearings where appropriate
4. Considering adopting different operating hours to maximize HMCTS' own space

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4 See Alberta Courts Notice to the Profession and Public - Judicial Dispute Resolution Pilot Project

5 See Alberta Courts Notice to the Profession and Public – Appeal Conference Pilot Project for Family Law Fast Track Appeals

6 Office of the Commissioner of Official Languages, "A Matter of Respect and Safety: The Impact of Emergency Situations on Official Languages", (October 2020), see online

7 See online.

8 See Update on the HMCTS Response for Criminal Courts in England and Wales (September 2020)

RECOMMENDATION

1. All dispute resolution bodies (courts, tribunals, boards, etc.) should permanently implement the following measures to improve access to justice, modernize and address long-standing challenges in the justice system:

a) Remote (video, online, telephone) proceedings should be available for settlement conferences, examinations for discovery, various hearings, motions, trials and appeals. Remote proceedings should continue especially for procedural, uncontested, shorter and less complex matters. While the court, tribunal or other dispute resolution body should ultimately decide if a matter is to proceed remotely, the parties should be given an opportunity to be heard and present their position on proceeding remotely.

b) Electronic filings (via secure drop box, online portals, email, etc.) of court documents and acceptance of service by email

c) Ability to remotely view hearings, trials or motions via an online platform (e.g. Zoom, YouTube) [subject to addressing the concerns outlined in this report]

III. HOW TO IMPLEMENT NEW MEASURES PROPERLY, TO AVOID RISKS OR UNINTENDED SIDE-EFFECTS

A. Access to justice and confidence in the justice system

Access to justice must not be deterred: Protecting the treasure trove of data in the surveillance economy

Courts, tribunals and other dispute resolution bodies, eager to show they are not lagging behind the times, are embracing technology whose promise of simplicity and efficiency is difficult to ignore. However, in a sincere effort to expand access to justice, users of complex innovative tools may risk overlooking some inherent perils. In the surveillance economy,[9] these tools reveal personal information of users of the justice system, potentially exposing them to shaming, doxing, identity theft, blackmail, ransomware and witness intimidation.[10] Moreover, the practice of "mass-scraping data" has additional, not yet fully understood, geo-political implications.[11]

These realities deter access to justice and taint the courts and other bodies that are de facto responsible

[9] S. Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, PublicAffairs (2019). Zuboff explains that social media companies are driving the rise of surveillance capitalism. Where profits once flowed from goods and services under *industrial* capitalism, then financial speculation under *financial* capitalism, profits are increasingly derived from surveillance of platform users and service providers by the platforms, and the monetization of aggregate data through analysis and sale of insights to third parties.

[10] K. Eltis, "Courts, Litigants and the Digital Age" (2016) Irwin Law. See also J. Farrell discussion on identity theft and other problems related to openness of courts in "Public Records on the Internet: The Privacy Dilemma' (2002 posted; revised 2006) See online.

[11] See for example, Chinese Firm Amasses Trove of Open Source Data on Influential Canadians (Globe and Mail, September 14, 2020). See online.

for protecting valuable and delicate digital data. In the surveillance economy, courts and other dispute resolution bodies must recognize the changing value of personal information and their new role as publishers of data, which requires vigilance in guarding this treasure trove of information.

Enthusiasm for the proliferation of electronic court documents, recordings and webcasts must be balanced with sober thought about their implications, particularly the unintended disclosure of personal information in ways not anticipated by current rules and the resulting affront to the access to justice that digital files were meant to promote.

Information of this nature has always been public — with excellent reason. The distinction between past and present lies in the new conception of accessibility where an audience of incalculable numbers now has unprecedented and indiscriminate access to bits and pieces of sensitive and personal information.[12]

In this context, unrestrained disclosure can chill access to justice as individuals hesitate to forward their claims for fear of eternal shaming, being denied housing or employment, and other unintended but common side-effects of online posting.[13]

Vulnerabilities of videoconferencing platforms

The increasing use of videoconferencing platforms[14] has highlighted vulnerabilities in these applications. For example, infiltration or digital hijacking (so-called Zoom-bombing) can disrupt business or compromise computer systems. Insufficient encryption and data protection could enable information gathering from malicious third parties.[15] These vulnerabilities can result in loss of confidentiality and credibility, with resulting economical and reputational damage.

Videoconference platforms in use across Canada vary widely (see Appendix A) with varying levels of security architecture, risks and limitations. Court administrators and other justice system participants need complete information to accurately assess the security of proprietary and novel platforms to make informed decisions on the short- and long-term implications of their use.

RECOMMENDATION

2. Justice system partners, including court and tribunal administrators, government officials and the CBA, should establish a working group to share information on best practices on the security of videoconferencing and to conduct a thorough evaluation of all videoconferencing platforms.

[12] See Canadian Judicial Council, Model Policy for Access to Court Records in Canada (Ottawa: Judges Technology Advisory Committee, 2005), online. See also Rebecca Fairley Raney, "The Jury is Out on Online Court Records" Online Journalism Review (January 2002), online.

[13] K. Eltis, "Courts, Litigants, and the Digital Age" (2016)

[14] These platforms include Zoom, Microsoft Teams, Cisco Webex, Slack, Google Hangout, etc.

[15] See online.

Protect data but foster innovation

The Legal Futures Report emphasized the importance of innovation and facilitating a national dialogue on innovation in the legal profession.[16] There is no question that the shift to delivering justice remotely creates opportunities for innovation.

While the security of data and personal information must always be paramount, justice system data should be made available in a controlled and secure environment to allow innovative legal solutions. For example, the development of applications to improve legal research and other tools to assist self-represented litigants are important considerations.

The recently created Legal Innovation Data Institute[17] (LIDI) aims to lower legal data access barriers in Canada and facilitate innovation. One of the LIDI's key objectives is to increase access to justice with innovation while shoring up the protection of personal privacy with emerging machine learning models that differentiate between justice system participants and private citizens engaged as parties or witnesses.[18]

RECOMMENDATION

3. Courts, tribunals and other dispute resolution bodies should carefully examine whether and how justice system data can be made available in a controlled and secure environment to enhance access and improve the justice system.

A step forward

In *A.B. v. Bragg*[19], the Supreme Court of Canada began a cultural shift. It recognized that in the digital age (in contrast to its brick and mortar counterpart), allowing indiscriminate and often decontextualized access to information about justice system participants, based on the open courts principle as it was interpreted in days of yore, thrusts courts into an unfamiliar role of publisher (rather than custodian) of sensitive data.

What must we do?

In Australia, the Government of Victoria reflected on the courts' role as custodians of digital data and underlined three main practical issues for the security of electronic documentation:

1. verify the identity of persons purporting to electronically sign or submit a document;
2. ensure the electronic document is received and stored in the same form in which it was sent;
3. prevent unauthorized access to documents either in transmission or storage.[20]

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[16] Legal Futures Report, page 68 (Recommendation no. 2)

[17] The Legal Innovation Data Institute (LIDI) was founded in September 2020. It is a not-for-profit organization that takes inspiration from public interest legal technology innovators and university research labs.

[18] See online

[19] 2012 SCC 46

[20] See online.

Another measure is to limit digital information to the minimum necessary — contextually and proportionally. Nefarious uses can be minimized by releasing only "meaningful data" online, following a qualitative triage aimed at holding back superfluous sensitive information, not directly connected to the underlying rationale of the open courts principle.

The experience in Belgium is instructive with its recognition that only personal details directly connected to the principle and purpose of open courts should be published, to attain equipoise between that important value (la publicité des audiences) and privacy of litigants, who might otherwise fear accessing justice if information superfluous to public consumption but sensitive to process participants were divulged.[21]

As the Belgian Privacy Commission stated, "[…] the purpose of publishing court decisions is to stimulate discussion on caselaw as a source of law — not to divulge participants' names to third parties".[22]

The Justice Lab UK[23], an initiative of the Legal Education Foundation, has commissioned research[24] to gather information about the methods and approach various jurisdictions take to manage and share data generated by their justice systems. The aim is to identify what works well and how countries can learn from approaches taken elsewhere.

RECOMMENDATION

4. Courts, tribunals and other dispute resolution bodies should establish robust practices and procedures to safeguard sensitive data. These practices and procedures must ensure that publishing sensitive data is done purposefully and guided by the "atteinte minimale" principle to not compromise access to justice or undermine confidence in the justice system. They could consider collaborating with the Justice Lab UK.

Effective triage to facilitate early dispute resolution and to optimize online courts and online dispute resolution (ODR)

The Equal Justice Report recognizes that the essence of a people-centered justice system is "the way people enter the system and the way they are treated on day one."[25] There are many paths to justice and it is crucial to quickly and properly direct people to the appropriate venues including, where appropriate, online courts and online dispute resolution.

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[21] K. Eltis, « La cyber diffusion des documents de la Cour: dans la quête d'un juste équilibre pour assurer l'accès à la justice dans l'ère numérique ('Purposively' Posting Court Documents Online: Striking a Balance with an Eye Towards Protecting Access to Justice in the Digital Age Post A,B. v Bragg) (December 5, 2013). In Peter Oliver and Graham Mayeda (eds.), Principles and Pragmatism: Essays in Honour of Louise Charron (LexisNexis, 2014).

[22] *Ibid.*

[23] See online

[24] See online

[25] Equal Justice Report, page 72.

For our purposes, online courts refer to existing processes and hearings transposed online. In Canada, this is largely what happened during the pandemic: existing proceedings were conducted remotely.

Online Dispute Resolution (ODR) uses *new* processes and technology (often a digital platform) to facilitate and expedite the resolution of disputes between parties, generally seeking to minimize the need for judicial supervision. ODR may involve different methodologies, including facilitated negotiation and early neutral evaluation (either with human input or artificial intelligence), digital communication (remote or video hearings and asynchronous messaging), and uploading and responding to evidence online.

The Civil Resolution Tribunal in British Columbia, discussed below, is an example of an ODR platform.

One key to improving access to justice is to distinguish between areas of law that more readily lend themselves to online courts in the short term and areas of law that require longer consultation and preparation for online courts or potentially ODR (or may never be suitable for these platforms).

In some Commonwealth democracies[26], smaller (relatively less complex) private disputes and some family law disputes amenable to settlements best lend themselves to remote and ODR hearings. Criminal and immigration matters are more delicate and require separate reflection.

Family law – special considerations

One of the biggest concerns in family justice is the ability for persons to access the justice system. Family law also presents unique issues of credibility and emotional elements. The reality is that there are few "simple" family law matters. There is also many self-represented parties, many of whom do not have the technology or the capacity to participate fully in a digital justice system. Any foray into online platforms is challenging in family law matters.

Publicly-integrated ODR

ODR has traditionally been private where attempts to reach settlement between parties bypass the public justice system. It was initially developed in the commercial sphere to deal with high-volume, low-value, consumer disputes arising from online transactions on e-commerce websites such as Amazon, eBay and PayPal.

The potential of ODR to resolve disputes efficiently and effectively eventually attracted the attention of governments, courts and tribunals around the world. More recently, ODR has been incorporated into domestic justice systems and processes in several ways, including as an external process that feeds into a formal determination, as the default platform for a new tribunal, and integrated into a pre-existing court system.[27]

Given the importance of a strong and viable justice system (as the third branch of government) to a

[26] Primarily the U.K, Australia with some attention to India.

[27] P.K. Cashman, E. Ginnivan, "Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex Litigation and Class Actions" (August 2019), Macquarie Law Journal, Vol. 19, 2019, at p. 3. See online

proper functioning democracy, ODR should not be relegated to the private sector. It should be properly integrated into the public justice system. Renewed reflection on how to integrate private ODR into the public system is helpful and timely.

Challenges of British Columbia's Civil Resolution Tribunal

The BC Civil Resolution Tribunal (CRT) is Canada's first and only Online Dispute Resolution tribunal and one of the first in the world.[28] It uses digital technology to help resolve disputes in a way that is "accessible, speedy, economical, informal and flexible."[29] There are four stages of a CRT application: Solution Explorer, Negotiation, Facilitation, and Tribunal Decision Process.

While the CRT is admirable in its goal of increasing access to justice, it is not without its faults. Critics have highlighted its stance against legal representation, lack of Tribunal independence and expertise, and accessibility restraints as areas requiring attention and improvement.[30] Appendix B gives a detailed discussion on the CRT, its advantages and limitations.

Not one-size-fits-all

We underscore that remote hearings and ODR are not a panacea. Successful, transparent and fair implementation is contingent on distinguishing the areas of law suitable for them. Alternative digitized solutions in their multiple forms are not one-size-fits-all. Each area of law has its own challenges and apprehensions and cannot be lumped together with all private dispute resolution for digitizing.

RECOMMENDATIONS

5. Short term: Justice system partners (including groups representing justice seeking individuals, court and tribunal administrators, bar representatives etc.) should establish a working group dedicated to exploring how to effectively triage matters that are more amenable to early resolution and matters that better lend themselves to remote proceedings.

6. Medium term: The working group should explore which areas of law are potentially suited for ODR-type platforms and how to integrate all these matters into the public system.

Systemic racism, anti-poverty and biases in artificial intelligence

The advent of AI in decision-making is already in place just south of us.[31] As it is likely to gain further traction in coming years, it entreats us to discuss its implications for access to justice and marginalized groups. Put simply, technology must serve the disadvantaged, "not perpetuate disadvantage".[32] As Chief

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[28] The CRT was established by the *Civil Resolution Tribunal Act*, SBC 2012, c 25, and began resolving matters in July 2016.

[29] *Civil Resolution Tribunal Act*, SBC 2012, c 25, s 2(2)(a).

[30] *See Canadian Bar Association, BC Branch, "CBABC Position Paper on The Civil Resolution Tribunal Amendment Act, 2018 (Bill 22)", (8 May 2018). See online.*

[31] *Loomis v.* Wisconsin, 881 N.W.2d 749 (Wis. 2016), cert. denied, 137 S.Ct. 2290 (2017), Comment online.

[32] See Stanford Law School Blog

Justice MacCormack cautions, there is the "very real possibility that legal tech will make it easier for employers, creditors and landlords to bring cases against employees, debtors and tenants — not the other way around."[33]

Courts, tribunals and other dispute resolution bodies, like other segments in society, are likely to introduce AI progressively for uses ranging from judgment writing to decision-making.[34] It is incumbent on us to consider the disparate impact these technologies may have on marginalized groups, in particular systemic racism against Black Canadians and Indigenous people in the criminal justice system.[35] Finding inclusive platforms — and insisting on inclusiveness in technology itself — is the essence as we digitize the justice system.

In employing AI for decision-making, we should be mindful of the risks of trying to apply "industrial ideas of efficiency to the judiciary":[36]

> […] we will be asking them to abandon deliberation, independence, and the slow methods that give time for reason to trump emotion. Are we prepared to abandon, too, the idea that judges have good character? Alternatively, what are the values that will be brought to court by future judges who are digital natives? How might the current judiciary play a role in the creation of new legal culture? […] For a democratic social order to survive, we must not think of justice as a profit center; we need to have a truly public sphere where we can nurture dreams of the public good.[37]

In sum, it is essential to nurture institutional norms and values because efficiency is a poor substitute for the integrity of the system.[38]

RECOMMENDATION

7. All justice system stakeholders must consider the implications on access to justice for marginalized groups when implementing AI and other emerging technologies in the justice system and remove any negative impact.

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[33] Supra, note 32

[34] See AI Can Almost Write Like a Human – and More Advances are Coming

[35] See J. Sealy-Harrington and J. Watson Hamilton, "Colour as a Discrete Ground of Discrimination" (2018) 7:1 Canadian Journal of Human Rights 1, See online. See also Canada's Courts Need a System Update to Deal with Internet Connected Juries, Globe and Mail, November 30, 2020

[36] See C. Spiesel's review of Courts, Litigants and the Digital Age at "Eyes on the Horizon (December 1, 2012). McGill Law Journal.

[37] See note 36, C. Spiesel

[38] See Judicial Applications of Artificial Intelligence, edited by Giovanni Sartor, and Karl Branting, Springer Netherlands, 2010. ProQuest Ebook Central.

Active management in the digital age

The objective of online justice, as Susskind remarks[39], is not to "replicate inefficiencies" but to explore new models for courts and other dispute resolution bodies. In this vein, it may be worth exploring the suggestion that dispute resolution models encouraging more active management by the presiding member may be better suited for online hearings.[40] Active management by judges and administrative tribunal members can be more advantageous in the digital age and could palliate to some extent the proclivities of technologies and procedural challenges feared about moving online.

RECOMMENDATION

8. Courts, tribunals and other dispute resolution bodies should explore the potential benefits of increasing the active management of presiding members to accommodate the shift to online justice.

B. Safeguarding judicial independence: rise of the private platforms

Videoconferencing and other online platforms have suddenly become critical infrastructure of the justice system. Over-reliance (or abdication) of an integral part of the justice system to commercial parties can present significant challenges to judicial independence.

Part of the justice system is now hosted or mediated on platforms operated by large corporations whose for-profit model is based on surveillance capitalism.[41] The profits of many of these companies are derived from surveillance of platform users and the "monetisation of aggregate data through analysis and selling of insights to third parties."[42] Exacerbating the problem is that these companies have now acquired a "scale and indispensability" and living without them "shackles social and cultural life."[43]

We must consider the consequences of the justice system relying on commercial platforms that gather, analyze and sell information generated by users (in this case, justice system participants) for profit.

To address some concerns about the activities of major internet platforms, the European Union is preparing regulations[44] to increase transparency and require companies to open their algorithms to regulatory oversight and offer users more control.

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[39] R. Susskind, Online Courts and the Future of Justice, (2019).

[40] See supra note 39 (Susskind) at p.335.

[41] See supra note 9, Zuboff

[42] Lawrence, M, "Building a Digital Commonwealth", (March 2019), See online

[43] Plantin J-C, Punathambekar A. "Digital media infrastructures: pipes, platforms, and politics". *Media, Culture & Society*. 2019;41(2):163-174. (December 2018). See online

[44] See Big Tech's "Blackbox" Algorithms Face Regulatory Oversight under EU plan. See online.

RECOMMENDATION

9. Short term: Courts, tribunals and other dispute resolution bodies should examine how other industries and custodians of sensitive information (e.g. the financial services industry) have addressed the control of their data, curtailed their dependence on commercial platforms and protected their independence.

10. Long term: Courts, tribunals and other dispute resolution bodies should explore the possibility of developing their own platforms (or using open-source options). Alternatively, and perhaps more effective, the federal government should consider regulating private platforms or subjecting them to some level of oversight and scrutiny.

C. Self-represented litigants

The Equal Justice Report recognized the most obvious consequence of the gap between the prevalence of legal problems and inadequacies of legal services in the exponential growth of unrepresented and under-represented litigants.[45]

For self-represented litigants especially, timely and relevant assistance is key to improving access to justice. Online resources and technology can be useful. Simplified procedures and well-resourced technology have tremendous potential for reducing inefficiencies[46] and empowering individuals, including self-representatives and those with accessibility issues.

However, delivering justice remotely has underlined the unequal access to technology (e.g. differences in software, hardware, internet speed, user skills) and its impacts on access to justice for self-represented litigants. These differences often reflect the participant's income, age, physical and mental conditions.[47]

Many people need human help to navigate the system. Closing courthouses and registry offices makes it more it difficult to obtain legal information. In some areas of law, self-represented litigants experience greater barriers to access justice.[48]

Our consultations with CBA Sections revealed that implementation of some changes without proper consultation and assistance to self-represented litigants resulted in delays, expense and frustration. One suggestion was to appoint a court liaison officer to help parties understand the changes. Court registry personnel already walk a fine line between legal information (which they are authorized to offer) and legal advice (which they must not give) and are mindful to maintain that balance.

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[45] Equal Justice Report, page 44.

[46] See online.

[47] J. McIntyre, A, Olinyk, K. Pender, Civil Courts and COVID-19: Challenges and Opportunities in Autsralia (Alternative Law Journal) May 2020. See online

[48] For example, the CBA Family Law Section reported that applications filed by self-represented litigants to see their children are delayed because of a backlog. Cases with legal representation are more likely to move forward because lawyers know who to contact to get the file triaged and scheduled.

RECOMMENDATION

11. Courts, tribunals and other dispute resolution bodies should undertake consultations with self-represented litigants to determine the impact of new measures, practices and technologies on their needs, concerns, safety and security.

D. Open courts

It is well established that "justice should not only be done, but it should manifestly and undoubtedly be seen to be done."[49] In Canada, transparency of the justice system must be maintained in accordance with the open courts principle recognized under section 2(b) of the *Canadian Charter of Rights and Freedoms*. Open courts are essential to a well-functioning democracy and judiciary and must be safeguarded against threats that would weaken them.

Challenges

The emergence of online proceedings can pose challenges to the public and media's ability to access hearings. For example, in British Columbia, the courts require people to apply to attend virtual hearings, making it less open than simply walking into a courtroom. In Quebec, people wishing to attend hearings online must submit forms and wait for an answer. As a result, it is more difficult for the public to attend hearings.

In Australia, the Federal Court registry gives daily advice for members of the public who wish to observe an online hearing remotely.[50] The court may also require a person to give an email address (the court specifies that the address will only be used to send a link to the online hearing and will not be retained).[51]

In the UK, the Judiciary of England and Wales Protocol Regarding Remote Hearings[52] states that hearings can be open to the public "if technically possible" but recognizes that "in the exceptional circumstances presented by the current pandemic, the impossibility of public access should not normally prevent a remote hearing taking place."

Opportunities

While the shift online has created challenges to the open courts principle, it also creates opportunity. The easy access of court proceedings online (e.g. broadcast on YouTube or Zoom) is a boon to transparency and the open courts principle. People who would otherwise have to travel to the courthouse or have other obligations (such as childcare) can conveniently view proceedings by visiting an online platform.

The ease to view a remote hearing has also increased media presence at some professional disciplinary

[49] *R. v. Sussex Justices; Ex parte McCarthy* [1924] KB 256, 259 (Lord Hewart CJ).

[50] See online.

[51] See online.

[52] See online.

body hearings.[53] On a larger scale, it was reported that the UK Supreme Court's livestream of Brexit hearings attracted more than 29 million viewers.[54]

RECOMMENDATION

12. Justice system participants including courts, tribunals, other dispute resolution bodies and bar and media representatives should prepare a tip sheet on best practices to ensure public and media access to courts in a way that respects open courts and privacy principles.

E. Importance of investment in the justice system

The Equal Justice Report did not sugar coat the challenge of increasing equal justice. The report described a "world thick in law but thin in legal resources" and asked change agents to not "shy away from the dramatic level of change required."[55]

The Equal Justice Report concluded that spending on the justice system[56] was roughly 1% of government budgets. Health and education funding is generally stable or gradually increases, while spending on justice is flat or declines from year to year. For more perspective, for every dollar spent on the justice system, governments spend about $40 on health care.[57]

The Equal Justice Report explains that:

> [...] justice has been devalued. We see it as a luxury that we can no longer afford, not an integral part of our democracy charged with realizing opportunity and ensuring rights. The justice system has been starved of resources and all but paralyzed by lack of coordinated leadership and competitive blaming between the major institutions and a tendency to focus on how justice institutions other than are own are contributing to the problem.[58]

An accessible and modern justice system is not a luxury: almost 50% of adult Canadians will experience a serious everyday legal problem in a three-year period.[59] An everyday legal problem includes matters related to family, employment, wills, incapacity, treatment by police, personal injury, discrimination or debt. Making matters worse is that an unresolved legal problem can result in other (otherwise avoidable) problems, like physical and mental health problems, loss of housing and relationship breakdown.[60]

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[53] Reported by the CBA Health Law Section

[54] Gina Miller, "How I Won Against the Government – And What You Can Do Next", The Guardian, December 7, 2019. See online.

[55] Equal Justice Report, page 8.

[56] Includes spending on prosecutions, courts, victim and other justice services, and legal aid but excludes policing and corrections.

[57] Equal Justice Report, page 51.

[58] Equal Justice Report, page 51.

[59] The Canadian Forum for Civil Justice (CFCJ) describes an "everyday legal problem" as "an event or issue that happens during normal, daily life that has a legal aspect and a potential legal solution within the civil justice system". See online

[60] See CFCJ cost of justice/infographics everyday legal-problems and cos of justice

These everyday legal problems have significant social and economic consequences. Each year, they cost governments $248 million in social assistance payments, $450 million in employment insurance payments and $101 million in health care costs.[61]

The justice system also needs access to relevant information to ensure future decisions are evidence-based and made to improve the user's experience. In this vein, the Legal Futures report highlighted the importance of data to contemplate "transformation in ways that have not yet been seen envisioned."[62] However, the justice system has little information to help it understand what users prefer, demographics, volumes and other trends affecting the delivery of justice. While some progress has been made over the past twenty years, the empirical basis for decision making is still extremely limited.[63]

There is also no sugar coating the investments and resources required to implement the new measures, practices, and technologies discussed in this report. We recognize the recommendations in this report come with a high price tag. We also appreciate the financial challenges and pressures governments face, especially amid the pandemic. However, given the social and economic costs of an ill-resourced justice system and a clear return on investment in an accessible and modern justice system, we suggest investment in this area is justified.

RECOMMENDATIONS

13. The federal government should appoint a Justice Innovation Champion to work with provincial and territorial governments to lead the permanent implementation of new measures, procedures and technologies to deliver justice remotely.

14. The federal, provincial and territorial governments should invest to ensure the timely and effective implementation of new measures, procedures and technologies to deliver justice remotely, including:

- Technology and virtual platforms for courts, tribunals and other dispute resolution bodies
- training for judges, members of administrative tribunals and boards, mediators, adjudicators, court personnel and other justice system partners
- training for self-represented, marginalized and other litigants who require support.

15. The CBA should revive efforts to establish a Professional Centre of Expertise and Information to be the authoritative source of data on the legal profession in Canada. This Professional Centre of Expertise and Information should collect feedback from individuals who use the justice system to resolve their legal problems. This input should be used to improve their experience and inform future decisions on triage, ODR, effectiveness of increased "active management" in proceedings, etc.

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[61] Supra CFCJ cost of justice/infographics everyday legal-problems and cost of justice

[62] Legal Futures Report, page 37

[63] Equal Justice Report, page 51.

F. Coordination and collaboration between justice system partners

The Equal Justice Report recognized that the greatest challenge is to simultaneously focus on individual innovations and the broader interdependence of all aspects of access to justice. Collaboration works best when based on a shared understanding of the problem and a shared vision of the end goals.[64]

We cannot lose sight of the fact that the public and parties themselves are justice system partners, and measures that may work for lawyers and decision-makers might not benefit those directly affected by the changes.

This report is meant to complement the work of other initiatives such as the National Action Committee on Access to Justice in Civil and Family Matters, the Action Committee on Court Operations in Response to COVID-19, the Advocates' Society and others. One example of a partnership is the Best Practices for Remote Hearings guide, a collaboration of The Advocates' Society, the Ontario Bar Association, the Federation of Ontario Law Associations, and the Ontario Trial Lawyers Association.

The National Action Committee on Access to Justice in Civil and Family Matters fosters engagement, pursues a strategic approach to reforms and coordinates the efforts of all participants concerned with civil and family justice. The Action Committee calls for a culture shift and a more cooperative and collaborative approach. It also emphasizes putting the public first as a guiding principle. The Action Committee is creating an inventory of innovations and changes to legal system operations to help build a national picture, encourage collaboration and support research.

RECOMMENDATION

16. The CBA should collaborate with the National Action Committee on Access to Justice in Civil and Family Matters to optimize the inventory of innovations and share communications tools to increase access to justice awareness in the public.

The Action Committee on Court Operations in Response to COVID-19 was established by Chief Justice Richard Wagner and Justice Minister David Lametti, to give national leadership to support the work of provincial and territorial governments, individual courts and court administrators to restore full operation of Canada's courts while ensuring the safety of court users and staff.

RECOMMENDATION

17. The CBA should collaborate with the Action Committee on Court Operations in Response to COVID-19 on complementary activities.

The Hague Institute for Innovation of Law[65] (HiiL) is a not-for-profit social enterprise devoted to user-

[64] Equal Justice Report, at page 8.

[65] See online

friendly justice. Its goal is to ensure that by 2030, 150 million people will be able to prevent or resolve their most pressing justice problems. The HiiL stimulates innovation to find new ways to prevent and resolve pressing justice needs. Its Justice Accelerator programme offers peer learning, funding, access to a global network of justice institutions and potential investment opportunities. It funds, trains and scales a global cohort of justice startups each year that focus on people and user-centred approaches.

Similarly, the Legal Innovation Zone (LIZ) at Ryerson University, the world's first legal tech incubator, is a global hub focused on building better legal solutions to improve the justice system. It gathers entrepreneurs, lawyers, students, tech experts, government and industry leaders to drive legal innovation. The LIZ supports startups and works with companies, law firms, governments and organizations to help them bring their legal innovations from ideation to execution.

RECOMMENDATION

18. The CBA should collaborate with the Hague Institute for Innovation of Law and the Legal Innovation Zone where possible to develop innovative solutions to improve the justice system.

IV. CONCLUSION AND RECOMMENDATIONS

Two principal themes underlie this report and recommendations.

First, there is no turning back. The pandemic propelled the justice system into a long-awaited modernization. We must continue forward and build on the measures, procedures and innovations implemented in response to the pandemic and focus on the needs of the users of the justice system.

Second, to enhance access— rather than unintentionally inhibit it — new measures and technology must be deployed in a manner that mitigates their adverse and unintended effects on access to justice, self-represented individuals, judicial independence and the open courts principle. To this end, technology is best construed as a targeted aide — not a crutch to defer to mindlessly.

It is not just about minimizing COVID-19 disruption — or playing the classic carnival 'whack a mole' game — it is also about harnessing innovations purposefully and sustainably, lest justice be relegated to an unfulfilled promise or unattainable luxury for most.

Implementing changes correctly in these circumstances is somewhat akin to "meditating in Times Square."[66] A long-awaited new paradigm in the digital age that ultimately realigns the justice system with our digital reality is the "work of a generation to integrate tech and determine policy".[67]

In the end, the secret of getting ahead is getting started.

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[66] Expression attributed to Arvind Narayanan. See Princeton Center for Information Technology Policy (CITP) Launch Initiative on AI and Policy (October 19, 2017). See online.

[67] See Brookings "National Security for the AI Era". See online.

Summary of Recommendations

1. All dispute resolution bodies (courts, tribunals, boards, etc.) should permanently implement the following measures to improve access to justice, modernize and address long-standing challenges in the justice system:

    a) Remote (video, online, telephone) proceedings should be available for settlement conferences, examinations for discovery, various hearings, motions, trials and appeals. Remote proceedings should continue especially for procedural, uncontested, shorter and less complex matters. While the court, tribunal or other dispute resolution body should ultimately decide if a matter is to proceed remotely, the parties should be given an opportunity to be heard and present their position on proceeding remotely.

    b) Electronic filings (via secure drop box, online portals, email, etc.) of court documents and acceptance of service by email

    c) Ability to remotely view hearings, trials or motions via an online platform (e.g. Zoom, YouTube) [subject to addressing the concerns outlined in this report]

2. Justice system partners, including court and tribunal administrators, government officials and the CBA, should establish a working group to share information on best practices on the security of videoconferencing and to conduct a thorough evaluation of all videoconferencing platforms.

3. Courts, tribunals and other dispute resolution bodies should carefully examine whether and how justice system data can be made available in a controlled and secure environment to enhance access and improve the justice system.

4. Courts, tribunals and other dispute resolution bodies should establish robust practices and procedures to safeguard sensitive data. These practices and procedures must ensure that publishing sensitive data is done purposefully and guided by the "atteinte minimale" principle to not compromise access to justice or undermine confidence in the justice system. They could consider collaborating with the Justice Lab UK.

5. Short term: Justice system partners (including groups representing justice seeking individuals, court and tribunal administrators, bar representatives etc.) should establish a working group dedicated to exploring how to effectively triage matters that are more amenable to early resolution and matters that better lend themselves to remote proceedings.

6. Medium term: The working group should explore which areas of law are potentially suited for ODR-type platforms and how to integrate all these matters into the public system.

7. All justice system stakeholders must consider the implications on access to justice for marginalized groups when implementing AI and other emerging technologies in the justice system and remove any negative impact

8. Courts, tribunals and other dispute resolution bodies should explore the potential benefits of increasing the active management of presiding members to accommodate the shift to online justice

9. Short term: Courts, tribunals and other dispute resolution bodies should examine how other industries and custodians of sensitive information (e.g. the financial services industry) have addressed the control of their data, curtailed their dependence on commercial platforms and protected their independence.

10. Long term: Courts, tribunals and other dispute resolution bodies should explore the possibility of developing their own platforms (or using open-source options). Alternatively, and perhaps more effective, the federal government should consider regulating private platforms or subjecting them to some level of oversight and scrutiny.

11. Courts, tribunals and other dispute resolution bodies should undertake consultations with self-represented litigants to determine the impact of new measures, practices and technologies on their needs, concerns, safety and security.

12. Justice system participants including courts, tribunals, other dispute resolution bodies and bar and media representatives should prepare a tip sheet on best practices to ensure public and media access to courts in a way that respects open courts and privacy principles.

13. The federal government should appoint a Justice Innovation Champion to work with provincial and territorial governments to lead the permanent implementation of new measures, procedures and technologies to deliver justice remotely.

14. The federal, provincial and territorial governments should invest to ensure the timely and effective implementation of new measures, procedures and technologies to deliver justice remotely, including:

    - Technology and virtual platforms for courts, tribunals and other dispute resolution bodies
    - training for judges, members of administrative tribunals and boards, mediators, adjudicators, court personnel and other justice system partners
    - training for self-represented, marginalized and other litigants who require support.

15. The CBA should revive efforts to establish a Professional Centre of Expertise and Information to be the authoritative source of data on the legal profession in Canada. This Professional Centre of Expertise and Information should collect feedback from individuals who use the justice system to resolve their legal problems. This input should be used to improve their experience and inform future decisions on triage, ODR, effectiveness of increased "active management" in proceedings, etc.

16. The CBA should collaborate with the National Action Committee on Access to Justice in Civil and Family Matters to optimize the inventory of innovations and share communications tools to increase access to justice awareness in the public.

17. The CBA should collaborate with the Action Committee on Court Operations in Response to COVID-19 on complementary activities.

18. The CBA should collaborate with the Hague Institute for Innovation of Law and the Legal Innovation Zone where possible to develop innovative solutions to improve the justice system.

APPPENDIX A

VIDEOCONFERENCING PLATFORMS IN CANADA

Courts	Platform
Supreme Court of Canada	Zoom
Federal Court of Appeal	Zoom
Federal Court	Zoom
Tax Court of Canada	None
British Columbia Court of Appeal	Zoom
British Columbia Supreme Court	Microsoft Teams
British Columbia Provincial Court	Microsoft Teams
Alberta Court of Appeal	Cisco Webex
Alberta Court of Queen's Bench	Cisco Webex
Alberta Provincial Court	Cisco Webex
Saskatchewan Court of Appeal	Cisco Webex
Saskatchewan Court of Queen's Bench	Cisco Webex
Saskatchewan Provincial Court	Cisco Webex
Manitoba Court of Appeal	GoToWebinar
Manitoba Court of Queen's Bench	Family Division - Microsoft Teams General Division - format arranged by the parties
Manitoba Provincial Court	None
Ontario Court of Appeal	Zoom
Ontario Superior Court	Zoom
Ontario Court of Justice	Zoom
Quebec Court of Appeal	Microsoft Teams
Quebec Superior Court	Microsoft Teams
Court of Quebec	Microsoft Teams
New Brunswick Court of Appeal	Microsoft Teams
New Brunswick Court of Queen's Bench	Microsoft Teams
New Brunswick Provincial Court	Microsoft Teams
Nova Scotia Court of Appeal	Skype for Business
Nova Scotia Supreme Court	Skype for Business
Nova Scotia Provincial Court	Skype for Business
PEI Court of Appeal	Cisco Webex. Zoom
PEI Supreme Court	Cisco Webex. Zoom
PEI Provincial Court	Cisco Webex. Zoom
Newfoundland and Labrador Court of Appeal	CourtCall (used in NL before the pandemic for circuit courts and to connect remote areas).
Newfoundland and Labrador Supreme Court	CourtCall, Skype for Business
Newfoundland and Labrador Provincial Court	CourtCall
Nunavut Courts	Government videoconferencing system (Cisco), Cisco Jabber
Yukon Court of Appeal	Cisco Movi, Cisco Jabber Guest, Zoom
Yukon Supreme Court	Cisco Movi, Cisco Jabber Guest, Zoom
Northwest Territories Court of Appeal	Telemerge
Northwest Territories Supreme Court	Telemerge

APPENDIX B

British Columbia Civil Resolution Tribunal

The BC Civil Resolution Tribunal is Canada's first and only Online Dispute Resolution tribunal and one of the first in the world. It uses digital technology to help resolve disputes in a manner that is "accessible, speedy, economical, informal and flexible."[68] It was established by the *Civil Resolution* Tribunal *Act*, amended in 2015 and 2018, and began resolving matters in July 2016.

Jurisdiction

The CRT has jurisdiction over small claims disputes under $5,000, motor vehicle injury claims occurring after April 1, 2019 of up to $50,000, strata property disputes of any amount and societies and cooperative associations disputes up to any amount.

The CRT does not have authority to decide matters that affect land or terminating an interest in land, significant issues affecting an entire strata complex, claims of slander, defamation, or malicious prosecution or constitutional questions.

Process

There are four stages of a CRT application: Solution Explorer, Negotiation, Facilitation, and Tribunal Decision Process.

Solution Explorer

The Solution Explorer is a free online tool that asks plain language questions of the individual to properly classify their dispute. The Solution Explorer offers legal information and additional tools based on the individual's answers, with the hope that simple disputes can be resolved out of the CRT.

If deemed appropriate, the Solution Explorer will provide the necessary forms to open a claim with the CRT. Applicants who do not have access to a computer or prefer to work offline may begin their application in paper format.

The CRT fees vary by the type of dispute.[69] All online applications are granted a $25 discount and, to increase access to justice, the CRT allows any party to apply to have all fees waived.

If the CRT accepts an application, it will give the applicant a Dispute Notice Package. Generally, the CRT also serves the other parties with the Dispute Notice to ease the burden of the applicant. The CRT provides instructions for respondents, including the option to make a third-party claim or counterclaim. The response of the served party, or lack thereof, determine the next steps.

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[68] *Civil Resolution Tribunal Act*, SBC 2012, c 25, s 2(2)(a) (CRT Act)

[69] *CRT Act*, s 62(2)(m); *Civil Resolution Tribunal Rules effective May 1, 2020*, *r 1.6 [CRT Rules]; "Fees" Civil Resolution Tribunal*, (2020), online.

Negotiation

Once a response is received by the CRT and communicated to the applicant, the CRT assigns a case manager to guide the dispute through the next phases. For all but minor injury determinations in motor vehicle injury claim, the next phase is negotiation. This is an opportunity for the parties to resolve the dispute themselves, with minimal supervision by the case manager to ensure there is no abuse. Negotiation can occur through whichever medium the parties agree to, such as in-person, email, phone calls, or the private messaging function on the CRT's website. If the parties reach an agreement through negotiation, they have the option to turn that agreement into an enforceable order at no additional cost.

Facilitation

Should the negotiations fail to reach an agreement, the case manager will facilitate mediation. Case managers are neutral third parties, trained to assist in dispute resolutions. They can clarify the details of the dispute, help the applicant articulate what they want, determine if parties should be added or removed from the proceedings, and review communications before delivery to ensure they are respectful and productive.[70]

Case managers can propose orders, though they are entirely non-binding. If the parties agree with an order, they can request a Consent Resolution Order to have it turned into an enforceable order. Other ways a dispute might end at this stage are if the applicant asks the CRT to withdraw it, or if all parties agree to have it dismissed without a decision being made.

Tribunal Decision

If the parties cannot reach an agreement through facilitation and choose to continue, their dispute will be resolved, for a fee, by the Tribunal Decision Process. The case manager from the previous stage will help the parties create a Tribunal Decision Plan from the CRT's website, which will set out timelines for giving evidence and arguments and prescribe the length of written submissions.

The final decision is made by a CRT member, not the case manager. All earlier communications are confidential, and the CRT member decides the matter solely on the evidence and arguments presented by the parties. Submissions are most commonly done online, in writing. If the CRT member thinks it necessary, or if either party requests it, there may be an oral hearing, likely conducted over the phone or by videoconferencing platform.

Most disputes are resolved in 60 to 90 days from commencing CRT proceedings. All decisions are in writing and are sent to all parties, with most published on the CRT website.

Parties who disagree with the CRT decision have different options depending on the type of dispute. For strata and motor vehicle injury decisions, parties can apply to the BC Supreme Court for judicial review within 60 days of the decision. For small claims disputes, parties must submit a Notice of Objection and restart a claim with the BC Provincial Court.

[70] *CRT Rules*, r 5.3.

Challenges of the CRT

Restriction on Legal Representation

The most frequently cited concern of the CRT is the restriction on legal representation. Section 20 of the Act says that parties are to be self-represented, unless they are a child or person with impaired capacity, or the dispute is a motor vehicle injury claim.

The CRT does retain discretion to permit representation if the Tribunal Rules allow, or if it is otherwise in the interests of justice and fairness.

Representatives are distinguished from "helpers" in that, although helpers may assist parties behind the scenes, only representatives are allowed to speak to the CRT on one's behalf. Though the tendency to prefer paper hearings means the issue does not arise frequently, the CRT's general unwillingness to permit representatives has caused frustration for parties and lawyers.

Lack of Independence and Expertise

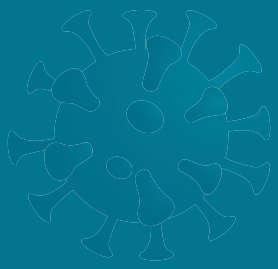
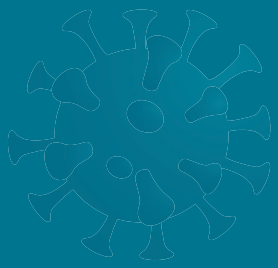
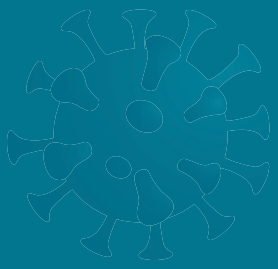
CRT members do not enjoy the same independence from government as judges, who are appointed by the Lieutenant Governor in Council.[71] Lack of independence comes from the fact that there is no security of tenure: tribunal members are hired, paid and fired by the same government that appointed them and that can be party to certain claims. This conflict could be resolved by transferring the CRT to the judicial branch.

Accessibility

Not everybody can use online platforms, and command of the language can be a challenge when negotiation, facilitation and hearings are all carried out in writing.

Though the CRT is committed to helping people "resolve their disputes using the communications method that best serves their needs," most CRT proceedings occur online. This may discourage those with low technological literacy or limited access to technology — often society's most marginalized individuals — from using these services.

[71] *CRT Act*, ss 67(1), 68(1)-(2).

THE CANADIAN
BAR ASSOCIATION

The Canadian Bar Association
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TAB 30

Female partners earned nearly 25 per cent less than their male colleagues at a major Toronto law firm, document shows

ROBYN DOOLITTLE AND CHRISTINE DOBBY

PUBLISHED FEBRUARY 9, 2021

At one of Canada's largest business law practices, Cassels Brock & Blackwell LLP, women who are equity partners earned nearly 25 per cent less than their male colleagues on average, a confidential document reviewed by The Globe and Mail shows. Translated into dollar figures, this means each man made an average of about $200,000 more a year.

That document, which outlines the projected income for equity partners in 2019, shows that 75 per cent of the lawyers at that level were men. (Equity partners are the lawyers who buy an ownership stake in the firm and get paid a share of the profits.) Of the 116 lawyers on the document, it appears just four were women of colour. Three of those were in the lowest earning quartile.

The Globe reviewed a second document – an e-mail written by a partner who was looking into the gender wage gap – that shows female associates were also out-earned by male colleagues, particularly when it came to bonuses. "Over 80 per cent of men got a bonus, only 44 per cent of women did," the e-mail read.

At Bay Street's top law firms, pay and power gaps are well-kept secrets – but women are struggling toward equity

Why don't women advance through the corporate world like men do? Seven reasons why, and three women's stories

This is the Power Gap: Explore the investigative series and data

In a statement, Cassels' deputy managing partner Kristin Taylor said the firm was "not able to comment extensively on highly private and confidential documents that have been shared without the permission of the firm," but that in the past four years, Cassels has promoted 19 women to equity partner.

The internal compensation documents from Cassels are the first public glimpse into a major Canadian law firm's pay structure. They are part of a two and a half year investigation by The Globe that has shown women continue to be outnumbered, outranked and out-earned in the modern work force. The most recent Power Gap story detailed the persistent pay equity problem in the legal profession.

"As you would expect, early-stage partners – both men and women – require time to rise up our compensation grid," Ms. Taylor wrote. "It also is worth noting that, for the past two years, women have risen more quickly up our compensation grid than their male counterparts. In the last two years, 42.5 per cent of our partners who moved up were women, although they comprised 27 per cent of equity partners at that time."

For years, female lawyers have lobbied for better pay transparency, but the large law firms have blocked these efforts.

In 2018, the Women Lawyers Forum (WLF), a branch of the Canadian Bar Association, attempted to conduct a study of partner compensation. But the majority of the firms were unwilling to release compensation amounts – even expressed as a percentage of total partner income.

The final report was published last October with no information on the gender wage gap. The WLF could gather only some data on partner representation – the firms that participated had an average of 49 partners, 30 per cent of whom were women – and some insights into how firms determine compensation. Just 27 (unnamed) law firms out of 65 responded to the survey.

Even internally, compensation is a closely guarded secret at big law firms. Some require a password to access the information, or allow partners to view the numbers only once. Others

use a closed model in which even partners don't have access to the full breakdown. The Seven Sisters – the business law firms regarded as the most prestigious in the country: Blakes, Davies, Goodmans, McCarthy Tétrault, Osler, Stikeman Elliott and Torys – largely use an "open compensation" model, in which partners can see what the others make. (Only Torys told The Globe it was "not in a position to comment.") Borden Ladner Gervais LLP, Canada's largest law firm, with almost 800 lawyers, uses a closed model.

The one constant is that those below the equity partner level are mostly in the dark about what others make. In fact, more-junior lawyers, known as associates, are often discouraged from discussing income with colleagues.

Veronica Singer, chair of the National Women Lawyers Forum, said the lack of pay transparency exacerbates the problem.

"Women lawyers don't need data to know that there's inequality … [but] the powers that be won't acknowledge that there is an issue [and] we don't have the quantitative data to show it," she said. "If you can go to the partners [and say], 'Why is John paid this and Jane is paid this?' then it becomes a lot more difficult to ignore."

According to Lexpert, a resource for lawyers, Cassels is the 15th largest firm in the country, with 250 lawyers. It is primarily based in Toronto, with smaller offices in Vancouver and Calgary.

The first document – the partner compensation figures – showed actual earnings for 2018 and projected income for 2019. In both years, equity partners earned from about $335,000 to more than $3-million. About a third of the women were concentrated in the lowest quartile in 2019. The highest-paid woman in both years was a dozen spots from the top.

During this period, Cassels appeared to make some improvements on the gender divide with respect to representation. In 2018, about 78 per cent of equity partners were men, compared with 75 per cent the next year. But the firm backslid on compensation. In 2019, the gender wage gap was about 24 per cent, up from 22 per cent the year before. (In both years, The Globe removed one individual from its calculation of the average because he earned dramatically more than the others. Including his total pay would nudge the male average higher by several percentage points.)

The Globe also reviewed an e-mail that outlined pay equity concerns at the associate level for 2018, which was written by a female partner and dated April 4, 2019. Most firms use a grid

model for associate compensation, in which everyone earns the same salary based on the year they were called to the bar. Bonuses are more discretionary.

"Attached is my quick-and-dirty calculation on gender disparity in our associate compensation. Women associates make less by every metric in every year from years one through seven – including bonus alone, salary alone and total compensation," she wrote. The exception was salaries in the sixth year after being called to the bar, "but men still lead in total compensation that year."

The salary gap is "relatively small," she wrote, less than 5 per cent a year, but bonuses were "a different story."

The e-mail continued: "Over 80 per cent of men got a bonus, only 44 per cent of women did. Men took home 69 per cent of the total bonus pool given out to years one through seven."

One lawyer at Cassels with knowledge of the firm's efforts to address pay inequities said the issues are more complicated than the numbers suggest. On average, the women had more work interruptions – such as maternity leave – and the men were more likely to report that they had hit, or exceeded, their billing targets.

Another Cassels lawyer expanded on the issue of billing targets, adding that male associates were more likely to be put on files that generate more billable hours. This is a problem everywhere, the person said. Often these assignments are given out based on who has relationships within the firm, but the decision-makers – mostly white men – fail to account for the fact that they're more likely to build connections with people who are like them.

The Globe is not identifying the two sources because they are not authorized to speak on behalf of the firm.

To this point, Cassels' Ms. Taylor said: "I completely agree that senior partners assigning work to associates and junior partners who are like them has been a thorny problem in law firms. It is the reason we have implemented diversity audits and monitor work opportunities for our students and associates. It is the reason we require attendance at unconscious bias seminars. … We are trying to interrupt these patterns and recognize there is still work to do."

This phenomenon – men being more likely to refer work to other men – also affects which lawyers are able to bring in the best and biggest clients.

Previous reporting in The Globe has shown that men are more likely to hold positions of power in public institutions and big companies, and they give their business to lawyers with whom they have relationships; relationships that may be easier to develop with people who look like, and are like, them. This is a harder problem to fix, said the second Cassels source, and one of the ways that compensation models have historically disadvantaged female lawyers. Additionally, women are more likely to be asked to take on non-billable work, and are also sometimes less able – or willing – to do after-hours networking, which often involves late-night drinking, the source said.

In Cassels' statement, Ms. Taylor noted that the e-mail about associate pay was written by a member of the firm's women's practice development committee, a group dedicated to advancing gender equity. "The April 4, 2019, e-mail shows that concerns that are raised have a venue for further discussion and action. We take this self-reflection seriously."

Cassels said it has taken steps to address systemic and unconscious inequities on gender and race. Compensation has been primarily tied to billable hours and revenue generation, but the firm has made efforts to recognize contributions such as "mentorship, corporate responsibility, leadership on committees and in management, and involvement in [equity, diversity and inclusion], pro bono and community activities," Ms. Taylor wrote.

"Ensuring that our compensation decisions are entirely free from gender bias and creating a culture that invests in the success of our women is something we continue to strive for," she wrote. "While we're not yet where we need to be, we believe that we are making significant progress and that we can do better."

PLAY VIDEO
4:12

A two-and-a-half-year investigation by The Globe and Mail into the wage gap has revealed a bigger problem: The Power Gap between men and women at Canada's public institutions. Investigative reporter Robyn Doolittle runs through some of the key takeaways of how and where men outnumber, outrank and out-earn women in Canada. You can see more at tgam.ca/powergap

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Major Canadian law firms willing to release wage-gap data; 'We want to help identify the problem': Seven firms support gender-salary transparency

Globe and Mail | Robyn Doolittle | 25 Feb 2021 07:25
Lead

Seven of the largest law firms in the country have signalled they are willing to share gender wage-gap data for research purposes, similar to what firms in the United States and Britain have been doing for years.

Borden Ladner Gervais, Norton Rose Fulbright, Stikeman Elliott, Aird & Berlis, Dentons, Stewart McKelvey and MLT Aikins - representing more than 3,100 lawyers - all left the door open to the possibility, in response to recent questions from The Globe and Mail.

Texte/Text

Several of the firms stated that, as private companies, they would be uncomfortable revealing their full compensation grids or specific salaries - for competitive and privacy reasons - but were open to reporting the difference between what men and women earn. Firms also noted there would need to be discussions around methodology, as well as how the information would be collected and communicated. But in general, each of the firms were supportive of more specific wage-gap transparency.

HOW WE DID IT: A LOOK AT HOW THE GLOBE COLLECTED AND ANALYZED SALARY DATA FOR THE POWER GAP

"We want to help identify the problem and be part of the solution," said Lydia Bugden, chief executive officer and managing partner of Stewart McKelvey, noting one way to do this would be for firms to share their gender wage-gap percentages.

Aaron Runge, managing partner of MLT Aikins, said in a statement: "We see great value in having representative, cross-country data that can help the legal industry establish benchmarks and track progress, and we would benefit from participation and access to the final aggregate data."

This is a significant shift.

Three years ago, the Canadian Bar Association's Women Lawyers Forum attempted to conduct a partner compensation survey - mirroring the one produced by the National Association of Women Lawyers (NAWL) in the U.S. But firms refused to provide numbers, even expressed as a percentage, and even though the results would be anonymous.

As a result, the extent of the gender wage gap in the Canadian legal profession has largely remained a mystery. A 2020 survey of in-house counsel showed that, on average, women lawyers working in corporate legal departments made 11 per cent less than their male counterparts. But private firms, where the majority of lawyers work, have never

participated in a similar survey.

In fact, the majority of the two dozen firms questioned by The Globe are still refusing to take this step.

Four firms declined to answer The Globe's questions: Fasken, DLA Piper, Davies, and Cox & Palmer. McInnes Cooper said it would not comment on staff compensation models and Goodmans and Osler said they do not share compensation data outside of the partnership.

McCarthy Tétrault, Bennett Jones, Torys, Lavery, Cain Lamarre and BCF did not acknowledge multiple e-mails.

Blakes did not address the question of whether it would consider sharing wage-gap data, and instead included details of other diversity and inclusion initiatives.

Gowling WLG, Miller Thomson and McMillan acknowledged The Globe's e-mail, but did not provide answers in time for publication.

Earlier this month, The Globerevealed that female equity partners at Cassels Brock & Blackwell made an average of about 25 per cent less than the men, according to a confidential document that showed projected compensation for 2019. This worked out to male equity partners earning about $200,000 more a year. Additionally, about 75 per cent of Cassels' 116 equity partners that year were men. Of the women, it appears just four were women of colour, and three were among the lowest-earning quartile.

This trend continued at the associate level, where the men out-earned the women, particularly when it came to bonuses. "Over 80 per cent of men got a bonus, only 44 per cent of women did," read an internal e-mail reviewed by The Globe.

Cassels said that while it could not "comment extensively on highly private and confidential documents," the firm has promoted 19 women to equity partner in the past four years.

"As you would expect, early-stage partners - both men and women - require time to rise up our compensation grid," Cassels' deputy managing partner Kristin Taylor said in a statement. "It also is worth noting that, for the past two years, women have risen more quickly up our compensation grid than their male counterparts."

Because of the lack of data, it's unclear whether Cassels' numbers are representative of other firms, but information from other jurisdictions suggests it is.

In the United Kingdom, businesses with 250 employees or more must publicly report wage-gap data, law firms included - many of which also voluntarily disclose partner figures. At DLA Piper U.K., for example - whose Canadian branch declined to answer questions from The Globe - the gender gap at the partner level was24.7 per cent. Even some smaller firms are pro-actively releasing their statistics, said Christina Blacklaws, former president of the Law Society of England and Wales.

"In addition, some firms have voluntarily started to include ethnicity pay gap, disability and LGBTQ+. There's a movement and desire to report beyond the government requirement," Ms. Blacklaws said.

At Norton Rose's U.K. office, the firm reported an overall average ethnicity pay gap of14.4 per cent. The report shows its LGBTQ+ staff made 9.5 per cent more. (It should be noted that one-third of employees did not disclose race, and 40 per cent didn't disclose sexual orientation.)

In the U.S., where NAWL has been surveying the country's 200 largest firms for 13 years, female partners have been shown to make about 15 per cent less. (About half of the firms respond to the survey; of those, between 35 and 40 per cent provide compensation figures.)

Destiny Peery, who has been the principal investigator of the NAWL survey for the past five years, said the numbers show a small but persistent compensation gap of about 7 per cent at the associate and non-equity or income partner level (the first stage of partnership).

Historically, Ms. Peery said, the push for diversity, equity and inclusion has focused on women. "By virtue of being half

the population and half of law-school graduates, it seemed quite obvious."

But in recent years, this work has expanded to include other measures of diversity.

"There is a push to go beyond what seemed like the easier element of diversity ... the idea that, when you talk about who is getting access to equity partner, women as a whole do have much less access than men," she said. "But ... it's mostly white women to make it to that level."

Thelatest NAWL survey, which also collects demographic information, showed 21 per cent of equity partners in the U. S. are women. Of those, just 14 per cent are women of colour.

The Globe reached out to the two dozen largest firms in Canada (as identified by the legal resource Lexpert) to ask whether they would consider sharing wage-gap data.

Aird & Berlis was one of the seven firms that said they were open to it. "Pay equity is important to us and the broader legal profession," managing partner Steven Zakem said. "We would consider participating in any initiative that seeks to understand and address the gender compensation gap between male and female lawyers."

BLG's statement read: "Although we view compensation as confidential, we would be prepared to participate in a broader dialogue regarding compensation and diversity," including potentially providing wage-gap data to a professional research body.

Dentons said it would be "supportive of a sector-wide initiative and believe it would assist all firms in determining where gaps exist and, ultimately, what needs to change in order to close those gaps."

Stikeman Elliott indicated it would need to consider a number of factors, including "the methodology, the questions, how the data will be preserved, aggregated and presented to ensure individual privacy ... and to whom the results will be made available and for what use." But, "if overseen and developed as described above, we would seriously consider participating in such a survey."

Norton Rose said that "should a reputable legal association lead an initiative to gather data on our sector, we would be happy to contribute by sharing some of our own information and analysis, as well as learnings, on the wage gap. We would need to discuss what that might include, but don't envision providing detailed information like compensation grids for competitive and commercial reasons."

As for the Canadian Bar Association, president Brad Regehr said more transparency is necessary - not just around compensation, but also who's going to law school, who's graduating, where they end up and the success of equality-seeking groups.

"What gets measured gets done. Having better data and transparency can help accelerate change."

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