April 18, 2000

Privileged and Confidential

Mr. Richard Drouin, O.C., Q.C.
Chair
Judicial Compensation and Benefits Commission
8th Floor
99 Metcalf Street
Ottawa, ON K1A 1E3

Dear Mr. Drouin,

Re: Section 42(1)(a) of the *Judges Act*

You have asked for my advice as to whether the criteria for retirement benefits set out in s. 42(1)(a) of the *Judges Act*, R.S.C. 1985, C. J-1 (the "*Act*") and, in particular, the "modified Rule of 80" which it establishes, violate section 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter"*). You have asked that in responding to your request I specifically address the submissions that have been made to the Judicial Compensation and Benefits Commission (the "Commission") on this matter by various interested parties.

SUMMARY OF CONCLUSIONS

Under the modified rule of 80 provided for in section 42(1)(a) of the *Act*, two criteria must be satisfied in order for a judge to qualify for an annuity equal to two thirds of salary at the time of retirement:

(i) the combined age and number of years in judicial office must equal 80; and

(ii) the judge must have continued in office for at least 15 years.

These criteria are said to give rise to equality rights concerns under section 15 of the *Charter* on the theory that younger judicial appointees, the majority of whom are women, are required to work longer and to pay more in order to receive an annuity that is exactly the same as that paid to older appointees.

In my view, however, there are three significant reasons why an equality rights challenge brought on this basis would be unlikely to succeed.

First, although younger judicial appointees are required to work longer and pay more than older appointees in order to qualify for a full two-thirds annuity upon retirement, the value of the annuity available to a younger appointee is far greater than that available to an older appointee. This results from a number of factors, the most important being that under the modified rule of 80 the younger appointee is entitled to retire at a younger age. For example, a judge appointed at age 40 will be entitled to retire with a two-thirds annuity at age 60, whereas a judge appointed at age 50 will not be entitled to retire with a two-thirds annuity until age 65. This means that the younger appointee and his or her survivor will generally have a longer life expectancy at retirement and will therefore collect the two-thirds annuity for a longer period of time than the older appointee. Moreover, the nominal dollar value of the annuity payable to the younger appointee will be higher since he or she will be eligible to retire with a full annuity later (assuming both were appointed at the same time), at which point judicial salaries will be higher than they were on the date that the older appointee was eligible to retire with an annuity.

The Office of the Chief Actuary was asked to calculate the relative present values of the annuities available to appointees at different ages. The actuarial analysis indicates that the annuity available to an appointee at age 40 will have a present value of approximately $5 million in the year 2020, which is significantly higher than the present value of the annuity available to the 50 year old appointee ($3.64 million in the year 2015) or the 60 year old appointee ($2.64 million in the year 2015). Even discounting for inflation between the years 2015 and 2020, the present value of the 40 year old's annuity is approximately 19 per cent higher than that of the 50 year old appointee, and 63 per cent higher than that of the 60 year old appointee. Female appointees are assumed to live longer than male appointees and thus the present value of their individual annuities (considered without regard to the value of a survivor's annuity) is uniformly higher for all age groups. However the life expectancies of survivors of male appointees are assumed to be longer, which has the effect of increasing in relative terms the present value of the total annuity attributable to male judges to a level which is broadly comparable to the value of the total annuity attributable to female judges.

The Office of the Chief Actuary also calculated the ratio of contributions to benefits, as well as the normal service cost (the uniform percentage of salary that would have to be deducted from an appointee in order to fund the annuity provided at retirement) for judges appointed at different ages. This analysis indicated that there were slight variations in these ratios and normal service costs. However, such minor variations are a common feature of defined benefit pension plans, since the benefits provided are determined by a formula based on salary and years of service rather than based on the value of contributions (the latter being a feature of defined contribution pension plans). The pension plan for DM-3s (which was also analysed by the Chief Actuary at the request of the Commission) exhibits similar minor variations. Therefore minor variations in the ratio of contributions to benefits or normal service costs do not give rise to equality rights concerns.

In short, since younger appointees are entitled to receive an annuity with a present value that is far greater than older appointees, they cannot be said to be subject to unequal treatment.

Even if this first consideration were not to prove decisive, the second reason why an equality rights claim would be unlikely to succeed is that the age of judicial appointment is within the significant control of the appointee. Only those who apply are eligible for appointment. Once an applicant has been assessed by the appropriate judicial appointment advisory committee, he or she is eligible to be appointed at any time within the next two years. If an appointment is not made within that time period, the candidate is asked to re-apply and is then reassessed. Therefore, while the precise date of an appointment is determined by the Governor in Council, the two-year time period or window within which such an appointment can be made is determined by the candidate. Thus if a potential candidate came to the view that the judicial annuity scheme is discriminatory towards younger appointees, he or she could avoid this discrimination by waiting to apply until a later date. On this basis, even if it were to be found that there was some form of inequality inherent in the judicial annuity scheme, it is arguable that the inequality can be avoided by the conscious choice of candidates and thus cannot give rise to a successful equality rights claim.

The third consideration relevant to the likely success of an equality rights claim is that only laws that are ‘discriminatory’ have been found to be inconsistent with section 15. The Supreme Court of Canada has stated that a law will be held to be discriminatory where it “demeans a claimant’s dignity” or where it “perpetuates or promotes the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society...” Even if the judicial annuity scheme were to be found to impose some form of unequal treatment, it nevertheless confers a significant economic benefit on judicial appointees of all ages. Therefore it is very unlikely that the judicial annuity scheme could be held to be discriminatory, within the definition elaborated by the Supreme Court of Canada.

Since in my view the judicial annuity scheme would very likely be found not to violate section 15, it would not be necessary for a court to consider whether any limitation on rights could be justified as a reasonable limit under section 1 of the *Charter*. However, it should be noted that the Supreme Court has been extremely deferential to Parliament in previous cases dealing with retirement provisions and benefits, and I expect that same deferential approach would be applied in the context of a challenge to section 42(1)(a). Therefore, if it were found necessary to consider whether section 42(1)(a) represented a reasonable limitation on rights that could be justified under section 1, I believe that a court would be likely to find that it does represent such a reasonable limit.

ANALYSIS

1. Introduction

In this memorandum I will address only the issue whether the criteria for retirement set out in section 42(1)(a) of the *Act* are susceptible to a *Charter* challenge. I will not address any other constitutional issues that could potentially be raised in relation to any other aspect of the scheme for judicial annuities in the *Act*.

Further, although it is perhaps self-evident, it bears noting that any constitutional concerns relating to section 42(1)(a) are totally separate and distinct from the issue of whether changes should be made to the judicial annuity arrangements for other reasons.

2. Section 42(1)(a) and the "Rule of 80"

Section 42(1)(a) of the *Act* provides as follows:

> 42. (1) The Governor in Council shall grant to
>
> (a) a judge who has continued in judicial office for at least fifteen years, whose combined age and number of years in judicial office is not less than eighty and who resigns from office,
>
> [...]
>
> an annuity equal to two-thirds of the salary annexed to the office held by the judge at time of his resignation, removal or attaining the age of retirement, as the case may be.

Until recently, section 42(1)(a) required a judge to serve for at least 15 years and attain the age of 65 years prior to becoming eligible to receive an annuity. However, in late 1998 the section was amended so as to delete the age 65 requirement and provide for what has been termed the "modified rule of 80".[1] Under the modified rule of 80, two criteria must be satisfied: (i) the combined age and number of years in judicial office must equal 80; and (ii) the judge must have continued in office for at least 15 years.

In her testimony before the House of Commons Committee studying the 1998 amending legislation, the Minister of Justice, the Honourable Anne McLellan, explained that the previous rule, which had required a judge to attain the age of 65 years before retirement, was perceived to be unfair to younger judges, who were required to serve much longer before

---

[1] See S.C. 1998, c. 30, s.7, in force November 18, 1998.

qualifying for an annuity.[2] She explained that the proposed modified rule of 80 was designed to provide a more equitable basis for determining eligibility for a judicial annuity:

> In our view, the proposed rule of 80 responds in an important way to the changing demographic profile of the judiciary. More and more judges are being appointed at a younger age, and many of these younger judges are women. The current provision, although based on the rule of 80, requires a minimum age of 65. A judge who retires before 65 has no right to a pension at all. A judge appointed at the age of 50 can retire with a pension at 65 with 15 years of service, but a judge who was appointed at 40 must serve 25 years to receive any pension at all, a situation that is increasingly considered unfair.
>
> This situation is even more unacceptable when we consider that it has a particular impact on women judges, who constitute the majority of those appointed at an early age. The rule of 80 would allow older, long-serving judges to retire when they feel they no longer wish to continue in the role. Permitting this will be good for them and for the court itself as an institution.

The Minister also noted that consideration had been given to a more generous rule, under which judges would be permitted to retire when their combined age and years of service reached 80 regardless of how long they had served on the bench (the so-called "unencumbered rule of 80"). However, the government was not recommending the unencumbered rule of 80, and it was the modified rule of 80 that was incorporated in the statute that was enacted by Parliament in November of 1998.

3. Equity Concerns

Although the purpose of the amendment to section 42(1)(a) enacted in 1998 was to respond to concerns about the equity and fairness of the previous retirement rule, various parties to the Commission have argued that the amended rule gives rise to continuing and serious equity concerns. In particular, the submission of the Canadian Judges Conference and the Canadian Judicial Council dated December 20, 1999 (hereinafter the "Joint Submission") argues that "the current annuity scheme leads to unequal treatment amongst judges (a characteristic which raises *Charter* implications)..."[3] The Joint Submission identifies a variety of *Charter* concerns with the current annuity scheme, including its impact on judges living in common law and same-sex relationships, and single judges.[4] However, the Joint Submission also raises

---

[2]See House of Commons, Standing Committee on Justice and Human Rights, *Minutes of Proceedings and Evidence*, (36th Parliament, First Session) May 11, 1998.

[3]Joint Submission at p.3-2.

[4]As noted in my letter to you dated March 24, 2000, any *Charter* issues arising from the

specific concerns in relation to the alleged discriminatory impact of the modified rule of 80 on younger judges, the majority of whom are women.[5] In particular, the Joint Submission argues that the current plan, despite the modified rule of 80, "does not provide comparable or equal benefits for comparable or equal contributions and service."[6] The Joint Submission offers a number of examples of this lack of comparability, including the fact that a judge appointed at age 50, after serving 15 years and paying for 15 years, will receive the same 2/3 annuity on retirement as a judge appointed at age 36, who is required to serve and pay for 22 years before qualifying. Based on these examples, the Joint Submission concludes as follows:[7]

> Clearly, then, younger appointees work more years and pay longer before being entitled to retire with exactly the same benefits as colleagues who may have been judges for half the same length of time.

Later, this conclusion is reinforced by pointing to the fact that women are disproportionately represented in the affected category:[8]

> We submit that requiring younger appointees to work significantly longer and to pay significantly more than their older appointee colleagues, once they have met the qualifying norm of 15 years for a fully earned 2/3 annuity, raises serious equality issues. This is particularly so given the disproportionate representation of women in this affected category. For all those judges who have worked and paid contributions for at least 15 years, there is no fair reason for requiring continued contributions. Moreover, there is no logical reason for not

---

differential treatment of judges living in common law or same-sex relationships, as compared with married judges, will be remedied by the enactment of Bill C-23, *An Act to modernize the Statutes of Canada in relation to benefits and obligations*, which was recently approved by the House of Commons and is currently before the Senate.

[5]See the Joint Submission, p. 3-3. The evidence that was tendered in support of the proposition that the majority of younger judicial appointees are women is that the average age of women at the time of appointment in recent years has been lower than that of men. (See Appendix IV to the Joint Submission, which shows that over the past 14 years the average age of women at appointment was lower than that of men.) However, since there were more men than women appointed to the federal judiciary during this period, the fact that women's average age at appointment is lower than men's does not necessarily establish that the "majority of younger appointees" are women. On the other hand, information provided by the Office of the Federal Commissioner for Judicial Affairs establishes that this is in fact the case. See Schedule A to this memorandum, "Judicial Appointments, 1995-99 By Age and Gender".

[6]Joint Submission at p. 3-17.

[7]Joint Submission at p. 3-17.

[8]Joint Submission at p. 3-19.

providing additional benefits for the extra years worked in recognition of longer service.

The submissions to the Commission do not contain any further analysis of the equality rights concerns associated with the modified rule of 80. [9] There is no actuarial or other analysis provided comparing the value of the benefits received by judges retiring at different ages. Nor is there any specific discussion of the recent Supreme Court of Canada jurisprudence on the interpretation of equality rights under section 15 of the *Charter* in relation to the validity of section 42(1)(a).[10]

4. Section 15 Test

In its recent decision in *Law v. Canada (Minister of Employment and Immigration)*,[11] the Supreme Court of Canada set out a three-part test for assessing potential violations of equality rights under section 15 of the *Charter.* The test consists of the following:

(i) does a law impose differential treatment between the claimant and others, in purpose or effect, resulting in unequal treatment?;

(ii) are one or more enumerated or analogous grounds of discrimination (i.e. those expressly identified in section 15, or grounds analogous to those expressly identified) the basis for the differential treatment?; and

(iii) does the law have a purpose or effect that is discriminatory within the meaning of

---

[9]The Submissions which I have reviewed are as follows: all written submissions, appendices and replies filed by the Canadian Judges Conference/The Canadian Judicial Council; a letter from Madam Justice M.S. Paperny of the Court of Queen's Bench of Alberta, dated November 15, 1999; a letter from the Hon. D.B. Mason and eight other judges of the Court of Queen's Bench of Alberta, dated December 20, 1999; the Submission of Manitoba Justices Krindle, Beard and Hamilton, dated December 24, 1999; a letter from Judith F. MacPherson, Q.C., Chair, Standing Committee on Pensions for Judges' Spouses and Judges Salaries, dated February 22, 2000; and Transcripts of the proceedings of the Commission dated February 14, 2000 and March 20, 2000.

[10] I note that a number of submissions have commented on the impact of the failure to provide for a pro-rata or deferred pension for judges who serve less than 15 years. However, in my respectful view this issue is separate and distinct from the constitutional validity of the modified rule of 80; accordingly, the issue of the absence of a pro-rata or deferred pension raises concerns that are distinct from the constitutional validity of the modified rule of 80 in section 42(1)(a) and is not addressed in this memorandum.

[11][1999] 1 S.C.R. 497 (hereinafter "*Law*").

the equality guarantee?[12]

All three elements of the test must be satisfied in order for a claimant to establish a violation of the equality guarantee.

With respect to the first of these factors (the 'differential treatment' inquiry), the Court has indicated that such differential treatment may arise in one of two ways.[13] The first is for a law to expressly or on its face deny a benefit or impose a burden on a claimant as compared to others. This is known as direct discrimination. The second is where a law is facially neutral but has a disproportionate impact on a group because of the particular characteristics of that group. This second form of discrimination has been termed adverse effects discrimination. A claimant need show only that a law, rule or practice differentiates in either of these two ways in order to satisfy the differential treatment inquiry. However, the Court has also stated that in order to satisfy this part of the test, the differential treatment must arise from the law, rule or practice that is the subject of the inquiry, and not from factors or conditions that arise or exist independently in society. Thus in *Symes v. Canada*[14] the Court dismissed a challenge to provisions in the *Income Tax Act (Canada)* which limited the deductibility of child care expenses for income tax purposes. While the Court accepted that women disproportionately bear the burden of child care in society, the taxpayer had not shown that women disproportionately bear the cost of child care expenses. Since it was not established that the law itself had a differential impact, the equality rights claim was dismissed.

The third element of this test, the 'discrimination inquiry', has proven particularly elusive for the courts to define. In *Law* the Supreme Court stated that a law would be held to be discriminatory when it imposed burdens or withheld benefits in a manner "...which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration".[15] Amongst the 'contextual factors' that were stated to be relevant in determining whether a law 'demeans a claimant's dignity' were the following:[16]

(iv) whether the claimant is associated with a historically disadvantaged group (which

---

[12]See *Law* at paragraphs 88 to 90.

[13]See *Law* at paragraph 88. See also *Egan v. Canada*, [1995] 2 S.C.R. 513 at paragraphs 137-138 (*per* Cory and Iacobucci JJ. (dissenting, although not on this point).)

[14][1993] 4 S.C.R. 695 (hereinafter "*Symes*").

[15]*Law* at paragraph 88.

[16]See *ibid*. It should also be noted that the Court stated that no one of these factors is determinative, and the list of factors identified is not exhaustive.

will tend to favour a finding of discrimination);

(v) whether the distinction in the law is one that fails to takes into account the actual need, capacity or circumstances of the claimant as compared with others (which will likewise tend to favour a finding of discrimination);

(vi) whether the purpose or effect of the law is to ameliorate the conditions of a more disadvantaged person or group in society (which will tend to make it more difficult to find discrimination); and

(vii) the nature and scope of the interest affected by the impugned law (with the more severe and localized these consequences for the affected group, the more likely it will be that there is discrimination).

In *Law* it was the third element of the section 15 test which proved determinative. The Court found that federal legislation which denied survivor's benefits under the *Canada Pension Plan* where the survivor is under age 35 did not demean the claimant's dignity. The Court reasoned that the restriction did not reflect or promote the notion that younger people are less capable or less deserving of concern, respect or consideration. Rather, the restriction was based on the assumption that younger persons have greater prospect of long-term income replacement, an assumption which accords with their actual situation. Thus even though the legislation imposed differential treatment on the enumerated ground of age (and therefore met the first two elements of the section 15 test), it was not discriminatory within the meaning of the equality guarantee. In the result the section 15 claim was dismissed, making it unnecessary for the Court to consider the limitations clause in section 1.[17]

5. Application to section 42(1)(a) of the *Act*

In my view, section 42(1)(a) does not violate section 15 of the *Charter*. There are two overriding reasons which lead to this conclusion. The first is that, in my view, the modified rule of 80 does not impose differential or unequal treatment on the basis of age or gender. The second is that, even if such differential treatment were found to exist, it is likely that it would be found not to demean the human dignity of the affected class of judges and therefore would not constitute discrimination.

I will consider each of these issues in turn.

(i) *Differential or Unequal Treatment*

As noted above, the Joint Submission argues that the modified rule of 80 is

---

[17]Section 1 permits violations of *Charter* rights to be upheld where the limit is reasonable, prescribed by law, and can be demonstrably justified in a free and democratic society.

discriminatory because younger judges are required to work more years and pay longer before being entitled to retire "with exactly the same benefits as colleagues who may have been judges for half the length of time." This statement appears to be based on the assumption that an annuity of two-thirds of salary at time of retirement is "exactly the same benefit" for all recipients. Yet in order for this assumption to be true, two conditions would have to be satisfied: (A) the same dollar amounts (in constant dollars) would have to be paid to all recipients; and (B) the payments would have to continue for exactly the same length of time.

Under the modified rule of 80 in section 42(1)(a) neither of these conditions holds. First, although the formula for calculating the annuity is the same, namely, two thirds of salary at retirement, since judges who enter the plan at different ages will retire at different points in time, their salaries at retirement (and thus the dollar amount of their annuity) will differ. In particular, those who retire later will have a higher salary at retirement for purposes of the annuity calculation. Second, because judges will be eligible to retire at different ages depending upon their date of entry into the plan, their respective life expectancies (as well as the life expectancies of survivors) will differ. In particular, judges appointed at younger ages will be eligible to retire earlier and thus they and their survivors, if any, will receive benefits for a longer period of time than judges appointed at a later age. Furthermore, since women generally have longer life expectancies than men, annuities payable to female judges will generally be paid for a longer period than those to male judges appointed at precisely the same age, even though they have both contributed the same 7% of salary towards the cost of the annuity.

The impact of these various factors on the relative benefits and burdens of the judicial annuity scheme is illustrated in an analysis of the scheme, undertaken at the request of the Commission, by Mr. L. M. Cornelis of the Office of the Chief Actuary of Canada. (Mr. Cornelis' report is attached as Schedule B to this memorandum.) The following calculations were requested:

(a) the actuarial present value of a judicial annuity at the time of receipt;

(b) the actuarial present value of the contributions of a judge towards that annuity at the time of receipt; and

(c) the ratio of ii) to (i).[18]

The Chief Actuary was asked to undertake these calculations in respect of both male and female judges appointed at the ages of 40, 45, 50, 55 and 60, respectively,[19] and to assume that they

---

[18]See letter dated March 21, 2000 from Mr. Richard Drouin to Mr. David Sgayias, requesting the Government of Canada to obtain this information from the Office of the Chief Actuary.

[19]In the last five years, 276 of the 291 federal judicial appointees fell within these age ranges. During this period, there were two judges appointed at an age under 40 (one male and

would retire at the earliest opportunity to receive a full annuity under the terms and conditions set out in the *Act*.

In subsequent discussions, the Chief Actuary was also asked to calculate what is termed the 'normal cost' for these annuities, namely, the uniform percentage of salary that would have to be contributed in each year by judges appointed at these different ages in order to fund the annuity provided upon retirement. Finally, the Chief Actuary was also asked to undertake the same calculations for DM 3s in the Government of Canada. In particular, the Commission requested the present values and ratios corresponding to those calculated in respect of judicial appointees, by gender and by the same age of appointment, taking into account the Special Retiring Allowance provisions which should be assumed to apply to these hypothetical Deputy Ministers.[20] The response was provided in the form of a letter dated April 14, 2000 from Mr. L.M. Cornelis of the Office of the Chief Actuary of Canada to Mr. D. Sgayias of the Department of Justice, attached as Schedule B hereto.

In order to undertake these calculations, it is necessary to make a series of economic assumptions, including assumptions respecting future interest rates, future increases in the consumer price index, and future increases in the Industrial Aggregate index.[21] It is also necessary to make certain demographic assumptions, such as assumptions as to the life expectancy of members of the plan at various retirement ages, the proportion of retiring judges who will leave a survivor and/or children eligible to receive an annuity, as well as the life expectancy or entitlement period of these other beneficiaries.

Since these assumptions are predictions of future events which may or may not

---

one female) and 13 judges (all male) appointed at age 60 or more. See the data set out on Schedule A.

[20]The Special Retiring Allowance applies to approximately 30 Deputy Ministers who head a government Department. These individuals are permitted to accrue benefits, in addition to those available to other senior executives in the public service, at a rate of 2% per year of service, to a maximum of 10 years. The effect of this plan is to allow the Government to recognize years of service as a Deputy Minister as being worth twice their face value in pension credits. The Special Retiring Allowance was introduced following the recommendation of the Advisory Group on Executive Compensation in 1988. See Responses to Requests Provided by the Government of Canada to the Judicial Compensation and Benefits Commission (March 31, 2000) at p. 6 and Appendices 49 and 50.

[21]See Michael Hafeman, (Acting Chief Actuary, Public Insurance and Pension Programs), *Actuarial Report as at 31 March 1998: Pension Plan for Federally Appointed Judges* (Office of the Superintendent of Financial Institutions, Government of Canada, April 9, 1999) at pp. 8-15 (hereinafter "*1998 Actuarial Report*"). The Industrial Aggregate index, maintained by Statistics Canada, measures the average earnings of employed Canadians. This index is used to calculate salary adjustments for judges under the *Act*.

occur as expected, there is no single set of assumptions which can be deemed to be 'correct'.[22] Therefore, as discussed in his letter to Mr. Sgayias, Mr. Cornelis has undertaken the calculations requested on the basis of three different sets of assumptions, presented in his report as Basis I, Basis II and Basis III. The Basis I calculation reflects the assumptions used to value the annuity scheme for judges in the *1998 Actuarial Report.*[23] The Basis II calculation uses assumptions that are broadly similar to those in Basis I, except that a uniform interest rate of 6 per cent for the entire calculation period is used.[24] The Basis III calculation assumes an interest rate of 7.25% throughout the calculation period.

Given the fact that no single set of economic and demographic assumptions can be shown to be inherently or necessarily correct, and that the use of different assumptions will affect the relative valuations of both judicial contributions and annuities payable, one might question whether these actuarial valuations reflect the 'true' value of the relative burdens and benefits of the plan. The answer to this concern is that these valuation methods represent the best available methodology for valuing pension liabilities and entitlements, and are statutorily authorized for all public pension plans.[25] I also note that the Joint Submission seems to accept the validity and appropriateness of such a valuation methodology, albeit in a slightly different context.[26]

The Chief Actuary was requested to assume that judges will retire immediately upon becoming eligible for a 2/3s annuity. Material tendered to the Commission indicates that judges generally work beyond the point at which they are first eligible for a full annuity, with the average retirement age being 72 years. Thus the calculations that were requested will not reflect the actual values of contributions or entitlements for the vast majority of judges, since judges tend to work longer and to contribute more towards their annuities than is suggested in the

---

[22]For this reason the *Public Pensions Reporting Act*, R.S.C. 1985, c. 13 (2nd Supp.) does not prescribe a uniform set of assumptions but, rather, requires the Chief Actuary to identify the assumptions that are used.

[23]See *1998 Actuarial Report*, at p.11 for a summary of the assumptions used.

[24]Basis I assumes an interest rate of slightly over 9 per cent in year 2000, declining gradually to 6 per cent by the year 2023, after which time it remains constant at 6%.

[25]See the *Public Pensions Reporting Act*, above.

[26]See Joint Submission at p. 3-36 (requesting that single judges be entitled to receive an amount "equal to the actuarial equivalent of a spousal annuity, calculated assuming the deceased judge had been married to a person of the same age.") The issue of the appropriateness from a constitutional perspective of such a payment to single judges is not addressed in this memorandum; the reference to this aspect of the Joint Submission is intended merely to indicate the appropriateness of valuing judicial annuities on the basis of actuarial valuations involving assumptions as to future contingent events.

calculations requested of Mr. Cornelis. (The difference is reflected in a separate worksheet prepared by Mr. Cornelis, which focuses on a typical judge appointed at age 50 and retiring at age 72. This worksheet is attached as Appendix A-IV to his report.) However, the request to the Chief Actuary was structured in this particular way in order to identify any inequities which arise by virtue of the legislation itself, as opposed to from the voluntary choices of individual members. In other words, to the extent that an individual chooses to continue working beyond the age at which he or she is eligible to retire with a full annuity, thereby working for a longer period or contributing more before collecting the annuity, this is a result of that individual's voluntary choice, and cannot serve as the basis of an equality rights claim.[27]

The Basis I worksheet for judicial annuities prepared by Mr. Cornelis, based on the assumptions used in the *1998 Actuarial Report* prepared under the *Public Pensions Reporting Act*, is labeled Appendix A-1 to his April 14, 2000 letter. The following aspects of Appendix A-1 are of particular interest:

(A) all of the judges in the calculation are assumed to be appointed on April 1, 2000 at the various ages indicated under the column "Entry age";

(B) judges who are appointed at ages ranging from 40 to 60 will be eligible to retire at ages ranging from 60 to 75, in accordance with the modified rule of 80;

(C) the earliest eligible to retire will be those appointed at ages 50, 55 and 60, who will all be eligible to retire in the year 2015; those appointed at ages 45 and 40 will be eligible to retire in the years 2017 and 2020, respectively;

(D) the annuities payable will vary, since salaries will be different in the years 2015, 2017 and 2020. Those retiring later are assumed to have higher salaries at retirement and thus a higher annuity in nominal dollars;

(E) the present value of the annuity payable upon eligibility for retirement will vary by age. Thus, those judges who are older at appointment will have a lower annuity and a shorter life expectancy than those appointed at a younger age. The difference in value is considerable, ranging from a high of approximately $5 million for judges (both male and female) appointed at age 40, to a low of approximately $2.6 million for judges appointed at age 60;

(F) the accumulated contributions of the judges fund a relatively similar proportion of their total benefits, ranging from a low of 11.2 per cent for a male appointed at age 50 to a high of 15.4 per cent for males and females appointed at age 60;

(G) the 'annual normal cost' (the uniform percentage of salary that would need to be contributed in each year to fund the annuity entitlement) ranges from a low of 45.4 per cent for judges appointed at age 60 to a high of approximately 62 per

[27]See the discussion of the *Symes* case, above.

cent for judges appointed at age 50;

(H) female judges are assumed to live longer than male judges and thus the present value of their individual annuities (considered without regard to the value of a survivor's annuity) is uniformly higher in all age groups; however the life expectancies of survivors of male judges are assumed to be longer, which has the effect of increasing in relative terms the value of the total annuity attributable to male judges to a level that is broadly similar to the value of the total annuity attributable to female judges.

As noted above, different economic and/or demographic assumptions produce different valuations. The Basis II worksheet prepared on the basis of an assumed interest rate of 6% (Appendix A-II to the Cornelis April 14 letter) produces different salaries at retirement and thus different annuities. This, in turn, alters the present value calculations and the ratios of contributions to benefits. Similar differences are evident in relation to the Basis III worksheet, prepared on the basis of an assumed interest rate of 7.25%. However, while the absolute and relative valuations differ from one Basis to the other, the findings as set out above remain constant.

The Chief Actuary was asked to undertake the identical calculations for the pension contributions and entitlements of Deputy Ministers at the DM-3 level, who are to be assumed to be eligible for the Special Retiring Allowance.[28] The calculations in respect of the DM-3 class are set out on the worksheets labeled Appendices B-I to B-III (which show the results for the DM-3 primary pension only) and Appendices C-I to C-III (which show the results for the total pension package, including any survivor pension that might eventually become payable). These worksheets show that the present value of the contributions of DM-3s generally represent a slightly higher proportion of their pension entitlements, while their normal costs are generally lower.

What are the relevant conclusions that emerge from these worksheets in terms of an equality rights claim directed at the modified rule of 80 under section 42(1)(a)?

First, these figures demonstrate that the value of a judicial annuity varies with the age and gender of the appointee. However, it is incorrect to claim that younger appointees (whether male or female) work longer and contribute more in order to receive exactly the same benefit as is provided to older appointees. For example, the Basis I calculation indicates that a 40 year old appointee is entitled to receive an annuity that has a present value (in constant 2015 dollars) of about $4.3 million,[29] which is approximately 19 per cent more than the annuity

---

[28]See note 20 above. Not all DM-3s are in fact eligible for the Special Retiring Allowance, since it is only provided to those Deputy Ministers who are heads of government Departments.

[29]In comparing the present value of the annuity payable to the 40 year old appointee with

payable to a 50 year old appointee ($3.6 million) and approximately 63 per cent more than the annuity payable to a 60 year old appointee (about $2.64 million). These differences are a result of a combination of factors, the most important of which are that the annuity of a younger appointee will be higher at retirement (since they will retire later, at which point salaries will have increased) and he or she will be entitled to receive the annuity for a longer period of time (since he or she is eligible to retire at a younger age). Thus, the judicial annuity scheme provides for a correlation between a member's contributions and years of service and the value of entitlements he or she receives under the plan.

Second, far from discriminating against female appointees, the current plan benefits such appointees at all age levels since they will live longer (and thus collect benefits for a longer period of time) and yet make the same 7 per cent contribution toward their annuity.

One issue that bears particular discussion is the fact that the various worksheets prepared by Mr. Cornelis indicate that the precise ratio of contributions to benefits is not identical for all age groups within the plan. In particular, the contributions of those appointed at the youngest and oldest ages (i.e. ages 40 and 60) tend to represent a slightly higher proportion of their total benefit than is the case for those appointed between ages 45 to 55. Moreover, the annual normal cost needed to fund the annuities of the 40 and 60 year old appointees is slightly lower than the comparable cost for the annuities of those ages 45 to 55 at appointment. Could these discrepancies in the ratios of contributions to benefits, and in normal service costs, serve as the basis for an equality rights claim by either the 40 year old or 60 year old appointees?

In my view, a constitutional challenge mounted on this basis is unlikely to succeed, for a variety of reasons.

First, all defined benefit pension plans (in contrast to defined contribution pension plans) exhibit similar discrepancies in the ratio of benefits to contributions, and in normal costs, for entrants at different ages. This reason for this (as is explained in a separate letter dated April 18, 2000 by Mr. Cornelis and attached as Schedule C hereto) is that entitlements under defined benefit plans are calculated according to a formula that is generally tied or linked to years of service and salary levels, rather than on the basis of the accumulated value of the members' contributions. (In contrast, a defined contribution plan provides benefits that are expressly linked to contributions.) While there will often be some rough approximation between contributions and entitlements under a defined benefit plan (since members who enter at an earlier age, and who will be entitled to a higher defined benefit, will also contribute more), it would in practice be impossible for the ratio of contributions and entitlements to be precisely identical for all members. It is for this reason that in both the judicial annuity and DM-3 pension plans, the ratio

---

that payable to the 50 or 60 year old appointee, it is appropriate to take account of the fact that the annuity of the 40 year old appointee will not be payable until the year 2020, whereas the annuities of the other appointees will commence in the year 2015. Therefore the 40 year old's annuity of $5.3 million in 2020 dollars was discounted using a 3 per cent inflation rate, to produce an annuity with a present value of $4.3 million in 2015 dollars.

of contributions to benefits varies slightly by age of entry to the plan. Moreover, and this is the significant point, any alternative basis for determining eligibility for an unreduced judicial annuity would also contain a variance in these ratios (although not necessarily identical to or in precisely the same pattern as those set out in the worksheets prepared by Mr. Cornelis.) For example, the unencumbered rule of 80, which was proposed by the Canadian Judicial Council as a replacement for the modified rule of 80, would enhance the present value of annuities for older appointees, who would be permitted to retire at an earlier age and thus collect their annuities for significantly longer periods of time. The effect of this rule would not be to equalize the ratios of contributions to benefits, but to substitute different ratios for those that currently exist. Thus the fact that the current judicial annuity scheme fails to provide for precisely identical ratios between contributions and benefits for entrants at all ages is a characteristic shared with defined benefit pension plans generally.

There are other considerations which lead to the conclusion that the ratio of contributions to benefits need not be identical for entrants at various ages. These considerations can be summarized as follows:

(I) since there is no single set of ‘correct’ economic or demographic assumptions, even if the ratios of contributions to benefits were precisely identical for all entrants under one set of assumptions, the calculations would differ under a different set of assumptions;

(II) the present value calculations set out in Mr. Cornelis' worksheets do not represent the benefits that will actually or necessarily be received by the judges appointed at the various ages indicated. Rather, they represent estimates of what judges who retire at a certain age will likely receive, based on average life expectancy at age of retirement. But no-one is guaranteed a payment of an annuity worth a certain dollar amount. This is because annuities under the *Act* are payable for the life of the judge and the survivor, if any. Thus the actual value of the benefit received by two judges who retire at precisely the same age and on the same day will almost certainly turn out to be different, since chances are that they (and their survivors, if any) will live for different periods. Thus it is unclear what purpose would be served by constitutionally requiring that the ratios between accumulated contributions and the present value of annuities be identical for all age groups, since these calculations reflect estimates only rather than amounts that will necessarily be received.

Thus I conclude that the modified rule of 80 does not impose unequal treatment on younger appointees. Younger appointees will tend to receive a higher annuity for a longer period of time than older appointees, reflecting their longer service and higher contributions. While the precise ratios between contributions and expected benefits are not identical for judges appointed at different ages, they are broadly similar. Moreover, there is no constitutional obligation that such ratios be identical for all age groups. Thus section 42(1)(a) of the *Act* does not impose unequal treatment, as required under the first stage of the *Law* test.

Even if my analysis to this point were found to be in error, there is a further and separate reason which in my view would make it unlikely that an equality rights claim would be found to satisfy the first stage of the *Law* test.

Section 42(1)(a) only applies to those who elect to be subject to its terms, namely, those who apply for, are offered, and accept a judicial appointment. In effect, no one is compelled to become a judge at a particular age. (In fact, judicial appointments are highly sought after, as is reflected by the large number of applicants for the limited positions available.[30]) If, therefore, (contrary to the analysis outlined above) an individual were to come to the view that the judicial annuity scheme is discriminatory towards younger appointees, he or she could avoid such discrimination by simply postponing applying to the bench until a later date. As described earlier, *Symes* makes plain that equality claims can only be successful in the context of inequalities that result directly or indirectly from the terms of legislation, rather than from the independent choices of individuals affected by the legislation. The inequality must be imposed by the law. Thus, to the extent that unequal treatment of younger appointees arises from the voluntary decision of those appointees to seek judicial appointment, this would tend to defeat the claim at the first stage of the *Law* analysis.

Counsel for the Canadian Judges Conference/ Canadian Judicial Council took the position that the date of a judicial appointment is determined by the Governor in Council and not by the appointee.[31] Therefore, in counsel's submission, it could not be said that the appointee had voluntarily chosen to become a member of the judiciary at a certain age.

The current process for judicial appointments is described in a document prepared by the Minister of Justice and Attorney General for Canada.[32] All candidates wishing to be considered for appointment must apply to the Commissioner for Federal Judicial Affairs. Most candidates are required to be assessed by the appropriate judicial appointments advisory committee.[33] The assessments, when completed, are valid for a period of two years. After the expiry of the two-year period, a candidate is required to indicate that they continue to be

---

[30]See Appendix 11 to the Submission from the Government of Canada to the Judicial Compensation and Benefits Commission, December 20, 1999.

[31]See Judicial Compensation and Benefits Commission, Hearing of March 20, 2000.

[32]See Government of Canada, *Federal Judicial Appointments Process* (June 1999) (hereinafter "*Judicial Appointments Process*").

[33]Current judges are not assessed by the advisory committees. However, only 11.2% of appointments in the 1990-99 period were elevated from other judicial posts. See Appendix 10 to the Submission from the Government of Canada to the Judicial Compensation and Benefits Commission, December 20, 1999.

interested in an appointment and wish to be re-assessed by the advisory committee.[34] Thus, while it is true that the Governor in Council determines the precise date of a judicial appointment, it is the candidate who determines the relevant two-year period or 'window' in which such an appointment can be made. In this sense, the age at which an individual is appointed to the bench is within the significant control of the appointee.

Nor would this conclusion differ even if it could be demonstrated that the government of Canada had made particular efforts to recruit younger female candidates for the bench. Assuming such 'targeted recruitment' had taken place, the fact would remain that the decision as to whether or not to allow one's name to stand for consideration, and ultimately to accept an offer of appointment, would remain that of the candidate. Thus active encouragement to allow one's name to stand could not be said to vitiate the voluntariness of the candidate's decision to seek and accept a judicial appointment.

Given the other arguments discussed in this opinion, it is not necessary for me to express a firm view as to whether this particular consideration alone would be decisive in the context of an equality rights challenge to the modified rule of 80 in section 42(1)(a) of the *Act*. The fact that candidates for judicial office have significant control over the age at which they are appointed would certainly be an important consideration in a section 15 case, one that would tend to reinforce the conclusion that section 42(1)(a) does not impose unequal treatment upon younger judicial appointees.

(ii) *Discrimination*

Even if, contrary to the analysis thus far, a claimant could demonstrate that the eligibility criteria in section 42(1)(a) impose an unequal burden on younger appointees, and that such a burden results from the terms of the legislation rather than from the voluntary choice of the appointee, there is an additional hurdle that would be necessary to overcome in order for the section 15 claim to succeed. This additional hurdle is the requirement that the unequal treatment be found to be 'discriminatory'.

As the recent Supreme Court decision in *Law* pointed out, it cannot simply be assumed that laws which impose unequal burdens based on an enumerated or analogous ground will be found to be discriminatory. In order to establish discrimination, it is necessary to demonstrate that the legislation demeans the human dignity of the claimant or the class of persons of which the claimant is a member.

In the *Law* case itself the claimant was challenging a provision which denied survivor benefits under the *Canada Pension Plan* to those under the age of 35. In finding that this denial was not discriminatory, the Supreme Court relied upon statistical data which tended to show that younger persons generally were more likely to successfully re-enter the labour market after the death of a spouse. The legislation was based on what the Court termed "informed

---

[34] *Judicial Appointments Process* at p.4.

statistical generalizations" even though those generalizations "may not correspond perfectly with the long-term financial need of all surviving spouses."[35] In other words, even though this particular individual claimant may not have been able to achieve successful re-entry into the labour market, her dignity was not demeaned since individuals in her position were generally more likely to achieve successful re-entry than were older individuals. The Court also placed weight on the fact that the claimant in the case would eventually be eligible for a pension at age 65:

> I would also note that people in the position of the appellant are not completely excluded from obtaining a survivor's pension, although it is delayed until the person reaches age 65 unless they become disabled before then. The availability of the pension to the appellant strengthens the conclusion that the law does not reflect a view of the appellant that suggests she is undeserving or less worthy as a person, only that the distribution of the benefit to her will be delayed until she is at a different point in her life cycle, when she reaches retirement age.[36]

Conversely, in those cases where an equality rights claim has succeeded, it has generally involved a complete denial of access to an opportunity or benefit, as opposed to a limited or partial denial of a benefit.[37]

Applying this reasoning to the criteria in section 42(1)(a) of the *Act*, it seems highly unlikely that such criteria would be found to be discriminatory.

First, the judicial annuity scheme clearly confers a significant benefit to all participants, regardless of age or gender. The comparison with the pension entitlements of DM-3s set out in the worksheets prepared by Mr. Cornelis is instructive in this regard. Recall that the DM-3 calculations assume that the members are eligible to receive the Special Retiring Allowance, which is available to only approximately 30 Deputy Ministers who head a government Department. Thus the DM-3 plan represents one of the most advantageous pension plans available in the public service. Yet the benefits associated with the judicial annuity plan are clearly superior to those under the DM3 plan, both in terms of the ratio of contributions to benefits as well as in terms of normal service cost.

This is not a case in which a claimant would be able to demonstrate that they were being totally denied a benefit or opportunity that was being made available to other classes of persons. Rather, the claim would be based on the fact that the relative entitlements of younger or older judges were marginally less attractive, considered on a present value basis, than those available to judges who were appointed at ages 45 to 55. It is difficult to characterize such a

---

[35] *Law* at paragraph 106.

[36] *Law* at paragraph 107.

[37] See, for example, *M. v. H.*, [1999] 2 S.C.R. 3; *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

marginal difference in treatment as demeaning the human dignity of these younger or older judges, particularly since they are participating in a pension plan that is significantly more attractive than that available to the vast majority of other Canadians. Their situation bears no close similarity to the kinds of claims which have succeeded under section 15 of the *Charter*.

Also relevant in this context are certain comments with respect to the pension scheme for superior court judges in the pre-*Charter* case of *The Queen v. Beauregard*.[38] In *Beauregard*, a Quebec Superior Court judge had challenged the constitutional validity of a provision in the *Judges Act* requiring him to make contributions towards the cost of his annuity. In rejecting that challenge the majority opinion, written by Chief Justice Dickson, noted that the requirement to contribute towards the costs of pensions was "in accordance with standard, widely used and generally accepted pension schemes in Canada."[39] He also commented that there had been "no discriminatory treatment of judges" and that "contributory pension schemes are now widespread in Canada"; the effect of requiring judges to contribute to the cost of their pensions "merely moved superior court judges into the mainstream of Canadian pension schemes."[40]

Although these comments were made in the context of a pre-*Charter* case, in my view Chief Justice's Dickson's analysis of whether there was any 'discrimination' inherent in the judicial pension scheme would certainly be relevant in the context of a s.15 challenge. Chief Justice Dickson suggests that in assessing whether a provision in the judicial annuity scheme is discriminatory, it is relevant to consider the scheme in light of pension entitlements available to Canadians generally. Where the judicial annuity scheme incorporates elements that are "in accordance with widely used and generally accepted pension schemes in Canada", it will be more difficult to establish a claim of discrimination.

Not only is the judicial annuity scheme based on elements that are widely used and generally accepted in pension plans in Canada, the scheme provides for benefits that are considerably more attractive than those available to the vast majority of other working Canadians. This suggests that it is extremely unlikely that the judicial annuity scheme could be successfully attacked on the grounds that it is discriminatory.

Also relevant in this regard is recent litigation in New Brunswick involving the constitutionality of the judicial annuity scheme for provincial court judges in that province. In *Mackin v. New Brunswick (Minister of Finance)*,[41] the constitutionality of certain aspects of the

---

[38][1986] 2 S.C.R. 56. Although decided in 1986, the case was based on the law as it existed prior to the *Charter*.

[39]*Ibid* at p.77.

[40]*Ibid* at p.78.

[41][1998] N.B.J. 267 (Q.B.). See also the companion case of *Rice v. New Brunswick*,

judicial annuity scheme was challenged on the basis of interference with a judge's financial security. In particular, the following aspects of the judicial annuity scheme were challenged:

(A) the fact that judges were required to continue to make contributions towards their annuity after they qualified for retirement with a full annuity;

(B) the fact that the pension scheme did not allow for an increased annuity upon retirement despite these continued contributions; and

(C) the fact that a formula which integrated the judicial annuity with benefits available under the *Canada Pension Plan* had the effect of reducing a long-serving judge's annuity to a greater extent than that applicable in respect of judges who had served for a shorter time.

In *Mackin* the plaintiff did not raise any section 15 arguments in relation to these features of the judicial annuity scheme. Nor did the plaintiff raise any constitutional objection to the criteria which determined eligibility for a pension.[42] However, it is apparent that the plaintiff's constitutional concerns, which involved a comparison of the relative benefits available to judges based upon their years of experience, bore certain broad similarities with the arguments that have been considered in this memorandum.

Mr. Justice Deschênes of the Court of Queen's Bench dismissed the challenge to these so-called 'anomalies' in the judicial annuity scheme. He reasoned that the judicial annuity scheme could not be said to violate judicial independence since the scheme provided benefits that were generous in comparison to those available to judges in other provinces or to the public generally:[43]

> The pension provisions for Provincial Court judges in New Brunswick do contain certain anomalies, most of them related to the fact that salary increases for those judges have practically been non existent for a number of years. The pension scheme, however, is designed to attract competent persons to the bench and is in fact a generous pension scheme compared to others accorded to judges in most other provinces in particular and to the public in general whether in the public or private sector. Quite frankly, I fail to see how the obligation to continue contributions to the pension fund upon electing supernumerary status without a corresponding increase in benefits at retirement age or the fact

---

[1998] N.B.J. No. 266 (Q.B.).

[42]The New Brunswick scheme permitted provincial court judges who had attained the age of 65 and served for at least ten years to retire with an annuity equal to 60 per cent of their salary at retirement. In addition, judges between the ages of 60 and 65 who had served for at least 25 years were also permitted to retire with a full annuity.

[43][1998] N.B.J. 267 at paragraphs 45-46.

> that longer serving judges may, under certain circumstances, turn out to be entitled to pension benefits of a lesser amount than colleagues with shorter judicial careers can be looked upon as a violation of one of the essential conditions or guarantees of judicial independence.
>
> The pension scheme adopted by the Province in the late 60's for Provincial Court judges is not unconstitutional in spite of the identified "anomalies". On the pension scheme as a whole, I share the views of counsel for the defendant that what has been suggested in relation to the pension plan for federal judges, namely that "any perception of inequitable treatment is surely tempered by the benefits for the annuitant under the present arrangement" applies here.

The New Brunswick Court of Appeal affirmed the trial judge's decision that the judicial pension scheme was not unconstitutional, but referred the issue of these 'anomalies' in the scheme to a newly-created Judicial Remuneration Commission "for debate and consideration".[44]

The New Brunswick courts in this litigation adopted the same general approach as in *Beauregard*, namely, to compare the judicial annuity scheme to the pension entitlements available to Canadians generally. Because this comparison indicated that the judicial annuity scheme was relatively generous, it could not be overturned on constitutional grounds. Even though this analysis was presented in the context of a challenge to judicial independence rather than under section 15 of the *Charter*, I regard both the reasoning and the result as indicative of the general approach that would likely be applied in the context of a section 15 challenge.

I conclude, therefore, that it is unlikely that any unequal treatment of younger or older judges would be found to be discriminatory, within the meaning of section 15 and as propounded in *Law*.

(ii) Section 1

Even if, contrary to the analysis thus far, a court were to find the criteria in section 42(1)(a) of the *Act* to be a violation of section 15 of the *Charter*, it would still be necessary to determine whether such a violation could be upheld as a reasonable limit under section 1. Since I believe that the claim would be almost certain to fail under section 15, I will not devote any significant analysis to the section 1 issue. It is important to note, however, that in *McKinney v. University of Guelph*,[45] the Supreme Court found that mandatory retirement provisions violated section 15 on grounds of age, and yet could be justified under section 1. In the section 1 analysis, the Court was extremely deferential to the legislature, noting that determinations on issues relating to retirement benefits and entitlements were extremely complex and were therefore not

---

[44]See *Rice v. New Brunswick*, [1999] N.B.J. No. 543 (C.A.) *per* Ryan J.A. (Drapeau J.A. concurring) at paragraph 52.

[45][1990] 3 S.C.R. 229.

susceptible to close judicial supervision.

I expect a similar caution would be exhibited by a court confronted by a claim that section 42(1)(a) of the *Act* represents a rights violation that cannot be justified under section 1. This is because such a finding in relation to section 42(1)(a) could have broad repercussions in terms of numerous other defined benefit pension plans. If, for example, a court were to find the judicial annuity scheme to be unconstitutional on the basis of the discrepancies between the ratio of contributions to entitlements for judges appointed at different ages, this could call into question the validity of numerous other defined benefit pension plans in the public sector. This is because these other plans exhibit similar discrepancies. Thus, in my view, it is likely that a court would find any section 15 violation in relation to section 42(1)(a) to be justified under section 1.

CONCLUSION

For the reasons described herein, in my view the criteria for retirement benefits set out in s. 42(1)(a) of the *Act*, and, in particular, the "modified Rule of 80" which it establishes, would likely be found not to violate section 15 of the *Charter*. Moreover, in the event that such a violation were to be established, it is likely that it would be upheld as a reasonable limitation that can be demonstrably justified in a free and democratic society, under section 1.

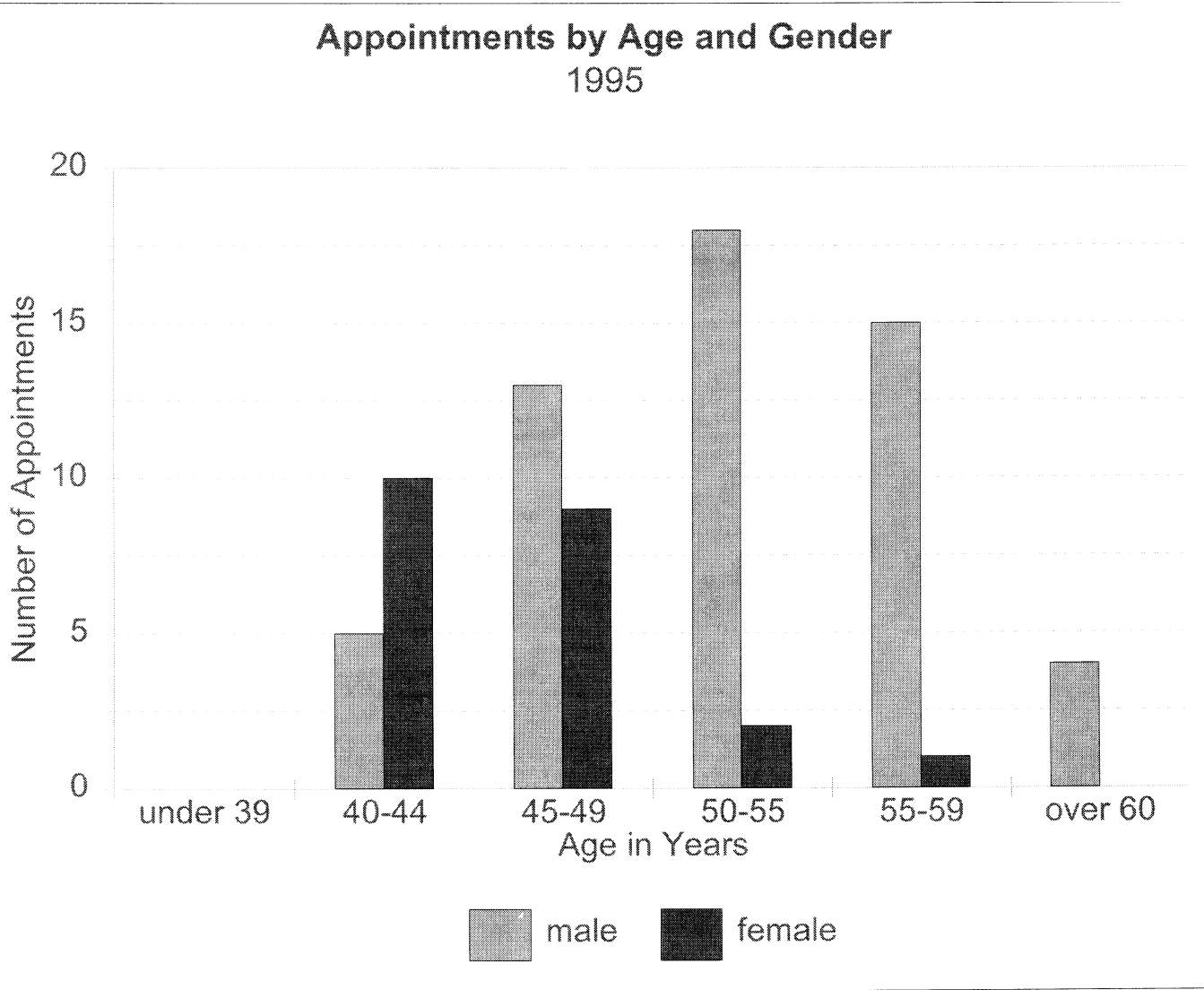
I would be happy to elaborate on any of the matters discussed herein at your convenience.

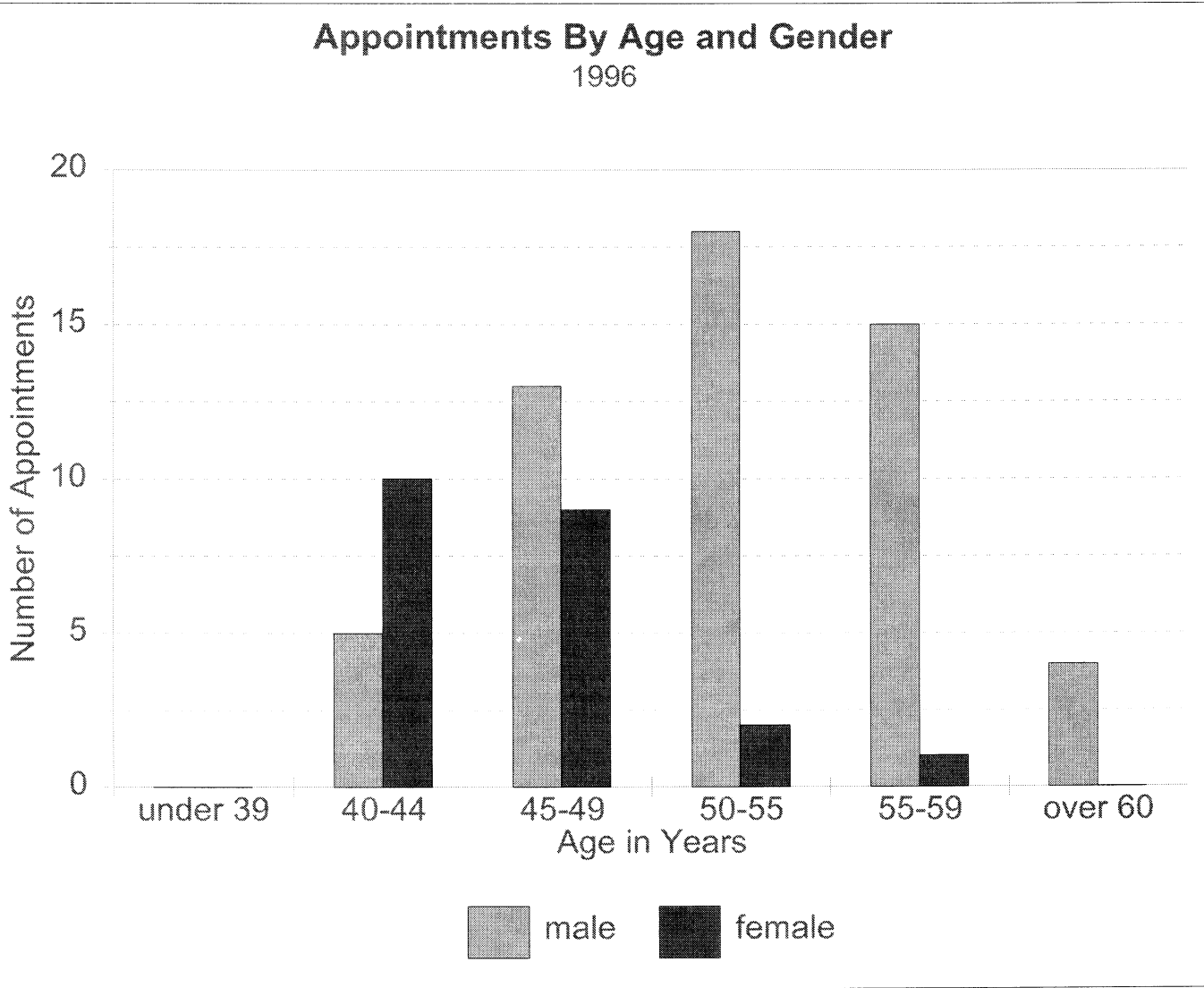
Yours very truly,

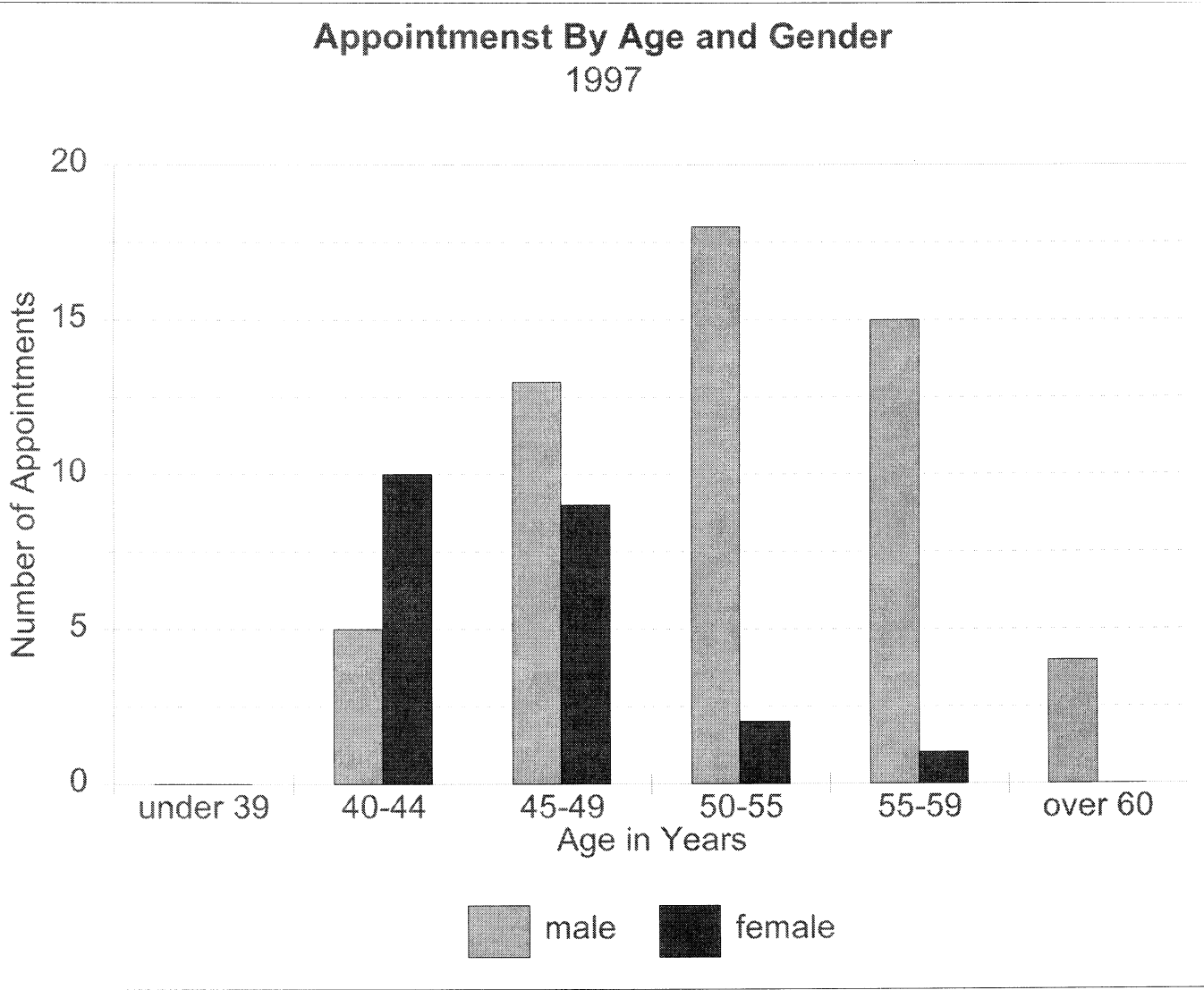
Patrick J. Monahan
Professor of Law

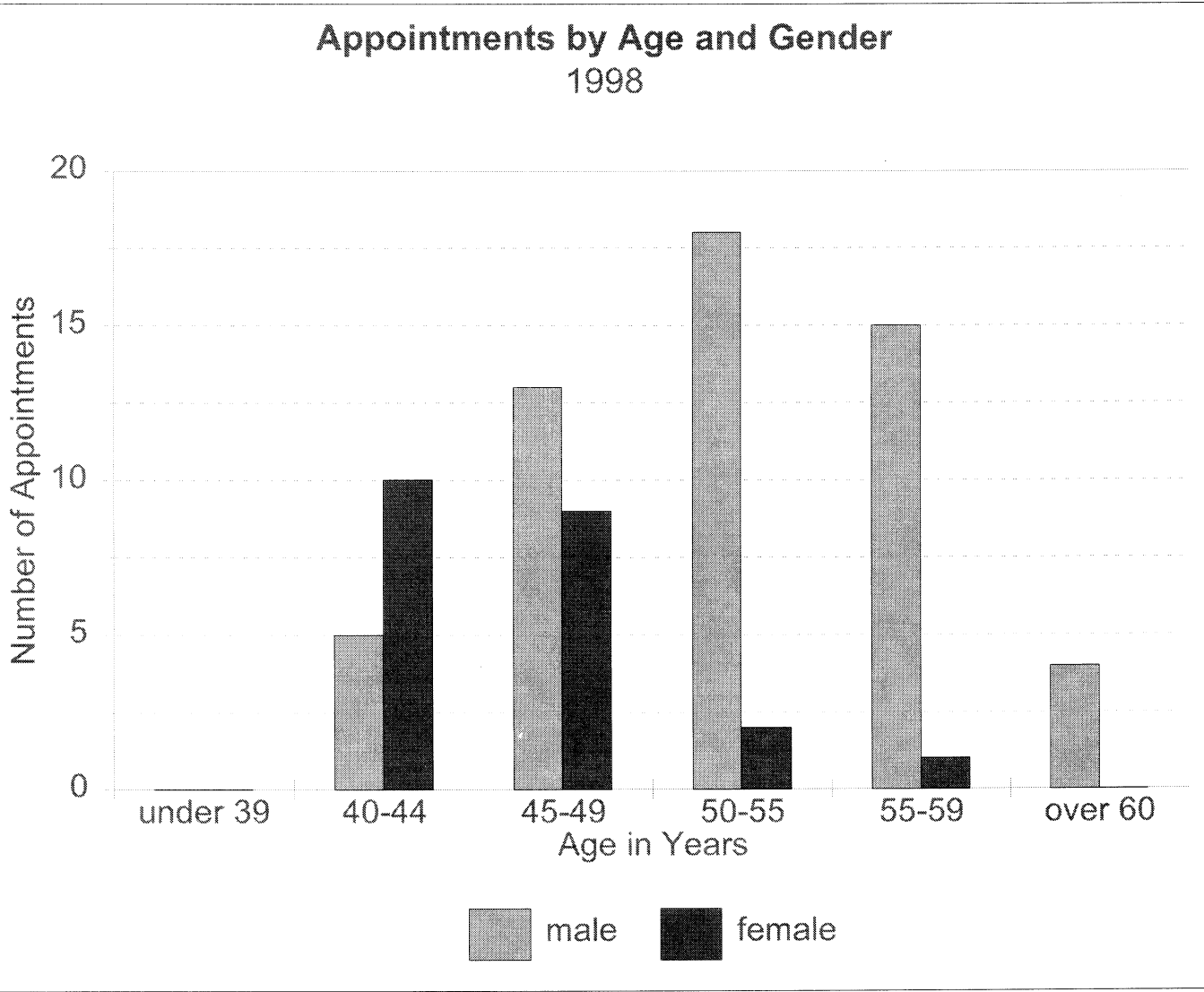
Judicial Appointments, 1995-1999
By Age and Gender

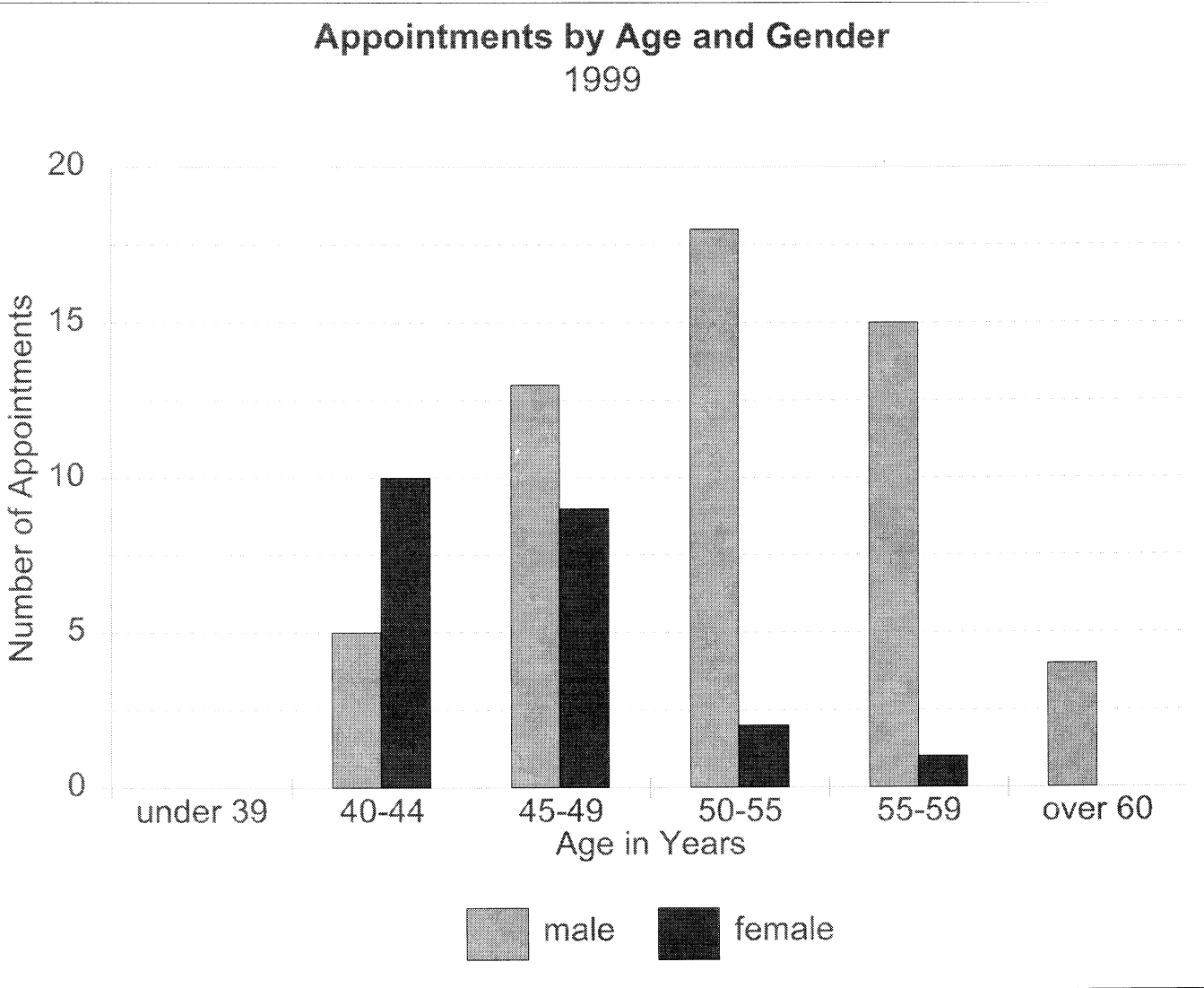
Year	Male							Female							total
	39	40-44	45-49	50-54	55-59	60 +	total male	39	40-44	45-49	50-54	55-59	60 +	total female	
1995	0	5	13	18	15	4	55	0	10	9	2	1	0	22	77
1996	1	2	10	10	4	0	27	1	8	7	1	1	0	18	45
1997	0	1	8	8	3	3	23	0	3	11	2	0	0	16	39
1998	0	1	12	8	15	2	38	0	0	9	8	0	0	17	55
1999	0	0	9	19	9	4	41	0	5	16	13	0	0	34	75
total	1	9	52	63	46	13	184	1	2652	26	2	0	107	291	


Appointments by Age and Gender
1995
20
15
10
5
0
Number of Appointments
under 39
40-44
45-49
50-55
55-59
over 60
Age in Years
male
female


Appointments By Age and Gender
1996
20
15
10
5
0
Number of Appointments
under 39
40-44
45-49
50-55
55-59
over 60
Age in Years
male
female


Appointmenst By Age and Gender
1997
20
15
10
5
0
Number of Appointments
under 39
40-44
45-49
50-55
55-59
over 60
Age in Years
male
female


Appointments by Age and Gender
1998
20
15
10
5
0
Number of Appointments
under 39
40-44
45-49
50-55
55-59
over 60
Age in Years
male
female


Appointments by Age and Gender
1999
20
15
10
5
0
Number of Appointments
under 39
40-44
45-49
50-55
55-59
over 60
Age in Years
male
female

Our File: P6120-5

14 April 2000

Mr. D. Sgayias, Q.C.
Senior General Counsel, Civil Litigation Section
Department of Justice
Room 2371
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Dear David:

Subject: Judicial Pensions

The purpose of this letter is to respond to the requests made in the 21 March letter from Mr. Drouin, Chairperson of the Judicial Compensation and Benefits Commission, and clarified in subsequent correspondence and telephone conversations.

A. Analysis of Judicial Pensions

The first request was for the proportion of the value of a judicial pension that is funded by the judges' own contributions of 7% of salary. Appendix A-I shows the proportion for the various age-sex combinations that were requested, all done on actuarial Basis I as defined in my 20 January letter. Appendices A-II and A-III are the same except that they are based on actuarial Bases II and III, respectively. Appendix A-IV is similar except that it focuses on a typical judge appointed at age 50 and retiring at age 72.

It should be noted that all of the normal costs shown in Appendices A-I to A-III are noticeably higher than the normal cost for the more typical member, as given in Appendix A-IV. The higher normal costs result from the assumption that those judges retire as soon as they qualify for a pension, which means that they contribute for as short a period as possible and collect their pensions as long as possible. In reality, relatively few judges retire as soon as possible.

B. Analysis of DM-3 Pensions

The analysis of DM-3 pensions is complicated by the fact that some, but not all, DM-3s receive a Special Retiring Allowance (SRA), which is an extra 2% pension for each year of service (to a maximum of ten years) in an eligible deputy minister position. Participants are not required to make contributions toward the cost of the SRA.

A DM-3 who is not eligible for an SRA would accrue a standard 2% annual PSSA[1] pension entitlement with a CPP offset reduction at age 65. The PSSA employee contribution rate was assumed to be frozen at the current[2] rate (i.e. 4.0% on salary up to the YMPE and 7.5% for all salary in excess thereof). For calendar year 2000, the average DM-3 contribution rate to the PSSA works out to 6.77% of total salary, where the assumed salary is $179,100 and the YMPE is $37,600.

DM-3s were assumed to be subject to the same demographic assumptions as judges because they would have much more in common with judges than with other PSSA members.

Appendices B-I to B-III show the results for DM-3 primary pensions only whereas Appendices C-I to C-III show the results for the total pension package, which includes any survivor pension that might eventually become payable. In these Appendices, it was taken that all those participating in the SRA would do so for the maximum possible ten years. In practice, the actual SRA participation period often falls short of the maximum.

C. Projection of Judicial Population

In my letter of 10 December 1999 to Mr. Peacock, I made projections for the next 50 years as to the proportion of the judicial population that would be eligible for retirement under the Rule of 80. Although not stated in that letter, I can confirm that such projections were made in accordance with the demographic assumptions of the most recent (i.e. March 1998) statutory actuarial report on the judicial pension plan.

It was assumed that sufficient new male judges would be appointed so that the male population would remain at 817 (i.e. the figure for March 1997) indefinitely. However, the female population was assumed to rise by 15% per annum initially with smaller increases thereafter until an ultimate annual increase of 2% per annum was first attained in the year 2014.

The assumed age distribution of the new appointees by sex was identical to the actual age distribution of the appointees by sex during the period April 1994 to March 1997, being as follows:

[1] In reality, part of the entitlement would come from an RCA; however, this distinction is of no relevance to an employee and has therefore been ignored herein.

[2] The PSSA specifies that the current rate will hold until 31 December 2003 and that it can be raised gradually thereafter.

Age Last Birthday at Appointment	Males (%)	Females (%)
35-39	1	7
40-44	9	38
45-49	34	42
50-54	34	9
55-59	16	4
60-64	6	0
Total	100	100

Average: 50.8 years 45.1 years

Based on the foregoing assumptions for the number and age of new entrants, the projected judicial population is as follows:

Year	Male Population	Female Population	Proportion Female (%)
1997	817	172	17
2003	817	330	29
2008	817	439	35
2013	817	492	38
2018	817	543	40
2023	817	599	42
2028	817	662	45
2033	817	730	47
2038	817	806	50
2043	817	890	53
2048	817	983	55

The actual female proportion as at 1 March 2000 was 23% (231 of 1,016 total), which fits in nicely with the foregoing chart. However, I note that the corresponding population of 1,016 is only marginally higher than the 989 as at 31 March 1997. The projected population of 1,147 for 31 March 2003 will not be realised if this trend continues.

The average age last birthday of the foregoing projected populations is as follows:

Year	Males	Females	Total
1997	60.6	50.0	58.7
2003	60.2	50.9	57.5
2008	59.8	53.0	57.4
2013	60.3	55.5	58.5
2018	60.7	56.7	59.1
2023	60.5	56.7	58.9
2028	60.4	55.9	58.4
2033	60.4	55.5	58.1
2038	60.5	55.7	58.1
2043	60.6	56.1	58.2
2048	60.6	56.2	58.2

The average age last of the males does not vary much from its ultimate figure of 60.6 years whereas that of the females increases strongly until the ultimate figure of 56.2 years is almost reached in 2013. The overall average age of the judiciary does not exhibit much annual variation from the ultimate figure of 58.2 years.

It should be noted that the average age at appointment during the three-year period ending March 2000 has increased by about two years for males and about three years for females relative to the statutory valuation assumption upon which the foregoing projections are based. If the analysis in my letter of 10 December 1999 were redone using these increased ages at appointment, the proportion of the judicial population eligible for a full pension would be somewhat lowered for the year 2018 and thereafter; as well, the average age would be somewhat higher in each future year.

D. Remaining Life Expectancies for Judges

Appendix D shows the remaining life expectancies for judges who retire at various ages. One set of expectancies is for retirements in future years' ranging from 2015 to 2022 while the other set assumes retirement in the year 2000. There is a noticeable difference between the two sets of figures because the statutory mortality assumption, upon which both are based, anticipates annual decreases in the general level of mortality.

I trust that the Commission will not hesitate to let you know if any further analysis is required.

Yours truly,

L.M. Cornelis

cc: J.-C. Ménard (OCA)
B. Peacock (TBS)

Our File: P6120-5

18 April 2000

Mr. D. Sgayias, Q.C.
Senior General Counsel, Civil Litigation Section
Department of Justice
Room 2371
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Dear David:

Subject: Benefit/Contribution Ratio in Defined Benefit Pension Plans

When a member of a defined benefit pension plan retires, the present value of the pension entitlement can be calculated on a given actuarial basis (i.e. demographic and economic assumptions). The present value can then be expressed as a multiple of the member's own accumulated required contributions to the plan. It is clear that the provisions of the plan will affect such ratio – for example, it will be infinite if the plan is non-contributory for the members. However, the ratio can also differ greatly for members of the same plan. The purpose of this letter is to discuss the reasons therefor.

For simplicity, the discussion shall be confined to a plan where the benefit formula is of the form

Years of Pensionable Service	**X**	**Unit Credit**	**X**	**Final Average Salary**

For example, under the PSSA one might retire with 30 years of pensionable service and a $50,000 average salary. With the 2% unit credit, the initial pension would be $30,000 per annum.

The key to the foregoing formula is that the amount of pension (and also the present value of the pension entitlement) is tied directly to length of service and final average salary, but in no way to the member's own accumulated contributions. That being the case, there can be a wide disparity of benefit/contribution ratios for members of the same pension plan.

Returning to the PSSA example of someone retiring in a given calendar year with a $30,000 annual pension, the present value of the pension entitlement would be maximised by factors such as:

- retirement being at the earliest possible age so that one is a pensioner for as long as possible;
- being a female rather than a male (assuming that one is unmarried), since females have longer life expectancies on average;
- having a younger spouse so that the survivor pension would be payable longer on average; and
- being in normal health rather being disabled.

Conversely the member's own accumulated contributions would be minimised if the salary were relatively low until the last five years (PSSA benefit is based on best five-year salary history). This would be the case if the member received a promotion late in his or her career.

It is clear that many factors can significantly affect the benefit/contribution ratio for an individual member, and so it is not surprising that significant variations can occur within the same plan.

I trust that you will contact me if there are any questions.

Yours truly,

L.M. Cornelis

cc: J.-C. Ménard (OCA)
B. Peacock (TBS)