CHAPTER 2

JUDICIAL SALARIES

The determination of compensation for judges is grounded in the constitutional imperative that the independence of the judiciary be fostered and maintained. This necessarily means that the evaluation of judicial salaries, and benefits, must begin with recognition of the special role in Canada occupied by judges and the unique responsibilities they bear. As described in the submission of the Government, the role and responsibilities of judges are "*sui generis*", that is, in a category or class of their own.[1] For our purposes, their role and responsibilities require that they be paid a salary and be provided with benefits that are adequate to ensure them a reasonable standard of living, both prior to and after retirement, in relation to their position and duties in our society, in order that they might continue to function impartially and fearlessly in the advancement of the administration of justice.

We detail in this Chapter those considerations underlying our approach to evaluation of the adequacy of current judicial salaries, our assessment of the issues raised before us and those other matters which we regarded as relevant and useful.

2.1 The Legal Framework

The constitutionally-mandated requirement of judicial independence has resulted in special provisions under our law relating to judges. Some of these provisions deny to judges, basic rights and opportunities available generally to most other Canadians. Other provisions establish special entitlements for judges. Some of the indicators of the unique responsibilities and role of judges are embodied in the Constitution itself, and in our constitutional jurisprudence. Others

[1] Submission of the Government dated December 20, 1999, at para. 31.

flow from general statutory provision as, for example, under the *Judges Act*. In combination, they define the legal parameters within which compensation policy for judges is to be determined.

Constitutional Principles

The primary constitutional indicator of the importance of judicial independence is found in section 100 of the *Constitution Act, 1867*. By this provision, Canadian judges are the only persons in Canadian society whose compensation, by constitutional requirement, is to be set by Parliament. As discussed in section 1.2 of Chapter 1, constitutional jurisprudence, established most recently by the *PEI Reference Case*, requires that this be done following a process of review by independent compensation commissions.

Constitutional principles also protect judicial salaries from falling below an acceptable minimum level. As stated by Chief Justice Lamer:

> *…Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation, as is witnessed in many countries.*[2]

In *The Queen v. Beauregard*,[3] Chief Justice Dixon quoted with approval the following provision of the Universal Declaration of the Independence of Justice (1983), which affirmed that the salaries of judges:

> *…[must be adequate] commensurate with the status, dignity and responsibility of their office, and be regularly adjusted to account fully for price increases.*[4]

However, as noted by the Department of Justice in its submissions to the Crawford Commission in 1993:

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[2] *Supra*, Chapter 1, fn. 4, at para. 135, and Submission of the Government dated December 20, 1999, at para. 24.
[3] [1986] 2 S.C.R. 56.
[4] *Ibid*., at para. 33.

> *There is no certain way of determining what amount of salary is necessary to provide the degree of financial security required for judicial independence. The amount of salary has always been, and will always be, a judgment call, and the unique responsibility for making that judgment call is placed, by our constitution, on Parliament. …*[5]

Also relevant is the constitutional prohibition against judges negotiating any part of their compensation arrangements, including salaries, with the executive or representatives of the legislature. This prohibition on negotiation is exceptional. No similar restraint applies to any other class of persons in Canada. Except for the process of compensation commissions, it requires that judges refrain from negotiating or lobbying for improvements in their compensation arrangements. Under our traditions and laws, judges do not publicly advocate on such matters. As noted by Chief Justice Lamer in the *PEI Reference Case:*

> *I recognize that the constitutional prohibition against salary negotiations places the judiciary at an inherent disadvantage compared to other persons paid from the public purse, because they cannot lobby the executive and the legislature with respect to their level of remuneration. The point is put very well by Douglas A. Schmeiser and W. Howard McConnell in The Independence of Provincial Court Judges: A Public Trust (Toronto: Canadian Association of Provincial Judges, 1996), at p. 13:*
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> > *Because of the constitutional convention that judges should not speak out on political matters, judges are at a disadvantage vis-à-vis other groups when making a case to governments for increments in salaries.*
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> *I have no doubt that this is the case, although to some extent, the inability of judges to engage in negotiations is offset [by the constitutional guarantees requiring an independent compensation commission process]. In particular, the mandatory involvement of an independent commission serves as a substitute for negotiations, because it provides a forum in which members of the judiciary can raise concerns about the level of their remuneration that might have otherwise been advanced at the bargaining table…*[6]

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[5] *1975 Equivalence – An Explanation*, Department of Justice, October 1992, at 7, contained at Appendix 3 to the February 14, 2000 Submission of the Conference and Council.

[6] *Supra*, fn. 2, at para. 189.

While the *PEI Reference Case* makes it clear that this prohibition on negotiation does not preclude expressions of concern or representations by Chief Justices and Chief Judges, and organizations that represent judges, to governments regarding the adequacy of judicial remuneration, nonetheless, the prohibition means that judges do not enjoy a basic right of other Canadians – the right to openly assert the need, and engage in negotiations, for improvements in compensation.

In part to offset the prohibition on negotiation, and the politicization that would otherwise result with respect to judicial compensation, the Judiciary enjoys the benefit of mandatory annual indexation of their salaries, as a matter of law. This entitlement, established by section 25 of the *Judges Act*, is also unique. Since 1981, automatic indexation according to the Industrial Aggregate Index (then known as the Industrial Composite Index) effective each April 1st, has been provided for by statute.[7]

Statutory Provisions

The special position of judges in our society is also reflected in a number of statutory provisions. For example, under our laws:

i) judges are precluded from engaging in any other occupation or business other than their judicial duties;[8] and

ii) entry to the class of persons comprising the Judiciary is confined to lawyers of at least ten years standing at the bar of any province in Canada. This constitutes an entry level eligibility requirement particular to judges.[9]

[7] The Industrial Aggregate Index (the "IAI") is a measure of wages. It is intended to, and in many years does, encompass more than changes in the cost of living as reflected in the consumer price index (the "CPI"). Over the period 1992-1998, the cumulative increase in the IAI was 14.51%, compared to a cumulative increase in the CPI of 10.2%. The IAI, however, does not always exceed the CPI in every year. For example, the increase in the IAI used to index judges' salaries as of April 1, 2000 was only 0.67%, compared to an increase of 1.7% in the CPI over the same period. This was the lowest level for the IAI experienced since 1981.

[8] Section 55 of the *Judges Act* (Canada).

[9] Section 3 of the *Judges Act* (Canada). This provision, of course, is designed to ensure that candidates for appointment to the Bench have achieved the requisite level of experience, judgment and skill, as well as seniority and profile within the legal profession, as to warrant consideration of their candidacy for appointment. In essence, it represents a statutory form of competency threshold.

Other Considerations

All of the constitutional and statutory factors described above contribute to the overall legal framework within which any analysis of the adequacy of judicial salaries must be undertaken. We were mindful of these factors, and this framework, in approaching our task.

Other considerations are also relevant, however, to the assessment of judicial salaries. Foremost among these, arguably, is the fact that the nature of the job required and expected of Canadian judges has undergone significant change over the years. 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. There is no reason to conclude that this will change during the planning period relevant to our report.

We also recognized the constraints facing judges should they become dissatisfied with working conditions or compensation arrangements. In practical terms, should the morale of members of the Judiciary deteriorate because of such matters following appointment to the Bench, there is no ready forum or remedy, short of resignation by individual judges or litigation, by which the Judiciary may seek to achieve a negotiated resolution of complaints or dissatisfaction. Once again, under our constitutional system, the Judiciary does not speak publicly on such issues. They are limited to seeking redress once every four years, in the process of a compensation commission review. This constitutes a further limitation on the options of judges, in contrast to those available to other Canadians.

Moreover, many concepts and mechanisms that are basic and useful in the setting of compensation policy in the private and public sectors traditionally have not applied, and in some cases cannot apply, to the Judiciary. While this emanates from sound public policy and, in some instances, in consequence of constitutional requirements, it does mean that the potential for utilizing flexible or creative approaches to compensation policy for the Judiciary is constrained. For example:

i) in the private corporate sector, it is common to set compensation policy, including salary levels, for senior managers and executives taking into account and integrating where appropriate some combination of bonus plan arrangements, profit-sharing, gain-sharing, merit awards, long-term cash incentives, stock purchase plans and stock options. Some of these mechanisms can and do apply to lawyers engaged in the practice of law with law firms or corporations. They have no application, however, to the Judiciary;

ii) similarly, resort cannot easily be had to compensation techniques sometimes utilized in the public service. While performance pay, bonus arrangements, "at-risk" or variable pay and recruitment or signing bonuses all potentially play a role in the determination of compensation for senior managers or Order-In-Council appointees within the Government, such concepts are not easily imported into the design of a judicial compensation scheme. In any event, the application of some of these mechanisms to the Judiciary, in our view, would not be in the public interest; and

iii) concepts of promotion and merit pay have no application in the judicial context.

These factors make the evaluation of judicial salaries complex, and the prospects for innovation remote. The Commission believes it is important, therefore, to recognize that both practical constraints and legal requirements define the boundaries for setting judicial compensation policies.

We have also taken into account three other material considerations.

First, as subsequently discussed in this report, the annuity arrangements in place at present for the Judiciary are unique in Canada in many respects. This is so for many important policy and constitutional reasons. As observed by several Triennial Commissions, the value of a judicial annuity constitutes a significant portion of the total compensation available to judges. In our view, the assessment of the adequacy of judicial salaries cannot be undertaken prudently, or fairly, without examination of the total compensation of judges, including pension benefits. Consideration of the value of the annuity benefit available to judges upon retirement is an important, although not determinative, factor in setting salary levels.

Second, in several submissions received by the Commission, it was emphasized for varying purposes that the demographics of the Judiciary have changed significantly such that they have

come to include, over time, the appointment of a greater number of young and female judges. The achievement of greater diversity in the demographic profile of the Bench, a laudable policy objective identified and supported by the Government, Bench and bar over the years, also carries with it compensation consequences. One of these consequences is increased life expectancies of some appointees in comparison to others, as well as greater anticipated tenure of younger appointees on the Bench until eligibility for retirement is achieved, in contrast to the anticipated tenure of colleagues appointed at comparatively older ages. These factors have implications both for the evaluation of judicial salaries and to issues concerning the current pension arrangements for the Judiciary.

Finally, in contrast to both the private and public sectors, retention factors traditionally have not played a material part in the setting of judicial salaries. Historically, few judges resigned their positions prior to eligibility for retirement, save for health or personal reasons. In these times, it would be unwise to assume that retention is not a relevant factor in judicial compensation.

2.2 The Positions of the Parties

At present, puisne judges (excluding puisne judges of the Supreme Court of Canada) are paid a salary of $179,200 per annum, inclusive of indexation as of April 1, 2000, in accordance with section 25 of the *Judges Act*. Also effective April 1, 2000, Chief Justices and Associate Chief Justices of the Superior, Federal and Tax Courts receive a base salary of $196,500, and Justices of the Supreme Court of Canada receive a base salary of $213,300. The April 2000 adjusted salary for the Chief Justice of Canada is $230,200.

On the issue of the current adequacy of these judicial salaries, the principal parties were starkly divided.

The Conference and Council urged that judicial salaries be increased to at least $225,000 per year effective April 1, 2000 and, further, that provision be made to supplement that base salary with further staged increments, in addition to the mandatory annual statutory indexing, for the duration of the work of this Commission as currently constituted and as may be necessary to

reflect any parallel movement in the remuneration of senior Deputy Ministers within the Government.

The request for a $225,000 salary level was premised in part on the proposition that such an increase was warranted to establish a necessary and reasonable relationship between judicial remuneration and that of senior lawyers at the bar from whose ranks judges are traditionally appointed. In addition, it was argued that recent increases in the salaries of senior Deputy Ministers in the Government supported such a salary level. The Conference and Council also pointed out that review of judicial compensation is now undertaken at four-year intervals rather than three year intervals as was the case prior to 1998. Thus, judicial salaries will not be reviewed again until at least the fall of 2003. In contrast, the compensation of senior Deputy Ministers and others within Government will next be reviewed in 2001. Moreover, based on past history, some delay may be anticipated in implementing those salary recommendations of this Commission that are accepted by Parliament. For all of these reasons, the Judiciary argued that it was now time for a "*real and substantive increase*" in the salaries of the Judiciary.

In contrast, the Government submitted that the current level of judicial salaries, coupled with automatic annual adjustments mandated by the statutory indexation provision, reflects an adequate and acceptable level of judicial remuneration. In the alternative, if the Commission concluded that an increase in judicial salaries was necessary based on compensation trends in the federal public service, the maximum increase that could be justified would be 5.7% as of April 1, 2000, inclusive of statutory indexing effective the same date.[10]

The Government submitted that the effect of section 25 of the *Judges Act* has been *"not merely to protect judicial salaries against inflation, but to deliver an increase in salary in real terms"*.[11] In addition, it was submitted that the level of existing judicial salaries fully reflects the recommendations of the Scott Commission (1996), which expressed concern about the erosion of judicial salaries resulting from the freeze on the salaries of judges and other publicly - remunerated officials during the five-year period commencing December 1992 and ending

[10] Submission of the Government dated December 20, 1999, at paras. 25 and 40.
[11] *Ibid.*, at para. 18.

March 31, 1997 pursuant to the *Public Sector Compensation Restraint Act* (Canada).[12] As a result of that statute, annual statutory indexing of judicial salaries was suspended for a five-year period and no other alterations in the level of judicial salaries were made.

The Scott Commission recommended 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*".[13] This recommendation was implemented over two years, with the result that judicial salaries were increased by 4.1% on April 1, 1997 and by an additional 4.1% on April 1, 1998. The Government asserted that these increases were in addition to the restoration of annual indexing adjustments and that they had the effect of restoring judicial salaries to the levels that would have been attained if indexing had not been suspended during the five years of the freeze.[14]

2.3 The Suggested Comparators

The Conference and Council suggested to the Commission that the adequacy of current judicial salaries should be examined with reference to various comparators, namely:

i) the salaries at present of the most senior level of deputy ministers within the Government ("DM-3s");

ii) the incomes of the top one-third of lawyers in the private practice of law in Canada, to the extent measurable by available income tax data; and

iii) the salaries available to judges, including senior judges, in other jurisdictions including England, Australia and New Zealand.

As later discussed, the Government expressed concerns regarding the applicability, and reliability, of such comparators.

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[12] *Ibid.*, at para. 11.
[13] Scott (1996), at 16.
[14] *Supra*, fn. 10, at para. 12.

Because of the special legal and other considerations that establish the framework within which judicial salaries are to be assessed and determined, no suggested comparator to the Judiciary is truly apt. Nonetheless, each suggested comparator informs the overall assessment of the adequacy of judicial salaries. In this context, some comparators are more useful than others.

We concluded that all of the suggested comparators should be included in our considerations but, as earlier noted, a strictly formulaic approach to the determination of an adequate salary level for judges was not desirable or appropriate. Our conclusion in this regard was reinforced by our review of the reports of various Triennial Commissions, each of which considered one or all of the comparators suggested to us by the Conference and Council, and each of which placed greater or lesser weight on them depending upon their view of prevailing circumstances at the time of their respective inquiries. Thus, while one comparator might be apposite during the planning horizon of one compensation commission, another suggested comparator might be more relevant during the inquiry of another, depending upon all of the considerations then relevant. In our view, at this time, no one comparator can or should dominate.

Various Triennial Commissions discussed in their reports the concept of "relationships" between judicial salaries and the salaries of DM-3s or the compensation of senior members of the bar. In some instances, recommendations concerning judicial salaries were based on a suggested "gap" between the salary level of judges and the salary of one or more comparator groups. Thus, all of the Lang (1983), Guthrie (1987), Courtois (1990) and Crawford (1993) Commissions specifically considered the historic relationship between judicial salaries and the salaries of DM-3s, and the status of that relationship at the time of their respective inquiries. Similarly, those Commissions and the Scott Commission (1996) considered the incomes of legal practitioners to be a relevant and useful comparator and the relationship between judicial salaries and the incomes of private practitioners an important factor in formulating recommendations on judicial salaries. In the case of the Scott Commission (1996), as discussed further below, this comparator was regarded as the most significant one for the purposes of that Commission's salary recommendations.

In our view, the criteria now enumerated in subsection 26(1.1) of the *Judges Act* expressly permit consideration of such relationships. The criterion identified in subsection 26(1.1)(c), for example, is directed expressly to the issue of recruitment of suitable candidates for the Bench. Traditionally, most judges in Canada are appointed from the ranks of private legal practitioners. Accordingly, those factors constituting incentives or disincentives to the seeking of judicial office by private legal practitioners are relevant to recruitment of judicial candidates. Compensation differentials are clearly one of the factors influencing the decision by practitioners to seek appointment to the Bench. Similarly, none of the parties before this Commission took issue with the proposition that the compensation of DM-3s could be considered by this Commission, if thought by us to be relevant, under subsection 26(1.1)(d).

Part of our principal mandate under the *Judges Act* is to inquire into the adequacy of the salaries of the Judiciary. "Adequacy" is a relational term. In seeking to determine its meaning in the context of judicial salaries, several questions arise: Adequate for what purpose? Adequate in relation to who, or what? Adequate over what time frame? Against the background of the constitutional principles articulated in the *PEI Reference Case*, we have concluded that the operative meaning of "adequacy", to guide our work, requires us to determine what constitutes a fair and sufficient salary level for the Judiciary taking into account the criteria set out under subsection 26(1.1). What is required in this context is a proper judicial salary level, not a perfect one.

The DM-3 Comparator

The number of DM-3s fluctuates by reason of resignations and promotions.[15] There were 10 Deputy Ministers within Government at the DM-3 level as of late November 1999. As of April 1, 2000 there were 13 incumbent DM-3s.

[15] Responses to Requests Provided by the Government of Canada to the Judicial Compensation and Benefits Commission dated April 19, 2000, at para. 5.

As a result of a report in 1998 by the Strong Committee[16] on Senior Level Retention and Compensation, significant enhancements to the salary levels of DM-3s, among others, were recommended and ultimately accepted by the Government. In summary, the Strong Committee recommended a base salary increase for DM-3s of 19.4% effective April 1, 1998, plus variable at-risk pay. As implemented to date, effective April 1, 1999, the mid-point base salary level for DM-3s was set at $188,250, within an overall salary range of $173,000 to $203,500. Table 2.1 below, reproduced from materials provided to the Commission by the Government,[17] illustrates the increases in the mid-point of the base salary of DM-3s since 1992.

Table 2.1
Mid-Point and Base Salary Ranges: DM-3s

Date	Mid-Point Salary	Base Salary Range
April 1, 1992	$150,750	$136,000 - $165,500
June 1, 1992	$155,300	$140,100 - $170,500 (3% legislated increase effective June 1, 1992)
April 1, 1993	$155,300	$140,100 - $170,500
April 1, 1994	$155,300	$140,100 - $170,500
April 1, 1995	$155,300	$140,100 - $170,500
April 1, 1996	$155,300	$l40,100 - $170,500
April 1, 1997	$155,300	$140,100 - $170,500
April 1, 1998	$188,250	$173,000 - $203,500 (19% increase as a result of Advisory Committee recommendations)
April 1, 1999	$188,250	$173,000 - $203,500

[16] First Report of the Advisory Committee on Senior Level Retention and Compensation, dated January 1998 (the "Strong Committee").
[17] Letter from the Department of Justice, Canada, dated December 9, 1999.

In addition to their base salary level, DM-3s have been entitled since July 1, 1996 to some form of performance, variable or at-risk pay. The Strong Committee recommended a new scheme of variable, at-risk compensation for DM-3s, to replace the previously existing performance pay scheme and to be paid on the basis of performance measured against agreed targets and the achievement of business plans. This variable pay component was regarded by the Strong Committee as an integral part of the total compensation for DM-3s. It is a pensionable component of compensation for these public servants in that it forms part of the compensation against which annual pension accrual entitlements are calculated. Fourteen persons received at-risk pay as DM-3s as of April 1, 1999.

The Strong Committee recommended that at-risk or variable pay for DM-3s up to a maximum of 10% of salary be introduced by April 1, 1999, and that a maximum of 20% of salary be introduced by April 1, 2001 (for performance in fiscal year 2000-2001). Table 2.2 below, illustrates the range of at-risk awards that were made as of April 1, 1999.[18]

Table 2.2
Distribution of 'at-risk' pay for DM-3s (14 eligible)
As of April 1, 1999

Percentage of 'at-risk' pay	Number of DM-3s
Between 0% and 5%	2 (average $4,400)
Between 5.5% and 7%	4 (average $13,200)
Between 7.5% and 10%	8 (average $17,735)

Overall average 'at-risk' pay: $15,800
Overall average 'at-risk' pay as % of average salary: 8.19%

[18] Submission of the Government dated March 31, 2000, at Tab 48.

As appears from Table 2.2, the average at-risk pay effective April 1, 1999 ranged from $4,400 (2 DM-3s) to $17,735 (8 DM-3s). The overall average at-risk pay, as of the same date, was $15,800 or 8.19% of average salary.

The Government argued that the DM-3 comparator was a weak one for the purposes of assessing the adequacy of current judicial salaries and, in any event, that it should not be determinative of our recommendations concerning judges' salaries. It was suggested that the overall increase in the compensation of DM-3s, as recommended by the Strong Committee and accepted by the Government, came about because DM-3s did not have the advantage of automatic annual indexing of their salaries, in contrast to the benefit afforded judges under section 25 of the *Judges Act*. Accordingly, if the DM-3 comparator was to be used by the Commission, it was the Government's position that regard should be had only to the mid-point of the base salary level of DM-3s, namely, to the sum of $188,250, without any regard to at-risk awards. This would result in a 5.7% salary increase for puisne judges[19], inclusive of annual statutory indexing as of April 1, 2000.

Several observations should be made:

i) the Commission does not accept the Government's submission that no regard should be had to the at-risk component of the DM-3 compensation package in comparing judicial salaries with those of DM-3s. Similarly, the Commission does not agree with the implied submission of the Conference and Council, that the proper comparison point is the maximum at-risk award. It is not clear what proportion of at-risk pay is relevant in making the compensation comparison between judges and DM-3s but, in our view, it is not zero, and it is not 100%. We concluded that neither of these approaches is appropriate;

ii) while the relevant proportion, for comparison purposes, of DM-3 at-risk pay cannot be precisely ascertained, one can consider the average of actual at-risk awards, as a percentage of the maximum. Based on the most current information available (that is, the at-risk awards made as of April 1, 1999), this average was 82%. If the 82% average payout effective as of April 1, 1999 is added to the mid-point of the DM-3 base salary range ($188,250), it results in total compensation of $203,686 ($188,250 plus $15,436);

[19] That is, an increase of $10,250 from a 1999 base of $178,000.

iii) based on the information provided to the Commission, it is not possible to ascertain the number of DM-3s who were at the high end of the total salary range as of April 1, 1999. In the interests of maintaining the privacy of the affected individuals, the Commission is unaware of what any individual DM-3 earns, either as base salary or for at-risk pay as of April 1, 1999. What is clear from the available information, however, is that the overall total range for DM-3 compensation as of April 1, 1999 was $173,000 (the lowest end of the base salary range without any at-risk award) to a maximum of $223,850 (the highest end of the base salary range, plus the maximum at-risk award of $20,350);

iv) at the time of finalizing our report, the at-risk awards for DM-3s effective as of April 1, 2000 had not yet been determined. The Strong Committee recommended variable pay for DM-3s up to a maximum potential of 10% of salary for fiscal years 1998-99 and 1999-2000, to reach 20% for fiscal year 2000-2001. The Government informed us that, "*consistent with the recommendations, the maximum available in respect of 1998-99 was 10% and is likely to be 10% for 1999-2000*".[20]

Assuming, therefore, a 10% maximum for at-risk awards in 1999-2000, the total range for DM-3 compensation as of April 1, 2000 would be identical to the range as of April 1, 1999, that is, $173,000 to $223,850; should the at-risk awards again average 82% of maximum, applying the average at-risk award to the mid-point of the base salary range would result in an overall compensation level of $203,686 as of April 1, 2000;

v) should the Government accept the Strong Committee recommendation to increase at-risk awards as of April 1, 2001 (for performance in fiscal year 2000-2001) to a maximum of 20% of salary, the total range for DM-3 compensation as of that date will be increased to $173,000 (the lowest end of the base salary range without any at-risk award) to $244,200 (the highest end of the base salary range, plus the maximum at-risk award of $40,700). If actual at-risk awards are again in the range of 82% of maximum, application of this average to the mid-point of the base salary range would result in an overall compensation level of $219,123 as of April 1, 2001 ($188,250 plus 82% of 20% of salary);

vi) if one were to assume that all DM-3s will receive the maximum 20% at-risk award as of April 1, 2001, the mid-point of the compensation range would be adjusted by 20% to yield a total salary of $225,900 ($188,250 plus $37,650). The request of the Conference and Council before this Commission for a salary level of $225,000 emanates from this calculation; and

[20] Submission of the Government dated January 21, 2000, at para. 16.

vii) the Strong Committee is scheduled to again review compensation for senior executives within the Government, including DM-3s, in 2001. The Commission has taken into consideration the timing of that scheduled compensation review in comparison to the timing of the next required review of judicial compensation and benefits, in the fall of 2003.

Before the Triennial Commissions, much was said about the concept of "1975 equivalence", referring to the historic relationship of rough equivalence between the salaries of judges and those of senior deputy ministers in the federal public service. This concept of the relational aspects of judicial salaries to those of DM-3s, was a significant issue for each Triennial Commission, including the Scott Commission. Both the Guthrie and Scott Commissions (1986 and 1996, respectively) observed that 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 DM-3s. They suggested, however, that thereafter the relationship again deteriorated. By 1989 the level of judges' salaries was said to be $8,200 below 1975 equivalence.[21]

In submissions in 1993 by the Department of Justice to the Crawford Commission, the Department, argued that:

> *Despite the historically lower salaries of judges as compared with senior deputy ministers, the government has indicated to the judges that a rough equivalence between judicial salaries and the midpoint of the DM-3 salary scale would be considered appropriate. Support for this sort of rough parity between judges and top-level public servants is found in comparative figures from other common-law countries that are most like Canada. …*
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> *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.*[22]

[21] Lang (1983), at 6; Guthrie (1987), at 8; Courtois (1990), at 10 and see *Supra*, fn. 5, at 3.
[22] *Ibid.*, fn. 5 at 6.

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.[23]

In this context, the Commission noted the suggestion by the Scott Commission (1996) that there were two contributing factors to erosion in judicial salaries, the first only of which was attributable to the withdrawal of statutory indexing and the second of which was occasioned by the suggested failure of governments to introduce 1975 equivalency.[24] We agree with the suggestion made by the Department of Justice in 1992 that the concept of 1975 equivalence may be less useful today than it once was to earlier compensation commissions. We were concerned, nonetheless, to track the historical relationship between the mid-point salary levels of DM-3s and judges. Table 2.3 below, reproduced from information provided by the Government, tracks the historical salary data of Superior Court Judges and DM-3s at mid-point of salary range, from 1980 to 2000.[25]

Based on Table 2.3, it appears that by 1989 the salaries of Superior Court Judges were $10,850 below the mid-point salary level of DM-3s. A disparity between the salary levels of such judges and DM-3s persisted until 1991 (in reducing amounts). In 1992 the situation was reversed and the judicial salary level became slightly more per annum than the base mid-point salary level of DM-3s. This remained the case for the next four years, while wage restraint measures were in effect. In 1997, as a result of partial implementation in that year of the salary recommendations of the Scott Commission (1996), the judicial salary level became $10,200 higher than the mid-point base salary level of DM-3s. By 1998, when salary levels for DM-3s were adjusted as a result of the Strong Committee recommendations, the base salary level for DM-3s was increased to a mid-point amount of $188,250, the level at which it remains today. After implementation in 1998 of the remaining aspects of the Scott Commission's salary recommendations for judges, a salary gap or differential was again created between the salary level of judges and that of DM-3s, in amounts ranging from $12,450 (1998) to $9,050 (2000).

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[23] *Ibid.*, at 5.
[24] Scott (1996), at 15 to 16.
[25] *Supra*, fn.15, at Appendix 57.

Table 2.3
Historical Salary Data – 1980 to Present

Year	Superior Court Judges	DM-3 – Mid-Point
1980	$70,000	$77,300
1981 (Apr)	$74,900	$86,750
1981 (Nov)	$74,900	$91,750
1982	$80,100	$97,250
1983	$84,900	$102,105
1984	$89,100	$105,675
1985	$105,000	$110,950
1986	$115,000	$110,950
1987	$121,300	$126,500
1988	$127,700	$134,550
1989	$133,800	$144,650
1990	$140,400	$150,750
1991	$147,800	$150,750
1992	$155,800	$155,300
1993	$155,800	$155,300
1994	$155,800	$155,300
1995	$155,800	$155,300
1996	$155,800	$155,300
1997	$165,500	$155,300
1998	$175,800	$188,250
1999	$178,100	$188,250
2000	$179,200	$188,250

Note: The salaries in Table 2.3 are as of April 1 of the year in question. The only exception is for 1981; the first entry is for April 1; the second is for November 1, the date on which executive classifications and salaries were restructured.

To the extent then, that rough equivalency between judicial salaries and the remuneration of DM-3s was the desired outcome, the basic salary levels of these groups have been "out-of-sync" for the last four years. When it is recognized that variable, at-risk pay for DM-3s became substantial in 1998 as a result of the adoption of the recommendations of the Strong Committee, the pay gap between the two groups becomes more pronounced.

We have considered this matter in detail and have examined the various approaches taken by Triennial Commissions, the Judiciary and Government depending upon the timing and circumstances applicable to previous judicial compensation reviews. 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*".[26]

This approach is consistent, in our view, with the conclusions reached by successive Triennial Commissions that judicial salaries are not to be addressed *"as though judges were subject to the conditions of service of federal government employees"*[27] because they are *"a distinct group with compensation requirements that set them apart from the public service"*.[28] This proposition is not simply a matter of policy perspective. It has long been recognized in the relevant jurisprudence. As articulated by 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.*[29]

More recently, the Supreme Court of Canada in the *PEI Reference Case* unequivocally confirmed that judges are not to be regarded as civil servants for the purposes of compensation policy. As stated by Chief Justice Lamer:

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[26] Scott (1996), at 13; Courtois (1990), at 10.
[27] Lang (1983), at 3.
[28] Guthrie (1987), at 7.
[29] *Ibid.*, at 7.

> *…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.*[30]

In this context, it is clear that the salaries of judges are not to be set automatically based on the remuneration of public servants. To do so would be to treat judges, indirectly, as part of the executive branch of government. That does not mean, however, that the salaries of judges must be set without any regard to remuneration levels within the senior ranks of the Government, or that they should be permitted to lag materially behind the remuneration available to senior individuals within the Government. To allow this to occur, would be to legitimize a financial gap between the overall remuneration of judges and the remuneration of those within the Government who, historically, have been regarded as possessing the same characteristics of skill, integrity, talent and leadership required of judges.

We have concluded, therefore, as did successive compensation commissions before us, that the remuneration of DM-3s at the time of our inquiry and for the term of our mandate is relevant to our assessment of the adequacy of judicial salaries and, further, that rough equivalency between the overall remuneration of DM-3s and the salary level of judges is both proper and desirable in the public interest.

Incomes of Private Practitioners

The appropriateness and utility of examining the relationship between judicial salaries and the incomes of lawyers in private practice, as earlier noted, was affirmed by various Triennial Commissions. Just as the concept of a relationship between remuneration levels of DM-3s and judges has been found worthy of support, so too has the concept of a relationship between the incomes of above-average lawyers and salaries of judges.

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[30] *Supra*, fn. 2, at 640, para. 143.

The Lang Commission (1983) supported maintenance of a proportionate relationship between the salaries of Superior Court Judges and the professional incomes of senior members of the bar because it is the latter class of persons who, in the public interest, should be attracted to the Bench. It was the conclusion of that Commission that such a proportionate relationship should be maintained *"… 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"*.[31]

Thirteen years later, the Scott Commission was more strongly of this view. It concluded that the relationship between judicial salaries and the incomes of lawyers in private practice was a "far more significant aspect" of judicial compensation than was the relationship between DM-3s and judges' compensation.[32] The Scott Commission felt that the entitlement of judges to automatic statutory indexing of their salaries was reflective of much more than a statutory device designed merely to prevent erosion of salaries from inflation. Rather, it suggested, the provisions of section 25 of the *Judges Act,* 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.*[33]

The Conference and Council strongly urged the Commission, when assessing judicial salaries, to have regard to the available data concerning incomes of lawyers in private practice including those, in particular, within the top third of income earners based on reported income tax data.

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[31] Lang (1983), at 3.
[32] Scott (1996), at 14.
[33] *Ibid*., at 14 to 15.

The Government argued that various difficulties arise when such a comparison is undertaken. These difficulties concern both the availability of income data and issues relating to the appropriate comparator segment of the legal profession. In raising these concerns, however, the Government did not argue that any comparison with the incomes of members of the legal profession was inappropriate or irrelevant.[34]

Other groups also supported consideration by us of the incomes of private practitioners. The Canadian Bar Association ("CBA"), through its Standing Committee on Pensions for Judges' Spouses and Salaries, provided the Commission with both written and oral submissions on the matter of judicial salaries. The CBA expressed concerns that:

> *…judicial salaries are falling farther and farther behind those of senior practitioners, who form the pool from which judges are selected. Except for indexation to reflect inflation, federally appointed judges have not received a salary increase for over a decade. Indexation does not take into account that salaries for senior practitioners, as determined by the market, probably increased more than the cost of living.*
>
> *As a result, the CBA recommends that judges receive a salary increase over and above indexation. To determine the appropriate level of salary, reference should be made to salaries of senior practitioners as well as senior employees in the public service.*[35]

The CBA did not make any submission as to a specific salary level considered by its members to be appropriate or adequate.

While the information available to the Commission did not support, for reasons earlier outlined in this Chapter, the suggestion that the Judiciary has not received "*a salary increase for over a decade*", the available data did indicate that the incomes of senior practitioners in the legal profession are in some instances higher, sometimes materially higher, than the salary level of judges. However, as appears from the discussion below, much depends on regional location and urban versus non-urban factors.

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[34] Submission of the Government dated December 20, 1999, at paras. 27 and 28.
[35] Submission of the Canadian Bar Association dated January 14, 2000, at 4 to 5.

The Commission also had regard to a submission received from John Honsberger, Q.C., an experienced practitioner from Toronto. Mr. Honsberger urged that:

> *The salaries of judges should be increased by at least the increased cost of living and any additional amount as may be necessary to catch up to an appropriate salary level so that judges may maintain a standard of living comparable to what most members of the profession enjoy but with some reduction to represent the value of the pension a judge will receive on retirement.*[36]

It is the view of this Commission that the need to consider the relationship between the incomes of private practitioners and judicial salaries arises in consequence of the mandatory statutory requirement that we consider, as a criterion relevant to the assessment of the adequacy of judicial salaries, "*the need to attract outstanding candidates to the judiciary*". This statutory criterion expressly engages recruitment issues that, in turn, give rise to consideration of those factors that encourage or discourage applications for appointment from outstanding candidates. Income differentials are clearly such a factor.

a) The Importance of Recruitment Issues

The *PEI Reference Case* confirmed that the objective is to recruit to the Bench lawyers of great ability and first class reputation.[37] This principle was subsequently confirmed by statute upon introduction of subsection 26(1.1)(c) of the *Judges Act*, which identifies the type of candidates to be attracted as those who, by ability and experience, may be regarded as "outstanding". This is significant because many lawyers in Canada apply for appointment, but few are chosen. Between 1990 and 1999, for example, 4,209 applications for appointment to the Judiciary were received.[38] This statistic is of limited use, however, because the number of overall applications across Canada does not reflect the number of applications from outstanding candidates. Expressed differently, it is not difficult to encourage 1,000 applications. It is much more difficult to ensure that 1,000 applications from the best applicants are received.

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[36] Letter from John Honsberger, Q.C., dated January 11, 2000, at 2.
[37] *Supra,* fn. 2, at para. 55.
[38] Data provided by the Commissioner for Federal Judicial Affairs to the Commission.

Therefore, the Commission specifically considered the category of applicants comprising those who, following assessment by the involved advisory committees, were ranked as "recommended" or "highly recommended" for consideration for judicial office. This analysis revealed that in the same 10-year period (1990 to 1999), 40% (1,682) of the total number of overall candidates were recommended or highly recommended for consideration for appointment. Based on information provided by the Government, we estimate that approximately 25% were ranked as "highly recommended" for appointment[39]. Overall, 556 candidates were appointed to the Bench.[40]. Even if only the 25% of candidates who were "highly recommended" are considered to be "outstanding", it cannot be said that serious recruitment problems currently exist. Indeed, no party to our inquiry provided evidence of, or suggested, a current recruitment problem.

It is also important to consider the distribution of judicial appointments, in geographic terms, of the 556 persons appointed to the Bench. Information provided to the Commission revealed that in the years 1990 to 1999, of the 556 appointees in Canada, 36.5% were from Ontario, 20.5% were from Quebec, 11.5% were from British Columbia, and 10.4% were from Alberta.[41]

At present, there are 1,014 members of the Judiciary, including 192 judges who have elected to serve as supernumerary judges. As pointed out by Counsel for the Government, no segment of the legal profession has a monopoly on outstanding candidates.[42] Rather, they are drawn from the private bar, provincial and territorial Benches, the academic community and government service. Nonetheless, while it is inappropriate to regard the private bar as the only relevant source of candidates for appointment to the Bench, the data indicate that the overwhelming majority of candidates continues to be drawn from private practice. In the years 1990 to 1999:

i) 73% of appointed judges were drawn from private practice;

ii) 11% of appointed judges were elevated to the Judiciary from a provincial or territorial Bench; and

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[39] Submission of the Government dated March 14, 2000, at Appendix 35.
[40] Data provided by the Commissioner for Federal Judicial Affairs to the Commission.
[41] *Ibid.*
[42] Submission of the Government dated December 20, 1999, at para. 28.

iii) 16% of appointed judges were drawn from government (9%), from the academic community (4%) and from other legal fields (3%).[43]

If those judges elevated from the provincial or territorial Bench are excluded from the assessment, approximately 82% of those appointed to the Bench in this 10-year period were appointed from the private bar. Thus, it clearly represents the primary source of potential candidates for appointment to the Bench. This underscores the importance and relevance of a comparison between the incomes of lawyers in the private bar and judicial salaries.

b) Available Data Concerning Incomes in the Private Bar

A direct comparison between judicial salaries and the incomes of lawyers is difficult given:

i) the unavailability of current reliable income data relating to legal practitioners including, in particular, those in the private bar;

ii) the unavailability of income data of practitioners at the time of their appointment to the Bench;

iii) the difficulty in isolating appropriate comparison points. As queried by Counsel for the Government, are the average or median earnings of lawyers to be considered, or those of only higher income earners, or of the profession as a whole?[44]

iv) that available income data does not distinguish between areas of practice. Thus, to the extent relevant, it is not possible on the information available to us to distinguish the reported incomes of litigation versus non-litigation lawyers at the bar.

Because the comparison is difficult, however, it does not follow that it is irrelevant or impossible.

We had available to us a report prepared by Sack Goldblatt Mitchell on behalf of the Conference and Council concerning the "*Incomes of Canadian Lawyers Based on Revenue Canada Income Tax Data*", dated January 31, 2000 and based on 1997 income tax data (the most current

[43] *Ibid*., at Appendix 10.
[44] *Ibid.*, at para. 27.

available income tax data); a letter dated February 10, 2000 from Hay Management Consultants Limited commenting on the Sack Goldblatt Mitchell report; and detailed submissions by the Conference and Council, and the Government, on the issue. In addition, as described below, the Commission consulted its own experts, Morneau Sobeco, on standard compensation principles and the data provided by the parties. In combination, this formed a sufficient data base to assist us in understanding the current relationship between judicial salaries and the incomes of lawyers in private practice.

The available data make clear that the incomes of private practitioners vary materially by the age and experience of the practitioner, the province or territory in which the lawyer practises, and the geographic location of the practice within each province (that is, whether the lawyer practises in an urban or non-urban setting). The Sack Goldblatt Mitchell report indicates that the average income of the top third by income of those lawyers aged 44 to 56 years who earn more than $50,000 per year, is $342,280.[45] Not unexpectedly, the figures are higher in large metropolitan centres such as Toronto, Calgary and Vancouver. The comparable figure for the top third of lawyers practising in the seven largest census metropolitan areas, as defined by Statistics Canada (the "Largest Metropolitan Areas"), according to the Sack Goldblatt Mitchell report, was $393,881[46], in 1997. The Largest Metropolitan Areas examined were: Toronto, Montreal, Vancouver, Ottawa-Hull, Edmonton, Calgary and Quebec City. The Largest Metropolitan Areas account for 52% of the appointments to the Judiciary made since 1989.[47]

The following is noteworthy concerning this information:

i) the overall data applied to 31,270 self-employed lawyers of all ages in Canada. The data was refined to focus on self-employed lawyers between the ages of 44 to 56 years. We were informed that this age grouping was selected by the Conference and Council because since 1989 approximately 69% of persons appointed to the Judiciary have been in this age grouping;[48]

[45] Report by Sack Goldblatt Mitchell dated January 31, 2000 and entitled "*Incomes of Canadian Lawyers Based on Revenue Canada Income Tax Data*", at 1.
[46] Morneau Sobeco calculate this number to be $399,720.
[47] *Supra,* fn. 45.
[48] The data available to the Commission from the Commissioner for Federal Judicial Affairs indicates that in the last 10 years, the overall average age of appointees to the Bench was 50.

ii) an income exclusion, set at $50,000, was used by the Conference and Council and their experts to exclude potential distortions in the data that might be occasioned by inclusion of lawyers practising law on a part-time basis. They suggested that this was a conservative approach because lawyers practising full-time, among other matters, likely earn far more than $50,000, even if they utilize low billing rates.

Issue was taken in several respects with the appropriateness of a $50,000 income exclusion based on the assumption of part-time employment. It was pointed out to the Commission, for example, that the effect of such an income exclusion was to reduce the number of lawyers covered in the data by almost 48% and, if examined strictly in the 44 to 56 years age grouping, by approximately 39%.

In the Commission's view there may be many explanations, in addition to part-time employment, for income of less than $50,000 by members of the private bar. These include life-style decisions to moderate work commitments, new practices that are not yet fully established, and less successful or profitable practices. In this connection, it is important to recall that lawyers are not eligible for appointment to the Bench for ten years following their call to the bar. It can be expected that income levels for new lawyers, generally, will be lower than for more experienced lawyers and that, absent income-limiting choices by practitioners, income will increase with seniority, experience and increased profile at the bar; and

iii) as a result of application of an income exclusion of $50,000, and the decision to focus on self-employed lawyers between the ages of 44 to 56 years, the number of lawyers to whom the income data applied was reduced from 31,270 to 7,830 (the "Comparator Population");

The Conference and Council suggested, in connection with this income data, that the comparable group of practitioners for the purposes of comparison to judges was the group of lawyers comprising the top third income earners within the Comparator Population, and that the average income of this group was the appropriate comparison point. While this approach recognizes that the majority of judges (as noted, approximately 69%) appointed since 1989 were between the ages of 44 to 56 at the time of their appointment, it also has the effect of targeting an income range with a mid-point at approximately the 83rd percentile within the Comparator Population. In addition, the average income in that range ($342,280) is above the 87th percentile for lawyers in the Comparator Population.

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*".[49] The experts engaged by the Commission agreed with this observation.

In light of these issues, the Commission sought additional data regarding the net professional income of lawyers in 1997, broken down in multiples of 5 percentiles, between the 50th and 95th percentiles in the Comparator Population. The purpose was to examine the comparable income figures for practitioners within the group of lawyers thought to be the group at the bar most likely to represent the primary source of outstanding candidates for the Judiciary, while at the same time targeting an income range at the 75th percentile of the Comparator Population. The detailed calculations in this regard are attached at Appendix 4 to this report. They revealed the following incomes for lawyers at the 75th percentile:

Alberta	$283,000
British Columbia	$236,000
Manitoba	$176,000
New Brunswick	$177,000
Newfoundland	$222,000
Nova Scotia	$191,000
Ontario	$260,000
Prince Edward Island	$179,000
Quebec	$209,000
Saskatchewan	$163,000
CANADA	$230,000

In 1997, the year to which this income data pertains, the salary of a federally-appointed puisne judge of the trial and appellate superior courts was $172,000. The comparative data suggested

[49] Letter from Hay Management Consultants Limited to D. Sgayias of the Department of Justice, dated February 10, 2000, at 5.

that a significant gap existed in 1997 between the salary of such judges and the reported incomes of private practitioners at the 75th percentile in the Comparator Population. The gap is higher, lower or eliminated depending upon the geographic location of the practitioner within Canada. The gap is more pronounced in urban areas from which the largest number of appointees to the Bench are drawn. In those centres, the range of incomes for young lawyers is often significantly higher than the salary level of judges. The impact of urbanization on the potential for income in the private bar is clearly demonstrated by the 1997 professional income data available to the Commission. It revealed incomes, at the 75th percentile, of lawyers in the Comparator Population practising in the Largest Metropolitan Areas, as follows:

Toronto	$343,000
Montreal	$248,000
Vancouver	$266,000
Ottawa-Hull	$198,000
Edmonton	$163,000
Calgary	$375,000
Quebec City	$204,000

As appears from these figures, the gap can vary among urban areas even within the same province (as, for example, between Edmonton and Calgary, Alberta). Overall, there is a significant disparity between incomes within the Largest Metropolitan Areas and other areas. The data available to the Commission indicate that the incomes of practitioners in the Comparator Population at the 75th percentile is $284,000 in the Largest Metropolitan Areas. Outside these areas, the figure drops to $158,000. When it is recalled that the current, and historical, approach in Canada to judicial salaries for puisne judges has been the adoption of a flat national salary level, the potential implications of urbanization become more serious.

The Significance of the Judicial Annuity to the Assessment of Salary Levels

For the reasons earlier described in this Report, we also had regard to the value of the judicial annuity in assessing the adequacy of current judicial salaries. We recognized, in both economic and human terms, that the value of future pension entitlements does not assist in the payment of bills due in the present. The pension value, however, is a significant factor to be taken into account in comparing the income position of judges and lawyers in private practice. This is so because lawyers in private practice form the group from whose ranks the majority of judicial candidates are selected. Further, such lawyers generally do not have the benefit of pension arrangements or pension schemes and are obliged to save for their retirement through Registered Retirement Savings Plans ("RRSPs") and from after tax savings on an on-going basis. For some, therefore, it may safely be assumed that the judicial annuity is an important engine driving recruitment. Moreover, the availability of the judicial annuity frees judges from any form of savings plan for retirement, aggressive or otherwise, which lawyers in private practice ignore at their peril.

Therefore, we asked our experts to examine the benefit of the pension with regard to lawyers in private practice, by addressing the following question: what additional salary would a judge require, to purchase the annuity that the judge in fact would receive under current pension arrangements? Expressed differently, were a lawyer in private practice to attempt to save from income an amount sufficient to yield an equivalent pension benefit per annum upon retirement as the current annuity benefit available to judges upon retirement, what amount would the lawyer be required to save per annum?

There is no single answer to these questions, because the calculation depends upon assumptions about the age of retirement of the judge, the gender of the judge, and the economic value of the ability to elect supernumerary status. Our experts made assumptions about these variables that

we believe to be reasonable. Their assumptions and calculations are set out in detail at Appendices 5 and 6 to this report.[50]

Hay Management Consultants Limited, on behalf of the Government, suggested that a 50-year old individual commencing to fund a retirement income of $120,000 per year and planning to retire at age 65, expecting to live to the age of 80, would need to invest approximately $57,500 in after tax income per year (assuming a 5% real rate of return on investment), to generate such a retirement income. Assuming maximum annual RRSP contributions, this would require over $90,000 per year in pre-tax income.

The Commission's experts suggested that the pre-tax estimate of $90,000, in fact, was somewhat conservative. As a general proposition, they estimated that a judge, appointed at age 50 and retiring at age 65, would require a salary approximately 70% higher in order to fund the annuity available to him or her under the current annuity arrangements. A judge retiring at age 70, in contrast, would require a salary approximately 55% higher to fund the annuity to which the judge would be entitled under the current annuity arrangements. In terms of 1997 dollars, an additional salary of $95,000 to $120,000 pre-tax income would be required to fund the judicial annuity if a judge were required to do so, or if a lawyer in private practice sought to fund a similar annuity benefit.

The calculations in Appendix 6 reveal that the base salary of judges in 1997 dollars ($172,000) was slightly in excess of the average income of two-thirds (62%) of the lawyers in the Comparator Population. When the total compensation of judges in 1997 was taken into account, including an attributed value for the judicial annuity, it exceeded the average income of approximately 79% of lawyers in the Comparator Population, regardless of whether retirement for judges was assumed to be at age 65 or age 70.

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[50] Appendix 5 sets out the assumptions used to calculate the values of the annuity. Appendix 6 provides calculations that illustrate the total 1997 earnings of the Judiciary, including an attributed value for the judicial annuity, in comparison to the net reported income of self-employed lawyers in Canada based on 1997 income tax data in each of the 10 provinces in Canada (except Prince Edward Island) and in each of the Largest Metropolitan Areas, as well as on a national basis. To ensure comparability insofar as possible with the methodology reflected in the Sacks Goldblatt Mitchell report, the comparisons in Appendix 6 were restricted to lawyers in the Comparator Population.

As shown in Table 2.4 below, if the comparison is made at the 75th percentile of the Comparator Population, the base salary of judges in 1997 was less than the average income of lawyers at the 75th percentile in all provinces in Canada except Saskatchewan. However, when the total compensation of judges in 1997 is taken into account, including an attributed value for the judicial annuity, it exceeded the average income of private practitioners at the 75th percentile on a Canada-wide basis in all areas, except in Toronto and Calgary[51].

Table 2.4
Estimated Percentage Gaps between the Compensation of Judges and the Incomes of Private Practitioners at the 75th percentile in the Comparator Population, 1997 data

Geographic Area	Income of Private Practitioners at the 75th percentile in the Comparator Population	Percentage Gap Between the Compensation of Judges and Incomes of Lawyers (positive indicates that judges compensation exceeds lawyers income), based upon		
		Judges Salary ($172,000)	Judges Salary adjusted for benefit of judicial annuity, estimated at:	
	$		$267,000	$292,000
CANADA	230,000	-25.2	16.1	27.0
Alberta	283,000	-39.2	- 5.7	3.2
British Columbia	236,000	-27.1	13.1	23.7
Manitoba	176,000	- 2.2	51.7	65.9
New Brunswick	177,000	- 2.8	50.8	65.0
Newfoundland	222,000	-22.5	20.2	31.5
Nova Scotia	191,000	- 9.9	39.8	52.9
Ontario	260,000	-33.8	2.7	12.3
Prince Edward Island	179,000	- 3.9	49.2	63.1
Quebec	209,000	-17.7	27.8	39.7
Saskatchewan	163,000	5.5	63.8	79.1
LARGEST METROPOLITAN AREAS	$			
Toronto	343,000	- 49.8	-22.2	-14.9
Montreal	248,000	-30.6	8.7	17.7
Vancouver	266,000	-35.3	0.4	9.8
Ottawa-Hull	198,000	-13.1	34.8	47.4
Edmonton	163,000	5.5	63.8	79.1
Calgary	375,000	-54.1	-28.8	-22.1
Quebec City	204,000	-15.7	30.9	43.1

[51] As indicated in Table 2.4, at the level of $267,000 for total judicial compensation, judges' compensation is also less than the overall average income of practitioners in the Province of Alberta.

When this data is reviewed in the context of urban versus non-urban settings, it becomes clear that profound disparities exist between the total compensation of judges (including an attributed value for the judicial annuity) and the incomes of lawyers in the Comparator Population, depending upon geographic location. What is critical to this analysis is the impact of regionalization and urbanization within various regions.

It is apparent, therefore, that use of a uniform national salary scale for the Judiciary fails to take into account pronounced regional disparities in the income of those practitioners considered, at least by the Judiciary, to form the group of lawyers most likely to generate outstanding candidates for judicial appointment.

The Commission therefore considered whether some compensation arrangement should be recommended which specifically took into account and responded to the financial disparities created by regionalization and urbanization. One of the most obvious ways to address this issue would be to recommend a salary differential between members of the Judiciary serving in urban, versus non-urban settings. Other creative ways may also be available to compensate judges serving in urban centres without introducing a base salary differential.

In considering this matter, we noted the observation of the Lang Commission (1983) which concluded that the implications of regionalization should be considered by successor commissions.[52] We were conscious, however, of the fact that no party to our inquiry recommended the creation of a salary differential between members of the Judiciary based on the geographic location of residence of the judge. Indeed, both the Government, and the Conference and Council indicated during the Commission's public hearings that they did not support such a differential[53]. We were also concerned that creation of such a differential, or the adoption of other differentiating income mechanisms, could have the practical effect of creating many different classes of judges at the same level within the Judiciary, in fact or in perception. In our view, this would not be in the public interest or in the interests of the administration of justice cherished in this country.

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[52] Lang (1983), at 7.
[53] Transcript of the February 14, 2000 Public Hearing, Vol. II, at 232 to 237.

While it may be that introduction of some differentiating income mechanism will be warranted in the future, so as to take into account directly the negative financial impact of regionalization and, in particular, urbanization, for the reasons indicated, we have decided not to recommend such an approach at this time. While we are mindful of the income disparities created by regionalization, demonstrated by the Sack Goldblatt Mitchell report and the additional income data provided to the Commission and presented at Appendix 6, we do not think it responsible to suggest that the salary level of the Judiciary should be set so as to match the income of the highest income earning lawyers in the largest urban centres in Canada. What is required, in our view, is the striking of an appropriate balance in order to ensure that the judicial salary level is sufficient to continue to attract outstanding candidates to the Bench, including outstanding candidates from the most lucrative of legal services markets in Canada, and that current and future judges serving in urban areas receive a fair and sufficient salary.

We therefore concluded that the assessment of the adequacy of judicial salaries in relation to the incomes of private practitioners must take into account the following:

i) the total compensation of judges includes a significant pension annuity that has substantial value when a comparison of judicial compensation to the income of private practitioners is undertaken;

ii) continued use of a uniform national salary scale for puisne judges will have an adverse differential impact in different regions of the country and, therefore, potentially on the ability to attract outstanding candidates to the Judiciary in some areas of the country; and

iii) while judicial salaries should not be set according to the most lucrative legal services market, they must be set at a level which will not have a chilling effect on recruitment by serving as a disincentive to outstanding candidates in the Largest Metropolitan Areas, including those urban centres in which lawyers in private practice realize the highest incomes. They must also be set at a level that does not result in unfairness to those current and future judges residing in larger urban areas.

Pension Benefits of DM-3s

As noted, we believe that the value of the judicial annuity is a significant and relevant factor to be considered in assessing the adequacy of judicial compensation in comparison to the incomes of lawyers in private practice. It is clear to us that this comparison is both necessary and useful because the incomes of lawyers in private practice affect recruitment among the class of persons from whom most judges are drawn.

It is less clear that it is appropriate to have regard to the comparative positions of DM-3s and judges in relation to annuity benefits. We recognize that there will be differing views on this issue. We thought it important to at least be aware of the facts concerning the value of the pension benefit available to DM-3s.

We therefore requested the experts engaged by the Commission to determine the additional salary that would be required, as a percentage of pay, to accumulate in after-tax savings funds necessary to provide a retirement income equivalent to the difference between the judicial annuity and the DM-3 pension (and special retiring allowance, where applicable). The additional value of a judicial annuity, compared with a DM-3 pension, increases with the age of appointment of the judge and the DM-3. Later ages of appointment, and shorter terms of service, provide substantial pension benefits to judges compared to pension benefits available to DM-3s. For example, if a judge appointed at age 50 were required to purchase the pension benefits to which he or she is entitled under the current pension regime, over and above those currently available to a DM-3 appointed at the same age, the judge would require a salary approximately 25% higher than that paid to the DM-3 (assuming a salary of $200,000 in the year 2000). If one assumes that the judge was appointed at age 40, however, and retires at age 65 after 25 years service, only about 2% additional salary would be required for the judge to purchase the additional pension benefits received, over and above those currently available to a DM-3 who serves for a similar period. On the same assumptions, if the judge retires at 70 years of age, no additional salary would be required. Particulars of the calculations carried out by the Commission's experts in this regard, and the assumptions underlying them, are set out at Appendix 5 to this report.

Judges' Salaries in Other Jurisdictions

The Commission was also requested by the Conference and Council to take into account the current salary levels applicable to judges in other jurisdictions. We were informed that effective April 1, 1999, the salary of an English High Court Judge is approximately $309,500 (Cdn) and that Circuit Judges in England now receive the equivalent of approximately $232,000 (Cdn). Moreover, District Judges in England, who have a more limited jurisdiction than do members of the Canadian Judiciary, currently receive a salary of approximately $186,000 (Cdn). The Commission was also provided with some data concerning judicial salary levels in Australia, New Zealand and at the Federal Circuit Court level in the United States.

In every instance made known to us, the salary level of judges in other jurisdictions exceeds the current salary, sometimes significantly, of the Canadian Judiciary. Care must be taken, however, not to assess these figures out of context. The utility and reliability of comparisons between judicial salaries in other jurisdictions and those in this country are questionable on the basis of the information now available to us. This is so, in our view, because of variations between economic and social conditions in Canada and the other identified jurisdictions, fluctuating exchange rates, significantly different income tax structures, differing costs of living and the absence of information concerning the retirement benefits of judges in the other identified jurisdictions. Without further, and more detailed, information regarding the process for setting judicial salaries in other jurisdictions, the nature and extent of the responsibilities of the judges in those jurisdictions suggested to be comparable to Canada, and the overall total compensation scheme applicable to judges in the other identified jurisdictions, we are unable to place significant reliance on data concerning judges' salaries in other jurisdictions.

2.4 Recommendations Concerning Salaries for Puisne Judges

We have attempted in our recommendations to be fair both to the Judiciary and taxpayers. We believe that our recommendations for judicial salaries are in the public interest and strike the appropriate balance.

Recommendation 1

The Commission recommends that the salary of puisne judges be established as follows:

Effective April 1, 2000: $198,000, inclusive of statutory indexing effective that date;

Effective April 1, 2001: $200,000, plus statutory indexing effective that date;

Effective April 1, 2002 and 2003, respectively: the salary of puisne judges should be increased by an additional $2,000 in each year, plus statutory indexing effective on each of those dates.

2.5 Salary Differentials for Trial and Appellate Judges

The appellate judges of six Courts of Appeal in Canada (Alberta, Saskatchewan, Manitoba, Ontario, Quebec and New Brunswick) urged the Commission to recommend a salary differential between appellate and trial court judges. They requested a recommendation that the salaries for federally-appointed appellate court judges be fixed at that amount which is the mid-point between the salaries of puisne judges of the trial court and the salaries of puisne judges of the Supreme Court of Canada. They also requested that we recommend that the salaries of the Chief Justices of the appellate courts continue to be set at an amount that represents the same approximate percentage by which the salaries of those Chief Justices now exceed the salaries of judges of their respective courts, that is, approximately 10%.

The Commission received both a written submission on behalf of the appellate judges and an oral presentation by Mr. Justice J. Michel Robert of the Quebec Court of Appeal supporting salary differential recommendations. The Commission also received a written submission from Mr. Justice Ronald L. Berger of the Court of Appeal for Alberta, submitted in his individual capacity as a puisne judge of that Court, opposing any such salary differential. The Conference and Council took no position on the request for a salary differential between appellate and trial court judges.

In the written submissions delivered on behalf of the various appellate courts and in the oral presentation of Mr. Justice Robert, a number of significant factors were outlined in support of the proposal for differential salaries between trial and appellate court judges. Any summary of those factors in this report would not do justice to the full reasoning identified by the requesting appellate courts. Briefly, however, the main arguments advanced in support of differential salaries were as follows:

i) when regard is had to the hierarchical organization of the Canadian judicial system, it is clear that salary differentials already exist for all levels of courts, save that no increased salary is paid to judges in the appellate courts. For example, salary differentials now exist between judges on the Supreme Court of Canada and other courts; between judges on the trial courts in each province and provincial court judges and masters in each province and territory; and between justices of the peace and commissioners, or their equivalents, and judges at various levels in all provinces and territories. Thus, it might be said that salary differentials are currently the norm in Canada, with one prominent exception, namely, the absence of a differential between the salaries of trial and appellate court judges;

ii) other common law countries, including the United Kingdom, Australia, New Zealand, and the United States provide for salary differentials between their trial and appellate courts;

iii) the responsibilities and obligations imposed on appellate courts in Canada are extensive. The appellate courts in the provinces and territories, in practical terms, are courts of last resort for the overwhelming majority of cases. This is reflected in the fact that more than 98% of the cases in some provinces never reach the Supreme Court of Canada. These facts underscore the importance of the jurisprudential development role of the appellate courts in the provinces and the territories. In this context, it may be argued that a salary differential between trial and appellate courts is as justified as the current salary differential between appellate courts and the Supreme Court of Canada;

iv) the costs of implementing a salary differential for trial and appellate judges would not be excessive having regard to the relatively limited number of appellate judges (138); and

v) finally, the absence of a salary differential in Canada between trial and appellate court judges may be characterized as an historical anachronism arising from an era in history pre-dating the creation of separate courts of appeal. The reality of the current court structure in Canada, it was argued,

> necessitates bringing compensation policy for trial and appellate court judges in this country into line with those of other common law countries and, as well, with the contemporary reality of our court system.

The Commissioners regarded many of these arguments as compelling. We were concerned, however, with the opposition to such a salary differential advanced both by the Government and by Mr. Justice Berger of the Court of Appeal for Alberta. We also noted that some appellate courts did not join in the request for a salary differential. Mr. Justice Berger made it clear in his written submission that his remarks to the Commission were made on his own behalf only. He argued that:

i) the absence of hierarchical distinctions among federally-appointed judges strengthens collegiality and fosters mutual respect. This traditional legal culture, he suggested, promotes constructive and useful interaction among members of both levels of court. In his view, the adoption of a salary differential between trial and appellate court judges would give rise to a "*very real risk of destroying the goodwill, collegiality and interaction that we have worked so hard to achieve*"; (at 2)

ii) some trial judges sit from time to time with courts of appeal. A pay differential among judges performing the same judicial function, Mr. Justice Berger suggested, would be both undesirable and potentially vulnerable to constitutional challenge. The alternative solution, of paying those trial judges who sit with appellate courts a special *per diem* or *ad hoc* pay amount, would have the effect of creating two classes of judges performing the same functions; and

iii) members of appellate courts sit as a group thereby sharing collective responsibility for the outcome of cases argued before them and diffusing the workload and responsibilities within the group. This contrasts to the daily tasks of individual trial judges who bear their decision-making responsibilities alone.

The Government argued that the Commission should not recommend a salary differential for trial and appellate judges absent evidence that the work of appellate judges is more onerous or of greater value than that of trial judges. This, it was submitted, would require an objective and principled assessment of the responsibilities of both appellate and trial judges. Moreover, the Government suggested that recommendations for such a salary differential should not be made without consultation with affected provinces. The Government maintained that a salary

differential could have implications for the structure of the system of courts within the provinces, giving rise to constitutional issues under the *Constitution Act, 1867*. This is so, it was suggested, because legislative responsibility for the structure of the system of courts within Canada rests with the provinces.

We recognized the merits of the arguments made by various parties on this issue. The proposal for a salary differential between trial and appellate court judges is of significant importance and far-reaching implication having regard to the traditions of the Canadian judicial system and the historical construct of our court system. We concluded that any decision on the matter necessitates an in-depth review and evaluation of more extensive information than is currently available to us. Such additional information, we suggest, might usefully include data concerning the current workloads and responsibilities of trial and appellate courts across the country, the history of salary differentials in other comparable jurisdictions, and consideration of potential constitutional issues identified by various of the parties. We would be prepared to consider this matter in further detail, should it be made the subject of a referral to us pursuant to the *Judges Act* (Canada) within the term of our mandate.

2.6 Salary Levels for Other Judges

For many years a relatively constant differential has been maintained between the salaries of puisne judges and Chief Justices/Associate Chief Justices. No party before the Commission suggested that this differential should be altered. Chief Justice Lamer, on behalf of the Canadian Judicial Council, requested that the Commission recommend continuation of approximately a 10% differential between the salaries of puisne judges and the salaries of their Chief Justices and Associate Chief Justices. The Commission sees no reason to alter this well-established relationship.

Recommendation 2

The Commission recommends that the salaries of the Justices of the Supreme Court of Canada, and the Chief Justices and Associate Chief Justices should be set, as of April 1, 2000 and inclusive of statutory indexing effective that date, at the following levels:

Supreme Court of Canada:	
Chief Justice of Canada	**$254,500**
Justices	**$235,700**
Federal Court and Tax Court:	
Chief Justices	**$217,100**
Associate Chief Justices	**$217,100**
Superior and Supreme Courts and Courts of Queen's Bench:	
Chief Justices	**$217,100**
Associate Chief Justices	**$217,100**

As of April 1 in each of 2001, 2002 and 2003, these salaries should be adjusted to maintain the same proportionate relationship with the salary of puisne judges established as of April 1, 2000.