

CHAPTER 5

OTHER BENEFITS

The Commission also received proposals for certain changes to current insurance and related benefits available to the Judiciary. These concerned:

- i) basic and supplementary life insurance benefits;
- ii) health benefits;
- iii) survivor benefits following death on duty; and
- iv) dental benefits.

5.1 Basic and Supplementary Life Insurance Benefits

At present, the Judiciary participates in insurance benefits available under the Public Service Management Insurance Plan (the “PSMIP”). Full-time Order-In-Council appointees and other senior public service executives (including Deputy Ministers) enjoy different benefits under an executive group life insurance plan (the “Executive Plan”) available under the framework of the PSMIP. The Commission was informed that the Judiciary, for some time, has sought the benefits available under the Executive Plan. This was supported by the Scott Commission, which recommended that “*the government paid life insurance coverage for judges be brought more closely into line with that provided to Deputy Ministers*”.¹

The basic life insurance benefits now available to the Judiciary provide a judge with coverage of one or two times salary, at the option and expense of the judge. Variable premiums apply, based on the age and gender of the participant in the plan.

¹ Scott (1996), at 28

In contrast, under the Executive Plan, basic insurance coverage of two times salary at no cost to the participants is provided. Similar benefits are available, without cost to the participants, to Members of Parliament and Senators under another plan. These separate plans have a single premium rate for life insurance based on the claims experience of the group as a whole. Under this structure, the actual premiums paid on behalf of an individual by the Government vary by salary level and are treated as a taxable benefit to the individual plan participant.

In submissions to this Commission, the Government recognized and supported the need to improve the life insurance available to the Judiciary, and indicated that it was prepared to fund the level of benefits equivalent to that available in the Executive Plan, so long as two concerns could be met. First, there should be no “cross-subsidization” within the PSMIP. For example, if the Judiciary were included in one of the existing plans under the PSIMP this would lead to higher premiums for each participant, thereby triggering increased taxable benefits. In effect, this would result in non-judicial plan participants subsidizing the participation of the Judiciary and, at the same time, receiving lower net insurance benefits. Second, the structure of the plan for the Judiciary should be such that the degree of cross-subsidization that would take place within the plan (between younger and older judges) would not result in a breach of section 15 of the *Charter*.

In this context, the Conference and Council suggested that a separate plan could be created for the Judiciary under the general rubric of the PSMIP, in order to avoid any cross-subsidization between members of the Judiciary and members of the Executive Plan.

Both the Conference and the Council, and the Government agreed that such a plan would provide to the judges benefits with respect to basic life insurance coverage, supplementary life insurance coverage, and post-retirement benefits that are, in all material respects, the same as those available to members of the Executive Plan

The understanding of the Commission with regard to post-retirement benefits under the Executive Plan is that coverage would be available, at no cost to the insured, equivalent to 100% of final salary during the first year of retirement; 75% of salary during the second year; 50% of salary in the third year; and 25% thereafter for life.

Our understanding with regard to available supplementary benefits is that members of the Executive Plan, at their option and cost, and with suitable evidence of insurability, can purchase supplementary insurance up to 100% of annual salary.

Despite the willingness of both the Conference and Council, and the Government, to move in this direction, the proposed structure of the plan creates two separate issues, each related to the proposal of the Conference and Council that participation in the plan be compulsory for persons appointed to the Bench after introduction of the plan. The issues are:

- i) whether compulsory participation could result in a successful challenge under section 15 of the *Charter*; and
- ii) whether compulsory participation can be accommodated within the umbrella of the PSMIP.

The Conference and Council are strongly of the view that the economic sustainability of the plan, given the demographic profile of the Judiciary, depends upon compulsory participation in the plan of all judges following introduction of the plan. This is so because, over a certain age range for younger judges, the tax payable on the taxable benefit resulting from participation in the plan will likely exceed the actual cost at which insurance could be purchased in the market. If such judges opt out of the plan, this would raise premiums, raise taxable benefits, increase the range over which “opting-out” becomes attractive, and potentially threaten the viability of the plan. Compulsory participation, on the other hand, clearly results in cross-subsidization of older participants by younger participants.

In hearings before the Commission, the Conference and Council suggested that, upon creation of a separate plan, a one-time “opt-out” opportunity would be provided by which those persons who were judges at the time of introduction of the separate plan could elect whether to participate in the plan. Thereafter, following introduction of the plan, new judicial appointees would be required to participate in the plan or forego Government-paid basic life insurance benefits. Counsel for the Government expressed concern that limiting the ability to opt-out of the plan to those judges who are serving at the time the plan is introduced, and denying such ability to

judges who might be appointed subsequent to the introduction of the plan, could lead to a challenge under the *Charter*.²

In an effort to better understand the structure of the group insurance plans, and the concerns of the Conference and Council, and Government, we asked our expert advisors to convene a meeting of experts to explore some of the issues in more depth. We also requested the views of Professor Patrick Monahan, of Osgoode Hall Law School at York University, concerning the question of whether restricting an opt-out provision to those judges serving at the time of introduction of the plan could lead to a successful challenge under section 15 of the *Charter*.

Subsequent to the meeting of experts, and in response to a request to the Conference and Council for clarification of some points in their proposal, we were informed by letter that the opt-out proposal being requested by the Judiciary was an ability for a sitting judge, on a one-time basis at the inception of the plan, to exercise an option to either:

- i) opt out of the Government-paid basic life benefit; or
- ii) elect a lower basic life benefit of 100% of salary, rather than 200%³.

With respect to the potential *Charter* concerns, the Commission was informed by Professor Monahan that his preliminary examination of the issues suggested that an equality challenge to the plan proposed by the Conference and Council would not likely be successful.⁴

The second concern raised by the Government is that the current structure of the PSMIP does not provide for compulsory participation. In a letter to the Commission dated May 16, 2000, Counsel for the Government informed the Commissioners that:

The terms sought by the Conference and Council are incompatible with the PSMIP. Participation in the PSMIP is always optional: executives and parliamentarians have the choice of not participating. Compulsory

² Transcript of the February 14, 2000 Public Hearing, at 258 to 259.

³ Letter to Commission from Leigh D. Crestohl, dated April 28, 2000, at 1 to 2.

⁴ Memorandum from Patrick J. Monahan to Mr. Richard Drouin, dated April 28, 2000 and reproduced at Appendix 10 to this report. Professor Monahan's memorandum suggests that more detailed analysis of the situation would be appropriate in order to provide a more definitive opinion. The view of the Commission was that such further analysis was not necessary.

*participation...would be inconsistent with the principles that groups may participate in the PSMIP only on the basis that they abide by the overall plan design as established for the public service population.*⁵

In response to this letter the Commissioners sought and obtained confirmation from the parties that there was no disagreement between them about the benefits being sought; rather, the issues of concern related solely to the structure of the plan. An option was explored of legislating a stand-alone plan for the Judiciary outside the PSMIP, but such a stand-alone plan was subsequently rejected by the Conference and Council on the grounds that it would be economically prohibitive. In a letter to the Commission dated May 19, 2000, Counsel for the Conference and Council categorically rejected a solution outside the PSMIP. They strongly reiterated their rationale for requiring compulsory participation, but indicated that:

*...should the Commission be of the opinion that the Judges cannot or should not be accommodated within the PSMIP, unless membership in the plan is voluntary, the Judges would rather forego insistence on compulsory membership in the plan than to find themselves thrust outside of the PSMIP.*⁶

The Commission is satisfied that a separate plan within the PSMIP for the Judiciary is essential to obtain the economies necessary to make the group life insurance plan reasonable. We are further satisfied that there is a sound rationale for the structure of the plan proposed by the Conference and Council. On the basis of the advice received from Professor Monahan, we do not believe that this structure is likely to lead to a successful challenge under section 15 of the *Charter*. That leaves the issue of whether the framework of the PSMIP can be altered, as necessary, to accommodate the proposed structure of the judges' plan. We have heard suggestions that legislation might be required to do so, but we have not heard any evidence that the framework cannot be so modified.

⁵ Letter to Commission from David Sgayias, dated May 16, 2000.

⁶ Letter to Commission from L. Yves Fortier and Leigh D. Crestohl, dated May 19, 2000.

Recommendation 17

The Commission recommends that a separate plan, under the general framework of the PSMIP, be created promptly for the Judiciary so as to provide the Judiciary with basic life insurance, post-retirement life insurance, and supplementary life insurance benefits that are, in all material respects, the same as those now enjoyed by members of the Executive Plan.

Recommendation 18

The Commission recommends that incumbent judges, at the time of introduction of the new plan, have the option, at their sole discretion, of opting out of insurance coverage or electing to accept coverage of 100% of salary, rather than 200% of salary.

5.2 Health Benefits

Under the applicable current plan, the Judiciary is provided with Government-paid health insurance coverage, which provides 80% reimbursement of all eligible medical expenses subject to an annual deductible of \$25.00 for an individual and \$40.00 for a family. In connection with hospital benefits, judges currently have the option of upgrading hospital coverage from \$60.00 per day to \$150.00 per day, at their own expense. The Conference and Council proposed that the current hospital benefit of \$60.00 per day be upgraded to \$150.00 per day, at the cost of the Government, to accord with hospital benefits that the Judiciary understands are currently available to Deputy Ministers and OIC Executives.

The Commission was informed that effective April 1, 2000 the Government had entered into an agreement with relevant public service unions establishing a trust to manage the Public Service Health Care Plan. As part of this agreement, the Government undertook that no changes would be made to the plan prior to April 1, 2000 and that changes thereafter would be in the discretion of the trustees of the plan. Accordingly, while the Government was not opposed in principle to the request by the Conference and Council for Government-paid hospital coverage at the rate of \$150.00 per day, it cautioned that introduction of such an improved benefit ultimately was within the discretion of the trustees and not the control of the Government.

In these circumstances the Commission concludes that the Government should assume the cost of this additional benefit, and should take all available steps to urge the trustees to make the changes to the plan necessary to effect this result.

Recommendation 19

The Commission recommends that the Government take all available steps with the trustees of the applicable health benefits plan to effect a change under the plan to the hospital benefits available to the Judiciary, so as to increase such hospital benefits from \$60.00 per day to \$150.00 per day at no cost to judicial participants in the plan.

The Commission also received a submission from Madam Justice Alice Desjardins of the Federal Court of Appeal. Madam Justice Desjardins urged that single judges be allowed to register a close family member under the Public Service Health Care Plan, even if that family member was neither in a conjugal relationship with the judge nor a dependent. While sympathetic to the general principle raised by Madam Justice Desjardins, the Commission felt that a change of this nature would have such far-ranging implications for so many social programs that we were not able to recommend it.

5.3 Survivor Benefits Following Death On Duty

The Commission learned during the course of its inquiry that, at the present time, limited survivor benefits are available to the survivors of judges who die of unnatural causes during the course of the discharge by them of their public duties. This is to be contrasted with arrangements that apply for the surviving families of those senior public servants who regrettably suffer accidental or violent death as a result or during the course of the discharge by them of their public duties.

The Conference and Council requested that survivor benefits be made available to the families of judges who die by reason of, or in the performance of, their judicial duties, at the same level and under the same conditions as such benefits are made available to the survivors of Deputy

Ministers and other senior members of Government who die in like circumstances. The Government, in turn, informed the Commission that survivor benefits of this type are available for public servants but may not be available for Order-In-Council appointees. Apart from providing this clarification, the Government took no position on this request by the Conference and Council.

The Commission recognizes that in contemporary society members of the Judiciary, by virtue of the nature of their duties and the public aspect of their responsibilities, regrettably are exposed to increasing risk of personal, including fatal, injury. The frightening possibility of grave disabling or fatal injury occasioned by virtue of their status as judges is a possibility that can no longer responsibly be considered as entirely hypothetical. The Commission, therefore, strongly supports the proposition that the survivors of members of the Judiciary who die by reason of violence or through accident as a result or during the performance of their judicial duties, should receive survivor benefits at the maximum level and on the same basis as now provided for the most senior category of public servants for whom such benefits are currently provided.

Recommendation 20

The Commission recommends that, effective as of April 1, 2000, survivors of members of the Judiciary who die by accident or an act of violence occurring in the course of, or arising out of, the performance of their judicial duties should receive survivor benefits at the maximum level and on the same basis as now provided for the most senior category of public servants for whom such benefits are currently provided.

5.4 Dental Benefits

The Conference and Council requested that the Commission consider and recommend improvements to the dental plan benefits available to judges so as to provide benefits comparable to those provided under private sector dental plans. Further, the Commission was requested to recommend that coverage under the current dental plan available to judges be extended to retired judges. The dental coverage available to the Judiciary is identical to that currently provided to OIC Executives. The Government indicated that the dental plan is currently in the process of

being amended to provide coverage for retirees on an optional basis. The Government anticipated that retired judges would be eligible to participate in the dental plan, once so amended.

Although the Conference and Council provided some summary information to the Commission to compare the level of benefits under the public sector plan to those under certain private sector plans, the information, in our view, was not adequate to allow us to reach a determination with regard to the overall comparability of the public sector plan with the wide range of practices in the private sector. The Conference and Council were not specific in recommending particular changes to the current dental insurance arrangements. The Commissioners are aware that dental benefits under private sector plans are subject to considerable variation depending on the plan, the number of participants, the nature and extent of related benefits and the total compensation arrangements for plan participants. Accordingly, without specific details as to the nature of the improvements sought and identification of the type of private sector dental plan considered relevant by the Judiciary, we are not in a position to make any recommendation on this issue at this time.

With respect to the issue of inclusion of retired judges in the available dental plan, the Commission understands that the Government does not object to such inclusion so long as the necessary amendments are made to the current dental plan so as to permit the participation of such retirees, on the same terms and conditions as other retirees.

Recommendation 21

The Commission recommends that when the dental plan is amended to provide coverage to retirees, retired judges be eligible to participate on the same terms and conditions as other retirees.