**Legislative Summary** **LS-533E**

# BILL C-17: AN ACT TO AMEND THE JUDGES ACT AND CERTAIN OTHER ACTS IN RELATION TO COURTS

**Nancy Holmes**
**Law and Government Division**

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# LEGISLATIVE HISTORY OF BILL C-17

| HOUSE OF COMMONS | | SENATE | |
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| **Bill Stage** | **Date** | **Bill Stage** | **Date** |
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Statutes of Canada 2006, c. 11

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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# TABLE OF CONTENTS

**Page**

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# BILL C-17: AN ACT TO AMEND THE JUDGES ACT AND CERTAIN OTHER ACTS IN RELATION TO COURTS*

## INTRODUCTION

On 31 May 2006, Bill C-17, An Act to amend the Judges Act and certain other Acts in relation to courts, was introduced in the House of Commons by the Minister of Justice, Vic Toews. The bill deals with judicial salaries and allowances, judicial annuities and other benefits **pursuant to the *Judges Act***. As such, it constitutes a response to the May 2004 report of the Judicial Compensation and Benefits Commission (commonly referred to as the "McLennan Commission" after its chair, Roderick A. McLennan, Q.C.).(1) The bill also contains some technical amendments to other court-related Acts.

Bill C-17 is the second government response to the 2003 Judicial Compensation and Benefits Commission. On 30 November 2004, the former government issued a response to the Commission report accepting all of the Commission's recommendations with the exception of one, which it modified.(2) On 20 May 2005, the then-Minister of Justice, Irwin Cotler, introduced Bill C-51, An Act to amend the Judges Act, the Federal Courts Act and other Acts,

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

(1) The Commission's report can be found at www.quadcom.gc.ca and the government response at http://www.justice.gc.ca/en/dept/pub/jcbc/table.html. The government accepted all of the recommendations in the Commission's report with the exception of the salary proposal (Recommendations 1, 2 and 3) and the recommendation pertaining to judicial representational costs (Recommendation 16). In both instances, the government introduced alternative proposals in clauses 1, 2 and 5 of Bill C-17.

(2) The government accepted Recommendations 1-15 of the Commission's report; however, it was not prepared to fully accept Recommendation 16 pertaining to judicial representational costs. Instead, the government proposed an alternative formula in its legislative response, Bill C-51. It should be noted that the same approach has been taken in clause 5 of Bill C-17.

in order to implement the government's response to the Commission's report.[3] In addition to responding to the Commission's report, Bill C-51 also proposed a number of court-related reforms, including the expansion of the unified family courts across the country. Bill C-51 did not proceed beyond first reading and it died on the *Order Paper* with the dissolution of Parliament in November 2005.

**The Standing Senate Committee on National Finance, in its hearing on Bill C-17, raised concerns about the practice of placing other court-related amendments in judicial salary bills. These bills should essentially constitute a response to the recommendations of judicial compensation commissions and, as such, relate only to amendments to the *Judges Act*. On 12 December 2006, in its Observations to its Ninth Report, the Senate Committee therefore urged the Department of Justice to find a separate legislative process by which these other court-related issues can be dealt with.**

## BACKGROUND

Pursuant to amendments made to section 26 of the *Judges Act*, the McLennan Commission is the second judicial remuneration commission mandated to review judges' salaries and benefits every four years.[4] The new quadrennial process emerged partly in response to the Supreme Court of Canada's 1997 decision in *Reference Re Remuneration of Judges*,[5] and partly as a result of the work of previous triennial commissions [Scott (1996), Crawford (1993),

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(3) See Nancy Holmes, *Bill C-51: An Act to Amend the Judges Act, the Federal Courts Act and other Acts*, LS-513E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 28 September 2005, http://www.parl.gc.ca/common/bills_ls.asp?lang=E&ls=c51&source=library_prb&Parl=38&Ses=1.

(4) The Commission consists of three members: one person nominated by the judiciary; one person nominated by the Minister of Justice; and a chairperson nominated by the first two members. The Commission is required to commence an inquiry on 1 September of every fourth year and to submit a report with recommendations to the Minister of Justice within nine months of its commencement. In conducting its inquiry, the Commission is required by section 26(1.1) of the *Judges Act* to consider:

a. the prevailing economic conditions in Canada, including the cost of living, and the overall economic and financial position of the federal government;
b. the role of financial security of the judiciary in ensuring judicial independence;
c. the need to attract outstanding candidates to the judiciary; and
d. any other objective criteria that the Commission considers relevant.

Upon receipt of the Commission's report, the Minister of Justice is required to table a copy in Parliament within 10 sitting days, and respond to the Commission's recommendations within 6 months.

(5) [1998] 1 S.C.R. 3.

Courtois (1990), Guthrie (1987), and Lang (1983)]. These commissions found that the idea of an independent body to review and make recommendations on the salaries and benefits of federally appointed judges, although sound in theory, was not put into practice under the triennial system. Successive governments largely ignored the extensive work of these bodies, except to lay commission reports before Parliament, almost as if by doing so, they had absolved themselves of their constitutional obligations in the area of judges' compensation.

The Supreme Court of Canada in the *Reference* case also recognized that government delays or complete inaction in responding to the reports of judicial compensation commissions can diminish judges' morale and the independence of the judiciary. The Court reiterated that judicial independence is a fundamental constitutional tenet containing three core characteristics: security of tenure, financial security, and administrative independence. The financial security aspect is critical, not only for maintaining judicial independence and impartiality, but also for attracting persons most suited by their experience and ability to be excellent candidates for the bench.

The Court held that governments are therefore under a constitutional obligation to establish independent, effective and objective judicial compensation commissions, i.e., bodies which are necessary to prevent political interference by the executive and legislative branches of government in the determination of judicial remuneration. Specifically, the Court held that independent commissions are intended to remove decisions concerning the amount of judges' remuneration from the political sphere and to avoid confrontation between governments and the judiciary. Although commission recommendations do not have to be binding on the government, it is imperative that a government formally respond to a commission's report within a specified period of time and, where the government chooses not to accept one or more of the commission's recommendations, it must provide a reasonable justification for its decision. The reasonableness of the government's response may be subject to review by the courts on the basis of the legal standard of "simple rationality."

While the Supreme Court of Canada may have intended to resolve the issue of judicial remuneration in this country, the result of the *Reference* case was a surge of court challenges by the judiciary in instances where provincial governments rejected provincial commission recommendations. The litigation culminated in four consolidated appeals (from Ontario, New Brunswick, Alberta and Quebec) before the Supreme Court of Canada in

November 2004 on the question of what constitutes a reasonable basis for a province to reject a recommendation of a provincial judicial compensation commission.

On 22 July 2005, the Supreme Court released a unanimous decision(6) upholding the refusals of the governments of Ontario, New Brunswick and Alberta to follow the recommendations of the judicial compensation and benefits commissions in their provinces. In the case of Quebec, the matter was referred back to the Quebec government so that it could provide further reasons for its decision. The Court emphasized that government decisions to depart from commission recommendations are subject only to a limited and deferential form of review by the courts. The courts are not to determine the adequacy of a commission's findings or recommendations. Instead, the courts must focus on the government's response and on whether the purpose of the commission process has been achieved.

The Court set out a three-part test for assessing the rationality of a government's departure from a judicial compensation commission's recommendations: 1) whether the government has articulated a legitimate reason (reasons that are complete and provided in a meaningful way) for departing from the commission's recommendations; 2) whether the government's reasons rely upon a reasonable factual foundation; and 3) whether, viewed globally and with deference, the commission process has been respected and the purposes of the commission (preserving judicial independence and depoliticizing the setting of judicial remuneration) have been achieved. In those cases where the standard of rationality has not been met (where the commission process has not been effective and the setting of judicial remuneration has not been "depoliticized"), the Court held that the appropriate remedy is to return the matter to the government for reconsideration.(7) Where the problems can be traced back to the commission, the matter should be returned to that forum. Essentially, the Court acknowledged that the legislature has exclusive jurisdiction over the allocation of funds from the public purse and that it is, therefore, not appropriate for the courts to issue orders making

(6) *Provincial Court Judges' Association of New Brunswick* v. *New Brunswick (Minister of Justice)*; *Ontario Judges' Association* v. *Ontario (Management Board)*; *Bodner* v. *Alberta*; *Conférence des juges du Québec* v. *Quebec (Attorney General)*; *Minc* v. *Quebec (Attorney General)*, [2005] S.C.R. 286.

(7) It is not clear from the decision, however, what would happen if the government were to come back with another response that failed to meet the standard of rationality.

commission recommendations binding unless the governing statutory scheme gives them that option.(8)

## DESCRIPTION AND ANALYSIS

### A. Judges' Salaries

#### 1. Commission Recommendations and Government Response

In its report, the McLennan Commission recommended that federally appointed judges receive a 10.8% salary increase effective 1 April 2004, inclusive of statutory indexing (Recommendation 1). The government, however, is proposing in Bill C-17 that judicial salaries increase by 7.25% as of 1 April 2004. The government essentially reached its salary proposal on the basis of an interpretation that differed from that of the Commission with respect to paragraphs (a) and (c) of section 26(1.1) of the *Judges Act* (the prevailing economic conditions in Canada, including the cost of living; the overall economic and financial position of the federal government; and the need to attract outstanding candidates to the judiciary).(9)

The Commission interpreted the need to consider the prevailing economic conditions in Canada requiring it to determine whether the state of the economy should restrain it from recommending what it considered to be an appropriate judicial salary. After reviewing Canada's economic situation, the Commission concluded that there was no basis for restraining its salary recommendation. The government, however, sees this approach as too narrow. Rather than simply establishing whether the government has sufficient funds to comply with an adequate salary recommendation, consideration should also be given to the other economic and social priorities of the government. In other words, the government believes that other legitimate claims on the public purse must also be factored into any salary proposal.

With respect to the need to attract outstanding candidates to the judiciary, the Commission canvassed a number of salary comparison points, including the remuneration of all senior-level deputy ministers and Governor in Council appointees, as well as the income levels of lawyers in private practice. The Commission was, however, extremely disappointed,

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(8) For example, under the statutory regime in Ontario, a commission's salary recommendations are binding on the government.

(9) Section 26(1.1) sets out the factors to be considered when determining the adequacy of judicial salaries (see footnote 2).

and found its task made more difficult, by the lack of available and reliable data on comparison points other than the remuneration of public servants at the deputy minister level. In particular, the Commission was unhappy with the deficiencies in the available data on incomes of self-employed lawyers, which the Commission felt were a critical comparison point for its work. The Commission was so concerned about the need for a reliable information base in this regard that it made separate recommendations at the end of its report for the benefit of future commissions.

Although the government acknowledges that the Commission was required to work with unsatisfactory data, it is concerned about the methodology and assumptions used by the Commission in relation to the income of private practitioners as a comparison point group for determining judicial salaries. The government also feels that the Commission should have paid more attention to the deputy minister comparison points since the financial position of the government is reflected in part by the salaries it is prepared to pay its most senior employees. With respect to the self-employed lawyer comparison point group, the government believes that the Commission gave too much weight to the premise that, in order to attract quality candidates to the bench, judges' salaries should keep pace with those of highly paid lawyers in private practice in major urban centres. The government's position is that more consideration should have been given to income levels of private practitioners across all provincial centres, urban and rural. Moreover, the government feels that the Commission, in its salary considerations, did not adequately take into account the value of the security that is provided to judges by way of their unique annuity entitlement.

2. Implementation of the Government Response (Clauses 1, 2, 4)

Sections 9 to 22 of the *Judges Act* set out the salaries to be paid to federally appointed judges on a court-by-court basis. Pursuant to the Drouin Commission's recommendations,[10] these sections currently establish the salary levels effective 1 April 2000 and provide a method for calculating final salaries for the periods commencing on 1 April of 2001, 2002 and 2003. The salary recommendations of the McLennan Commission (Recommendations 1-3) do not, however, require a year-by-year structure. Thus, clauses 1 and 2 of Bill C-17 amend sections 9 to 22 of the Act to implement the government's response to the Commission's salary recommendations for each federal judicial position. Clause 4 of the bill amends section 25 of the Act to provide that these salaries are effective as of 1 April 2004 and that they shall be subject to annual indexing commencing 1 April 2005.

(10) Report of the 1999 Judicial Compensation and Benefits Commission, 31 May 2000, Recommendations 1 and 2.

Under the bill, puisne judges[11] will each receive $232,300 as of 1 April 2004 – a 7.25% increase, inclusive of statutory indexing. Effective 1 April of 2005, 2006 and 2007, these judges will receive an increase based on the statutory indexing formula contained in section 25(2).[12] Currently, section 25(1) prescribes a formula that permits judges to receive an annual increment of $2,000 plus statutory indexing. The annual increment was a recommendation of the Drouin Commission; however, the McLennan Commission could find no discernable rationale for such an increase and rejected its continuation. Thus, clause 4 removes the annual salary increment from section 25(1), but leaves the formula for calculating the amount of annual indexation unchanged (section 25(2)).

The McLennan Commission also recommended (Recommendation 2), and the government accepted, the continuation of the approximate 10% differential that has long existed between the salaries of puisne judges and Chief Justices/Associate Chief Justices. Indeed, no party before the Commission suggested that this differential be altered. Clauses 1 and 2 of the bill set out the salaries of the chief justices (other than the Chief Justice of Canada) and associate chief justices at $254,600, inclusive of statutory indexing, as of 1 April 2004. Clause 1 of the bill will also implement the Commission's recommendation (Recommendation 2) that an approximate 10% differential be maintained between the salaries of chief justices/associate chief justices and that of Supreme Court of Canada justices, and also between the latter and the salary of the Chief Justice of Canada. As of 1 April 2004, the Chief Justice of Canada will earn $298,500 and Supreme Court justices will earn $276,400. All of the judges (chief justices/ associate chief justices and justices of the Supreme Court of Canada) will also be entitled to statutory indexing as set out in proposed section 25 (clause 4).

It should be noted that if Bill C-17 becomes law, it will also affect the salaries of such Officers of Parliament as the Auditor General, the Privacy Commissioner, the Information Commissioner, the Commissioner of Official Languages and the Chief Electoral Officer, whose salary levels are deemed by their governing legislation to be equal to that of certain federal judicial offices.

Finally, the McLennan Commission also considered and recommended (Recommendation 3) that senior northern judges receive the same salary as provincial superior court Chief Justices, given that they have the same duties, responsibilities and functions.

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(11) The term "puisne" means "ranked after" and refers to all federally appointed judges who do not have the title of Chief Justice or Associate Chief Justice.

(12) Essentially, the adjustment is made annually, on 1 April, by multiplying the previous year's salary for judges by the Canadian Industrial Aggregate Index, which is a measure of average weekly wages across Canada published by Statistics Canada, up to a maximum of 7%. The statutory indexing increase on 1 April 2006 was 3.1%.

In 2000, the legislative assemblies in the three northern territories passed legislation creating the office of a Chief Justice in their jurisdictions; however, the statutes have yet to be proclaimed into force. In anticipation of senior judges being designated Chief Justices in the future, clause 2 of the bill will implement the Commission's recommendation, thereby enabling senior judges of the northern superior courts to receive the salary of a Chief Justice.

3. Judicial Allowances – Clauses 6 and 9
(Recommendations 9, 10, 12, 13)

Sections 27 and 40 of the *Judges Act* provide judges with various annual allowances:

- The incidental allowance ($5,000 per annum) permits them to purchase items and equipment – such as robes, law books and computers – that assist in the execution of judicial duties.
- The northern allowance ($12,000 per annum) is intended to compensate for the higher cost of living in the territories.
- The representational allowances reimburse chief justices and other senior judges for travel and expenses actually incurred as they discharge such extrajudicial obligations as representing their courts at conferences or public events.
- The removal allowance offers assistance to judges who have to incur relocation expenses upon judicial appointment and transfer. Certain judges are also entitled to a removal allowance upon retirement.

While the Commission rejected the submission by the representatives of the judiciary to increase the incidental allowance of federally appointed judges, it accepted the proposal that regional senior judges in Ontario be entitled to a representational allowance of $5,000 a year. The Commission noted the unique situation that exists in Ontario, which is divided into eight judicial regions with regional senior judges appointed for five-year terms to administer the judges in each of those regions. As a result, the administrative responsibilities of regional senior judges in Ontario are significant and similar to those of chief justices and associate chief justices. Clause 6(2) of the bill merges sections 27(6) and (7) into a new section 27(6) in order to implement the Commission's recommendation (Recommendation 9).

The Commission also recommended (Recommendation 10) that the higher cost of living and isolation experienced by the lone superior court judge resident in Labrador warranted the payment of an isolated post allowance, the equivalent of a northern allowance, in the amount

of $12,000 a year. Clause 6(1) of the bill implements this recommendation by amending section 27(2) to extend the northern allowance to judges of the Supreme Court of Newfoundland and Labrador resident in Labrador.

With respect to relocation expenses, the Commission accepted the submission of the representatives of the judiciary and recommended (Recommendation 12) that certain judges be reimbursed for expenses incurred within two years prior to eligibility for retirement age, but in anticipation of retirement.(13) The Commission also recommended (Recommendation 13) that spouses and common-law partners of judges of the Supreme Court of Canada, the Federal Court, the Federal Court of Appeal and the Tax Court of Canada be reimbursed for relocation expenses up to an accountable $5,000 limit. Clause 9 of Bill C-17 implements these recommendations into section 40 of the *Judges Act*, which specifies eligible moving and other expenses that can be reimbursed.

4. Judicial Annuities

a. Division of Annuity After Conjugal Breakdown – Clause 15 (Recommendation 5)

Currently, there is no provision within the *Judges Act* that provides for the division of the judicial annuity after conjugal breakdown. Unlike other federal pension plans, judicial annuities are also not subject to such pension benefits legislation as the *Pension Benefits Division Act*.(14) Bill C-17 seeks to respond to this equity gap for spouses and common-law partners of judges by facilitating the division of judicial annuities in a manner consistent with that which applies to other federal pensions, while taking into account the unique structure of the judicial annuity scheme.(15)

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(13) Paragraphs 40(1)(c) and (e) of the *Judges Act* currently permit judges of the territorial and federally constituted courts to be paid a removal allowance when they relocate within two years after actual retirement or resignation. Clause 9(1) and (2) add an entitlement to a removal allowance when these judges incur moving and other expenses in anticipation of retirement where the expenses are incurred no earlier than two years before the judge's date of eligibility to retire. The rationale for these allowances is that the judges of these courts are required to comply with statutory residency requirements when they accept their appointments; therefore, many will incur relocation expenses upon retirement as they return to the places where they lived prior to judicial appointment.

(14) Currently, in a context where family property is being divided, a spouse seeking to enforce an entitlement to a judicial annuity would have to have his or her entitlement satisfied by some other means.

(15) For an overview of the history and evolution of federal judicial annuities, see the Report of the 1999 Judicial Compensation and Benefits Commission, 31 May 2000, Ch. 4.

The McLennan Commission report (pp. 61-66) carefully canvassed the issue of how to treat the judicial annuity when a judge's conjugal relationship breaks down and the parties, or the courts, come to determine the division of family assets. All parties to the Commission process agreed that it was imperative that, in order to preserve the importance of the judicial annuity to the concept of judicial independence, no more than 50% of the value of the annuity accrued over the course of a relationship should be available for distribution to a judge's spouse or common-law partner. It was also agreed that the rights to a portion of an annuity should be determined by provincial or territorial law, as is the case with the division of all family property. As well, the parties eventually agreed on the need to devise a mechanism that would allow for a clean break through a lump sum to be paid out at the time of the division of the family property.

In terms of the valuation of an annuity at relationship breakdown, the Commission recommended that it should be based on actuarially determined retirement patterns, as of the date of the division of assets. The Commission determined that the annuity should be deemed to accrue over the entire period of judicial service, and not just when a judge completes 15 years of service and satisfies the modified Rule of 80,[16] as proposed by the government. The Commission felt that its accrual period recommendation was more fair and that it would also allow for an allocation to a second spouse in the event of another conjugal breakdown, without impinging on the 50% share of the annuity remaining with the judge.[17]

Clause 15 of Bill C-17 implements the Commission's recommendation (Recommendation 5) with respect to the division of the judicial annuity on relationship breakdown. Proposed section 52.11 sets out that a judge, judge's spouse, former spouse or former common-law partner may apply for a division of the judge's annuity. Proposed section 52.13 sets out the circumstances in which the Minister, upon receipt of an application,

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(16) Paragraph 42(1)(a) of the *Judges Act* provides that a full retirement pension is available to a judge who has served on the bench for a minimum of 15 years and whose age and years of service together total at least 80.

(17) Thus, in an example provided by the Commission on pp. 65-66 of its report, a married judge appointed at age 50 and whose marriage ended at the age of 60 would calculate the portion of the judicial annuity subject to division to be 10/22. This is based on the assumption that the expected retirement age of the judge is 72, based on the demographic assumptions of the last actuarial report and on his or her current age (60) and years of service (10). If the same judge remarried at age 65 and subsequently separated from the second spouse at age 70, the judicial annuity subject to division with the second former spouse would be 5/24 of the judicial annuity, assuming that the expected retirement age of the judge is 74, based on the demographic assumptions of the last actuarial report and on his or her current age (70) and years of service (20).

shall approve, defer approval or refuse to approve an application for division. Where a division is approved, proposed section 52.14 describes how the division shall be carried out. Specifically, the spouse, former spouse or former common-law partner is accorded a share of the annuity benefits that are deemed to have accrued to the judge, or a share of the judge's contributions where the judge is not yet entitled to an annuity benefit, has ceased to hold office or has died. The spouse's share shall be 50% of the proportion, or such lesser amount as provided by a court order or agreement. The proportion is calculated as a fraction of the period of time the parties have been together and the judge has held office, divided by the deemed accrual period (the total years of service of the judge up to the actual date of retirement or, where the judge has not yet retired, the expected date of retirement).

Clause 13 of the bill addresses the calculation of survivor benefits where there has been a division of annuity benefits pursuant to proposed section 52.14. Currently, section 44(2) of the *Judges Act* provides that a survivor of a judge who dies while in receipt of an annuity receives a survivor benefit equal to one-half of the annuity that had been granted the judge. Clause 13 adds a provision to ensure that a full survivor benefit is received by a surviving spouse even where there has been a division of the judge's annuity benefits. Put another way, the survivor benefit is calculated on the basis of the full annuity a judge would have received had there been no division of the judge's annuity benefits. This provision seeks to align the treatment of survivor benefits under the *Judges Act* with that currently applicable to these benefits under federal public service pension legislation.

b. Early Retirement for Justices of the Supreme Court of Canada – Clauses 11 and 14 (Recommendation 15)

In 1998, in a partial acceptance of the Scott Commission's recommendations,[18] the government amended paragraph 42(1)(e) of the *Judges Act* to allow judges of the Supreme Court of Canada who have served on that court for 10 years and have attained the age of 65 to resign from office and receive their full annuity. All other federally appointed judges are subject to paragraph 42(1)(a) of the Act, which allows for retirement with a full annuity when the judge has served on the bench for a minimum of 15 years and his or her years of service and age

(18) Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits, 30 September 1996, Recommendation 4.

combined total 80. The 10-year service requirement for justices of the Supreme Court of Canada is based on the heavy responsibility and onerous workload associated with the Court.

Like the Scott Commission, which would not have imposed the age requirement of 65 on the early retirement provision for Supreme Court justices, the McLennan Commission recommended (Recommendation 15) that Supreme Court of Canada justices be permitted to retire with a full annuity after 10 years of service, regardless of age. The Commission noted that its proposal would affect only a small number of justices. Most Supreme Court appointees have previous judicial service and would therefore be eligible for retirement (governed by the modified Rule of 80) after 10 years, notwithstanding a minimum age requirement. In any case, the Commission felt that 10 years might be more than enough for certain justices, given the heavy burden inherent in the membership of that court. Clause 11 of Bill C-17 amends paragraph 42(1)(e) to implement the McLennan Commission's recommendation.

Clause 14 of the bill makes a consequential amendment to section 50(2.1) of the *Judges Act* to reflect the new retirement provisions for Supreme Court of Canada justices. Section 50(2.1) reduces contributions toward a judicial annuity from 7% of salary to 1% for the period during which a judge is entitled to receive a full annuity but continues to work in either a full-time or supernumerary capacity.

### 5. Funding of Representational Costs of Judges – Clause 5 (Recommendation 16)

Currently, section 26.3 of the *Judges Act* sets out a formula for providing costs payable to representatives of the judiciary participating in the commission process on a solicitor-client basis. The section subjects the judiciary's legal representational costs to review by a prothonotary of the Federal Court[(19)] for reasonableness, and the government pays 50% of the resulting total. This provision, which was enacted in 2001, contrasts with the Drouin Commission's recommendation in 2000 that the government pay 80% of the total representational costs of the Canadian Judges Conference and the Canadian Judicial Council that were incurred in connection with their participation in the commission inquiry.[(20)]

For reasons similar to those put forward by the Drouin Commission, the McLennan Commission recommended (Recommendation 16) that the government pay 100%

(19) Prothonotaries are officers of the Court who exercise judicial and quasijudicial functions, including case management, interim motions and final determination of cases involving less than $50,000.

(20) Report of the 1999 Judicial Compensation and Benefits Commission, 31 May 2000, Recommendation 22.

of the disbursements and two thirds of the legal fees (subject to assessment) incurred by the Canadian Superior Court Judges Association and the Canadian Judicial Council in preparing their submissions and bringing them before the Commission. In reaching this recommendation, the Commission noted that all of the representational costs, as well as the costs of various expert services incurred by the government, are covered by public funds.

In its 2004 response to the Commission's report, the previous government stated that it was not prepared to fully accept the Commission's recommendation with respect to representational costs. It continued to hold the view that, while representatives of the judiciary should be afforded a largely unchecked discretion in deciding what costs will be incurred in preparing for a commission inquiry, there must still be a financial incentive to ensure that the public is not held responsible for paying for significant and unpredictable expenditures incurred by the judiciary. This rationale applies equally to disbursements as well as legal fees, especially as disbursements in these matters can be quite significant.(21)

Bill C-17 adopts the same approach as that of the previous government in Bill C-51 (clause 6). Clause 5 of the bill amends section 26.3(2) to increase the payment of the judiciary's assessed representational legal costs (both disbursements and legal fees) from one half to two thirds.

### B. Implementation of the 1999 Judicial Compensation and Benefits Commission's Recommendation 8: Supernumerary Status – Clauses 7 and 8

The ability to elect supernumerary status, under certain conditions, allows a judge who would otherwise be eligible to retire with an annuity equal to two thirds of salary, to continue to work on a part-time basis for full salary until the mandatory retirement age of 75. In 1971, when the measure was first introduced, judges could elect supernumerary status at age 70 if they had served at least 10 years on the bench. Amendments to the *Judges Act* in 1973 permitted judges to elect supernumerary status at age 65 for a maximum period of 10 years, so long as they had served on the bench for at least 15 years. This change was made to align the election of supernumerary status with the conditions required at the time to become eligible for a full annuity.(22)

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(21) See the Government Response to the 2003 Judicial Compensation and Benefits Commission at: http://canada.justice.gc.ca/en/dept/pub/jcbrj/response_02.html.

(22) An annuity could be granted only to a judge who resigned from office after having been on the bench for at least 15 years and who had attained the age of 65.

In 1998, conditions for eligibility for a full annuity were revised to incorporate the modified Rule of 80;[23] however, no accompanying amendments were made to the supernumerary provisions. As a result, judges who are now eligible for a full annuity at ages younger than 65 years cannot elect to become supernumerary until they have served a longer period of time as a full-time judge.

In its 2000 report, the Drouin Commission recommended (Recommendation 8) that this gap between eligibility for a full annuity and the ability to elect supernumerary status be closed. Specifically, the Commission recommended that judges be given the right to elect supernumerary status for a period not exceeding 10 years upon attaining eligibility for a full pension.

At the time of the Drouin report, the government responded by stating that it was not prepared to accept this recommendation until the area was more broadly studied. Clauses 7 and 8 now amend sections 28 and 29 of the *Judges Act* to implement the Drouin Commission's recommendation. Thus, a judge who satisfies the "modified Rule of 80" retirement formula can elect to become supernumerary. Provision is still maintained, however, for a judge aged 70 with 10 years of service to make a supernumerary status election (subsections 28(2)(b) and 29(2)(b)).

## COMMENTARY

Bill C-17 itself has attracted little in the way of widespread public commentary. The Canadian Superior Court Judges Association has, however, indicated that it is concerned about the government's rejection of the Commission's salary recommendations. Specifically, the Association is troubled by what it sees as a government simply picking another salary figure and justifying it by criticizing the commission for not having accepted its arguments in the first place. The Association feels that this sort of practice could put the integrity of the independent commission process, not to mention the concept of judicial independence, at risk. The Association has indicated that it will wait and see what happens to the bill before

(23) In 1998, Bill C-37 removed the minimum age (65) requirement for receipt of a federal judicial annuity. The aim was to provide a more flexible retirement option that would adequately reflect the changing age profile of the judiciary. Thus, judges younger than 65 can retire, provided they have served for a minimum of 15 years and their age and service total at least 80.

considering whether or not to go to court and challenge the government's rejection of the Commission's salary proposal.(24)

While not specifically related to the bill, there has been some noteworthy reaction to the Supreme Court of Canada decision in the *Bodner* case.(25) The President of the Canadian Association of Provincial Court Judges has indicated that there is a great deal of disappointment and discouragement among provincial and territorial judges who feel that the Supreme Court decision effectively gives governments the last word in judicial pay disputes. Professor Jacob Ziegel of the University of Toronto, however, has stated that in his view, the Supreme Court was right to step back from a position that appeared to make the courts judges in their own cause. He also suggested that the federal government has been too generous in accepting the recommendations of federal judicial compensation commissions (well in excess of cost-of-living increases and increases given to senior public servants), and that it was this generosity that led to court claims by provincially appointed judges for major increases in their salaries and benefits.(26)

(24) Cristin Schmitz, "Unhappy judges 'wait and see' on reduced pay hike," *The Lawyers Weekly*, Vol. 26, No. 16, 1 September 2006, p. 1.

(25) See footnote 6.

(26) Jacob Ziegel, "Judges Shouldn't Set Their Own Pay," *National Post*, 18 August 2005.