



CANADIAN JUDICIAL COUNCIL



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PREFACE

The architecture of the Canadian judicial system, and of Confederation itself, was drawn from the marriage of two distinct legal traditions, that of the civil law and that of the common law. Over the decades, this marriage has evolved to reflect what life in this land requires of the law, as well as the essentially European origins of these traditions.

In recent years, however, new and powerful pressures on our judicial system have emerged. Some have arisen from within Canadian society, like the *Canadian Charter of Rights and Freedoms*, human rights legislation applying to both federal and provincial jurisdictions, the assertion of the traditional rights of aboriginal people, and the rise of the equality movements among women, the disadvantaged and minorities.

Others arise from a world in which borders no longer hold people in one country, or hold them out, and in which travel and communications are increasingly within the reach of restless people in every country on the earth. In this context, the influences of an open, changing world are easily brought to bear on the institutions of our own society, including of course our judiciary. Often, the influences derive from sources other than the European origins which find expression in our own institutional forms.

But equally, our influence is felt more than we might imagine in other lands. In virtually every country, developed and not so, democratic and less-so, deeply rooted or newly carved from an ancient empire, there is a searching after new and more workable institutional models. For a number of reasons, most importantly because we are seen as a civil, prosperous and workable country, Canada serves as a model for those who see an honest, impartial and independent judiciary as the best route into a better future. In Africa, Asia and the emerging lands that once formed the Soviet and, before that, Russian Czarist empires, the need to place the law and legal institutions on a basis like our own is deeply felt.

Canadian jurists have much to offer these countries and in a limited way Canadian judges, on a short-term and unpaid basis, have for some time now been able to help. I hope that in coming years, indeed hopefully in the coming months, ways will be found to provide even greater assistance to these emerging democracies as they try to place their judicial systems on the same solid basis as our own. At least in part, such assistance is a function of Canada's moral obligation to assist the "have-not" peoples of the world.

More than altruism is involved in this however. We live in a world in which Canadians in their daily lives are increasingly mobile. At home and abroad, they come more and more into contact with people from other lands and other legal traditions. We need to understand those different traditions if we are to ensure that an open, restless world can go about its business on the basis of well-understood legal principles and institutional arrangements, both at the level of the nation state and internationally. Equally, our effort at understanding can serve to promote the human rights of all who live on our planet.

But we need to understand these different traditions for another, more immediately self-interested reason: increasingly, problems we face in our courts and our judicial system involve the clash of traditions, of perceptions of the law and of justice, that comes from a country more and more cosmopolitan in its nature. Our judicial system, with its long tradition of reconciling differences, now needs to reach out as never before to understand and accommodate the new forces at play in our country and reshaping our future. Reaching out to the world seeking our help is not just a way to employ one of our great national assets, a judiciary of quality, in the service of a more harmonious world, but to build, through the experiences of the judges who offer such help, a more harmonious Canada.

In the pages of this annual report, the reader will find the marks of a judiciary seeking that kind of change and improvement, addressing the difficult issues that arise when traditions are challenged and cultures clash in the courtroom, seeking both to help and to learn from a changing world. The reader will find, too, a judiciary capable of addressing the occasional transgressions

from the high standards to which Canadian judges hold themselves and, always, seeking to build on the traditions we have inherited.

By such efforts, year after year, Canada's judiciary has earned the excellent reputation it holds with Canadians and with those in other lands who are now seeking to build what we have enjoyed for so long. For their vital part in this, my thanks to all my colleagues on the Council. And my thanks, too, to the staff of the Council for all they have done during another very busy year.



The Right Honourable Antonio Lamer, P.C., C.J.C.
Chairman
Canadian Judicial Council

THE CANADIAN JUDICIAL COUNCIL



*Members of the
Canadian Judicial
Council, 1995
Annual Meeting*

GENERAL OVERVIEW

The Canadian Judicial Council was created by Parliament in 1971. Its statutory mandate is set out in subsection 60(1) of the *Judges Act* (Appendix F) which establishes that the objects of the Council are to “promote efficiency and

uniformity, and to improve the quality of judicial service in superior courts and in the Tax Court of Canada.”

The Council, which consists of 35 members, is chaired by the Chief Justice of Canada and includes the chief justices and associate chief justices, chief judge and associate

chief judge of all courts whose members are appointed by the federal government. As of March 31, 1996, the number of federally appointed judges totalled 987.

The senior judges of the Supreme Court of the Yukon Territory and the Supreme Court of the Northwest Territories share a seat serving during alternate two-year terms on the Council. The breadth of this membership means that the considerations of the Council can include views from throughout Canada. The members serving during 1995-96 are listed in Appendix A.

The Council's work falls into four broad categories, dealt with in subsequent chapters:

- the continuing education of judges;
- the handling of complaints against federally appointed judges;
- developing consensus among Council members on issues involving the administration of justice;
- making recommendations to the federal government, usually in conjunction with the Canadian Judges Conference, on judicial salaries and benefits.

The Council is required by statute to meet at least once a year. Current practice, however, is to hold two meetings a year, one in Ottawa in the spring and the other outside Ottawa in the fall. This serves over time to acquaint members with judicial practices, needs and concerns throughout the country.

The Council met in Toronto in November 1995; the spring 1996 meeting was held in Ottawa in March. At the November meeting, the Council welcomed its former Chairman, The Right Honourable Brian Dickson, former Chief Justice of Canada and the honorary chair of the Canadian Bar Association Task Force on Systems of Civil Justice. The Task Force Chair, Eleanore Cronk, a Toronto lawyer, set out the work being done by the Task Force, including fundamental research, consultations and communications. The Task Force was particularly concerned with court costs, access and alternate dispute resolution.

Much of the Council's work is carried on by Committees, which vary in size and frequency of meeting depending on the issues that are involved and the time members have to spare from their court responsibilities. Committee membership at March 31, 1996 is found in Appendix B.

During 1995-96, the Council was served by an Executive Director, a legal officer who joined the Council during the year, and two support staff, all located at the Council office in Ottawa. The expenditures for the year are set out in Appendix D.

SEMINAR FOR COUNCIL MEMBERS: EQUITY AND DIVERSITY

As has been the practice since 1992, a seminar for members of the Canadian Judicial Council was held in conjunction with its 1996 mid-year meeting in Ottawa.

The seminar, chaired by Professor Ed Ratushny Q.C. of the Faculty of Law, University of Ottawa, dealt with the issues of Equity and Diversity from the perspective both of the justice system and of a private institution widely recognized for its efforts in this area, the Bank of Montreal. The institutional focus within the justice system was provided by the report of the Commission on Systemic Racism in the Ontario Criminal Justice System, of which Professor Ratushny was a member.

Professor Bill Black of the Faculty of Law, University of British Columbia, provided an overview on the *problem of systemic discrimination and the institutional contexts within which it is found*. It arises from the way systems operate rather than from the conduct of individuals and is measured by consequences, not by motivations. Professor Toni Williams of Osgoode Hall Law School, a member of the Ontario Commission, then described the Commission's approach to identifying and analyzing various forms of systemic discrimination within the Ontario criminal justice system, and Judge David Cole of the Ontario Court of Justice (Provincial Division), co-chair of the Commission, described for the Council the recommendations of the Commission with a focus on those recommendations bearing on the work of the judiciary and the courts.

In the second part of the seminar, the Chairman and Chief Executive Officer of the Bank of Montreal, Matthew Barrett, described the program the bank has undertaken over six years to remove the systemic impediments to the equal treatment of both employees and customers. This program included task forces to deal with specific issues related to the equal treatment of women, aboriginal people, people with disabilities and members of visible minority groups.

JUDICIAL EDUCATION

OVERVIEW OF RESPONSIBILITIES

A central aspect of the Council's responsibilities is the continuing education of nearly one thousand federally appointed judges.

This responsibility derives from paragraph 60(2)(b) of the *Judges Act*, which empowers the Council to hold seminars "for the continuing education of judges." Since 1971, however, the continuing education of judges has taken on increasing importance and fulfilling this responsibility has required that seminars for judges be augmented by other educational opportunities to allow judges to keep abreast of changes in their profession.

The increased importance of education is the result of changes in all aspects of Canadian life in the nearly quarter century since the Council came into being.

The constitutional entrenchment of the *Canadian Charter of Rights and Freedoms* placed new burdens on judges. Legal scholarship blossomed around Charter issues and continues to take Canadian jurisprudence in new directions. The new *Quebec Civil Code*, revised for the first time since before Confederation and issued in its new form in 1994 after 40 years of work, has imposed its own needs on Quebec judges for continuing education.

To this must be added the pervasive impact of technological change on all aspects of Canadian society. Technology provides new tools to research issues and disseminate judgments, but also requires the constant re-examination of traditional practices and interpretations. As well, the judiciary has shared a universal experience — the "paperless" office has not come into being with new information handling systems. To the contrary, new ways of generating paper have increased the paper burden on judges. Managing this burden requires not only that they read more but that they know more.

Ultimately, the responsibility for keeping up to date falls on individual judges. At present, they are encouraged to devote 10 days a year on judicial education in order to ensure they are abreast of current developments. Given the demand for court time, the limited support services available to the courts, and the over-riding responsibility to ensure timely justice, this is not possible for many judges. However, the continual pressure of accelerating technological change interacting with growing legal complexity helps to explain why it is important, subject to a court's resources, that educational time be explicitly included in the calculation of a judge's sitting days.

If the primary burden of continuing education falls on the judges themselves, the Council nonetheless plays a vital role in supporting their efforts by providing opportunities for both continuing education and maintaining the quality of the judiciary.

The Council carries out its responsibilities in this area through its Judicial Education Committee which recommends education conferences and seminars in Canada that should be designated for the attendance of judges and the reimbursement of their expenses under subsection 41(1) of the *Judges Act*.¹

As well, the Council organizes seminars on matters of particular concern, although the nature of this activity has changed as the system for the continuing education of judges has evolved and needs have changed.

Until 1993-94, for example, the Council itself organized summer seminars for superior court judges from across Canada.

After the National Judicial Institute (NJI) assumed the role of co-ordinating judicial education according to agreed standards for judicial education, and, as part of this, began organizing seminars as well, the Council decided it would no longer conduct its summer seminars. The NJI is a non-profit organization funded by both federal and provincial governments, which designs and presents courses for both federal and provincial judges under its mandate for continuing education.

Through its Study Leave Selection Committee, the Council reviews applications and recommends judges for the National Judicial Study Leave Fellowship Program. The Judges Computer Advisory Committee provides advice and assistance on computer technology.

Aside from the Council's role, chief justices, under subsection 41(2) of the *Act* can authorize the reimbursement of expenses that judges in their courts incur while attending certain other meetings, conferences and seminars.

Second official language training is provided to judges under the auspices of the Commissioner for Federal Judicial Affairs.

The range and complexity of these courses and issues reflect the heavy demands placed on individual judges as well as on the resources of the judicial system as a whole. However, judges have made clear their commitment to both their own and their colleagues' continuing education, and the Council believes it vital for the continuing quality of Canada's justice system that opportunities be provided to ensure that the education of the judiciary is a life-long process.

AUTHORIZATION FOR REIMBURSEMENT OF EXPENSES

The *Judges Act*, subsection 41(1), provides for payment of the expenses of judges attending designated educational conferences and seminars.

¹ The *Judges Act*, subsection 41(1) provides as follows. "A judge of a superior court or of the Tax Court of Canada who attends a meeting, conference or seminar that is held for a purpose relating to the administration of justice, and whose attendance thereat in the capacity of a judge is required by law, or who, with the approval of the chief justice or chief judge of that court, attends any such meeting, conference or seminar that the judge in that capacity is expressly authorized by law to attend, is entitled to be paid, as a conference allowance, reasonable travel and other expenses actually incurred by him in so attending."

The Council authorizes reimbursement of expenses, in most cases for a specific number of judges to attend particular seminars and conferences that the Judicial Education Committee believes will be important and beneficial to the participating judges, and the Office of the Commissioner of Judicial Affairs administers the resulting claims.

Conference on Aspects of Equality: *Rendering Justice*

Prominent among these designated seminars and conferences was the Council's conference on *Aspects of Equality: Rendering Justice* held in Hull, Quebec, from November 17 to 19, 1995, which ultimately enjoyed the largest attendance of any judicial educational conference organized by the Council. Some 126 federally appointed judges were authorized to attend the conference, but it was open to provincial as well as federal judges and the final attendance totalled 210 judges.

The conference turned out to be the largest gathering of women judges in Canadian history. Those in attendance represented almost two thirds of the federal and provincial women appointees to the Bench sitting at the time in Canada. The idea for such a conference formed a part of the recommendations in *Touchstones for Change*, the report of the Canadian Bar Association Task Force on Gender Equality in the Legal Profession, chaired by The Honourable Bertha Wilson.

The historic character of the conference was underlined by The Right Honourable Antonio Lamer, the Chief Justice of Canada, who noted that the conference represented "the first occasion on which, in roughly equal numbers, such a large group of federally and provincially appointed judges have come together in such a setting."

He called the program for the conference "an outstanding one, constructed as it is around some of the most important theoretical and practical dimensions of equality, a value that has, from the time of Aristotle, intrigued and challenged philosophers and jurists alike."

Chief Justice Lamer also noted the educational importance, to men and women judges alike, of the issues raised at the conference.

The conference, which was organized by a Conference Planning Committee chaired by The Honourable Rosalie S. Abella of the Court of Appeal of Ontario, was planned so as to allow both plenary sessions and workshops where smaller groups could deal with workplace issues in a more detailed way. Details of the program are found in Appendix C.

Chief Justice Lamer's opening remarks provided the basis for the first session of the conference, *Judges in the Making: Equality in the Pre-Judicial World*, dealing with questions facing law schools and the legal profession, the environments in which judges form their views prior to appointment.

Other plenary speakers were The Honourable Claire L'Heureux-Dubé of the Supreme Court of Canada, on *Theories of Equality*; Judge Patricia Wald of the United States Court of Appeals, District of Columbia Circuit, on *Assessing Equality*; The Honourable Beverley McLachlin of the Supreme Court of Canada on *Equality and Judicial Neutrality*; and The Honourable Bertha Wilson, who gave the closing address.

As well, the conference provided an opportunity to honour seven women for their pioneering work in the judiciary at a reception and dinner addressed by the Minister of Justice of Canada, The Honourable Allan Rock.

Mr. Rock noted that the dinner honouring the seven was being held in the Centre Block of the Parliament Buildings, the construction of which began in the same year as Emily Murphy became a police magistrate in Edmonton, the first woman appointed to a judicial position in Canada. "In the almost 80 years that have passed since that milestone, we have travelled a long road," Mr. Rock said, "but in truth we have covered too little ground. Today, only 15 per cent of the almost 1,000 federally appointed judges in Canada are women. Seen from that perspective, almost all of the women judges can be regarded as pioneers."

National Judicial Institute (NJI) Programs

The National Judicial Institute was established in 1988 and the Council and the Institute have worked together since then. The Council is represented on the Institute's Board of Governors.²

In 1993, the Institute sought the Council's endorsement of standards for judicial education in Canada. These standards, which were accepted by the Council, encourage judges to spend approximately 10 days a year attending judicial education programs. The standards are intended to help judges to improve the administration of justice, to promote high standards of personal growth, official conduct and social awareness, and to perform judicial duties fairly, correctly and efficiently.

During 1995-96, according to practice, the Council arranged for the NJI to send each new federally appointed judge, on his or her appointment, the binders of written material used in the latest seminar for new judges organized by the Canadian Institute for the Administration of Justice (CIAJ).

The NJI also provides short introductory seminars for new judges that are designed to complement the week-long CIAJ seminar and to provide assistance for those whose appointments do not conveniently coincide with the annual seminar.

² Chief Justice Lorne Clarke of Nova Scotia was the Council's representative on the Board during 1995-96.

During 1995-96, the following NJI seminars authorized by the Council under subsection 41(1) of the *Judges Act* were each attended, on average, by some 20 to 30 judges:

NJI Intensive Study Program

The first NJI Intensive Study program was held in 1994 and received warm praise from participants for the quality of the program. As a result, in 1995, the second

Appellate Courts Seminar	Quebec City	April 23-27, 1995
Early Orientation for New Judges	Ottawa	July 19-21, 1995
Atlantic Judges Conference	Charlottetown	October 19-21, 1995
Pre-Trial Skills and Effective Trial Management	Halifax	November 1-3, 1995
Criminal Law, Procedure and Evidence	Toronto	November 8-10, 1995
Family Law Seminar	Vancouver	November 22-24, 1995
Jury Trials Seminar	Ottawa	November 27-29, 1995
Scientific Evidence Seminar	Ottawa	November 30-December 1, 1995
Early Orientation for New Judges	Ottawa	December 6-8, 1995
Family Law Seminar	Quebec City	February 7-9, 1996
Criminal Law, Procedure and Evidence	Vancouver	March 13-15, 1996
Case Management Seminar	Toronto	March 20-22, 1996

In addition to these seminars, 11 courses dealing with computers were conducted under the NJI's auspices throughout the country during the year.

The focus on technology was also reflected in an increasing number of materials available from the NJI on diskette. The 1995 NJI Intensive Study Program materials available on diskette included some 22 titles on subjects ranging from creative sentencing to judging psychological predictions and equal access to Canada's judicial system for persons with disabilities.

Intensive Study Program was held in Cornwall, Ontario, and attended by 60 judges from all levels of courts.

The purpose of the program was to bring judges together in an academic setting and provide them with the opportunity to consider current issues of criminal law and evidence in greater depth than is usually feasible in shorter programs. The key to the success of the program is that it involves some of Canada's finest judges, practicing members of the bar, and professors of law as faculty.

The 1995 program involved the consideration of fundamental questions such as the role of a criminal justice system in a democratic society and the influence of the changing face of Canada on the criminal justice system.

The program was opened by Chief Justice Lamer, who chairs both the Council and the Board of Governors of the NJL. In his address, the Chief Justice underlined his belief that “complexity and delay are the greatest challenges facing our criminal process today.”

Chief Justice Lamer said that in attacking these problems it was important that it be done in a way that enhances, not diminishes, the fairness and justice of the process.

“While the basic principles of the criminal process are fair and wise,” he said, it may well be that their implementation has been unduly complex and this has led to unfairness. “In other instances,” he said, “we may not have kept our practices in tune with the times — we run the risk of applying old solutions to new problems.”

Chief Justice Lamer suggested four areas of the criminal process that need critical scrutiny.

“The first is the preliminary inquiry and the second, the closely related subject of disclosure. The third is the proliferation of lengthy *voir dire*s and the fourth is the jury system in the large sense.

“All of the subjects are, at least to some extent, inter-related. And we must not forget that procedural problems may be created, or exacerbated, by problems with the underlying substantive law.”

“While much can be improved by changes in the substantive law,” he said, “within the sphere of the individual judge there is much that can be accomplished to rid our process of unnecessary complexity and to reduce delay,” but this requires a re-examination of the role of the judge.

“The image of the judge that emerges is one of part law reformer, part pre-trial facilitator, part trial manager, part effective communicator and, of course, a highly skilled and impartial adjudicator. I think that image is much more complex than the traditional image of the judge. Yet I believe it reflects what is required of judges today and into the future.”

Canadian Institute for the Administration of Justice (CIAJ) Programs

As in previous years, the authorized seminars included two well-established CIAJ programs:

- The annual seminar on judgment writing, in Montreal from July 5-8, 1995, with up to 50 judges authorized to attend;
- The annual seminar for new judges, in Bromont, Quebec, from February 25 to March 1, 1996, which is open to all judges appointed since the last seminar and brings the advice of experienced judges to bear on the concerns and problems of new judges.

The Council also authorized up to 95 judges — 85 as participants and 10 as organizers and speakers — to attend the conference on *Public Perceptions of the Administration of Justice*, held at Banff, Alberta, from October 11 to 14, 1995.

Other Seminars Authorized Under the *Judges Act*

Judges were also authorized under subsection 41(1) of the *Act* to be reimbursed for their expenses while attending a variety of other seminars and conferences during the year, including the following:

- Up to 45 judges were authorized to attend the seminar *Gender Issues in Family Law* in Montreal from May 17 to 20, 1995, under the auspices of the Association of Family and Conciliation Courts;
- Up to 60 judges were authorized to participate in the Federation of Law Societies of Canada National Criminal Law Program on *Criminal Law and the Charter* in St. John's from July 10 to 14, 1995;
- Two judges were authorized to attend each of the New Appellate Judges Seminar and the Senior Appellate Judges Seminar at the Institute of Judicial Administration, New York University School of Law, in July 1995;
- Up to 50 judges were authorized to attend the 1995 Cambridge Lectures of the Canadian Institute for Advanced Legal Studies from July 9 to 16, 1995;
- Up to 25 judges were authorized to attend the Canadian Bar Association Task Force Conference on *Civil Justice: Reform for the 21st Century* in Toronto from February 1 to 3, 1996.

SOCIAL CONTEXT EDUCATION

During the 1995-96 year, the Council's Special Committee on Equality considered the follow-up work related to the development of courses in social context education for judges.

The Council had unanimously adopted a resolution in 1994 calling for the "comprehensive, in-depth and credible" education for judges in social context issues.

The task of developing such an educational program was transferred to the National Judicial Institute which engaged Professor Katherine Swinton of the University of Toronto Faculty of Law to prepare an operational blueprint for the program.

Professor Swinton's report had the strong endorsement of the Minister of Justice, The Honourable Allan Rock, who expressed his support both during the *Aspects of Equality* conference in November 1995 and during his regular meetings with the Council itself.

Professor Swinton's report set out the case for social context education, the issues related to providing it and recommendations on a range of matters, including areas of priority concern.

She recommended that social context education should proceed on two tracks — through integration into traditional programs for judges, and through specifically dedicated programs. The priority areas, she

said, should be gender, race or culture, and aboriginal issues. There should be targeted programs to deal with particular needs and groups. The programs, she said, should clearly link content and the judicial task and provide opportunities for open and frank discussion among judges in small groups in a non-confrontational atmosphere.

The Special Committee on Equality received this report in February 1996. The Council endorsed the report at its March meeting and recommended that the NJI Board of Governors submit a request for the necessary funding.

STUDY LEAVE FELLOWSHIPS

Each year, a number of judges spend an academic year at a Canadian university for the purposes of research, study and, in some cases, teaching. The program for the study leave is tailored to the needs and interests of the individual judge and the host institution.

The fellowship program operates under the auspices of the Canadian Judicial Council and the Council of Canadian Law Deans and is administered by a Selection Committee which recommends judges for leave. Under section 54 of the *Judges Act*, the Governor in Council must approve leave from judicial duties.³

The aims of the program are to:

1. Enable a judge to engage in research, teaching or related activities at a Canadian Law School or cognate institution so that he or she can return to the bench better equipped to carry out judicial duties; and
2. Provide Canadian law schools or related institutions an opportunity to have experienced jurists participate in and contribute to research, teaching or related activities of benefit to faculty and students.

During a study leave, the judge continues to receive his or her salary but must cover living, travel and other expenses from personal resources.

During 1995-96, eight judges took leave:

- Mr. Justice Mark M. de Weerd of the Supreme Court of the Northwest Territories researched and partially wrote a book on "Justice in the North" at the University of British Columbia Law School, which he was to complete as time allowed on his return to his judicial duties;
- Mr. Justice John W. McClung of the Alberta Court of Appeal took his study leave at the Faculty of Law, University of Alberta, where he researched early Alberta law, legal institutions and legal traditions, including criminal litigation in Edmonton from 1879 to 1930, and delivered a number of papers to students based on this work;

Subsection 54(1) states: No judge of a superior court or of the Tax Court of Canada shall be granted leave of absence from his judicial duties for a period in excess of thirty days except with the approval of the Governor in Council and, whenever any such leave of absence is granted, the Minister of Justice of Canada shall forthwith notify the chief justice or chief judge, if any, of the court and the attorney general of the province accordingly.

- The late Mr. Justice David C. McDonald of the Court of Queen's Bench took leave to conduct research and write on the *Charter of Rights and Freedoms*, judicial appointments, independence and accountability, television in the courtroom and specific areas of legal history at the University of Victoria and the University of Alberta law faculties;
- Mr. Justice Douglas H. Carruthers of the Ontario Court of Justice (General Division) spent his leave at the University of Western Ontario Law School, teaching, participating in seminars and lectures, working with trial technique study groups and organizing day-long study tours of the family and criminal courts in London;
- Mr. Justice André Desmeules of the Quebec Superior Court in Quebec City, in his study leave at the Faculté de droit de l'Université Laval, concentrated on the areas of civil and administrative law, and with particular emphasis on economic and financial rights and the impact of new medical technologies on individual rights;
- Mr. Justice Benjamin Greenberg of the Quebec Superior Court in Montreal spent his leave at the Faculty of Law, McGill University, teaching, doing research, participating in faculty and student affairs, auditing classes and participating in a number of seminars and panels as "judge in residence";
- Mr. Justice F.B. William Kelly of the Supreme Court of Nova Scotia took his study leave at the International Centre for Criminal Law Reform and Criminal Justice Policy in Vancouver to focus on international criminal law issues and practices, including the

ongoing tension between various justice systems and the media, and comparative treatment of victims in different criminal justice systems;

- Madam Justice Alice Desjardins of the Federal Court of Canada (Appeal Division) focussed on the essence and function of judicial review during her leave at Osgoode Hall Law School at York University, and also dealt with equality issues and the role of women judges.

During 1995-96, the Governor in Council, on the Selection Committee's recommendation, granted study leave commencing September 1, 1996 to the following six judges:

- Mr. Justice John Agrios of the Court of Queen's Bench of Alberta for leave at the University of Toronto Law School;
- Mr. Justice Archie Campbell of the Ontario Court of Justice (General Division) for leave at Osgoode Hall Law School, York University;
- Mr. Justice Mark McGuigan of the Federal Court of Canada (Appeal Division) for leave at the University of Ottawa;
- Mr. Justice Jean Richard of the Quebec Superior Court for leave at l'Université Laval;
- Madam Justice Christine Tourigny of the Quebec Court of Appeal for leave at l'Université Laval;
- Mr. Justice Jacques Vaillancourt of the Quebec Superior Court for leave at l'Université de Montréal

JUDGES COMPUTER ADVISORY COMMITTEE

The Judges Computer Advisory Committee examines new information technologies, informs judges about their applicability and advises the Council of the policies needed to make the best use of them.

The major activity of the Committee was the development of draft standards for the electronic citation of judgments and documents, which were issued for comment. The draft standards are discussed in Chapter 4.

Most of the members of the Committee are puisne judges (see Appendix B for membership), which makes it unique among the Council's committees. It generally meets twice yearly and publishes a newsletter for judges, *Computer News for Judges*, offering practical advice on the use of computers in a judicial context. Some 550 federally appointed judges are on the mailing list, and another 550 copies are sent to provincial court chief judges for distribution to interested judges of their courts.

During 1995-96, two editions of the newsletter were published, Numbers 19 and 20. Articles in the editions included:

In No. 19, Spring-Summer, 1995

- An article on the birth of JAIN, the Judicial Affairs Information Network, which eventually is to provide to every member of the federal judiciary an electronic information infrastructure to store, exchange, disseminate and access information of interest to judges. The network, a bulletin board system, uses First Class, which is Canadian software

allowing the use of a high-speed modem for electronic messaging and conferencing.

- The second part of a two-part series by Judge Pierre Archambault of the Tax Court of Canada on how to Create Your Own Electronic Bank of Precedents, including the use of QUICKLINK for Windows (QUICKLAW), WordPerfect 5.1 for Windows, and Folio VIEWS 3.1.
- "Finding Law on the Internet: Where's the Beef?," an article by Robert Franson of the University of B.C. Faculty of Law, featuring advice on how to find information, a list of useful Websites and a discussion of the uneven quality of information on the Internet as of the summer of 1995.

In No. 20, Fall-Winter, 1995-96

- An article, "Rookies' Corner — Fax Modems," by Madam Justice Nancy Bateman of the Court of Appeal of Nova Scotia on the uses of fax modems and software in facilitating trial work.
- An extended discussion of Electronic Trial Transcripts in the Alberta Court of Appeal by Mr. Justice Roger P. Kerans of the Court of Appeal of Alberta and Patrick Keys, student-at-law. The article chronicles the efforts of the Court to implement a pilot project to test the viability of electronic appeal books, discusses the court's experiences and describes its future electronic plans for the judicial appeal process.
- A reprint of an article by Martin Felsky, which first appeared in *The Lawyers' Weekly*, dealing with the role of electronic standards in the evolution of technology in Canada's courts.

COMPLAINTS

THE ROLE OF THE COUNCIL

The *Constitution Act, 1867* provides that the judges of Canada's superior courts "shall hold office during good behaviour" and be removable only by "the Governor General on Address of the Senate and House of Commons."

This serves two vital purposes.

It provides the fundamental buttress for judicial independence — and thus for impartial justice — by ensuring that judges cannot be removed from the Bench except by Parliament and only for breaching the requirement of "good behaviour." A judge cannot be removed from the Bench because of his or her decisions.

At the same time, it provides a check on the judiciary, ensuring that the principle of judicial independence does not eliminate judicial accountability. In carrying out their duties, independently and impartially, judges try to be right, but whether they are correct or incorrect, right or wrong in their decisions, they are not free to breach the bounds of "good behaviour."

This broad framework is drawn from the *English Act of Settlement, 1701* which the Parliament at Westminster enacted to prevent the removal of judges whose decisions were viewed with disfavour by

the British monarch, a fairly usual practice in England prior to 1688.

Despite its breadth, it has proven remarkably effective in preserving judicial independence from the interference of monarchs and governments alike, and from the popular pressures that can periodically be brought to bear against particular decisions.

At the same time, it has also proven effective as a deterrent to judicial misbehaviour. Only once since 1701 has the U.K. Parliament removed a judge from office. Never has a Canadian judge faced Parliament for misconduct. However, a number of judges whose conduct has been under question have chosen to retire or resign rather than subject themselves to the glare of parliamentary scrutiny.

The role of the Canadian Judicial Council in considering complaints about the conduct of federally appointed judges proceeds within this historical and constitutional context.

The Council, whose statutory basis lies in an Act of Parliament, the *Judges Act*, can no more interfere in the decisions of a judge or in the conduct of a trial than can Parliament itself. Nor can a judge, even the chief justice of the judge involved, infringe upon the independence of another judge in relation to the conduct of a trial or proceeding.

A judge's decisions, of course, can be appealed to progressively higher courts and can be reversed or varied by the appeal courts without reflecting in any way on the capacity of a judge to perform his or her duties and without jeopardizing in any way the judge's tenure on the Bench, so long as the judge has acted "within the law and conscience."

This appeal process, well known and understood by professional and layperson alike, takes place under clearly established rules, precedents and practices up to the Supreme Court of Canada, since 1949 Canada's highest court. But at no point in this process does the Canadian Judicial Council have a role.

The role of the Council involves scrutiny not of a judge's decisions but of a judge's behaviour, and it comes into play when a complaint or allegation is made that the judge in some way has breached the requirement of good behaviour, and by his or her conduct "has become incapacitated or disabled from the due execution of the office of judge."

In this role, the Council membership acts not as individual members of the judiciary but as a unique tribunal whose mandate is to make an independent assessment of the judicial conduct in question.

Because the decision on whether a judge should be removed from office is reserved to Parliament, the Council can only recommend to the Minister of Justice that a judge be removed or not removed from office. The Minister, in turn, can only make a further recommendation to Parliament. A decision of the Council or of the Minister in favour of removal in and of itself cannot cause a judge's removal.

The Council, in brief, has no role in reviewing whether a judge has made an erroneous decision. It has a preliminary role in determining whether a judge should be removed from office.

The distinction between a judge's decisions and a judge's conduct is strict. This distinction is not always clear to most of those who complain to the Council, but it is fundamental to both the independence and the accountability of judges.

THE PROCESSING OF COMPLAINTS

The statutory role of the Council in considering complaints is set out in the *Judges Act* (Appendix F). The Council has had this role since it was established in 1971.

The Council's procedures and how they have evolved since 1971 were examined at length by Professor Martin L. Friedland of the Faculty of Law at the University of Toronto in his report *A Place Apart: Judicial Independence and Accountability in Canada* (see also Chapter 4). Professor Friedland reported:

"The Council gave me full access to all of their complaint files. Over the course of my research, I spent several days examining the files, particularly those in the past several years. My overall opinion is that the Judicial Conduct Committee and the Executive Director have dealt with the matters received carefully and conscientiously. I never sensed that any matter was being 'covered up' by the Council after a complaint was made to it. The descriptions in the Annual Report — at least for the

past few years — in my view appear accurately to reflect the complaints that have been received by the Council.”⁴

Complaints about the behaviour of federally appointed judges come to the Council from a variety of sources, the majority of whom are participants in court proceedings. The Council requires that a complaint be in writing and name a specific judge or judges before it will open a complaint file. There is no requirement that a complainant be represented by counsel or that a complaint be made on any specific form.

One result of this latter feature of the process is that complaints that might be rejected in a court proceeding for failing to meet basic evidentiary, procedural and other requirements are seriously examined by the Council until they are found to be without basis.

This system occasionally results in judges being exposed to unjust accusations and unwarranted public questioning of their character.

Judges, because of their position and the limits on what they can publicly say, cannot easily refute such accusations. They justifiably resent their character and reputations being questioned, particularly when the dispositions of complaints against them are not given the same public prominence as the original allegations might have received as a result of complainants having sought publicity.

Another result is that the statistics on the number of files opened by the Council reflect not only legitimate complaints about judicial conduct but also baseless ones.

At the same time, this openness to examination is an important aspect of demonstrating the willingness of judges both to be and to appear to be publicly accountable for their conduct, and it ensures that complainants, whatever their status, training or resources, can have access to the complaints process.

In addition to considering complaints from the public, the Council also undertakes formal inquiries initiated by the Minister of Justice or by a provincial attorney general concerning the conduct of a federally appointed judge. Almost all complaints received by the Council, however, are from the public.

The Council considers each letter that complains about the actions of a specific judge or judges identified by name. Where warranted, and it rarely occurs, the Council initiates a formal investigation, reports its findings to the Minister of Justice and, again where warranted, recommends a judge’s removal from office.

Under subsection 65(2) of the *Judges Act*, there are four grounds on which the Council may base a recommendation for removal as a result of its investigation of a judge’s conduct:

- (a) age or infirmity;
- (b) misconduct;

⁴ *A Place Apart. Judicial Independence and Accountability in Canada*, pp. 94-95

- (c) having failed in the due execution of office; or
- (d) having been placed, by conduct or otherwise, in a position incompatible with the due execution of office.

Under subsection 63(2), only the full Council can order a formal investigation of a complaint and only the full Council can recommend a judge's removal from office to the Minister of Justice. However, the initial responsibility for dealing with complaints falls to the Chairman or one of the two Vice-Chairmen of the Judicial Conduct Committee of the Council.

The Committee Chairman or a Vice-Chairman reviews each complaint and decides on its disposition. He or she may seek comments from the judge who is the subject of the complaint but, with or without such comments, may close the file with an appropriate explanation to the complainant.

The Chair or Vice-Chair also may ask independent counsel to make further inquiries — that is, to undertake an informal fact-finding.

On the basis of that fact-finding, the Chair or Vice-Chair may ask a Panel of up to five members of the Committee to consider the complaint. A Panel may conclude that no further action by the Council is warranted and direct that the file be closed with or without an expression of disapproval of the conduct in question. In expressing disapproval a Panel is in effect deciding that a complaint has some validity but is not sufficiently serious to warrant removal from the bench.

If the conduct complained of is sufficiently serious, the Panel may recommend to the Council that a formal investigation be undertaken under subsection 63(2) of the *Act* to consider whether a recommendation for removal is called for. Prior to making this determination, the Panel may refer the complaint back to the Chair or Vice-Chair for a fact-finding investigation and report, where this has not already occurred.

Only rarely does a complaint lead to a formal investigation. The largest proportion of complaints are dealt with by the Chairman and the two Vice-Chairmen on the basis of the authority delegated to them. The remainder are dealt with by Panels of the Committee, who are appointed in accordance with the Council's Judicial Conduct By-Laws, reproduced in Appendix E.

The members of the Judicial Conduct Committee, as of March 31, 1996, are listed in Appendix B.

THE 1995-96 COMPLAINTS

The number of new complaint files opened by the Council in 1995-96 was 200. As can be seen in Table 1, 180 files were closed during the year. Taking into account the 27 open files as of April 1, 1995, this left 47 open complaint files at March 31, 1996 when the Council ended its fiscal year.

Ten complainants filed more than one complaint during the year. In two cases, a single complainant resulted in four files being opened, in two cases three files and in six cases two files.

TABLE 1 • COMPLAINT FILES

	New Files Opened	Carried over from previous year	Total Caseload	Closed	Carried into the new year
1987-88	47	12	59	52	7
1988-89	71	7	78	70	8
1989-90	83	8	91	77	14 ¹
1990-91	85	13 ¹	98	82	16
1991-92	115	16	131	117	14
1992-93	127	14	141	110	31
1993-94	164	31	195	156	39
1994-95	174	39	213	186	27
1995-96	200	27	227	180	47

¹ One file was inadvertently counted twice in 1989-90, and the actual number of cases carried into 1990-91 was 13

To provide context for these numbers, the procedures used by the Council are as follows:

- Each letter naming a federally appointed judge in a complaint results in a separate file being opened, unless there are multiple complaints about the same matter, in which case they all go into a single file.
- A letter naming a federally appointed judge complaining of a matter on which the Council apparently cannot act — for example, a complaint about a judge's decision rather than his or her behaviour — will nonetheless result in a file being opened and will be considered a new complaint on the Council's records.
- Letters that express a generalized grievance against the judicial system, or the court process, or complain about the conduct of lawyers, provincial court judges, masters and other officials over whom the Council has no jurisdiction, or complain of a judge's conduct but do not name the judge, do not result in complaint files being opened and are not counted as complaints in the Council's records. Those who submit these grievances are so advised; occasionally, the Council's response to the writer will result in a complaint specifically naming a judge or judges and when this happens a complaint file will be opened.

As well, the Council receives numerous letters dealing with problems that do not derive from judicial proceedings nor relate to the judicial system. They

run the full gamut of life in Canada, including such problems as unpaid debts, problems with veterans' benefits, immigration or refugee board rulings and similar matters.

These often reflect considerable effort on the part of the writer and often include extensive documentation, but do not come within the Council's ambit and are not reflected in statistical summaries of the Council's work. The Council, with neither the resources nor a legal basis for dealing with these matters, nonetheless tries to provide as much guidance as it can as to where the writer might turn for redress.

A perspective on the picture provided by the statistics can be gained by a description of the disposition of files that were closed during the 1995-96 year, as set out in Table 2.

Some 98 per cent — 176 out of 180 — were closed after review by either the Chairman or the Vice-

Chairmen, either on the basis of the material provided by the complainant or following a review and a response from the judge who was the subject of the complaint and the judge's chief justice. Within the 176, eight files were closed as withdrawn or discontinued by the complainants.

Four files were referred to Panels of Committee members in accordance with the Council's by-laws. Of these, one was considered sufficiently serious to warrant a fact-finding by independent counsel.

While each of the complaints received is important to the complainants and the judges involved, and to the Council, the totals must be set against the fact that there are nearly 1,000 federally appointed judges in Canada. They deal with tens of thousands of cases each year, many involving multiple rulings in highly emotional circumstances. In that context, the number of complaints is small indeed.

TABLE 2 • COMPLAINT FILES CLOSED IN 1995-96

	Closed by the Chair/Vice-Chair of the Committee	Closed by Panels of the Committee
After response from the judge	79	4
Without requesting response from the judge	89	—
Files "Withdrawn" or "Discontinued"	8 ¹	—
Total	176	4

¹ Includes two files closed when the complainants wrote stating they were "withdrawing" their complaints and six files closed as "discontinued" when the complainants failed to provide additional details as requested of them.

FILES CLOSED BY CHAIRMAN OR VICE-CHAIRMEN OF THE JUDICIAL CONDUCT COMMITTEE

The Chairman or one of the two Vice-Chairmen of the Judicial Conduct Committee consider each complaint in which a federally appointed judge is named.

By far the largest proportion of these complaint files are closed on the basis of either the complainant's letter or the comments of the judge concerned — that is, without further fact-finding or investigation.

Most often, the reason for closing a file without seeking comment or conducting further investigation is because the complainant, either explicitly or implicitly, has asked that a judge's decision be reversed or altered, that a new trial or hearing be held, or that the complainant be compensated for an allegedly incorrect or unlawful decision.

The Council has no power to order any of these things. For the most part, these are matters for the appellate courts. All files requesting such relief are closed without further action.

Where a letter does not make clear the nature of the proceeding that gave rise to a complaint, the Chairman or a Vice-Chairman will often seek the comments of a judge and/or chief justice to ascertain whether the complaint falls within the Council's jurisdiction or outside it. Such comments will also be sought to gain a better understanding of the allegation that has been made in order for the Council to prepare an appropriate response to the complaint.

Table 2 sets out the files closed by the Chairman or Vice-Chairmen of the Committee. As it shows, 89 files were closed without seeking comment, and 79 were closed after comments from the judge and his or her chief justice.

To ensure the fairness of the screening process for considering complaints, the Council requires that the Chairman and the Vice-Chairmen not screen complaints involving judges in their own court or province.

As an additional safeguard, the Judicial Conduct Committee established at the Council's 1994 annual meeting that all complaints against members of the Council itself should be reviewed by independent counsel even if the complaint is without any apparent merit. Independent counsel reviewed six files during 1995-96 involving members of the Council.

Described here are some of the issues raised in files closed during 1995-96.

Alleged Gender Bias

The Chairman and Vice-Chairmen closed eight files in which gender bias was alleged during 1995-96. Two involved complaints in which the alleged bias on the part of a judge was against women, six in which the alleged bias was against men.

- One complaint file included three letters alleging gender bias against women. These complaints, from a women's centre and two individual complainants, alleged that a judge in family law proceedings used abusive language and intimidated women who appeared before him. One individual complainant

said she was threatened with jail if she did not allow her ex-husband access to the child, another said the judge would not allow her or her lawyer to present and defend her case. The judge said he had advised the first complainant in firm language of the consequences of continuing to deny access to the child but had not used inappropriate language, and had in fact provided full opportunity for the second complainant's case to be argued. The judge was supported in this by an affidavit from the lawyers involved, and subsequently by the directors of two other women's centres that the judge has been "respectful, fair and knowledgeable" in dealing with family issues. The complaint was found to be without merit.

- A complaint of gender bias against men arose from an application for a reduction in child support payments. Initially, the complaint concerned a five-month delay in providing reasons for judgment but the reasons were delivered before the Council could act on the complaint. Subsequently, the complainant alleged that, as a result of his complaint about the judge, the reasons for judgment were one-sided and "meant to be punitive as well." The judge denied that the decision reflected any bias against the applicant based on gender, but said the delay was the result of the voluminous pleadings and material, as well as the complexity of the issues involved. The complainant was advised of the judge's reply, and also advised that the appropriate remedy for the applicant's disagreement with the decision was by way of appeal.

Three other complaints of bias against men also involved family law proceedings, each involving the complainant arguing that decisions were unfair. In each

case, the complainant was advised the appropriate course was by way of appeal as the Council has no authority to review judges' decisions.

Alleged Racial Bias

Ten files complaining of racial bias (a number of which also raised other concerns) were closed during 1995-96. They included the following examples:

- A non-lawyer representing a friend in a landlord and tenant matter requested through the court clerk's office that the proceeding be bilingual, but when he appeared on the motion the judge did not speak French. The complainant alleged that the judge had pre-determined the case against him because he was a francophone and a member of a visible minority. The judge granted an adjournment on condition that the complainant's friend deposit rental arrear payments with the court on a monthly basis, a requirement, the complainant alleged, that was not imposed on others. The judge explained that he had requested an interpreter once he found he could not communicate with the complainant and adjourned the matter to a special date because 11 witnesses would have to be called. The deposit was required, the judge said, in view of the nature of the proceedings. No evidence of judicial misconduct was found by the Vice-Chairman who considered the complaint. Court staff had erred in booking the complainant's motion before the judge, it was found, but this was not the judge's fault. The judge's imposition of terms, the Vice-Chairman of the Judicial Conduct Committee found, was within the judge's discretion and could only be varied by an appeal court, not the Council.

- Another complainant, the accused in a criminal proceeding, alleged that the judge was a “racist” and had made up his mind before the trial began. As the complainant provided no particulars, no action could be taken on his allegation of racism on the judge’s part.
- A complainant acting on behalf of a friend in an eviction proceeding objected to the judge referring to him as a “young student from Africa” in his reasons and said this and other comments in his reasons demonstrated the judge was racially biased against him. Each of the instances cited by the complainant was reviewed; none was found to support the allegation of racism.
- A complainant, acting on behalf of a party in a custody proceeding, alleged that a judge was biased against men and racially biased. He cited five grounds for the complaint — including the judge’s telling the man involved that he should get on with his life and ordering him to withdraw money from a guaranteed investment certificate and give it to his former wife, who was on welfare. The charges were found to be unsubstantiated and the complaint to represent dissatisfaction with the judge’s decision, a matter outside the Council’s jurisdiction.
- A complainant, a party in a contract dispute, alleged that a judge had made “racist and religious” slurs against him and his wife, that the judge had shouted at a witness, had ignored evidence, had treated the complainant’s wife “as an ignorant and lifeless piece of furniture” and “had inside connections or arrangements” with the opposing party. The judge said that on reviewing his reasons for judgment, he noted that he had referred to the complainant and his wife by an incorrect name and if, by doing so, he had

inadvertently insulted them, their race or religion, he most sincerely apologized because he had no intention to do so. He noted that the complainant’s wife had not been in court but had been capably represented by counsel. On reviewing the allegations and the judge’s response, the complainant was advised that there was no basis for further action by the Council.

Alleged Conflict of Interest

A total of 19 files alleging conflict of interest were closed during the year. Many of these also involved other categories of complaints. The following examples indicate the nature of the complaints of conflict including the fact that many complaints arise not from trials but from the often-misunderstood conferences and processes that precede or accompany trials.

- A complainant, representing himself in civil proceedings before the court, alleged that the judge who presided over a pre-trial conference coerced him into signing Minutes of Settlement favourable to the opposing party because the opposing party was a lawyer. The complainant also said that because the suit was brought by a “friend or officer of the court,” a second judge who presided over a motion for an injunction made damaging comments about the complainant’s wife. The judge in the pre-trial conference cited a number of instances in the written record where she had told the complainant that any settlement had to be entirely voluntary. The second judge denied any special relationship between him and the lawyer and provided a transcript which he said demonstrated that he had given the complainant every opportunity to make his position clear to the court. On review of the complaint, the judges’ letters

and the transcripts of the proceedings, "absolutely no evidence of misconduct on the part of either judge" was found.

- Complainants in an intellectual property case alleged that a judge, in adjourning a motion *sine die* and becoming involved in helping the parties reach a negotiated settlement, had created "an apprehension of bias" by combining the roles of mediator and judge. The judge said that he had encouraged the parties to negotiate a settlement to avoid lengthy delays which would be harmful to them in light of the nature of the intellectual property at issue, that he had later acted with the consent of both parties and had met with counsel for each side separately, that he had acted impartially throughout and that the parties had reached a voluntary settlement with the assistance of their counsel. Subsequently, counsel for the complainants advised the Council that, in his view, the judge should not have met separately with counsel in the absence of opposing counsel and said he saw a conflict in the judge switching roles as mediator and judge. The complainants and their lawyer were advised that there was no evidence of misconduct on the part of the judge. But the letter also noted the substantial debate now under way about how such disputes should be managed and the evolving use of Alternative Dispute Resolution (ADR) to resolve disputes more efficiently and expeditiously. "The present view," the parties were advised, "is that a judge does not step over the line when she or he carries the matter to conclusion when parties have acknowledged that a settlement has been reached."
- A complainant, a party in a custody case, alleged bias on the part of the judge because the judge had told him at a pre-trial conference that it was likely a

trial judge would grant sole custody of the children to his ex-wife. He also objected to the number of pre-trial conferences the judge held and to the fact that the judge had held private sessions with his ex-wife and her counsel. The judge, in responding to the complaint, said her position on the custody question was based on the recommendations of a psychological assessor who had been chosen by both parties. She confirmed that she had held seven pre-trial conferences because each time such a conference was called the parties asked for an adjournment, and confirmed that she had met jointly and privately with both parties and their counsel in accordance with her usual practice. In light of the complaint to the Council, the judge said no further purpose would be served by having them appear before her again prior to trial. As a result, the matter had been set down for trial. The complainant was advised that, on review, no evidence of judicial misconduct was found. He was also advised that the judge could, at her discretion, make suggestions and interview parties jointly or separately as she thought best.

- A complainant in a family court proceeding alleged that the opposing lawyer arranged to have the matter heard by the judge because the judge and the lawyer had a close personal relationship. He alleged that the lawyer and her husband socialized with the judge and his wife. He complained that a settlement favourable to his ex-wife was the result of this relationship. The judge denied such a relationship and denied also that he and his wife socialized with the lawyer and her husband, saying that he knew her only as someone who had been active in the family law bar for many years. The complainant was advised that there was no evidence of misconduct,

and that the Council had no jurisdiction to inquire into the actions of the lawyer. The complainant wrote again, expressing his extreme dissatisfaction with the Council's reply and repeating his allegations against the judge, adding as well that the judge's conduct "was both discriminatory (including racist remarks), biased and should be dealt with." He provided no evidence to support his allegation of racial prejudice. He was advised that it was regrettable that he was dissatisfied with the response to his complaint and that there was no basis for re-opening the file.

- A complainant, representing himself, objected to a judge hearing a case, arguing that the judge was in a conflict because his daughter and son-in-law worked for the same law firm as opposing counsel and that a niece worked for the complainant's former law firm. The judge, in his response to the complaint, said his daughter and son-in-law did indeed work for the law firm but they were unaware of the proceedings involving the complainant. Had they been involved in any matter that might come before the court, they would have advised the Court Registrar so that the judge would not preside. As well, he said the niece worked for the complainant's former law firm but he had no knowledge of her practice. In view of the complaint, he said he had advised the Registrar that he should not hear any future matter involving the complainant. The complainant was advised that "it would be considered inappropriate for a close relative" to appear before a judge, especially if it is a contested matter, but it is generally not considered inappropriate for a judge to hear a matter where relatives are not directly involved in the litigation. He was also advised there was no evidence of misconduct.
- A number of complainants alleged that a judge was in a conflict because prior to his appointment to the bench he had acted on behalf of the ex-husband of one of those complaining and, as a result, the judge was biased against them. As the female complainant was only involved peripherally in the case and only to the extent that her name appeared on one of the documents in evidence, they were advised that the allegation of conflict was a "feeble excuse" for attacking the integrity of the judge. They were advised there was no merit to their complaint, and that the judge's findings and conclusions appeared to be based on the evidence at the hearing and the application of the law.
- A complainant, the friend of a plaintiff in civil proceedings for assault and wrongful dismissal, made various allegations against the judge and various lawyers who had acted for the plaintiff. The complainant alleged that the judge was in conflict because she had taught the plaintiff, who was a solicitor, at law school, where she had been made party to confidential aspects of the plaintiff's life and, as a result of this previous contact, was biased against the plaintiff. As a result, the complainant alleged that the judge had approved the withdrawal of criminal charges against one of the defendants. The judge denied any ill feelings against the plaintiff and, although having assisted her in law school with legal instruction, could not recollect any confidence the plaintiff might have shared with her. The complainant was advised that, on review of the complaint, the judge's response and the transcript of proceedings, there was no evidence of misconduct on the part of the judge. As well, the complainant was advised that when criminal charges are withdrawn it is done by the Crown and the decision is not reviewable by a judge.

- A complainant alleged that a judge's son was a lawyer with a firm that acted for a bank that was the opposing party in a proceeding, that the judge was in conflict and should have advised her of this before hearing her case. The judge confirmed that his son was with the firm but noted that the firm was not involved in any way with the case in which the complainant was involved, although the firm did act occasionally for the bank opposing her in the proceeding. The complainant was advised that the fact the judge's son's firm acted from time to time for the bank did not create a conflict of interest for the judge.
- A complainant, a party in a family law proceeding, said that a number of lawyers had told him the judge favours the wife in divorce proceedings, and alleged that the judge hates "ethnic people" and that his ex-wife's attorney was "feeding a kickback to the judge." The complainant was advised that these allegations were extremely serious but absolutely no evidence was provided to support them and hence there was no basis for any action by the Council.

Alleged Delay in Rendering Judgments

Three files alleging delay in rendering judgment were closed during the year, including the following example and one dealt with by a Panel, which is described later in this chapter:

- A complainant, a party to a family law proceeding, lodged a formal complaint regarding the delay in receiving a decision from the judge. Earlier he had written to express concern at the delay, asking only that his concerns be transmitted to the judge, which was done through the judge's chief justice, and not

be treated as a complaint by the Council. When he subsequently did complain about the delay, he also asked that the Council reimburse him for the "unnecessary" expense entailed in the judge's order that the parties submit written arguments to the court. On review, the judge's order was found to be reasonable "in the circumstances" and the complainant was advised that the Council had no authority to reimburse him for any costs.

Complaints Against Council Members

Six files involving complaints against Council members were closed during the year. In each case, independent counsel reviewed the Chairman's or Vice-Chairman's proposed disposition of the file before it was closed. These complaints are set out below:

- A complainant made a number of allegations that a chief justice was "hostile, belligerent, deprecating, sarcastic and obstructive." The complainant was asked to provide particulars and advised that the file would be held in abeyance pending his reply. The complainant did not provide any further material and the file was closed as "discontinued."
- A complainant serving four concurrent life sentences alleged that a chief justice had not acted expeditiously on a motion for *habeas corpus*. Documentation provided by the judge showed the complainant was clearly instructed that the proceedings could only be entertained if they were properly filed in accordance with the *Criminal Code* and the Rules of Practice. The complainant's application did not conform to the requirements and, as the complainant had refused to be represented by counsel under the Legal Aid plan, his application had not been heard. Independent

counsel agreed there was no basis for the allegation of misconduct. The complainant was advised of this.

- A complainant alleged that a chief justice was in conflict during a case heard in 1985 because the chief justice was depicted in a photograph along with a city mayor who was the defendant in the case. He alleged the chief justice and the mayor were directors of the same organization at the same time, and, further, that the chief justice had assigned himself to hear the case in question. The chief justice responded that the mayor had never been a member of the board of directors of the organization in question, nor had he attended any meetings while the chief justice was a member of the board, and he denied assigning the case to himself. The complainant was advised that his only recourse was by way of the Court of Appeal.
- A complainant alleged that a chief justice had altered the transcript of the complainant's son's criminal trial "to such an extent that he cannot have a fair and impartial appeal." The complainant was asked to provide particulars to support his allegations. The file was kept open pending receipt of further information. When the complainant failed to respond to the request for supporting information the file was closed as "discontinued."
- A complainant, who, like his ex-wife, the other party, represented himself in family law proceedings extending over a number of years, alleged that a chief justice abused his authority by referring the case to a Master. The complainant said the chief justice had no authority to vary an outstanding order regarding custody of the complainant's children. He also took issue with the case having been transferred, without hearing, to another centre in the province.

The chief justice said he had made an administrative decision to refer the case to a Master because the proceedings were long and complex and he wanted the Master to clarify the issues and make a recommendation on how to resolve them. The complainant was advised that there was no basis whatsoever for a finding of improper conduct by the chief justice and that the Council has no authority to review the administrative action he might take to case-manage a file.

- A complainant, who represented himself in complex business litigation, disagreed with a number of decisions rendered over a period of time by nine different judges, arguing that some of the decisions were improper and prejudicial while others were discriminatory and biased. He complained that the actions of the judges "amounted to or verge on judicial corruption." He provided no evidence of misconduct to support his claim. The complainant was advised that, on review, his complaint provided no grounds for his allegation of misconduct. In response, the complainant made allegations against two members of the Council for not adhering to the Council's mandate under the *Judges Act* "by suborning obstructive conduct and coddling jurists." This new allegation was also found to be without basis. Independent counsel concurred.

Other Complaints

Among other complaint files closed by the Chairman or a Vice-Chairman, three were dealt with as set out below.

- A complainant, the defendant along with her mother in a property dispute commenced by the complainant's sister, alleged that the judge, without hearing evidence from her, found she had been abusing her

mother. She provided letters from her mother's physician and neighbours to the effect that there was no abuse by the complainant, and she requested an apology from the judge. The judge said he continued to feel concern for the welfare of the complainant's mother and that he had told the parties he was satisfied she had been abused, but he acknowledged he should not have done so without hearing the testimony of the complainant. He asked that his apologies be conveyed to the complainant. The complainant was advised that her request for an apology was reasonable and, as the judge had apologized, the file was closed.

- The complainant, a party in a matrimonial dispute, alleged that the judge shouted at him, was rude and sarcastic and improperly accused him of lying. He said that the judge was biased against him and when his lawyer tried to say something the judge "shouted him down, too." The judge said that the complainant had failed to comply with a number of court orders he and other judges had issued and wanted to know why the complainant had not filed a financial statement when he had been ordered to do so on at least two previous occasions. The judge acknowledged that he had slammed his hand on the table and had told the complainant "in a very loud voice that he must comply with orders of the courts and that if he did not do so he could be sent to jail for contempt." He apologized for slamming his hand on the table and for speaking in a loud voice. But he denied saying that "I would look for something to send him in jail for" and he denied the other allegations of misconduct on the complainant's part. The complainant was advised of the judge's apology and of his denial of other allegations of misconduct. "While it is regrettable when a judge exhibits any

lack of judicial calmness," the letter to the complainant said, "an isolated act of impatience would be hardly sufficient to justify a recommendation for removal, especially when a person is in breach of court orders, and the judge is a person of good judicial repute."

- A complainant who was an employee in a courthouse complained of harassment in the workplace through "abuse of authority." She said a judge, acting in an administrative capacity, had no control of his temper and engaged in personal vendettas against people who crossed him. The complainant was advised that workplace harassment did not fall within the Council's jurisdiction in that supervision of court staff is a provincial responsibility. As well, she was advised that her complaint did not indicate any abuse of judicial authority for personal advantage, nor any conduct that could possibly lead to a recommendation that the judge be removed from office. She was advised that her administrative difficulties would have to be resolved through the usual channels in her workplace.

Files Re-Opened and Re-Closed

Occasionally, files from previous years are re-opened and re-closed. This occurred in the case of the following complaint file, which had been originally closed in 1991.

- A husband and wife, involved in a number of actions involving real estate, alleged that a judge had been involved in discussions with a lawyer at one of the defendant law firms with regard to having a single judge hear the numerous motions the complainants had brought. They alleged that "this smacks of

collusion.” They asked the Council to intervene to have the trial moved to another venue as they believed that all the judges in the area were biased against them because of their prior exposure to the case and unfavourable press coverage. They were advised that the Council had no jurisdiction regarding the venue of a trial. In August 1991, the file was closed for the first time. The complainants petitioned the Council throughout 1992 and 1993, along with an association which, in 1994, asked the Attorney General of Canada to investigate a second judge for misconduct and complained peripherally of comments made by a third judge. The file, re-opened in 1994-95, was examined by outside counsel who found no basis for the association’s allegations. The complainants were given a detailed response to each allegation and the file was re-closed again in 1995-96.

FILES CLOSED BY PANELS OF THE JUDICIAL CONDUCT COMMITTEE

Four files were referred to Panels of the Judicial Conduct Committee during the year, one to a five-member Panel and three to three-member Panels.

Involvement in Public Controversy

- Two complaints were received regarding a judge’s comments about the federal government’s proposed gun control legislation. The complaints alleged that the judge had written an open letter to the Prime Minister and the Minister of Justice, then made copies available to the media. The judge also gave interviews to Radio Canada in which he spoke against the proposed legislation. The complainants said it was improper for a member of the judiciary to

make comments about prospective legislation, as it undermined his ability to function in an impartial and independent manner. The judge defended his actions, stating that in the absence of a clear prohibition on judges’ freedom of expression, his actions were “restrained and within the guidelines of the Council.” The complaint file was referred to a five-member Panel of the Committee. The Panel said in its letter to the judge that his comments were a “highly partisan attack upon a proposal which, if carried forward into legislation, could well come before you for interpretation and enforcement.” Proper judicial conduct, the Panel said, could not be measured only in terms of strict, individual legal rights. The Panel expressed strong disapproval of the judge’s conduct because it compromised the judge’s impartiality. However, the Panel concluded that, while regrettable, the conduct could not properly lead to a recommendation for his removal from office.

Delay in Rendering Judgment

- A complainant, the head of a union, alleged that a judge had not rendered his decision in a case heard on an “emergency” basis seven and a half months before. The comments of the judge were sought and he provided the reasons for the delay, noting that he had delivered his reasons for judgment just prior to receiving the Council’s letter concerning the delay. A three-member Panel considered the file, and, while concluding that no further action was warranted, noted that in another case involving delay in rendering judgment on the part of another judge, a Panel had concluded “that a formal investigation should be initiated against a judge who had several

judgments outstanding over a long period of time.” The Panel advised the judge that “we are anxious that such a situation not develop in your case.” It urged the judge to institute a system, in conjunction with his chief justice, that would allow him to keep as up to date as possible. The complainant was informed of a Council resolution approved in 1985, declaring that “it is the view of the Council that judgments should be rendered within six months after hearing, except in special circumstances. . . . It is always regrettable when an urgently required decision is delayed unduly.”

Alleged Workplace Harassment

- A complainant, an employee in a court clerk’s office, alleged that she terminated her employment because “I could no longer accept the verbal and mental abuse that I had been subjected to for the past three years” at the hands of one of the judges on that court. She included with her complaint 40 pages of her “personal journal” and memoranda in which she described numerous contacts with the judge which she characterized as rude and unfair. The judge, in his response, said that there had been a deterioration in the employee’s behaviour over several years and “in the end, her behaviour towards the public and to other court personnel became unacceptable and unprofessional.” He admitted he had sworn at her on one occasion. A fact-finding was undertaken by independent counsel, and a three-member Panel was established. The Panel concluded that the conduct complained of, which it said “seems to have been highly unusual,” did not arise from the judge’s misuse of judicial office or misuse of judicial power or authority for personal reasons. The Panel said,

as well, that “the responsibility for the kinds of misconduct described ... (if such it was) rests more with the Chief Justice of the Court than with the Council.” The complainant was advised that complaints such as hers should be directed to her supervisor or to the judge, regional senior justice or chief justice.

Alleged Racial Bias

- Two complaints alleged that a judge had demonstrated racial bias in a criminal trial of a police officer charged with manslaughter in the death of a black man. The first alleged that the judge refused to listen to the Crown’s arguments and continually discredited any black witnesses. “The manner in which he addressed a group of black men who were waiting to be Crown witnesses was hostile and despicable.” The second complaint, from the mother of the dead man, alleged that the judge “continuously shouted at the prosecution ... while remaining in a calm and orderly fashion in his dealing (with defence counsel).” The judge denied addressing any offensive remarks to any blacks during the trial, or behaving toward any witnesses in an offensive manner. A three-member Panel struck to consider the complaints concluded, on the basis of inquiries and a review of the transcripts of the closing remarks by defence counsel, the judge’s charge to the jury and sections where the judge dealt with Crown witnesses, that there was no evidence of judicial misconduct. Detailed letters were sent to each complainant dealing with each of their allegations in turn.

THE BIENVENUE INQUIRY

In December 1995, during the trial and sentencing of Tracy Théberge in Trois-Rivières, Quebec, for murdering her husband, Mr. Justice Jean Bienvenue of the Quebec Superior Court made a number of comments which were widely publicized and which offended Jews and women in particular.

During sentencing, the judge said that "... when women ascend the scale of virtues they reach higher than men ..." but "... when they decide to degrade themselves, they sink to depths to which even the vilest men could not sink." He also said that "even the Nazis did not eliminate millions of Jews in a painful or bloody manner. They died in the gas chambers, without suffering." Judge Bienvenue also criticized the jury's decision to find Ms. Théberge guilty of second degree murder, referred to the jurors as "idiotic and incompetent" before an officer of the court, and made inappropriate comments about a female juror, about those contemplating suicide, about a parking attendant and about a female reporter's attire.

The justice ministers of Quebec, The Honourable Paul Bégin, and of Canada, The Honourable Allan Rock, requested an inquiry under ss. 63(1) of the *Judges Act*. When such a request is made, the Council is required to establish an inquiry committee and the committee's report must be submitted to the Minister of Justice by the Council. As well, about 100 complaints from members of the public about Mr. Justice Bienvenue's conduct in that case were received by the Council.

On January 24, 1996, the Council announced the establishment of the Inquiry Committee to be chaired by The Honourable Pierre A. Michaud, Chief Justice of Quebec and including The Honourable Joseph Z. Daigle, Chief Justice of the Court of Queen's Bench of New Brunswick, and The Honourable J.-Claude Couture, Chief Judge of the Tax Court of Canada. As well, the Minister of Justice of Canada appointed The Honourable Paule Gauthier of the Quebec City law firm of Desjardins, Ducharme, Stein, Monast, and Professor Nathalie Des Rosiers, Professor, Faculty of Law, University of Western Ontario. L. Yves Fortier, Q.C. of Ogilvy Renault in Montreal was engaged as independent counsel for the inquiry.

Hearings were conducted in the first week of March 1996, the last month of the Council's 1995-96 fiscal year, and the report of the Inquiry Committee was to be made public during the summer of 1996.⁵

⁵ The proceedings were terminated when the Judge resigned effective September 30, 1996. These proceedings will be reported in the Annual Report of the Council covering the period from April 1, 1996 to March 31, 1997

ISSUES

PRINCIPLES OF JUDICIAL CONDUCT

In October 1994, the Council announced that, in consultation with the Canadian Judges Conference, it would begin work on developing a statement of principles of judicial conduct. To this end a working committee was established consisting of representatives from its Judicial Independence Committee, a representative of the Conference, a law professor and the Council's Executive Director.

The idea of developing such a statement was first discussed by the Council in 1973 but, after considering the issue, the Council opted instead to prepare two books on judicial conduct. One was *A Book for Judges*, written by The Honourable J.O. Wilson, former Chief Justice of the Supreme Court of British Columbia. The other *Le Livre du Magistrat* was written by The Honourable Gérard Fauteux, retired Chief Justice of Canada. Both were published in 1980.

Subsequent work on the issue led to the publication by the Council in 1991 of *Commentaries on Judicial Conduct*.

While these three books have made an important contribution to understanding the issues involved in questions of judicial conduct, the Council has found a need to provide greater guidance to judges and the public on issues related to conduct.

There is often misunderstanding on the part of the public about the differences between a judge's decisions and a judge's conduct. Equally, there is often disagreement among judges as to what represents misconduct. There is an increasing need on the part of judges for clearer guidance on how to handle a range of difficult ethical issues.

The work begun in 1994 resulted during the 1995-96 fiscal year in the Council issuing a discussion document prepared by the Committee on the process to be used in developing a statement of principles on conduct, including a tentative list of issues that might be addressed in such a statement. The process was designed to develop consensus among judges, legal scholars and practitioners, and others, on the handling of ethical and other issues related to judicial conduct.

At the end of the fiscal year, the working group had prepared draft principles concerning political activity with the intention of eliciting comment from federally appointed judges that could be incorporated into subsequent drafts.

JUDICIAL COMPLEMENT

At a time of pressure on all public institutions to contain and reduce spending, requests by provinces to the federal government to increase the complement of federally appointed judges on their courts

have come under increasing scrutiny to ensure that there is clear justification for doing so.

In June 1995, the Minister of Justice, in a letter sent to the Attorney General of each province, expressed his concern that there has been no formal process for determining the appropriate number of judges for a particular court. At the same time, he asked for the Council's views on how to assess the need for new judges and determine the appropriate judicial complement for a court.

Under Canada's Constitution, the responsibility for the judiciary is divided. The federal government appoints judges to the Superior Courts in each province and fixes and provides for their salaries, pensions and benefits. The provincial governments are responsible for the administration of justice, including the structure of courts in a province and the provision of the necessary support for judges, including offices, staff and equipment.

A provincial decision to request an increase in judicial complement has ramifications for the federal government's finances. At the same time, the appointment of a judge by the federal government has consequential financial effects on a provincial government.

Previously, appointments and support decisions occasioned little controversy but, as financial pressures have built on both levels, the routine approval of provincial requests for additional judges has been called into question. Similarly, the requested appointments, when made, have not always brought a commensurate increase in the support the provinces provide for the courts.

Chief Justice Antonio Lamer, in his capacity as Chairman of the Council, expressed to the Minister of Justice the Council's willingness to co-operate with both federal and provincial governments to seek a solution to the problem. The Chief Justice noted, however, that there should be no illusions that even with the best will it would be possible to establish an agreed set of criteria that would resolve all questions related to the size of appropriate judicial complements for particular courts.

Circumstances vary from province to province, he said, and pressing needs are created when provincial or federal governments, for example, appoint judges to serve on commissions and inquiries, effectively reducing the number of judges available for court duties. As well, there is an increasing need for judges to set aside time to keep abreast of new developments in the law and the administration of justice, and a greater judicial involvement in managing cases in the system, particularly at the trial level.

Chief Justice Lamer noted that because the administration of justice is a provincial responsibility, the determination of the need for additional judges rests with each province. The final say on whether a given province needs new judges must therefore rest with the government of that province. At the same time, he said, it must be remembered that provincial governments have a duty to ensure that federally appointed judges have adequate support services and other resources to assist them in the performance of their functions.

The Minister of Justice asked the Council to appoint two or three representatives to a steering committee which would include federal and provincial deputy

ministers as well as other senior officials. The Committee would be asked to recommend broad guidelines that should go into estimating the judicial time to deal with the workload of a court, and how to measure the demands on a court. It would also suggest ways in which the development of criteria might be carried out in each jurisdiction.

At its 1995 annual meeting, the Council appointed three members to serve on the Committee.⁶ The Council also asked that the terms of reference be broadened "to recommend broad national standards for the appropriate support services and infrastructure which should be provided to federally appointed judges by the provinces."

The first meeting of the Steering Committee was held in January 1996 and it began its review of the approaches which could be taken to develop an objective measure of appropriate judicial complements and support service needs. That work was continuing at the end of the year under review.

THE FRIEDLAND REPORT ON JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

In early 1993, the Canadian Judicial Council commissioned Martin Friedland, Professor of Law at the University of Toronto, to undertake a wide-ranging analysis of the many issues encompassed by the paired concepts of judicial independence and accountability.

These issues included such theoretical and practical questions as the effect of the *Charter of Rights and Freedoms* on judicial independence, whether judicial independence required further constitutional protection, techniques for appointing and compensating judges, as well as the composition and functioning of judicial councils, the relationships between provincial and federal judicial councils, the disciplining of judges, and the administration of the courts.

In the spring of 1994, Professor Friedland visited every jurisdiction in Canada, conducting separate meetings with federal and provincial chief justices and puisne judges. By the end of his work he had met well over 200 puisne judges and "just about every" chief justice and chief judge in Canada, as well as government officials in every jurisdiction, lawyers organizations and Bar associations and academic experts on the judiciary. Many were asked to comment on draft chapters and did so.

Professor Friedland submitted his report in May 1995 and it was published on August 14, 1995. The report, 401 pages in English and 444 in French, is entitled *A Place Apart: Judicial Independence and Accountability in Canada*.⁷ "That place," Professor Friedland concluded, "has a solid historical foundation and a fine edifice. This study suggests some relatively modest renovations in its structure to keep it a strong, respected, and independent institution."⁸

⁶ The Council members were Chief Justice Patrick LeSage (Co-Chair), Chief Justice Catherine Fraser and Associate Chief Justice Lyse Lemieux

⁷ The report is available from Canada Communication Group - Publishing, Ottawa, Ontario, K1A 0S9.

⁸ *A Place Apart: Judicial Independence and Accountability in Canada*, p. 268

In releasing the report, Chief Justice Antonio Lamer, the Chairman of the Council and the Chief Justice of Canada, said that in commissioning the report the Council hoped that Professor Friedland would "provide the basis for an informed debate on what is necessary to secure the strength, independence and, above all, public confidence in our courts and our judges. He has done that."

The report, he said, provided ample material for the debate to proceed within the judiciary, in the wider legal community and among the broader public on how to improve those aspects of the judicial system needing improvement and better understand "what is tried and true and works well."

Chief Justice Lamer announced that the Council had established working groups of chief justices to begin the analysis of the various issues raised in Professor Friedland's report. The Council as a whole addressed many of the issues at its annual meeting in November 1995 in Toronto, the first available opportunity.

The Council's views on the issues raised in the report were put in final form over the winter of 1995-96 with a view to submitting the Council's response to the Friedland Report to the Minister of Justice, The Honourable Allan Rock, and to federally appointed judges.

STANDARDS FOR ELECTRONIC CITATION OF JUDGMENTS

Of particular importance during the year were the standards developed by the Judges Computer Advisory Committee for the electronic publication and citation of

court documents. The Committee requested public comments, prior to seeking the approval of the Council.

The standards were developed in order to exploit the potential in new technologies to cut costs, increase accuracy and broaden access to court documents. This potential could not be realized, however, so long as Canada's various courts used different and inconsistent formats for preparing and distributing judgments.

In a paper-based system, this inconsistency was of relatively little importance but in the emerging computer world the lack of a common standard would produce confusion, the need for expensive conversions and limited access.

The standards, once approved by the Council, would apply to all judgments issued by superior courts in Canada and all transcripts of reasons for judgment or reasons for sentence. They would not apply to reasons that are not transcribed.

The purpose of the standards is to cover the formatting of material as it affects both the display on a computer screen and the look of a page that is printed as output from a computer. This would include the formatting for disk, CD-ROM, or versions communicated by modem or any other digital means. The standards would apply only optionally to pages printed by other means or from other sources.

The standards would deal only with two of the three key issues related to electronic publishing — the need for a standard format and the need for a commonly accepted convention for citing electronically published judgments.

They would not deal with another key area, the means by which a guarantee might be provided of the authenticity of electronically generated legal documents.

EXTRA JURORS FOR LONG TRIALS

In 1993, the Council, on the recommendation of its Administration of Justice Committee, asked the Minister of Justice to consider amendments to the *Criminal Code* providing that, at a judge's discretion, two additional jurors could be selected during jury selection as alternates to jurors who might fall ill or for any other reason be unable to continue on the jury chosen for a long trial.

This request to the Minister of Justice was not reflected in amendments to the *Criminal Code* which the Government tabled in Parliament in December 1995.

The Council was advised that the reason for the omission were divergent views on the merits of the proposal among Department officials and the Uniform Law Conference and the fear that choosing alternate jurors could result in inordinately long jury trials during which jurors might not dutifully pay attention to the evidence.

At its mid-year meeting in March 1996, the Council confirmed that it continued to support its 1993 position in favour of alternate jurors.

JUDICIAL LEAVES OF ABSENCE

The Council was asked by the Minister of Justice for advice regarding an amendment to the *Judges Act* allowing judges to undertake international assignments. The request arose from the appointment of Madam

Justice Louise Arbour of the Ontario Court of Appeal as Prosecutor of the United Nations War Crimes Tribunal.

The appointment would require a leave of absence of at least two years and a relocation to Europe to take up these duties. The Council was advised that the Government believed it could grant this leave under the existing *Judges Act* but felt an amendment to the *Act* would be preferable. The *Act* allowed the Governor-in-Council to grant a leave for any length of time from judicial duties, but severely limited the non-judicial activities a judge could undertake and contained no reference to activities abroad or to acting on behalf of international organizations such as the United Nations, or to receiving a salary from an international organization.

The Council was asked for its advice on whether an amendment the Minister of Justice proposed to request to the *Act* should be a general one that would allow Canadian judges to be granted leave to engage in international activities or undertake paid assignments for international organizations, or a specific amendment allowing Madam Justice Arbour to be given leave without pay and to receive a salary and expenses from the United Nations.

The Minister, in making the request, indicated that his inclination was to think that a general bill was preferable to a special act, in that it would provide greater flexibility to respond to the growing demand for assistance from the Canadian judiciary in international legal development.

The Council agreed that the Minister should request a general amendment.

JUDICIAL SALARIES AND BENEFITS

Since 1981, the *Judges Act* has required that every three years, beginning in 1983, an independent commission be appointed by the Minister of Justice to examine the adequacy of judicial salaries and benefits.

With the establishment of the 1995 Triennial Commission in September 1995, the Canadian Judicial Council and the Canadian Judges Conference made a joint submission on the issues of concern to the judiciary, including needed changes to the triennial process itself. The submission also dealt with the more specific issues related to retirement, salaries, tax provisions affecting judges, pension contributions and benefits, including survivor benefits, study and parental leave, and insurance.

THE REVIEW PROCESS

This triennial review process was established in 1981 as a result of the failure of Parliament during the 1970s to respond in a timely way to the effects of inflation on the living standards of federally appointed judges. This, in the words of the Justice Minister of the day, had resulted in a judiciary "...whose morale has progressively deteriorated with the passage of time ... and an apparent lack of concern by the Government with their economic condition."

In addition to determining appropriate salaries and benefits, however, the review was intended to remove the question of judicial salaries and benefits as much as possible from the political arena, in order to protect the independence of the judiciary as a core principle of the Canadian democratic system.

Absent an independent and effective review process, judges would have to deal directly with the executive and legislative branches of government, as a result of which the independence of judges, if not compromised in fact, might be compromised in the appearance of having to depend on political favour for the adequacy of salaries and benefits.

With 15 years of experience, however, it is clear to judges that the intentions of the 1981 legislation have not been achieved. Successive commissions have made recommendations to successive governments on improvements to salaries and benefits, and also to the processes for deciding on these matters. But by virtually every measure — whether compared to senior civil servants or salaried Canadians in the private sector, whether measured against inflation or economic growth — judicial salaries and benefits have fallen behind.

Nor has the process served to remove the compensation issues from the political arena.

"The failure to deal with the recommendations of the Triennial Commission renders virtually meaningless the independent review process," the joint presentation to the 1995 Triennial Review Commission by the Canadian Judges Conference and the Canadian Judicial Council argued. It noted that this failure places the judiciary in the invidious position of having to engage in constant discussions about compensation with a branch of government that frequently argues before the courts.

"... The mere appearance of judges having to negotiate with the Executive Branch can only erode the public perception of judicial independence," the submission said. "This undesirable result cannot be avoided under the current system. We must, therefore, try to re-establish the long term goals of depoliticizing the process and protecting the independence of the judiciary."

The joint submission's analysis suggests that a principal reason for the failure of the process relates to a change in parliamentary rules after the *Judges Act* provisions related to the triennial process were approved in 1981. The *Act* requires the Commission to report within six months and the Minister of Justice to table the report in Parliament no later than the 10th sitting day after receiving it, but is silent on what then happens.

Under the rules prevailing when the *Act* was passed, parliamentary committees could not examine and make recommendations on reports such as those of Triennial Commissions until the Government had formulated its own position; under the rules established subsequent to passage, parliamentary committees were able to study these reports and develop their own positions and recommendations before the Government made its position clear.

As a result, the objective of removing judicial compensation from the political processes was defeated, with the consequence, as the joint submission argues, that "no other segment of society has its salary and benefits adjustments scrutinized through as many formal steps as the Federal Judiciary. Each of these steps takes place in Parliament. The current triennial process has now politicized judicial salaries to an extent never contemplated by the legislation creating the Commission." The submission did not question either the rule changes or the importance of Parliament ultimately having the power to decide these compensation issues, but it argued the impact on the judiciary was both unintended and unfortunate.

To deal with this, the submission proposed amendments to the *Judges Act* giving the Government up to three months to submit a Triennial Commission report to Parliament together with a Government Bill setting out the Government's response to the report. The submission also proposed that Commission members be available as witnesses before the applicable parliamentary committee.

Failing approval of these changes, the submission asked the Government to consider statutory changes along the lines suggested in the 1983 Triennial Commission Report, which proposed the use of a "negative resolution" approach to establishing compensation. Under various forms of this approach, Parliament would be required to reject the recommendations of a Commission and, if it did not do so, the recommendations would take effect.

In their joint submission, the Canadian Judges Conference and the Canadian Judicial Council noted

that they had reviewed this approach, as well as others used in the United Kingdom, Australia, the United States and New Zealand. "It would appear that all of the ... processes are superior in practice to the Canadian process," the submission said. "The Australian system has much to recommend it and could provide the most effective long term solution to the difficulties faced by both the Federal Government and the Federal Judiciary in setting remuneration for judges." The submission also noted that a negative resolution approach is used in British Columbia to establish the compensation of provincial judges.

THE "RULE OF 80"

The "rule of 80" is a formula which would allow retirement at full pension when the combination of a judge's age plus years of service totals 80. Three of the past four Triennial Commissions have recommended some form of the rule of 80 to deal with significant inequities and unfairness in the application of existing pension provisions in the *Judges Act*, but without legislative effect.

At present, retirement with an annuity is not permitted until a judge has been in office for at least 15 years and until he or she is at least 65 years of age.

In their joint submission, the Council and the Conference provided an example of the effect of this, noting that a judge appointed at the age of 40 must serve 25 years before being entitled to the same annuity as a judge who had served far fewer years because he or she was older when appointed — for example, a judge appointed at the age of 50 must serve only 15 years.

This inequity is compounded under existing legislation, which provides that a judge who leaves office before the age of 65, even after long service, is entitled only to a refund of personal accumulated pension contributions plus interest of four per cent a year.

The joint submission argued that both age and time of service can erode a judge's capacity to deal with the workload of the bench although it recognized that this varies with the judge involved. As a result, the submission says, "it is in the public interest that a judge be permitted to retire early, but on full pension, if that judge as a result of either age or time of service on the Bench is unable to effectively discharge the required workload. The rule of 80 provides a workable, fair and realistically limited access to that early retirement."

With judges being appointed at a younger age, changing the age profile of the judiciary and providing a group of judges able to devote more years to meeting the increasing demands of the court system, access to early retirement is particularly important in ensuring that long service is recognized and judges who no longer feel they can contribute as in the past do not "find it necessary to continue to struggle to serve to age 65" in order to secure the income necessary for his or her welfare in retirement.

The submission noted that a rule of 80 provision would be especially important to female judges. Only once in the past 15 years has the average age of the women appointed as judges been higher than that of the men who have been appointed. In most years, the average age of new female appointees has been seven to 10 years younger than the average age of male appointees.

JUDICIAL SALARIES

The first three Triennial Commissions, in 1983, 1986 and 1989, generally followed the same approach to judicial salaries.

They endorsed the view that, in deciding on an appropriate level for judicial salaries, “the most appropriate basis for comparison is with the salaries or incomes of members of the legal profession of comparable experience, and with the salaries of senior deputy ministers.” They also accepted that salaries should be established on the basis of being indexed to 1975 salary levels, adjusted for ceilings of six per cent and five per cent in 1983 and 1984. While the *Judges Act* was amended to reflect the “Six and Five” ceilings, no provision was made to base the requirements for indexation on 1975 equivalence. The effect of this was substantial. It resulted in judges’ salaries being fixed at \$105,000 in 1985-86, rather than \$123,400, as had been recommended. With indexing, this shortfall was perpetuated.

The joint submission calculated that from 1985 to 1992, by the standard of 1975 equivalence, the shortfall was \$10,575 a year. By 1992, the salary of a judge would have been \$165,500 a year — roughly the average income of a partner in a law firm of 31 to 60 lawyers, although substantially below the average for partners in law firms with more than 60 lawyers. Instead, the judicial salary in 1992-93 was \$155,800.

For the 1992 Triennial Commission, judges did not seek a salary increase because of the severe recession. In any case, the Government of the day imposed a two-

year salary freeze on all members of the public service and on judges, and this was subsequently extended to March 31, 1997, with statutory indexing of judicial salaries also being suspended.

The 1992 Commission, however, recommended a substantially different approach from that of its predecessors.

It recommended a rough equivalence of judicial salaries to deputy ministerial salaries at the middle of the DM3 range, rather than a salary in the range that could be enjoyed by a senior deputy minister. Recommending the mid-point meant that judges would be denied salaries in the higher end of the DM3 range.

In their submission to the 1995 Commission, the Council and Conference sought neither a return to the 1975 equivalence approach, nor a retroactive adjustment to compensate for the lost salaries during the 1993-1997 freeze period, but asked that the Commission recommend that judicial salaries be adjusted, as of April 1, 1997, to the level they would have reached had they been indexed to inflation during the four-year salary freeze.

“The net result of such a recommendation, based on the Industrial Aggregate Index for the years 1993 to 1996 inclusive, would do no more than bring judicial salaries up to slightly less than the maximum level of salaries paid to DM3s,” the submission argued. This would ensure that statutory indexation was maintained and that judges were “treated on the same basis as the average employed Canadian.”

As matters now stand, the submission said, judges will have sustained, by March 31, 1997, a salary loss of about 10 per cent on the basis of the Industrial Aggregate Index, and a loss of purchasing power of the same percentage as compared to employed Canadians other than the civil servants covered by the freeze.

The submission also asked that the 1995 Commission abandon the comparison with the mid-range DM3 salary because it is "a purely abstract figure."

In fact, the submission said, it is possible for all DM3s to earn more than the mid-range salary because the limit on salaries for DM3s is not the middle of the range but the top of the range, while judges, under this comparison, would be limited to the mid-range figure. The exact salaries of DM3s are not known, the joint submission notes, because they are fixed by confidential Orders-in-Council.

The comparison is inappropriate for other reasons, the submission argued. Deputy ministers have the flexibility judges lack to take early retirement on acceptable terms, as well as pensions representing 75 per cent of their salaries compared to 67 per cent for judges, and other benefits such as chauffeured automobiles and substantial performance bonuses.

The submission also asked the Triennial Commission to recommend that "Government and Parliament be urged never again to tamper with, suppress, reduce or suspend the section of the *Judges Act* providing for the annual statutory indexation of judicial salaries, except only as part of an overall policy or program of application to all Canadians."

RRSP CONTRIBUTIONS

Before 1992, all federally appointed judges could contribute to a personal Registered Retirement Savings Plan in the maximum amount. This was independent of the right of a judge eventually to receive an annuity on retirement, and afforded partial compensation for the loss of the right to a lifetime judicial appointment at full salary.

In 1992, however, maximum contributions were restricted to \$1,000 and judges, in consequence, lost the right to accumulate significant tax sheltered retirement savings and the benefit of tax deductions from contributions. These changes had the effect of reducing the economic value of a judge's compensation package.

The joint submission did not ask that the right to make a maximum contribution be fully restored, although prior to 1992 the RRSP contribution rules for judges were used to recruit lawyers to the judiciary and, as a result, formed an element in the financial assessment of judicial compensation prior to an appointee leaving the private sector for the bench.

But the submission noted that the amounts involved are substantial and, like existing rules imposing a heavy penalty for early retirement, have a proportionately greater impact on judges appointed at a younger age and now required to serve longer to receive the same annuity but without the compensating opportunity to build a retirement fund through an RRSP.

The sharp restrictions on contributions also removed a "safety valve" that allowed judges feeling the effects of stress or burnout to leave the bench without losing all the benefits of their judicial service, the submission said, arguing that this loss without compensation created an inequity that "should now be addressed by the introduction of the 'rule of 80' and allowing the modest salary adjustments requested..."

PENSION CONTRIBUTIONS

At present, judges who reach retirement age are required to continue making pension contributions of seven per cent of salary if they continue as full time or supernumerary judges.

The joint submission noted that other public service pension plans require a contribution of one per cent of earnings after the plan member becomes eligible for retirement on full pension. A contribution of one per cent of judges' salaries after age 65 to cover the possibility of judicial salary increases being greater than the indexation of judicial pensions would be consistent with other public service plans such as those covering the Public Service, the Canadian Forces, the Royal Canadian Mounted Police and Members of Parliament.

In a supplementary submission in January 1996, the Council and Conference argued that the treatment of judges as opposed to others under public pension plans means that "judges are treated differently from, and adversely to, all other members of public service plans." As well, private plans do not require any contributions from employees who continue to work after they are eligible to retire on full pension.

The supplementary submission noted that, as a result of this discrimination, the requirement that judges continue making full contributions may be unconstitutional.

As well, judges typically do not retire at age 65 but serve into their 70s and often to the mandatory retirement age of 75. By that age, the value of retirement benefits is significantly less than at age 65 and the accumulated value of their contributions significantly more.

"Even if contributions were to stop at age 65," the submissions said, "a judge following a typical career path would have contributed significantly more than half the cost of his or her retirement benefits by the time of retirement at age 75."

ADDITIONAL ISSUES

The Conference and Council submission recommended the following changes, most involving relatively minor amendments to the *Judges Act*:

(1) The *Act* should be amended to increase survivor benefits for the spouse of a judge who dies in office to 40 per cent of the judge's salary at the time of death, and for the spouse of a retired judge to 60 per cent of the judge's pension or annuity at the time of death;

(2) The *Act* should be amended to permit the retirement of Supreme Court of Canada judges after 10 years of service on the Supreme Court, regardless of age;

(3) The *Act* should be amended to provide for maternity/parental leave of up to six months on the approval of a chief justice;

(4) Consistent with other federal legislation, the *Act* should be amended to include common-law spouses within the definition of spouse;

(5) A retired judge should be given the option of receiving his annuity on a joint-and-survivor basis should the judge marry after retirement; and

(6) The entitlement of federally appointed judges to group life insurance coverage should reflect the coverage provided for senior civil servants who are covered by the Executive Plan. This would provide judges with group term life coverage up to an additional two times salary and continue until retirement without reduction.

“Accepted equity considerations suggest that the group life insurance level of coverage for judges is inadequate,” the submission said. “Increased life insurance is of particular importance given the removal of a judge’s right to make full RRSP contributions and the relatively low survivor benefits which are provided by the *Judges Act*.”

At the end of the fiscal year, a bill was passed by Parliament extending the term of the 1995 Triennial Commission by six months to September 30, 1996.

APPENDICES

MEMBERS OF THE CANADIAN JUDICIAL COUNCIL, 1995-96*

The Right Honourable Antonio Lamer, P.C.
Chief Justice of Canada
Chairman

The Honourable Allan McEachern
Chief Justice of British Columbia
First Vice-Chairman

The Honourable Lorne O. Clarke
Chief Justice of Nova Scotia
Second Vice-Chairman

<p>The Honourable Edward D. Bayda <i>Chief Justice of Saskatchewan</i></p> <p>The Honourable Norman H. Carruthers <i>Chief Justice of Prince Edward Island</i></p> <p>The Honourable Donald H. Christie <i>Associate Chief Judge of the Tax Court of Canada</i></p> <p>The Honourable J.-Claude Couture <i>Chief Judge of the Tax Court of Canada</i></p> <p>The Honourable Joseph Z. Daigle <i>Chief Justice of the Court of Queen's Bench of New Brunswick</i></p> <p>The Honourable Mark M. de Weerd** <i>Senior Judge of the Supreme Court of the Northwest Territories (to June 1995)</i></p> <p>The Honourable René W. Dionne <i>Senior Associate Chief Justice of the Superior Court of Quebec</i></p>	<p>The Honourable Patrick D. Dohm <i>Associate Chief Justice of the Supreme Court of British Columbia</i></p> <p>The Honourable Charles Dubin <i>Chief Justice of Ontario (to February 1996)</i></p> <p>The Honourable William A. Esson <i>Chief Justice of the Supreme Court of British Columbia</i></p> <p>The Honourable Catherine A. Fraser <i>Chief Justice of Alberta</i></p> <p>The Honourable Constance R. Glube <i>Chief Justice of the Supreme Court of Nova Scotia</i></p> <p>The Honourable Noel H.A. Goodridge <i>Chief Justice of Newfoundland (to December 1995)</i></p>
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Notes:

* Except that the Chairman and Vice-Chairmen are listed first, members are listed here in alphabetical order.

** The senior judges of the Supreme Courts of the Yukon and the Northwest Territories alternate on the Council every two years.

- The Honourable James R. Gushue
Chief Justice of Newfoundland
(from March 1996)
- The Honourable Benjamin Hewak
Chief Justice of the Court of Queen's Bench for Manitoba
- The Honourable T. Alex Hickman
Chief Justice of the Trial Division of the Supreme Court of Newfoundland
- The Honourable William L. Hoyt
Chief Justice of New Brunswick
- The Honourable Ralph E. Hudson**
Senior Judge of the Supreme Court of the Yukon Territory
(from July 1995)
- The Honourable Julius A. Isaac
Chief Justice of the Federal Court of Canada
- The Honourable James A. Jerome
Associate Chief Justice of the Federal Court of Canada
- The Honourable Lyse Lemieux
Associate Chief Justice of the Superior Court of Quebec
- The Honourable Patrick J. LeSage
Associate Chief Justice of the Ontario Court of Justice
(to February 1996)
Chief Justice of the Ontario Court of Justice
(from February 1996)
- The Honourable Kenneth R. MacDonald
Chief Justice of the Trial Division Supreme Court of Prince Edward Island
- The Honourable Donald K. MacPherson
Chief Justice of the Court of Queen's Bench for Saskatchewan
- The Honourable R. Roy McMurtry
Chief Justice of the Ontario Court of Justice
(to February 1996)
Chief Justice of Ontario
(from February 1996)
- The Honourable Gerald Mercier
Associate Chief Justice, Family Division of the Court of Queen's Bench for Manitoba
- The Honourable Pierre A. Michaud
Chief Justice of Quebec
- The Honourable W. Kenneth Moore
Chief Justice of the Court of Queen's Bench of Alberta
- The Honourable John W. Morden
Associate Chief Justice of Ontario
- The Honourable Jeffrey J. Oliphant
Associate Chief Justice of the Court of Queen's Bench for Manitoba
- The Honourable Ian H.M. Palmetter
Associate Chief Justice of the Supreme Court of Nova Scotia
- The Honourable Lawrence A. Poitras
Chief Justice of the Superior Court of Quebec
- The Honourable Richard J. Scott
Chief Justice of Manitoba
- The Honourable Heather J. Smith
Associate Chief Justice of the Ontario Court of Justice
(from February 1996)
- The Honourable Allan H.J. Wachowich
Associate Chief Justice of the Court of Queen's Bench of Alberta

COMMITTEE MEMBERS AT MARCH 31, 1996

Executive Committee

Chief Justice Antonio Lamer (*Chairman*)

Chief Justice Lorne O. Clarke

Chief Judge J.-Claude Couture

Chief Justice Catherine A. Fraser

Chief Justice Benjamin Hewak

Chief Justice Kenneth R. MacDonald

Chief Justice Allan McEachern

Chief Justice R. Roy McMurtry

Chief Justice Pierre A. Michaud

Associate Chief Justice John W. Morden

Standing Committees

Administration of Justice Committee

Chief Justice Patrick J. LeSage (*Chairman*)

Chief Justice Joseph Z. Daigle

Associate Chief Justice René W. Dionne

Associate Chief Justice Patrick D. Dohm

Chief Justice Constance R. Glube

Associate Chief Justice Jeffrey J. Oliphant

Associate Chief Justice Allan H.J. Wachowich

Judicial Benefits Committee

Chief Justice Constance R. Glube (*Chairperson*)

Chief Justice Edward D. Bayda

Chief Judge J.-Claude Couture

Chief Justice Catherine A. Fraser

Chief Justice Allan McEachern

Associate Chief Justice Gerald Mercier

Chief Justice Richard J. Scott

Note:

Committee membership is generally established at the Council's annual meeting, held in the autumn.

Judicial Conduct Committee

Chief Justice Allan McEachern (*Chairman*)
Chief Justice Lorne O. Clarke (*Vice-Chairman*)
Chief Judge J.-Claude Couture (*Vice-Chairman*)
Chief Justice Catherine A. Fraser
Chief Justice Benjamin Hewak
Chief Justice Antonio Lamer
Chief Justice Kenneth R. MacDonald
Chief Justice R. Roy McMurtry
Chief Justice Pierre A. Michaud
Associate Chief Justice John W. Morden

Judicial Education Committee

Chief Justice Catherine A. Fraser (*Chairperson*)
Chief Justice Norman A. Carruthers
Chief Justice Lorne O. Clarke
Chief Justice Benjamin Hewak
Chief Justice T. Alex Hickman
Chief Justice William L. Hoyt
Mr. Justice Ralph E. Hudson
Chief Justice Julius A. Isaac
Associate Chief Justice John W. Morden
Chief Justice Lawrence A. Poitras

Judicial Independence Committee

Chief Justice Richard J. Scott (*Chairman*)
Chief Justice Edward D. Bayda
Associate Chief Judge Donald H. Christie
Chief Justice William A. Esson
Chief Justice Allan McEachern
Chief Justice R. Roy McMurtry
Associate Chief Justice Gerald Mercier
Chief Justice Pierre A. Michaud
Chief Justice W. Kenneth Moore
Associate Chief Justice Ian H.M. Palmetter

Appeal Courts Committee

Chief Justice L.O. Clarke (*Chairman*)
Chief Justice Edward D. Bayda
Chief Justice Norman H. Carruthers
Chief Justice Catherine A. Fraser
Chief Justice James R. Gushue
Chief Justice William L. Hoyt
Chief Justice Julius A. Isaac
Chief Justice Allan McEachern
Chief Justice R. Roy McMurtry
Chief Justice Pierre A. Michaud
Associate Chief Justice John H. Morden
Chief Justice Richard J. Scott

Trial Courts Committee

Chief Justice Constance R. Glube (*Chairperson*)

Associate Chief Judge Donald H. Christie

Chief Judge J.-Claude Couture

Chief Justice Joseph Z. Daigle

Associate Chief Justice René W. Dionne

Associate Chief Justice Patrick D. Dohm

Chief Justice William A. Esson

Chief Justice Benjamin Hewak

Chief Justice T. Alex Hickman

Mr. Justice Ralph E. Hudson

Associate Chief Justice James A. Jerome

Associate Chief Justice Lyse Lemieux

Chief Justice Patrick J. LeSage

Chief Justice Kenneth R. MacDonald

Associate Chief Justice Gerald Mercier

Chief Justice W. Kenneth Moore

Associate Chief Justice Jeffrey J. Oliphant

Associate Chief Justice Ian H.M. Palmeto

Chief Justice Lawrence A. Poitras

Associate Chief Justice Heather J. Smith

Associate Chief Justice Allan H.J. Wachowich

Finance Committee

Chief Justice Donald K. MacPherson (*Chairman*)

Associate Chief Judge Donald H. Christie

Chief Justice William L. Hoyt

Associate Chief Justice Lyse Lemieux

Chief Justice Kenneth R. MacDonald

Associate Chief Justice John W. Morden

Ad hoc Committees

Judges Computer Advisory Committee

Mr. Justice Marvin Catzman (*Chairman*)

Judge Pierre Archambault

Madam Justice Nancy Bateman

Mr. Justice N. Douglas Coe

Mr. Justice Maurice Lagacé

Madam Justice M. Anne Rowles

Chief Justice Richard J. Scott

Madam Justice Lawrie Smith

Advisors:

Dr. Martin Felsky

Mr. Robert Franson

Professor Daniel Poulin

Liaison Committee of the Canadian Judicial Council and the Canadian Judges Conference

Chief Justice Benjamin Hewak (*Chairman*)

Chief Justice Pierre A. Michaud

Mr. Justice Bruce Cohen

Mr. Justice Guy Kroft

Special Committee on Equality in the Courts

Chief Justice Constance R. Glube (*Chairperson*)

Chief Judge J.-Claude Couture

Associate Chief Justice Lyse Lemieux

Chief Justice Patrick J. LeSage

Chief Justice Richard J. Scott

Associate Chief Justice Allan H.J. Wachowich

Study Leave Selection Committee

Chief Justice W. Kenneth Moore (*Chairman*)

Chief Justice Constance R. Glube

Associate Chief Justice John W. Morden

Dean Normand Ratti

Dean Peter MacKinnon

Working Committee on a "Code of Conduct"

Chief Justice Richard J. Scott

Chief Justice Allan McEachern

Madam Justice Elizabeth McFadyen

Chief Justice R. Roy McMurtry

Chief Justice Pierre Michaud

Professor Tom Cromwell

Ms. Jeannie Thomas

Nominating Committee

Chief Justice Benjamin Hewak (*Chairman*)

Chief Justice Norman H. Carruthers

Chief Justice Patrick J. LeSage

CONFERENCE ON ASPECTS OF EQUALITY: RENDERING JUSTICE

November 1995

The Conference on *Aspects of Equality: Rendering Justice*, held in Hull, Quebec, from November 17 to 19, 1995, had the largest attendance of any educational conference organized by the Council and was the largest gathering of women judges in Canadian history.

Conference Planning Committee

The Honourable Rosalie S. Abella (Chair)	The Honourable Georgina R. Jackson
The Honourable Catherine A. Fraser	The Honourable Beverley McLachlin
The Honourable Constance R. Glube	The Honourable Michèle Rivet
The Honourable Claire L'Heureux-Dubé	Ms. Jeannie Thomas

PROGRAMME

Friday, November 17

Opening Remarks

The Right Honourable Antonio Lamer
Chief Justice of Canada
Chairman, Canadian Judicial Council

Round Table Discussion:

Judges in the Making: Equality in the Pre-Judicial World

Moderator:

The Honourable Allen Linden
Federal Court of Appeal

Participants:

The Honourable Paule Gauthier
Former President, CBA
Desjardins, Ducharme, Quebec City

Ms. Cecilia Johnstone
Former President, CBA
Lucas, Bowker, Edmonton

Dean Sheilah Martin
Faculty of Law, University of Calgary

Dean Marilyn Pilkington
Osgoode Hall Law School

Dean Sanda Rodgers
Faculty of Law, University of Ottawa

Dean Lynn Smith
Faculty of Law, UBC

Saturday, November 18

Theories of Equality

Introduction of Speaker:

The Honourable Catherine Fraser
Chief Justice of Alberta

Plenary Address:

The Honourable Claire L'Heureux-Dubé
Supreme Court of Canada

Panel Discussion:

Moderator:

The Honourable Michèle Rivet
President, Quebec Human Rights Tribunal

Members:

Ms. Rosemary Brown
Chair, Ontario Human Rights Commission

Professor Irwin Cotler
Faculty of Law, McGill University

Ms. Donna Greschner
Chief Commissioner, Saskatchewan Human Rights Commission

Mr. David Lepofsky
Crown Law Office, Ministry of the Attorney General of Ontario

Assessing Equality

Introduction of Speaker:

The Honourable Constance Glube
Chief Justice of the Nova Scotia Supreme Court

Plenary Address:

Judge Patricia Wald
*United States Court of Appeals
District of Columbia Circuit*

Panel Discussion:

Moderator:

The Honourable Georgina Jackson
Saskatchewan Court of Appeal

Members: Mr. Alain Dubuc
Editorial Page Editor, La Presse

Professor Colleen Shepherd
Faculty of Law, McGill University

Mr. Haroon Siddiqui
Editorial Page Editor, Toronto Star

Professor Louise Viau
Faculty of Law, University of Montreal

HONOURING THE JUDICIAL PIONEERS

Introduction of Speaker: The Honourable Claire L'Heureux-Dubé
Supreme Court of Canada

Speaker: The Honourable Allan Rock
*Minister of Justice and
Attorney General of Canada*

Introduction of Pioneers: The Honourable Beverley McLachlin
Supreme Court of Canada

Pioneers:

Marjorie Montgomery Bowker
*First woman on the Family and Juvenile Courts
of Alberta (1966)*

Réjane Colas
First woman high court judge in the Commonwealth (1969)

Claire L'Heureux-Dubé
*First woman on the Appeal Court of Quebec (1979);
first woman from the Civil Law jurisdiction
on the Supreme Court of Canada (1987)*

Sandra Oxner
First woman judge in Nova Scotia (1971)

Patricia Proudfoot
*First woman judge on the B.C. Provincial Court
(Criminal Division) (1971), the County Court of B.C. (1974);
and the Supreme Court of B.C. (1977)*

Mabel Van Camp
First woman on the Ontario Superior Court (1971)

Bertha Wilson
First woman on the Supreme Court of Canada (1984)

Sunday, November 18	<u>Equality and Judicial Neutrality</u>
Introduction of Speaker:	The Honourable Lyse Lemieux <i>Associate Chief Justice of the Quebec Superior Court</i>
Plenary Address:	The Honourable Beverley McLachlin <i>Supreme Court of Canada</i>
Panel Discussion:	
Moderator:	The Honourable Louise Charron <i>Ontario Court (General Division)</i>
Members:	Professor Jacques Frémont <i>Director, Public Law Research Centre, University of Montreal</i>
	Ms. Roberta Jamieson <i>Ombudsman, Ontario</i>
	Professor Roderick Macdonald <i>Faculty of Law, McGill University</i>
	Professor Kathleen Mahoney <i>Faculty of Law, University of Calgary</i>
	<u>Closing Session</u>
Introduction of Speaker:	The Right Honourable Brian Dickson
Lunch Address:	The Honourable Bertha Wilson

HUMAN AND FINANCIAL RESOURCES, 1995-96

The Council is served by an Executive Director, a legal officer and two support staff located at the Council office in Ottawa.

1995-96 EXPENDITURES OF THE CANADIAN JUDICIAL COUNCIL

Salaries and Benefits	\$193,186
Transportation and Communications	49,558
Professional and Special Services	184,730
Rentals	17,640
Purchase, Repair and Upkeep	495
Utilities, Materials and Supplies	19,844
Construction and Acquisition of Machinery and Equipment	12,669
Other	201
Internal Government Expenditures	119,881
TOTAL	\$598,204

CANADIAN JUDICIAL COUNCIL BY-LAWS

ARTICLE I

Title

1.01 These by-laws may be cited as the *Canadian Judicial Council By-Laws*.

ARTICLE II

Interpretation

2.01 In these by-laws:

- (a) "Act" means the *Judges Act*, R.S.C. 1985, c.J-1;
- (b) "Chairman" means the Chief Justice of Canada;
- (c) "Council" means the Canadian Judicial Council established by the *Act*;
- (d) "Executive Committee" means the Executive Committee of the Council as provided for in these by-laws;
- (e) "Executive Director" means the Executive Director of the Council as provided for in these by-laws;
- (f) "First Vice-Chairman" means the Vice-Chairman who has been a member of the Council longer than the other Vice-Chairman;
- (g) "judge" means a judge to whom the *Act* applies;
- (h) "Second Vice-Chairman" means the Vice-Chairman who is not the First Vice-Chairman;
- (i) "Vice-Chairman" means a vice-chairman pursuant to these by-laws.

ARTICLE III

Meetings

Annual Meeting **3.01** There shall be an annual meeting of the Council which shall be held in the month of September unless the Executive Committee directs otherwise.

3.02 The Executive Committee shall fix the date and place of the annual meeting before August 1 but, if it fails to do so, the date and place shall be fixed by the Chairman.

Mid-year meeting **3.03** There shall be a mid-year meeting of the Council in Ottawa, in the month of March, unless the Executive Committee directs otherwise.

Special meetings **3.04** Special meetings of the Council may also be called by the Chairman, by the Executive Committee, by the Council or at the written request of not less than ten members of the Council. The dates and places for all special meetings, unless fixed by the Council, shall be fixed by the Executive Committee, except a meeting called by the Chairman for which the Chairman shall fix the date and place.

Notice of special meeting **3.05** Notice of the time and place of any such special meeting shall be communicated to every member of the Council in such manner as the Executive Committee deems expedient having regard to the circum-

stances except a meeting called by the Chairman, for which notice shall be given in a manner deemed expedient by the Chairman.

3.06 The Executive Director shall give to each member of the Council at least 30 days notice of the time and place of any meeting of the Council.

3.07 A majority of the members of the Council shall constitute a quorum.

3.08 Any meeting of the Council may be adjourned to such date and place as the Council may decide.

3.09 The presiding officer at all meetings of the Council shall be:

- (a) the Chairman;
- (b) in the absence of the Chairman, the First Vice-Chairman;
- (c) in the absence of the Chairman and the First Vice-Chairman, the Second Vice-Chairman, or
- (d) in the absence of the Chairman and the Vice-Chairmen, the senior member of the Council present at such meeting.

3.10 The Council may authorize any person who is not a member of the Council to attend, but not to vote, at a meeting of the Council.

3.11 Voting at meetings of the Council shall be by a show of hands unless a vote by secret ballot is requested by at least ten members.

ARTICLE IV

Officers

4.01 Except as provided in article 3.09, the Chairman shall preside at all meetings of the Council and of the Executive Committee, and shall be the Chief Executive Officer of the Council.

4.02 The Chairman may designate two members of the Council to be Vice-Chairmen of the Council, at least one of whom shall be an elected member of the Executive Committee.

4.03 The Vice-Chairmen shall hold office at the pleasure of the Chairman.

4.04 The First Vice-Chairman or, in the absence of the First Vice-Chairman, the Second Vice-Chairman, shall act in the absence or disability of the Chairman and perform such other functions and duties as the Council may determine.

4.05 The Chairman may from time to time designate a Vice-Chairman to act as Chairman of the Executive Committee, and the Vice-Chairman so designated shall thereupon have the authority and responsibility of the Chairman of such committee subject to the right of the Chairman to resume the chairmanship at any time.

4.06 The Chairman shall designate one of the Vice-Chairmen to be chairman of the Judicial Conduct Committee, who shall hold office at the pleasure of the Chairman.

4.07 The office of the Council shall be in the National Capital Region.

Executive Director of Council **4.08** The Council shall appoint an Executive Director who is not a member of the Council, and may also employ other personnel as required for the full and proper discharge of its duties and responsibilities.

Duties of Executive Director **4.09** The Executive Director shall have charge of the office of the Council, shall be responsible for all matters generally ascribed to the position and shall perform all duties required by the Chairman, by the Council or by any of its Committees.

Acting Executive Director **4.10** Where, for any reason, the Executive Director is unable to act, an acting Executive Director may be appointed by the Chairman.

ARTICLE V *Executive Committee*

Composition of the Executive Committee **5.01** There shall be an Executive Committee of the Council consisting of the Chairman and nine members of the Council who shall be elected by the Council from among its members.

Additional Member of Committee **5.02** If the Chairman appoints as one of the Vice-Chairmen a person who is not elected to the Executive Committee that Vice-Chairman shall be an additional member of the Executive Committee.

Members **5.03** Three members of the Executive Committee shall be elected at each annual meeting and shall hold office for three years. A member of the Executive Committee whose term expires at an annual meeting shall not be eligible for re-election until the following annual meeting.

Vacancy **5.04** When a member of the Executive Committee resigns therefrom or ceases to be a member of the Council, the Executive Committee may appoint another member of the Council as a replacement until the next annual meeting of the Council.

Vacancy **5.05** When a member of the Executive Committee resigns therefrom or ceases to be a member of the Council, the Council at its next annual meeting shall elect one of its members as a replacement.

Duration of term **5.06** A member of the Executive Committee elected pursuant to article 5.05 shall hold office until the expiry of the term of office of the person being replaced.

Powers and duties of the Executive **5.07** The Executive Committee is responsible for the supervision and management of the affairs of the Council. Without limiting the generality of the foregoing, the Executive Committee shall have all the powers vested in the Council except for (i) the making of by-laws, (ii) the appointment of members of the Executive Committee and standing committees other than as provided herein, and (iii) the powers of the Council referred to in Article VIII of these by-laws.

Quorum **5.08** A majority of the members of the Executive Committee shall constitute a quorum.

Functioning of the Committee **5.09** Meetings of the Executive Committee shall be held at such intervals, in such manner, at such place and upon such notice as the Executive Committee may from time to time determine.

Meetings **5.10** The Chairman, a Vice-Chairman or any three members may, at any time, call a meeting of the Executive Committee.

Resolution **5.11** A resolution consented to in writing or by any electronic method, by all members of the Executive Committee, shall be as valid and effectual as if it had been passed at a meeting of the Executive Committee duly called and held. Such resolution may be in two or more counterparts which together shall be deemed to constitute one resolution in writing. Such resolution shall be filed with the minutes of the proceedings of the Executive Committee and shall be effective on the date stated thereon or, if no date is specified, when filed.

ARTICLE VI

Standing and Ad hoc Committees

Standing Committees **6.01** There shall be a Standing Committee of the Council on each of the following subjects:

- (a) judicial conduct,
- (b) judicial education,
- (c) judicial benefits,
- (d) judicial independence,
- (e) administration of justice,
- (f) finance,
- (g) appeal courts, and
- (h) trial courts.

Membership **6.02** Each standing committee, except the Standing Committees on Judicial Conduct, Appeal Courts and Trial Courts, shall have a minimum of five members who shall be elected at each annual meeting. The chairman of each such committee shall be elected annually by the members of the Committee from among their own number.

Exception for committee membership **6.03** The members of the Standing Committees on Appeal Courts and Trial Courts shall respectively consist of the Council members who are members of such courts and the chairmen of such committees shall be the Chief Justices of the Appeal Court and the Trial Court of the province or territory in which the next annual meeting is to be held.

Vacancy **6.04** Any vacancy in a standing committee arising between annual meetings may be filled by the Executive Committee.

Objects **6.05** A standing committee is responsible for the achievement of its objects subject to the approval of the Finance Committee for the expenditure of public funds.

6.06 Articles 5.08, 5.09 and 5.11 of these by-laws apply *mutatis mutandis* to any committee of the Council.

Ad hoc Committees **6.07** The Chairman, the Executive Committee or the Council may establish and prescribe the powers and duties of ad hoc committees. Judges who are not Council members may be included in the membership as needed from time to time.

Expenses **6.08** Judges who attend a meeting of a standing or ad hoc committee of the Council duly called by its chairman, and for which approval to hold the meeting has been received from the Council Chairman, shall be reimbursed their expenses in so attending the meeting pursuant to section 41(1) of the *Act*.

ARTICLE VII
Nominating Committee

Election of Nominating Committee **7.01** At every annual meeting the members of the Council shall elect a three-member Nominating Committee.

Chairman **7.02** The Nominating Committee shall appoint from amongst its members, a chairman who shall organize the work of the Committee and preside over its meetings.

Duties of Committee **7.03** The Nominating Committee shall nominate candidates for membership on the Executive Committee and on all standing committees.

Written Report **7.04** A written report of the nominations proposed by the Nominating Committee shall be sent to the members of the Council at least 30 days before each annual meeting of the Council.

Representation **7.05** In preparing its report the Nominating Committee shall consider and, if possible, nominate candidates who will furnish regional and jurisdictional representation.

Candidates **7.06** Notwithstanding the report of the Nominating Committee, any member of the Council may nominate from the floor any eligible member of the Council for election to the Executive Committee or to a Standing Committee.

ARTICLE VIII
Judicial Conduct

Committee **8.01**

(a) The members of the Executive Committee shall constitute the Judicial Conduct Committee.

Vice-Chairman of Committee

(b) The Chairman of the Council may, after consultation with the Chairman of the Judicial Conduct Committee, designate one or more Vice-Chairmen of the Committee to carry out such duties of the Chairman of the Committee as may be delegated in writing by the Chairman of the Committee from time to time.

Complaint or allegation about conduct of a judge

8.02

(a) Every complaint or allegation received at the office of the Council, concerning a judge who is subject to the Act, shall be referred to the Executive Director.

(b) Every complaint or allegation received by any member of the Council concerning the conduct of a judge which, in the opinion of such member, may require the attention of the Council, shall be sent to the Executive Director.

(c) A Council member shall draw to the attention of the Executive Director any conduct of a judge of that member's court which, in the view of that member, may require the attention of the Council, and such conduct shall be treated in the same manner as if it were the subject of a complaint.

Referral to chairman

8.03

(a) The Executive Director shall establish a file and, subject to article 8.01 (b), shall refer every complaint or allegation mentioned in article 8.02 to the Chairman of the Judicial Conduct Committee.

Duty to inform

(b) The Executive Director shall provide a copy of any complaint or allegation made to the Council against a judge together with a copy of any reply, to the judge concerned, and to the judge's Chief Justice or Chief Judge.

8.04

- (a) The Chairman shall review the complaint or allegation and may:
- (i) close the file where the matter is trivial, vexatious or without substance and advise the complainant, who is the subject of the complaint, accordingly with an appropriate explanation;
 - (ii) after obtaining comments from the judge and the judge's Chief Justice or Chief Judge, close the file and advise the complainant, with an appropriate explanation, where the matter is without substance or where the conduct is inappropriate or improper but clearly is not serious enough to warrant removal.
- (b) The Chairman may cause further inquiries to be made where the matter is likely to be referred to a Panel of the Judicial Conduct Committee and where further information appears to be necessary for the Panel to fulfill its function.
- (c) Where further inquiries are made, the judge who is the subject of the complaint shall be provided an opportunity to respond to the gist of the allegations and evidence against such judge and any response by the judge shall be included in the report of such further inquiries.
- (d) The Chairman shall refer any file which is not closed, to a Panel of the Judicial Conduct Committee together with the report of the further inquiries, if any, and any recommendation which the Chairman may make.

8.05

- (a) A matter which is referred to a Panel of the Judicial Conduct Committee pursuant to article 8.04 (d) shall be dealt with by a Panel of up to five members of the Committee designated for this purpose by the Chairman of the Judicial Conduct Committee. The Panel member with seniority on the Council shall act as Chairman of the Panel.
- (b) The Panel shall review the matter and the report of the further inquiries, if any, and may:
- (i) refer the matter back to the Chairman to cause further inquiries to be made; or
 - (ii) decide that no investigation pursuant to subsection 63(2) of the *Act* is warranted and advise the complainant accordingly with an appropriate explanation where the matter is without substance or where the conduct is inappropriate or improper but clearly is not serious enough to warrant removal; or
 - (iii) refer the matter to the Council together with its own report and conclusion that an investigation pursuant to subsection 63(2) of the *Act* may be warranted.
- (c) If the Panel concludes that an investigation may be warranted pursuant to subsection 63(2) of the *Act*, it shall specify the grounds of alleged misconduct which could warrant an investigation.
- (d) After the Panel has completed its review of a complaint, the members of the Panel shall not participate in any further consideration of the same complaint by the Council.

Duties of Council **8.06**

(a) Prior to the Council considering the report of a Panel, the Chairman of the Judicial Conduct Committee shall designate up to five members of the Canadian Judicial Council (other than those who served on the Panel) to be available to serve on any subsequent Inquiry Committee which might be established pursuant to the *Act*. The members so designated shall not participate in any deliberations of the Council in relation to the matter in question.

(b) A copy of the report of the Panel to the Council shall be provided to the judge, who shall be entitled to make written and oral submissions to the Council as to whether or not there should be an investigation pursuant to subsection 63(2) of the *Act*.

(c) After considering the report of the Panel and the submissions, if any, the Council shall decide:

(i) that no investigation pursuant to subsection 63(2) of the *Act* is warranted and advise the complainant and the judge accordingly with an appropriate explanation where the matter is without substance or where the conduct is inappropriate or improper but is not serious enough to warrant removal; or

(ii) that an investigation into the matter shall be held pursuant to subsection 63(2) of the *Act* since the matter may be serious enough to warrant removal.

Inquiry Committee **8.07**

(a) Such investigation shall be conducted by an Inquiry Committee composed of the members designated previously pursuant to article 8.06(a) together with any additional members appointed by the Minister pursuant to section 63(3) of the *Act*.

(b) The Inquiry Committee shall conduct the investigation in accordance with sections 63 and 64 of the *Act* and shall report its conclusions to the Council.

Inquiry Committee Report **8.08**

(a) All of the parties before the Inquiry Committee shall be provided with copies of the Committee's report and shall be provided a full opportunity to be heard before the Council.

(b) Where the Council, in its report to the Minister pursuant to section 65(1) of the *Act*, departs from the report of the Inquiry Committee it shall, nevertheless, provide the Minister with the original report of the Inquiry Committee.

Request from Minister or Attorney General **8.09**

(a) Where the Council receives a request from the Minister of Justice of Canada under subsection 63(1) or 69(1) of the *Act* or a request from the Attorney General of a province under subsection 63(1) of the *Act* to conduct an inquiry as to whether a judge or other person should be removed from office for any of the reasons set forth in subsection 65(2) of the *Act*, the Chairman of the Judicial Conduct Committee shall appoint up to five members of the Council to serve on the Inquiry Committee.

(b) Such an inquiry shall be conducted in accordance with articles 8.07 and 8.08 of these by-laws as though it were an investigation.

Non-participation
in deliberations

8.10 The Chairman of the Canadian Judicial Council and the Chief Justice and Associate Chief Justice of the Federal Court of Canada shall not participate in the consideration of any aspect of a complaint in any capacity unless he or she considers it to be necessary to do so in the interests of the due administration of justice.

ARTICLE IX *Judicial Education*

Seminars and
Conferences

9.01 Pursuant to sections 41(1) and 60(2)(b) of the *Act* the Council may authorize judges to attend seminars and conferences for their continuing education.

ARTICLE X *Finance*

Meetings,
Seminars and
Conferences

10.01 The Chairman of the Council is authorized to approve the attendance of federally appointed judges at meetings, seminars or conferences held for a purpose related to the administration of justice. A judge attending such a meeting, seminar or conference is entitled to be reimbursed for expenses incurred, pursuant to section 41(1) of the *Act*.

Finance
Committee

10.02 The Finance Committee shall prepare for the Executive Committee the Council's annual budget for presentation to the Commissioner for Federal Judicial Affairs.

Objects **10.03** At each meeting of the Council the Finance Committee shall present a current report on the financial affairs of the Council. It shall also supervise the financial affairs and operations of the Council and its committees, and undertake such further financial assignments that the Council or its Executive Committee may direct.

ARTICLE XI *Amendment of By-Laws*

Amendments **11.01** These by-laws may be amended by a majority vote of all the members of the Council upon notice in writing of the proposed amendment being given to the Executive Director not less than 30 days before the meeting of the Council where such amendment will be considered.

Notice **11.02** Upon receiving any such notice the Executive Director shall forthwith, and not less than 10 days before such meeting, cause a copy thereof to be communicated to every member of the Council.

Waiving of
Notice Period **11.03** Notwithstanding articles 11.01 and 11.02 the notice period for a change to these by-laws can be waived by agreement of two-thirds of the members present at a meeting of the Council.

PART II OF THE JUDGES ACT

Following is the text of Part II of the *Judges Act*, which governs the Canadian Judicial Council. It is taken from the 1989 Office Consolidation of the *Act*.

**Part II
Canadian Judicial Council**

Interpretation

Definition of "Minister"

58. In this Part, "Minister" means the Minister of Justice of Canada.

Constitution of the Council

Council established

59. (1) There is hereby established a Council, to be known as the Canadian Judicial Council, consisting of

(a) the Chief Justice of Canada, who shall be the chairman of the Council;

(b) the chief justice and any senior associate chief justice and associate chief justice of each superior court or branch or division thereof;

(c) subject to subsection (2), one of the senior judges, as defined in subsection 22(3), of the Supreme Court of the Yukon Territory and the Supreme Court of the Northwest Territories;

(d) the chief judge and any associate chief judge of each county court or, where there is

no such chief judge or associate chief judge, such judge as is named by the judges of that court to represent that court on the Council; and

(e) the Chief Judge and Associate Chief Judge of the Tax Court of Canada.

Successive terms of senior judges

(2) The senior judges referred to in paragraph (1)(c) shall succeed each other on the Council every two years.

Successor to senior judge

(3) In the event of the death or resignation of a senior judge referred to in paragraph (1)(c) during the term of that judge on the Council, the judge who succeeds that judge as senior judge of the same court shall become a member of the Council for the remainder of the term.

Substitute member

(4) Each member of the Council may appoint a judge of that member's court to be a substitute member of the Council and the substitute member shall act as a member of the Council during any period in which he is appointed to act, but the Chief Justice of Canada may, in lieu of appointing a member of the Supreme Court of Canada, appoint any former member of that Court to be a substitute member of the Council. R.S., c. J-1, s. 30; 1976-77, c. 25, ss. 15, 16; 1980-81-82-83, c. 158, s. 45.

Objects of Council 60. (1) The objects of the Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior and county courts and in the Tax Court of Canada.

Powers of Council (2) In furtherance of its objects, the Council may

(a) establish conferences of chief justices, associate chief justices, chief judges and associate chief judges;

(b) establish seminars for the continuing education of judges;

(c) make the inquiries and the investigation of complaints or allegations described in section 63; and

(d) make the inquiries described in section 69. R.S., c. J-1, s. 30; R.S., c. 16(2nd Supp.), s. 10; 1974-75-76, c. 48, s. 17; 1976-77, c. 25, s. 15; 1980-81-82-83, c. 158, s. 45.

Meetings of Council 61. (1) The Council shall meet at least once a year.

Work of Council (2) Subject to this Act, the work of the Council shall be carried on in such manner as the Council may direct.

By-laws (3) The Council may make by-laws

(a) respecting the calling of meetings of the Council;

(b) respecting the conduct of business at meetings of the Council, including the fixing of quorums for such meetings, the establishment of committees of the Council and the delegation of duties to any such committees; and

(c) respecting the conduct of inquiries and investigations described in section 63. R.S., c. J-1, s. 30; R.S., c. 16(2nd Supp.), s. 10; 1976-77, c. 25, s. 15.

Employment of counsel and assistants 62. The Council may engage the services of such persons as it deems necessary for carrying out its objects and duties, and also the services of counsel to aid and assist the Council in the conduct of any inquiry or investigation described in section 63. R.S., c. 16(2nd Supp.), s. 10; 1976-77, c. 25, ss. 15, 16; 1980-81-82-83, c. 157, s. 16.

Inquiries concerning Judges

Inquiries 63. (1) The Council shall, at the request of the Minister or the attorney general of a province, commence an inquiry as to whether a judge of a superior or county court or of the Tax Court of Canada should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d).

Investigations (2) The Council may investigate any complaint or allegation made in respect of a judge of a superior or county court or of the Tax Court of Canada.

Inquiry Committee (3) The Council may, for the purpose of conducting an inquiry or investigation under this section, designate one or more of its members who, together with such members, if any, of the bar of a province, having at least ten years standing, as may be designated by the Minister, shall constitute an Inquiry Committee.

Powers of Council or Inquiry Committee (4) The Council or an Inquiry Committee in making an inquiry or investigation under this section shall be deemed to be a superior court and shall have

(a) power to summon before it any person or witness and to require him to give evidence on oath, orally or in writing or on solemn affirmation if the

person or witness is entitled to affirm in civil matters, and to produce such documents and evidence as it deems requisite to the full investigation of the matter into which it is inquiring; and

(b) the same power to enforce the attendance of any person or witness and to compel the person or witness to give evidence as is vested in any superior court of the province in which the inquiry or investigation is being conducted.

Prohibition of information relating to inquiry, etc. (5) The Council may prohibit the publication of any information or documents placed before it in connection with, or arising out of, an inquiry or investigation under this section when it is of the opinion that the publication is not in the public interest.

Inquiries may be public or private (6) An inquiry or investigation under this section may be held in public or in private, unless the Minister requires that it be held in public. R.S., c. J-1, s. 31; R.S., c. 16(2nd Supp.), s. 10; 1976-77, c. 25, s. 15; 1980-81-82-83, c. 158, s. 46.

Notice of hearing 64. A judge in respect of whom an inquiry or investigation under section 63 is to be made shall be given reasonable notice of the subject-matter of the inquiry or investigation and of the time and place of any hearing thereof and shall be afforded an opportunity, in person or by counsel, of being heard at the hearing, of cross-examining witnesses and of adducing evidence on his own behalf. R.S., c. J-1, s. 31; R.S., c. 16(2nd Supp.), s. 10; 1976-77, c. 25, s. 15.

Report and Recommendations

Report of Council 65. (1) After an inquiry or investigation under section 63 has been completed, the Council shall report its conclusions and submit the record of the inquiry or investigation to the Minister.

Recommendation to Minister (2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of

(a) age or infirmity,

(b) having been guilty of misconduct,

(c) having failed in the due execution of that office, or

(d) having been placed, by his conduct or otherwise, in a position incompatible with the due execution of that office,

the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office. R.S., 1985, c. J-1, s. 65; R.S., 1985, c. 27(2nd Supp.), s. 5.

Effect of Inquiry

Disentitlement to 66. (1) [Repealed, R.S., 1985, c. 27(2nd Supp.), s. 6]

Leave of absence with salary (2) The Governor in Council may grant leave of absence to any judge found, pursuant to subsection 65(2), to be incapacitated or disabled, for such period as the Governor in Council, in view of all the circumstances of the case, may consider just or appropriate, and if leave of absence is granted the salary of the judge shall continue to be paid during the period of leave of absence so granted.

Annuity to
judge who
resigns

(3) The Governor in Council may grant to any judge found to be incapacitated or disabled, if the judge resigns, the annuity that the Governor in Council might have granted the judge if the judge had resigned at the time when the finding was made by the Governor in Council. R.S., 1985, c. J-1, s. 66; R.S., 1985, c. 27(2nd Supp.), s.6.

67. [Repealed, R.S., 1985, c. 16(3rd Supp.), s. 5]

68. [Repealed, R.S., 1985, c. 16(3rd Supp.), s. 6]

Inquiries concerning Other Persons

Further
inquiries

69. (1) The Council shall, at the request of the Minister, commence an inquiry to establish whether a person appointed pursuant to an enactment of Parliament to hold office during good behaviour other than

(a) a judge of a superior or county court or of the Tax Court of Canada, or

(b) a person to whom section 48 of the *Parliament of Canada Act* applies, should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d).

Applicable
provisions

(2) Subsections 63(3) to (6), sections 64 and 65 and subsections 66(1) and (2) apply, with such modifications as the circumstances require, to inquiries under this section.

Removal from
office

(3) The Governor in Council may, on the recommendation of the Minister, after receipt of a report described in subsection 65(1) in relation to an inquiry under this section in connection with a person who may be removed from office by the Governor in Council other than on an address of the Senate or House of Commons or on a joint address of the Senate and House of Commons, by order, remove the person from office. 1974-75-76, c. 48, s. 18; 1976-77, c. 25, s. 15; 1980-81-82-83, c. 158, s. 48.

Report to Parliament

Orders and
reports to be
laid before
Parliament

70. Any order of the Governor in Council made pursuant to subsection 69(3) and all reports and evidence relating thereto shall be laid before Parliament within fifteen days after that order is made or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that either House of Parliament is sitting. 1974-75-76, c. 48, s. 18; 1976-77, c. 25, s. 15.

Removal by Parliament or Governor in Council

Powers,
rights or
duties not
affected

71. Nothing in, or done or omitted to be done under the authority of, any of sections 63 to 70 affects any power, right or duty of the House of Commons, the Senate or the Governor in Council in relation to the removal from office of a judge or any other person in relation to whom an inquiry may be conducted under any of those sections. 1974-75-76, c. 48, s. 18; 1976-77, c. 25, s. 15.
