Department of Justice Canada
Ministère de la Justice Canada

REPORT AND RECOMMENDATIONS OF THE 1986 COMMISSION ON JUDGES' SALARIES AND BENEFITS

February 27, 1987

Submitted to the Minister of Justice of Canada

Canada

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Pursuant to Section 19.3 of the *Judges Act*, I am now tabling the Report and Recommendations of the 1986 Commission on Judges' Salaries and Benefits, appointed as of September 1, 1986 to inquire into the adequacy of the salaries and other amounts payable under the *Act* and into the adequacy of judges' benefits generally. In accordance with Standing Order 67(4) of the House of Commons, this document shall be deemed to be referred to the Standing Committee on Justice and Solicitor General.

The Honourable Ray Hnatyshyn
Minister of Justice and
Attorney General of Canada

REPORT AND RECOMMENDATIONS OF THE 1986 COMMISSION ON JUDGES' SALARIES AND BENEFITS

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1986 COMMISSION ON JUDGES' SALARIES AND BENEFITS

I. Background

Members: Mr. H. Donald Guthrie, Q.C. (Chairman)
Mr. Edward H. Crawford
Mtre Jeannine M. Rousseau
Mr. Eldon M. Woolliams, Q.C.

Executive Secretary: Mr. Harold Sandell

Terms of Reference

The 1986 Commission on Judges' Salaries and Benefits was appointed as of September 1, 1986, by the Honourable Ray Hnatyshyn, Minister of Justice and Attorney General of Canada, pursuant to section 19.3 of the *Judges Act*, and was given the following terms of reference:

> "The Commission shall, pursuant to section 19.3 of the *Judges Act*, inquire into the adequacy of the salaries and other amounts payable under the *Act* and into the adequacy of judges' benefits generally.
>
> Without restricting the generality of the foregoing, the Commission shall inquire into and report upon the following matters:
>
> 1. The adequacy of salaries and allowances paid under the *Act*, having due regard for the adjustments made by S.C. 1985, c. 48.
> 2. The granting of annuities provided to judges and pursuant to subsection 23(1) of the *Act*, and more particularly
>   (a) the criteria for retirement with full benefits under the Act;
>   (b) the pro-rating of annuities for judges who resign without qualifying for full benefits under the *Act*;
>   (c) the contributions payable by judges towards annuities payable on the terms fixed by the *Act*.
> 3. The granting of annuities provided to surviving spouses and children pursuant to sections 25, 26 and 27 of the *Act*.
>
> The Commission shall report to the Minister of Justice upon the results of the inquiry in accordance with subsection 19.3(2) of the *Act*."

Further to these terms of reference, the Minister wrote to the Chairman on December 8, 1986 requesting that the Commission examine, as part of its statutory terms of reference, the matter of a removal allowance for judges of the Supreme Court of Canada, the Federal Court of Canada and the Tax Court of Canada who wish to leave Ottawa and live in another part of Canada on retirement.

The Commission held meetings and/or hearings as follows:

September 17, 1986 – Toronto
November 26, 27 and 28, 1986 – Ottawa
December 16, 1986 – Toronto
January 17 and 18, 1987 – Toronto
January 24 and 25, 1987 – Toronto
February 6, 7 and 8, 1987 – Toronto
February 17, 1987 – Telephone conference
February 18, 1987 – Telephone conference
February 24, 1987 – Telephone conference

Notice to the Public, Submissions and Hearings

The Commission published a Notice in 21 newspapers across Canada, during September and October, 1986, inviting written submissions and presentations at oral hearings, in either official language, concerning matters within the Commission's terms of reference. Notice was also given to a number of interested organizations and individuals. The Commission offered to conduct oral hearings in Halifax, Vancouver, Edmonton, Montreal and Ottawa during October and November, 1986.

Copies of the Notice in English and French are reproduced as Appendix "A". The Notice was published in the following newspapers:

St. John's Evening Telegram
Charlottetown Guardian
Halifax Chronicle-Herald
Le Courrier
Saint John Telegraph Journal
Le Soleil
La Presse
Montreal Gazette
Le Droit
Ottawa Citizen
The Globe and Mail
The Lawyers Weekly
Winnipeg Free Press
Regina Leader Post
Calgary Herald
Edmonton Journal
Le Franco-Albertain
Vancouver Province
Le Soleil de Colombie
The Yellowknifer
Whitehorse Star

Written submissions were received from the groups and individuals listed in Appendix "B".

The only requests for oral hearings were for Ottawa. These hearings took place on November 27 and 28, 1986, at the Canada Council Hearing Room, 99 Metcalfe Street. The following organizations, with the counsel indicated, made oral presentations to the Commission:

1. The Joint Committee on Judicial Benefits of the Conference of Chief Justices and Chief Judges and the Canadian Judges Conference

Counsel Appearing: John J. Robinette, Q.C., Toronto
Yves Fortier, Q.C., Montreal

2. Justices of the Supreme Court of Ontario

Counsel Appearing: John F. Howard, Q.C., Toronto

3. The Canadian Bar Association Standing Committee on Pensions for Judges' Spouses and Judges' Salaries

Counsel Appearing: Bryan Williams, Q.C., Vancouver
(President of the Association)
S.J. Safian, Q.C., Regina
(Chairman of the Standing Committee)
H.A.D. Oliver, Q.C., Vancouver
Thomas J. Walsh, Q.C., Calgary
Robert B. Goodwin, Winnipeg
John Fortier, Charlottetown
George A. Allison, Q.C., Montreal

Previous Committees and Commissions

The 1986 Commission on Judges' Salaries and Benefits is the fifth federal committee or commission established in recent years to inquire into and make recommendations to the Minister of Justice with respect to judicial salaries, allowances and benefits. It is the second commission appointed pursuant to section 19.3 of the *Judges Act*.

In September, 1974, a Special Advisory Committee, under the chairmanship of the Honourable Mr. Justice Emmett Hall, a retired member of the Supreme Court of Canada, reported to the Minister. The Dorfman Committee on Judicial Compensation and Related Matters, under the chairmanship of Irwin Dorfman, Q.C., (hereinafter, the "Dorfman Committee") reported to the Minister in November, 1978. The de Grandpré Committee on Judicial Annuities, under the chairmanship of Jean de Grandpré, Q.C. (hereinafter, the "de Grandpré Committee"), reported in December, 1981. The 1983 Commission on Judges' Salaries and Benefits, which was the first of the "Triennial Commissions" established pursuant to section 19.3 of the *Judges Act*, was chaired by the Honourable Otto Lang, P.C., Q.C. (hereinafter, the "Lang Commission") and it reported to the Minister in October, 1983.

Acknowledgements

The Commission wishes to thank Pierre Garceau, Q.C., Commissioner for Federal Judicial Affairs, and the members of his staff, in particular André Gareau and Louise Fox, for their support throughout the Commission's mandate.

We also thank Walter Riese, F.C.I.A., F.S.A., Chief Actuary of the Department of Insurance of Canada, and Claude Gagné, F.C.I.A., F.S.A., an Actuary on his staff, for their valuable assistance.

The Commission retained the services of Clarkson Gordon in connection with taxation matters discussed in this report and expresses its thanks to William E. Crawford, C.A. and Jennifer L. Shaw, C.A., for their excellent assistance.

The Commission was fortunate indeed to have had assigned to it as Executive Secretary, Harold Sandell of the Department of Justice in Ottawa. We wish to express our sincere appreciation for his enthusiastic, diligent and dedicated service, without which our task could not have been accomplished as effectively and expeditiously. His extensive knowledge of the Canadian legal and judicial systems and relevant statute law has been of immeasurable assistance.

II. Introduction

The principle that the judiciary exercises its authority independently of the executive and the legislature is fundamental to our democratic system.[1] The *Constitution Act, 1867* recognizes this principle by conferring on the Governor General, and not on the Governor in Council, the authority to appoint the judges of the provincial superior, district and county courts, as well as the authority to remove superior court judges, and then only following a joint address of the Senate and House of Commons. The *Constitution Act, 1867* further recognizes this fundamental principle by imposing on Parliament, and not on the executive, the duty to fix and provide the salaries, allowances and pensions of superior, district and county court judges. The concept of judicial independence is also implicit in the *Canadian Charter of Rights and Freedoms* and in the *Canadian Bill of Rights*. Furthermore, the law of Canada, in the form of doctrine and jurisprudence, has long recognized the concept of the independence of the judiciary, as have our inherited legal traditions. In addition, Canada is obligated to maintain an independent judiciary pursuant to the International Covenant on Civil and Political Rights[2], and the principle is further recognized in other international instruments.

One of the essential elements of judicial independence depends upon Parliament's duty to fix and provide judicial salaries, allowances and pensions. This remuneration should provide the element of financial security. The process and institutions whereby judicial compensation is fixed and provided must preclude the arbitrary interference of the executive in the determination and granting of judges' salaries and benefits. The actual monetary amounts involved must be sufficient to permit a judge and his or her family to be and to be perceived by society to be financially secure bearing in mind the statutory requirement that a judge not engage in any occupation or business, but rather devote himself or herself exclusively to judicial duties. Furthermore, the level of salaries and benefits should make appointment to the bench sufficiently attractive to the best qualified lawyers.

It is within this overall context that the Commission has inquired into the adequacy of judges' salaries and benefits.

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1. See *Her Majesty the Queen* v. *Marc Beauregard*, [1986] 2 S.C.R. 56, at pp. 69-76.
2. (1967), 61 A.J.I.L. 870.

III. The Review Process

Section 19.3 of the *Judges Act* provides for the appointment by the Minister of Justice, every third year, of not less than three and not more than five Commissioners "to inquire into the adequacy of the salaries and other amounts payable under [the *Judges Act*] and into the adequacy of judges' benefits generally". The section further provides that within six months of their appointment, the Commissioners must submit a report to the Minister of Justice "containing such recommendations as they consider appropriate". The Minister of Justice causes the report to be laid before Parliament "not later than the tenth sitting day of Parliament after he receives it".

Parliament has therefore legislated a time limit of six months from appointment for the Commissioners to report, as well as a time limit of ten days from receipt for the Minister to table the report in Parliament.

It is our understanding that the underlying purposes of the legislation providing for the review, by Triennial Commissions, of the adequacy of judges' salaries and other amounts payable under the *Judges Act* and of the adequacy of judges' benefits generally, are to reduce the element of partisan politics in the adjustment of judicial compensation and to reinforce the principle of judicial independence by obtaining the recommendations of "persons with experience and expertise after a full and independent review".

Delay in implementing or substantial disregard of the recommendations of a Triennial Commission threatens the integrity of the review process and materially reduces its effectiveness. Regrettable delays in coming to decisions concerning the reports of the Dorfman and de Grandpré Committees and the Lang Commission should be avoided in the future.

We therefore **recommend that Parliament either agree promptly with and implement quickly the individual recommendations of this and subsequent Triennial Commissions or, if necessary, indicate promptly its disagreement with any of such recommendations.**

IV. Judicial Salaries

In addition to a process of careful selection, a vital means of ensuring the competence and independence of the judiciary is the provision in our constitution requiring Parliament to fix and provide the salaries, allowances and pensions of judges. It is equally clear that the need for judicial independence, for attracting to the bench the best qualified lawyers, and for maintaining the morale and financial security of the judiciary means that judges are a distinct group with compensation requirements that set them apart from the public service, with which they are often erroneously compared.

Canada has been fortunate in the quality of its judges, a standard which it is most important to maintain.

Three quotations are as *à propos* today as when they were originally stated. The first, regarding the need for security and independence, is from a speech made by the Lord Chancellor, Viscount Sankey, to the House of Lords in 1933:

> "It is we think beyond question that the Judges are not in the position occupied by civil servants. They are appointed to hold particular offices of dignity and exceptional importance. They occupy a vital place in the constitution of this country. They stand equally between the Crown and the Executive, and between the Executive and the subject. They have to discharge the gravest and most responsible duties. It has for two centuries been considered essential that their security and independence should be maintained inviolate."[1]

The second, taken from the same speech by Viscount Sankey, pertains to the competence of the judiciary:

> "... we cannot avoid expressing a fear that if the salary and prestige of a High Court Judge are to remain as at present, those who will succeed us will probably not, as in the past, be drawn from the leaders of the Bar. There is now so little attraction to them to accept a seat upon the Bench, that it will be impossible to induce leading members of the Bar to make the necessary sacrifice.
>
> "The consequences ... will be far-reaching and detrimental to the true interests of the country."[2]

The third, also concerning competence on the bench, is from an often-quoted portion of a speech reprinted in the Canadian Bar Review of 1927, by the Honourable R.B. Bennett, K.C. (as he then was), later to be Prime Minister:

> "Now if men enjoying large incomes have no ambition to go upon the Bench it follows that you have to fall back upon the second line, and instead of appointing the best men to the judiciary you have recourse to men of indifferent qualifications in their profession ...".[3]

Recent constitutional changes have reinforced this need for our courts to remain attractive to men and women of the highest calibre. The role of the judiciary as a result of the *Canadian Charter of Rights and Freedoms* is of revolutionary significance in the legal history of Canada, and it has thrust our judiciary into the forefront of law-making, alongside Parliament itself.

We consequently reiterate and affirm the comment in the report of the Lang Commission (page 2) that:

> "The place of the judiciary has increased in importance in the light of recent constitutional developments in Canada, particularly the enactment of a Charter of Rights and Freedoms. The judiciary also plays a greater role in shaping our lives because of the growing complexity of our social and economic relationships. The independence of the judiciary is part and parcel of their unique position."

The Supreme Court of Canada, in the recent *Beauregard* decision, affirmed that since as far back as the *Act of Settlement* in 1700, independence of the judiciary has been predicated on both security of tenure and financial security.[4]

These considerations underlie the Commission's examination and conclusions with respect to judicial salaries.

As a result of 1975 amendments to the *Judges Act*, the salary level of superior court puisne judges was made roughly equivalent to the mid-point of the salary range of the most senior level (DM3) of federal deputy minister. This was not intended to suggest equivalence of factors to be considered in the salary determination process, for no other group shares with the judiciary the necessities of maintaining independence and of attracting recruits from among the best qualified individuals in a generally well-paid profession. In 1975, judicial salary equivalence to senior deputy ministers was generally regarded, however, as satisfying all of the criteria to be considered in determining judicial salaries. At that salary level, a sufficient degree of financial security was assured and there were few financial impediments to recruiting well-qualified lawyers for appointment to the bench.

Like the Lang Commission, we believe the 1975 judicial salary scale was satisfactory for that year and we **recommend that a new salary base be established as of April 1, 1986, by applying the Industrial Composite Index to the 1975 salary level for the years 1976 to 1986, capped by a 6% and 5% increase for 1983 and 1984, respectively** (while the *Public Sector Compensation Restraint Act* was in force). The annual salary adjustment provided for by section 19.2 of the *Judges Act*[5] would then apply for 1987 and 1988, to a maximum of 7% in each of those years, following which the 1989 Commission on Judges' Salaries and Benefits would again review salary levels.

Indexing is the only means yet devised to permit Parliament to discharge its constitutional duty under section 100 of the *Constitution Act, 1867* without the presentation of salary amendment bills on each occasion. In addition, it provides a relatively non-contentious means of adjusting judicial salaries between parliamentary action on Triennial Commission recommendations.

The income of judges has failed to keep pace with other groups in our society. The importance of calculating a base salary which is fair to judges cannot be over-emphasized, since successive annual shortfalls in income are built in and compounded if either the original or a subsequent base salary is lower than it should be. The Lang Commission made a calculation error in applying the Industrial Composite Index for the years 1976 to 1983 to the 1975 base salary of $53,000. The April 1, 1985, base salary figure for superior court puisne judges should have been $123,400, rather than $119,000 (see Appendix "C", submitted in evidence by the Joint Committee on Judicial Benefits, which states the accurate calculation for 1985 to be $123,500. This Commission arrives instead at a 1985 corrected figure of $123,400). On the basis of our recommendation to apply the Industrial Composite Index to the 1975 salary (of $53,000) for each of the years 1976 to 1986 (capped at 6% and 5% for 1983 and 1984), the salary calculations in Column 4 of the following table result.

1 Year	2 Actual	3 % change in industrial composite	4 Salary calculation[6] in accordance with industrial composite index
1975	$ 53,000[7]	—	—
1976	53,000	14.17	$ 60,500
1977	55,000	12.14	67,800
1978	57,000	9.61	74,300
1979	57,000	6.16	78,800
1980	70,000	8.65	85,600
1981	74,900	10.08	94,200
1982	80,100	11.93	105,400
1983	84,900	9.99 (6% cap)	111,700
1984	89,100	7.37 (5% cap)	117,200
1985	105,000	5.31	123,400
1986	108,700	3.53	127,700

The recommended levels of salary as of April 1, 1986 are therefore as follows:

Judges, Federal Court of Canada and Superior Courts –	**$127,700**
Chief Justices and Associate Chief Justices, Federal Court of Canada and Superior Courts –	**$139,700**
Judges, Supreme Court of Canada –	**$151,700**
Chief Justice of Canada –	**$163,800**

These recommended salaries for the Federal Court of Canada and superior court Chief Justices and Associate Chief Justices, and for the Judges and Chief Justice of the Supreme Court of Canada, would restore the relationships which existed in 1975 *vis-à-vis* the salary of Federal Court of Canada and superior court puisne judges (then $53,000, now recommended to be $127,700 as of April 1, 1986).

The Commission has independent knowledge of eminently qualified lawyers who have declined appointment to the bench due to the loss of income that would result. If implemented, these recommended salaries would satisfy to a much greater extent the dual requirements of ensuring financial security for the judiciary and attracting well-qualified lawyers to the bench. The Burns Report on Executive Compensation in the Public Service (May, 1985)[8], which dealt with rates of pay and conditions of service for managers in the federal public service, recommended salary ranges at the senior deputy minister level of between $106,500 (minimum) and $132,500 (maximum), effective April 1, 1985.

The Peat Marwick Compensation Study undertaken for the federal Department of Justice in 1985 (portions of which are reproduced below) surveyed associates and partners of law firms (75% of the

sample) and lawyers of corporations and municipal and provincial governments (25% of the sample). The Peat Marwick Study indicates that the average income (including salary, bonuses and the value of stock (for in-house corporate counsel) or share of profits (for law firm partners)) for lawyers called to the bar between 1960 and 1964 (the years of call of lawyers likely to be approached currently for appointment to the bench) was $124,548 in 1985:

Total Average Income by Year of Call to Bar for Associates/Partners for all Sectors

Year Admitted to the Bar	Average Income	(sample size)
1970-1974	$100,789	(457)
1965-1969	106,206	(194)
1960-1964	124,548	(140)
1955-1959	124,493	(125)
1954 and earlier	102,457	(117)

The Peat Marwick Study also shows that the average income for partners (called to the bar between 1960 and 1964) surveyed in large law firms (defined as 20 or more lawyers) was $155,056 in 1985, which is significantly more than we are recommending be paid to judges as of April 1, 1986:

Average Share of Profits per Partner by Year of Call to Bar for Large Law Firms (20 or more lawyers)

Year Admitted to the Bar	Share of Profits	(sample size)
1970-1974	$121,725	(63)
1965-1969	136,537	(34)
1960-1964	155,056	(30)
1955-1959	151,060	(22)
1954 and earlier	120,161	(30)

The Commission has considered the current salaries of judges in the United Kingdom, as well as the recently proposed (January, 1987) salary increases of federal judges in the United States. We feel that comparisons with British or American judicial salaries are not particularly helpful because of differences in economic and social conditions and fluctuating exchange rates.

The Lang Commission recommended that this Commission address the issue of regional and cost of living variations for judicial salaries. Having considered the matter, we are not disposed to recommend any changes.[9]

1. Parliamentary Debates, Lords, 1932-33, Vol. 88, p.1209 (July 27, 1933).
2. *Ibid.*, p. 1211.
3. (1927) 5 Can. Bar Rev. 272, at p. 272.
4. *Supra.*, at pp. 74-75.
5. We note that the salary adjustment formula based on the Industrial Composite will have to be modified in view of the discontinuance of the publication of that index by Statistics Canada. We should mention that the Industrial Aggregate Index has already been adopted, by statutory amendment, in lieu of the Industrial Composite Index for purposes of adjusting benefits under the *Canada Pension Plan*, and salaries under the *Senate and House of Commons Act* and the *Salaries Act*.
6. Lowered to the closest multiple of one hundred dollars (see *Judges Act*, subsection 19.2(3)).
7. Includes the $3,000 additional salary provided under what was then subsection 20(1) of the *Judges Act* (since repealed).
8. The Advisory Group on Executive Compensation in the Public Service (Mr. James W. Burns, Chairman) presented its Eleventh Report to the Prime Minister on May 13, 1985.
9. Pursuant to subsection 20(2) of the *Judges Act*, the judges on the territorial Supreme Courts receive a non-accountable annual allowance of $4000 as compensation for the higher cost of living in the two territories.

V. Salary Differential between the County and District Courts and the Superior Courts

The Lang Commission recommended that the salaries of judges of the county and district courts "should be calculated by reference to the same formula as has been applied with respect to the salaries of the judges of the superior courts, but that an absolute differential between the county and district courts and the superior courts be fixed at $5,000, such differential to be retained until review by the next triennial commission". Bill C-78 (which received Royal Assent on December 12, 1985 as Chapter 48 of the Statutes of Canada, 1985) gave effect to that recommendation and established as at April 1, 1985, an absolute differential of $5,000 between the salaries of county and district courts and those of superior courts.

Only three provinces, Ontario, British Columbia and Nova Scotia, retain county or district courts. Although the jurisdictional differences between the two levels of courts continue to narrow, the responsibilities of the superior court judges in terms of the subject matter of their jurisdiction and the requirement for travel in the performance of their duties are nevertheless significantly heavier than in the county and district courts. It may be noted that the status of the District Court in Ontario is currently under review as part of Mr. Justice Thomas Zuber's study into the courts of that province, undertaken at the instance of the Attorney General of Ontario. There was no compelling evidence before us and we see no compelling reason to narrow the differential at this time. We therefore **recommend that the present differential of $5,000 be maintained.**

VI. Incidental Allowance

In 1981, subsection 20(1) of the *Judges Act* was amended to provide, with effect from April 1, 1979, an accountable annual allowance for judges in the amount of $1,000, separate from salary, "for reasonable incidental expenditures that the fit and proper execution of his office as judge may require". The allowance applies against the cost of repair and replacement of court attire, the purchase of law books and periodicals, membership in legal and judicial organizations and other similar expenses not recoverable under any other provision of the *Judges Act*.

The inadequacy of the present allowance and the effects of inflation have resulted in the $1,000 maximum being exhausted or even exceeded by many judges. For example, the cost of judicial robes alone (in those provinces where robes are not provided by the provincial authorities) in the first year in office, or periodically thereafter, would exhaust the allowance. Similarly, the purchase of legal texts required by a judge, particularly when the judge is sitting in an outlying judicial centre where the court house library may be less than adequate, could quickly consume a significant portion of the current allowance.

We **recommend that the present incidental allowance be increased to $2,500 annually.**

VII. Removal Allowances

In 1985, Bill C-78 extended to retiring judges of the Supreme Courts of the Yukon and Northwest Territories, and to the surviving spouse and children of judges of those courts who die in office, the benefit of the removal allowance in order to facilitate their relocation to one of the provinces (*Judges Act*, paragraphs 21.1(1)(c) and (d)). The concurrent addition of subsection 21.1(1.1) of the *Judges Act* placed a limitation upon eligibility for the use of the removal allowance by a judge of a northern Supreme Court. In order to qualify for the allowance, the judge must have been resident in one of the provinces before his or her appointment to the northern Court.

The 1985 amendments were designed to alleviate possible hardship for any judge, or the family of any judge, in the circumstances provided for therein. Substantially the same potential hardship could occur with respect to a judge (or the family of a judge) who is required to move to Ottawa upon appointment, and who does not want to remain in Ottawa after retirement (or after the judge's death). The judge and his or her family are currently entitled to a removal allowance upon appointment pursuant to section 21.1. However, they are not entitled to an allowance should they wish to leave Ottawa and live in another part of Canada upon retirement or death.

Federal legislation compels the judges of three section 101 [1] courts (the Supreme Court of Canada, the Federal Court of Canada and the Tax Court of Canada) to reside in or near the National Capital Region (with the exception of judges on the Tax Court of Canada who were formerly members of the Tax Review Board resident outside of the National Capital Region). In order to alleviate the potential hardship referred to above, we **recommend that the removal allowance be extended to retiring judges of the three section 101 courts who are required upon appointment to change their place of residence to the vicinity of the National Capital Region, and as well to the surviving spouses and eligible children of these judges who die in office.** We also **recommend that the removal allowance permit such retiring judges, and/or the family, to move to a place of residence in any one of the ten provinces or two territories.** We further **recommend that there be a requirement whereby all removal allowances must be utilized within a reasonable period following the relevant event.**

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[1] *Constitution Act, 1867.*

VIII. Judicial Annuities

Section 23 of the *Judges Act* provides for the granting of an annuity equal to two-thirds of the salary annexed to the office of a judge at the time of his or her resignation, removal or ceasing to hold office, to a judge who

(a) has continued in office for fifteen years and has attained the age of 65, if he or she resigns his or her office;

(b) has continued in office for fifteen years but has not attained the age of 65, if his or her resignation is conducive to the better administration of justice or is in the national interest;

(c) resigns or is removed as a result of becoming afflicted with a permanent disability preventing him or her from executing his or her office; or

(d) has reached the age of mandatory retirement, if he or she has held office for at least ten years.

If a judge reaches mandatory retirement age without having served for ten years, he or she is entitled to an annuity pro-rated on the basis of years of completed service (to the nearest one-tenth of a year) as a proportion of ten years.

In addition, rather than leave the bench after attaining the minimum qualification for retirement, the option exists pursuant to sections 20.01, 20.1 and 20.2 of the *Judges Act*, for a judge to elect supernumerary status. Under this arrangement, a puisne judge who qualifies for non-mandatory retirement and who is entitled to an annuity may opt instead to continue in office (with a reduced caseload in most instances) while remaining entitled to full salary until the judge is mandatorily retired or otherwise leaves the bench, at which time he or she would receive the annuity. A Chief Justice or Associate Chief Justice who elects supernumerary status is entitled to receive only the salary of a puisne judge during his or her supernumerary service, although the subsequent annuity is based on the salary then in effect of a Chief Justice or Associate Chief Justice. The supernumerary programme promotes continuity on the bench, while making available positions which could not otherwise be filled until the mandatory retirement of the incumbents. All federally appointed judges except the members of the Supreme Court of Canada are entitled to opt for supernumerary status. Approximately 10% of the federally appointed bench are currently supernumerary judges.

A. Judges' Contributions towards Annuities

The *Beauregard* decision of the Supreme Court of Canada has settled the constitutional authority of Parliament to require reasonable contributions by judges towards their annuities. This authority is not unlimited, as the following passage from the reasons of the Chief Justice of Canada in the *Beauregard* judgment makes clear:

> "The power of Parliament to fix the salaries and pensions of superior court judges is not unlimited. If there were any hint that a federal law dealing with these matters was enacted for an improper or colourable purpose, or if there was discriminatory treatment of judges *vis-à-vis* other citizens, then serious issues relating to judicial independence would arise and the law might well be held to be *ultra vires* s.100 of the *Constitution Act, 1867*."[1]

Pursuant to section 29.1 of the *Judges Act*, enacted in 1975, judges appointed before February 17, 1975 contribute towards their statutory annuities (which include annuities for surviving spouses and

children) at a rate of 1½% of salary.[2] Judges appointed after February 16, 1975 contribute towards their statutory annuities at a rate of 6% of salary, and they contribute a further 1% of salary towards the cost of the indexation of their statutory annuities. The *Beauregard* decision also upheld the legality of this distinction in contribution rates which is based on date of appointment.

The Dorfman Committee recommended that judges should not be required to contribute towards their statutory annuities, and that all judges should be required to contribute towards the cost of supplementary retirement benefits (indexation) at a rate of 1% of salary. The de Grandpré Committee recommended that judicial annuities, including survivors' benefits, and supplementary retirement benefits should all be provided without any judicial contributions. The Lang Commission recommended that all judges should contribute at a rate of 1½% of their salaries towards their statutory annuities, and, one may assume, that they not contribute at all towards the cost of supplementary retirement benefits. Furthermore, the de Grandpré and Lang reports recommended the retroactive reimbursement (with interest) to judges of all (de Grandpré) or a portion (Lang) of the pension contributions theretofore paid. In their written and oral submissions to this Commission, both the Joint Committee on Judicial Benefits and the Canadian Bar Association recommended the repeal of the requirement for contributions to the cost of annuities and the retroactive reimbursement of contributions made since 1975.

We do not agree with the recommendations of the earlier Committees and Commission and the submissions made to us with respect to judges' contributions. Judicial pensions are not like ordinary pensions insofar as they are designed to enhance the independence and competence of the bench and to compensate in part for the high or potential earning power which lawyers forego upon acceptance of judicial appointment. The judicial annuity itself constitutes an important element in guaranteeing independence. However, the question of some judicial contribution to the costs of the pension is an entirely different matter, and we do not consider the issue of reasonable contributions to annuities as in any way affecting the independence of the judiciary. In the case of *The Judges* v. *Attorney-General for Saskatchewan*, the Judicial Committee of the Privy Council decided that a general income tax which charges the official incomes of judges on the same footing as the incomes of other citizens did not interfere with the "independence nor any other attribute of the judiciary".[3] We believe that the same principle applies with respect to contributions to judicial annuities.

The Commission is of the view that the unique character of the judiciary, and in particular the requirement for independence, is currently reflected in a number of aspects relating to judicial pensions. These include the relatively short qualifying period (as little as 10 years in some circumstances in order to qualify for full pension), the supernumerary option, the full indexation of benefits, the fact that the annuity is calculated on the basis of the salary at the time of retirement (and not on the basis of the average salary over a number of years of service immediately prior to retirement), and the disability provision in paragraph 23(1)(c) of the *Judges Act*. We feel that as this Commission is recommending judicial salaries which are more closely related to those earned by others of similar importance and stature, we must, in order to be consistent, also consider the non-salary benefits, which are unquestionably justified, in the same manner. We would emphasize that the Commission regards its recommendations with respect to salaries and pensions to be integrated components of a comprehensive compensation package. These components are seen by us to be interlinked, and the adoption of only part or parts would distort the philosophy and intent of the recommendations as a whole.

There appears to be little actuarial basis for the contribution rates presently in effect (see Appendix "D").[4] Their significance is essentially historical. The following table, prepared for the Commission in December, 1986 by the Chief Actuary of the Department of Insurance of Canada, shows, for annuities under the *Judges Act*, sample normal actuarial costs (consisting of the total of a judge's own contributions and the government contributions required to pay for that judge's pension)

expressed as a percentage of that judge's entire salary earned during his or her total years on the bench. The table is based on the actuarial assumptions set out below it.

Annuities pursuant to the Judges Act

Sample normal actuarial costs (contribution rates) expressed as a percentage of salary (payable from appointment to retirement)

Retirement Age		Years of Service 10	15	20	25	30	35
75	M	68.8	46.8	35.5	28.2	23.0	18.9
	F	70.2	46.0	33.7	26.2	21.0	17.3
70	M	79.6	53.1	39.3	30.6	24.5	20.1
	F	84.4	54.7	39.7	30.5	24.4	20.0
65	M	—	60.2	43.7	33.5	26.7	21.9
	F	—	63.0	45.3	34.7	27.6	22.6
60*	M	—	—	47.8	36.6	29.1	—
	F	—	—	50.3	38.4	30.5	—

* Illustrative of costs of retirement option not now available under the *Judges Act* but recommended in Item B below.

Actuarial Assumptions:

Rate of interest: 6.5%
Rate of increase in salaries: 5%
Rate of increase in Consumer Price Index (Indexing): 3.5%
Retirement Age: Age at which pension commences, provided a judge has survived in office to this age without becoming disabled
Mortality: 1983 GAM Table (rated up 3 years for disabled)
Disability: Probability assumed equal to rate of mortality
Proportion married: varying by age (e.g. 0.96 at 50 and 60, 0.73 at 70, 0.51 at 80 and 0.25 at 90)
Relative ages of spouses: Wife three years younger
Remarriage: Ignored
Children: Ignored
Withdrawal: 0.5% up to age 55 and 0.0% thereafter
Minimum (Return of Contributions) benefit: Ignored

Benefits Valued:

(a) annuity on disability or retirement equal to two-thirds final salary;

(b) annuity to surviving spouse equal to one half the annuity that was payable to a deceased judge or would have been payable if he or she had become entitled to a full annuity at the date of death;

(c) return of 7% contributions with interest at 4% on death without survivor prior to retirement age, or on resignation from office without entitlement to a pension.

The above table indicates, for example, that a male judge who retires at age 75 after 20 years of service will thereafter receive a full pension equal to two-thirds of his final salary, the full cost of which would have required a contribution of 35.5% of the salary he received in each of his 20 years on the bench. Of that 35.5% contribution required each year, the judge would have contributed 7% (assuming he was appointed after February 16, 1975) and the Crown would have contributed 28.5% in absolute terms.[5] In other words, even the higher judicial contribution rate of 7% of salary, while significant, is a modest contribution indeed in terms of the overall cost of the pension scheme, and seems eminently fair for newly-appointed judges.

We regret the impact which the imposition of judicial contributions has had on judges, yet any partial remedy is likely to create as many inequities as it cures. The unfortunate passage of time has probably rendered a simple solution impractical in any case. In November, 1986, there were 795 judges holding office, of whom 253 (32%) were appointed before February 17, 1975, and are therefore contributing 1½% of salary towards the costs of statutory annuities, and 542 (68%) were appointed after February 16, 1975, and are therefore contributing 6% of salary towards annuities and a further 1% towards supplementary benefits. When these statistics are related to the comparable figures at the time of the de Grandpré Report, when 360 judges (54%) contributed 1½% and 310 judges (46%) contributed 7%, it is evident that the inequities resulting from the "two classes of judges" is being remedied by the passage of time. It should also be mentioned that the present figure for judges contributing 1½% includes virtually all of the approximately 80 supernumerary judges. It is our view that the 1975 decision of Parliament to impose judicial contributions, whereby it created "two classes of judges", and the manner in which it was done, are now history. Parliament has not seen fit to act again notwithstanding the recommendations for change made in the Dorfman, de Grandpré and Lang reports and all things considered, maintenance of the *status quo*, as time removes the present anomaly, may well be the most realistic approach.

For the above reasons, we do not adopt the recommendations of the past with respect to lowering to 1½%, or to any other rate, or abolishing altogether, judicial contributions towards the cost of statutory annuities and supplementary benefits, or reimbursing contributions.

We therefore **recommend that the present rates of judicial contributions towards the costs of both statutory annuities and supplementary benefits (indexing) be maintained (including the February 16-17, 1975 contribution rate differential) and that contributions of the judiciary not be reimbursed.**

We note that significant future relief from the double taxation aspect of judicial contributions toward the cost of annuities has now been provided by amendment to the *Income Tax Act* (see Item G below).

B. "Rule of Eighty"

In the past, appointments of superior, district and county court judges were customarily made from the ranks of more senior members of the bar, i.e., in the age range of 50 years and upwards. However, commencing about 20 years ago, there began a practice of appointing on occasion younger men and women to judicial office, e.g., persons in their late 30's and early 40's. This has been well received and has produced a group of younger people who are able to give periods of long service to the judiciary and meet the increasing demands of the busy court systems. By all appearances, this practice has been successful but because of the longer period of service, some problems have appeared respecting supernumerary status and annuities. The present law was apparently premised on the expectation of more senior appointments and does not readily take into account those who accept an appointment to the bench in the early forties or younger. The Commission believes that

long periods of service, regardless of age, merit certain entitlements. The Commission also holds the view that age 60 should be the minimum age at which a judge qualifies for a full pension of two-thirds of salary.

We accept that professional "burnout" may manifest itself within the judiciary, and that retirement from the bench, but not election of supernumerary status, should be available as a solution for judicial "burnout".

We therefore **recommend that retirement at full pension, but not the election of supernumerary status, be permitted at the following combinations of age and years of service on the bench: 60 years of age and 20 years of service; 61 and 19; 62 and 18; 63 and 17; and 64 and 16.**

Age 75 is fixed by subsection 99(2) of the *Constitution Act, 1867* (as amended in 1960) for the retirement of judges of provincial superior courts, and a recent court decision[6] has held that the current requirement that judges of the Federal Court retire at age 70 was unconstitutional. We therefore **recommend that for the sake of equality and uniformity, the mandatory retirement age be standardized at 75 for all federally appointed judges, and that the mandatory retirement age of judges on the Federal Court of Canada, the Tax Court of Canada and the county and district courts be raised to 75.** We also **recommend that the supernumerary provisions be standardized for all federally appointed judges except the members of the Supreme Court of Canada.**

C. Adequacy of Pension Benefits

Paragraph 25(1)(a) of the *Judges Act* provides an annuity to the surviving spouse of a judge who dies, equal to one-third of the judge's salary, and paragraph 25(1)(b) of the Act provides an annuity to the surviving spouse of a retired judge who was in receipt of an annuity at the time of death, equal to 50% of the amount of the retired judge's annuity. Both these types of survivor's pensions are indexed pursuant to the provisions of the *Supplementary Retirement Benefits Act* (R.S.C. 1970, c. 43 (1st Supp.)).

In order to better reflect current values of survivors' benefits provided by many private pension plans and by recent federal and provincial pension benefits and standards legislative reforms, we **recommend that the surviving spouse of a judge who dies in office be entitled to an annuity equal to 40%** (instead of one-third) **of the judge's salary at the time of death.** We further **recommend that the surviving spouse of a retired judge who dies while in receipt of a pension be entitled to an annuity equal to 60%** (instead of 50%) **of the amount of the retired judge's pension at the time of death.** The benefits of eligible children should be adjusted accordingly. These increases in survivors' benefits should apply only with respect to survivors not in receipt of benefits upon the coming into force of the necessary amendments to the *Judges Act*.

There are provisions in the *Judges Act* (paragraphs 29.2(1),(2) and (3)) and in the *Supplementary Retirement Benefits Act* (section 6) for the return of pension contributions to a judge. Pursuant to paragraph 29.2(4)(b) of the *Judges Act*, interest is payable upon the return of contributions made under that Act, at 4% compounded annually. We believe this rate has been unfair and can be unrealistic. We **recommend that compound interest be payable upon the return of all contributions at a rate to be varied as and when necessary to reflect the "prescribed rates".**[7] If no prescribed rate was in effect, then a rate comparable to the average equivalent yield obtainable during each year on 90-day Government of Canada Treasury Bills should be used.

When a judge dies while in office, a lump sum "gratuity" equal to one-sixth of the judge's annual salary at the time of death is payable immediately to the surviving spouse pursuant to Treasury

Board Minute 757563 dated May 18, 1978. We **recommend that this gratuity be made a statutory entitlement by provision in the *Judges Act*.**

The Commission was invited to examine the proportion of salary (presently two-thirds) which forms the basis for the annuity. In view of the many favourable aspects of existing judicial annuities referred to previously, and of the recommendations we are making for several other improvements, we do not recommend an increase in the basic pension.

D. Early Retirement and Pro-rated Annuities

Judicial annuities are part of an overall compensation plan designed to reinforce the principle of judicial independence and to help make appointment to the bench attractive to the best qualified among lawyers. Notwithstanding that appointments at younger ages are now being made, appointment still generally comes later in life, often in the fifties (see Appendix "E"), and therefore a relatively short qualification period for full pension entitlement is necessary. All judges are precluded from receiving other salary or remuneration, or engaging in any occupation or business, while holding judicial office (section 36 and subsection 38(1) of the *Judges Act*). Moreover, it is considered inappropriate for a retired judge to return to active practice in the courts. Society, and particularly the bench and bar, have traditionally taken the view that appointment to the bench should continue to be regarded as the culmination of a lawyer's career, and not as a stepping stone to career advancement. For this reason, judicial pensions should provide sufficient income to obviate the need of a retired judge to return to full practice, but at the same time they should not have the effect of encouraging the early retirement of a serving judge. Furthermore, with respect to a lawyer who was appointed to the bench at a comparatively young age, he or she would probably not have had the opportunity, prior to appointment, to build up a retirement fund. Consequently, the eventual judicial pension must be sufficiently generous as it may be the only source of income upon retirement from the bench.

These considerations appear to be the foundation of the pension provisions presently contained in the *Judges Act*, and underlie the recommendations contained in this report.

It would not be inconsistent with these principles, and it would add an element of fairness to the situation, if the *Judges Act* were to entitle a judge to some benefit, other than the simple return with interest of accumulated pension contributions, should he or she choose to depart from the bench without otherwise qualifying for an annuity. Neither the Joint Committee on Judicial Benefits nor the Standing Committee of the Canadian Bar Association made submissions on this point, but it is specifically referred to in paragraph 2(b) of the Commission's Terms of Reference and was the subject of submissions by individuals.

We consequently **recommend that a judge who has held office for at least ten years and who retires without being entitled to an annuity should have the option of receiving an annuity, payable at age 65 should he or she retire before that age.** We further **recommend that the annuity of a judge who has served for ten or more but fewer than 15 years, when payable, should be pro-rated on the basis of years of service as a proportion of 15, with the resulting fraction being multiplied by two-thirds of the salary which the judge was earning when he or she retired.** We **recommend that in the case of this deferred annuity payable to a former judge at age 65, there be no "banking" or accumulation of indexing credits during the deferment, and that indexing commence only when the annuity becomes payable.** We **recommend that should the former judge die before attaining the age of 65, his or her surviving spouse should be entitled to an annuity equal to 60%** (consistent with our recommendation in Item C above) **of the annuity that the former judge would have received, payable when the former judge would have reached age 65.**

In our view, the deferral of the pension would discourage early retirement and the ten-year minimum qualifying period would provide an incentive for a judge to remain in office. The recommendations also reflect the spirit of recent federal and provincial legislative reforms with respect to pension benefits and standards.

E. Judges of the Supreme Court of Canada

Judges of the Supreme Court of Canada cannot elect to hold office as supernumerary judges. We appreciate that supernumerary status is inappropriate for the judges of our highest court, and inconsistent with the Court's unique role as the final arbiter of the country's legal values.

Nevertheless, we feel that by themselves, the retirement provisions of the *Judges Act* do not offer sufficient flexibility to the members of the Court, and that an additional retirement option should be made available. Because of the immense workload of Supreme Court judges combined with the heavy responsibility inherent in membership on that Court, we believe that a retirement option exercisable upon attaining the minimum age of 70, if the judge has served for at least ten years on the Supreme Court, is reasonable.

A Supreme Court judge who chooses to retire under this proposed provision should not be placed at a disadvantage in comparison to a judge on a lower court who elects to hold office as a supernumerary judge. Thus, a Supreme Court judge who takes up this option should be entitled to an income which is not significantly lower than what his or her salary would have been had he or she remained on the Supreme Court, and this income should continue until the judge reaches age 75, which would otherwise have been his or her mandatory retirement age.

The Commission therefore **recommends that a judge who has served on the Supreme Court of Canada for at least ten years and has attained the age of 70 years be eligible to retire and receive an income payable until age 75 equal to 90% of the salary that would have been received from time to time by that judge had he or she remained on the Supreme Court, and thereafter an indexed annuity equal to two-thirds of the salary annexed to the office formerly held by that judge at the time he or she attains the age of 75.**

In the event of the death of the retired judge before attaining age 75, 54% (60% of 90%, if our recommendation under Item C above is adopted) of the salary annexed to the office formerly held would be payable to the retired judge's surviving spouse, with the appropriate percentage for eligible children, until the time when the judge would have reached age 75, and thereafter the survivors' pensions would be in accordance with the applicable general rules.

F. Guaranteed Annuity Option

Should a judge in receipt of an annuity die, his or her surviving spouse is entitled to an annuity equal to one-half (or 60%, if our recommendation in Item C above is implemented) of the judge's annuity, pursuant to paragraph 25(1)(b) of the *Judges Act*. Thus, should the former judge die soon after commencing retirement, the retirement benefits to which he or she would have been entitled had he or she survived would be halved (or reduced by 40% under our recommendation) in the hands of the surviving spouse, with the former judge having received very little of what otherwise would have been payable. We believe this could result in unfair situations arising, particularly where the judge contributed towards the costs of the judicial annuity over very many years on the bench and then died shortly after retiring. We therefore **recommend that a retiring judge be given the one-time option of receiving an actuarially reduced annuity for a ten-year guaranteed period.** Following the expiry of the ten-year guaranteed period, a surviving spouse's pension would be reduced to 50% (or

60% pursuant to our recommendation in Item C above) of the initial (actuarially reduced) pension amount. The initial pension amount would continue for a ten-year period in favour of a surviving spouse, eligible children or the estate, as the case may be.

Our recommendation for a guaranteed annuity option is patterned after a benefit commonly available under private pension plans. There would be no additional cost to the public treasury for an option of this kind. A current sample of an actuarially reduced pension amount (based for illustration purposes on a purely hypothetical standard pension of $1,000 per month and assuming the adoption of our recommendation in Item C above), at different age levels, is shown below:

Age at Retirement and Monthly Amounts at Retirement

	Judge age 65 Spouse age 62	Judge age 70 Spouse age 67	Judge age 75 Spouse age 72
a) Joint Life reducing by 40% on judge's death	$1,000.00	$1,000.00	$1,000.00
b) Actuarial Equivalence of a joint life pension reducing by 40% at the later of the judge's death and the expiry of a 10-year guaranteed period	980.95	966.37	940.71

Note: The above figures are illustrative and based upon the 1983 Basic Mortality Table with projection scale G and 1983 year of purchase with interest at 10.75% for 20 years and 6% thereafter with a loading for expenses. This is an individual annuity purchase basis current at the time of our report. The figures also assume that the judge is a male with a spouse three years younger. The amounts will vary with assumptions used and ages and sex of the lives involved. The initial pension amount will continue for a 10-year period even if both lives die immediately.

G. Double Taxation

The salary deduction for a judge's contribution to judicial annuities and supplementary benefits is deemed to be contributed to or under a registered pension fund or plan, pursuant to subsection 29.1(3) of the *Judges Act*. For 1986 and subsequent taxation years, the entire contribution ($7,609 as of April 1, 1986, for a superior court judge appointed after February 16, 1975) is deductible in calculating federal income tax.[8]

Prior to 1986, only a portion of the contribution, namely $3,500, was deductible in calculating taxable income even though the annuity itself is fully taxable as income in the hands of the judge when received. Thus, the judge is potentially subject to double taxation on the amount of the contributions made in years prior to 1986 that exceeded $3,500 per annum; i.e., the amount is taxed as income as part of his or her salary in the year in which it was earned, despite the fact it was never received, and payments of the annuity are taxed again when received.

With the release of Interpretation Bulletin No. IT-167R5 in 1985, Revenue Canada's administrative practice was changed to permit a taxpayer to carry forward any registered pension plan contributions in excess of $3,500 made in respect of current service, and to deduct such excess in subsequent taxation years at the maximum rate of $3,500 per year, i.e., subject to the standard

$3,500 limit. Thus, over time, all pre-1986 pension contributions that were previously ineligible for deduction will be deductible from taxable income, as long as there are sufficient years in which actual contributions are less than $3,500.

This administrative position permitting a carry forward of excess contributions will be of assistance only where contributions for a subsequent year are less than $3,500. Thus, judges will not be able to avail themselves of this deduction for amounts carried forward from years prior to 1986 while they are making current contributions in excess of $3,500 to the pension plan, since both current service contributions and excess contributions carried forward must be aggregated for purposes of the $3,500 limit. It may therefore be some years after judges have been taxed on pre-1986 excess contributions before these contributions become fully deductible, i.e., only during retirement.[9] In fact, where death occurs before all amounts have been deducted, some amounts may never be deductible.

In view of the substantial measure of relief from double taxation afforded by the 1986 amendment for post-1985 contributions and the possibility of relief, though limited, pursuant to Interpretation Bulletin No. IT-167R5 for pre-1986 contributions, we do not feel it necessary to make any recommendation for further change in the *Income Tax Act* with respect to pension contributions at this time. We note however that provincial tax legislation may have to be amended where applicable to achieve the same result.

We understand that in addition to the above, judges are treated for certain income tax purposes as self-employed professionals, and consequently are now permitted to deduct up to $7,500[10] for contributions to their Registered Retirement Savings Plans, with no reduction for amounts contributed towards the cost of judicial annuities and supplementary benefits pursuant to subsections 29.1(1) and (2) of the *Judges Act*.

H. Indexation of Annuities

The indexing of judicial salaries is provided for in the *Judges Act*. On the other hand, judicial annuities, including those of surviving spouses and eligible children, are indexed pursuant to the *Supplementary Retirement Benefits Act*. That Act applies to many branches of the public service, as well as to judges, and it is administered by the President of the Treasury Board.

The separate status of the judiciary, the principle of judicial independence and the unique recruiting requirements of the judiciary, all suggest that the indexation of judicial annuities should likewise be provided for in the *Judges Act*, so that it be distinct from the indexation of other public service pensions and to place all legislative provisions relating to judges in the one statute. For the judiciary, and uniquely so, indexation of annuities is a factor that should be regarded within the overall constitutional guarantees of security of tenure and security of salary and pension. We therefore **recommend that the provisions for indexing judicial annuities, including those of surviving spouses and eligible children, and for the return of judges' contributions, should be transferred to the *Judges Act* from the *Supplementary Retirement Benefits Act*.**

We do not accept the suggestion that judicial annuities be linked to the salary of a judge current from time to time, with the exception of the income which we recommend (in Item E above) be payable to former members of the Supreme Court of Canada between the ages of 70 and 75 who elect to retire following ten years of service on that Court.

I. Suspension of Surviving Spouse's Annuity on Remarriage

Subsection 25(3) of the *Judges Act* suspends the pension entitlement of a surviving spouse during his or her remarriage. In the event of a decree of nullity or divorce, or upon the death of the spouse of the remarriage, payment of the annuity would be resumed by virtue of subsection 25(3.1).

We feel, as did the de Grandpré Committee, that subsection 25(3) "underscores a socially inappropriate and invidious policy". Furthermore, failure to amend the *Judges Act* to permit continuation of survivors' benefits upon remarriage may raise serious legal questions involving equality rights. We therefore **recommend the repeal of subsections 25(3) and 25(3.1) of the *Judges Act*.**

We also **recommend the removal of the words "is unmarried" from paragraph 25(1.3)(b) of the *Judges Act*,** thereby eliminating the criterion of a child's marital status in the consideration of eligibility for benefits.

We further **recommend that consequential amendments be made in the terms of eligibility for applicable group insurance, medical and other benefit plans.**

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1. *Supra.*, at p. 77. The *Beauregard* case dealt with the constitutionality of the *Judges Act* amendments requiring judges to contribute towards the costs of their pensions, and the legality of requiring higher contributions from judges appointed after the date of first reading of the amendments.

2. In a letter dated February 17, 1975, sent by the then Minister of Justice to inform all judges already in office of the decision of the Government to implement the new policy, he referred to their contribution of 1½% as being "in respect of the cost of the improved annuities for widowed spouses and other dependants". Subsection 29.2(2) of the *Judges Act* (which provides for the return of this (1½%) contribution to the judge should the spouse pre-decease him or her and should children (if any) no longer be eligible for annuities) confirms this limited purpose of the 1½% contribution made by judges appointed before February 17, 1975.

3. (1937), 53 T.L.R. 464, at p. 466.

4. The pension plan established by the *Judges Act* is among those of which the Chief Actuary is required to conduct periodic actuarial reviews and to file cost certificates and valuation reports pursuant to the *Public Pensions Reporting Act* (S.C. 1986, c. 16).

5. We have noted that in the *Beauregard* decision (*supra.*, at p. 95), the pleadings of the parties, as amended by the agreed statement of facts, are quoted as follows:

> "Upon his retirement, the Plaintiff's minimum contribution of $3,815.00 per annum with interest compounded annually using a rate of interest of ten per cent per annum will have established in the hands of the defendant a capital sum in the order of $400,000.00 an amount more than sufficient to take care of the Plaintiff's retirement annuities and the Plaintiff's supplementary retirement benefits."

Respectfully, we are curious as to whether the calculations and conclusion had ever been actuarially tested.

6. *Addy* v. *The Queen in Right of Canada* (1985), 22 D.L.R. (4th) 52 (F.C. (T.D.)).

7. See Part XLIII (sections 4300 - 4301) of the *Income Tax Regulations.*

8. Paragraph 8(1)(m) of the *Income Tax Act* permits a deduction for $3,500 of contributions to a registered pension plan. Paragraph 8(1)(m.1) of the *Act* permits the deduction of non-voluntary contributions in excess of $3,500 to a defined benefit registered pension plan, effective for 1986 and subsequent years.

9. Revenue Canada has stated in its Interpretation Bulletin that an excess contribution may be deducted in a subsequent year (subject to the $3,500 limit) even if employment ceases prior to that year.

10. The limit of $7,500 will increase for 1988 and subsequent years if current proposals to amend the *Income Tax Act* are enacted.

IX. An Alternative for Fixing Judicial Compensation

Both the Joint Committee on Judicial Benefits and the Canadian Bar Association recommended to the Commission that action be taken with a view to the adoption of a formula for fixing judicial compensation similar to that in place with respect to the federal judiciary in the Australian state of New South Wales. Under the "New South Wales formula", a remuneration tribunal is required to make an annual determination with respect to the remuneration to be paid to office-holders specified in the governing legislation, which includes judges. This determination takes effect after a fixed period unless either House of Parliament passes a resolution disallowing it. This procedure is known as proceeding by way of a negative resolution.

No evidence was submitted to the Commission on the experience, favourable or otherwise, of the "New South Wales formula", particularly as it applies to the judiciary. A particular concern we have is as to the nature of the relationship between the Houses of the New South Wales Parliament and the remuneration tribunal.

The Commission is of the view that to apply the formula in Canada would in any case quite likely require an amendment to section 100 of the *Constitution Act, 1867*, which requires Parliament to fix and provide the salaries, allowances and pensions of essentially all federally appointed judges. We are not convinced that the "New South Wales formula" would be such an improvement on the present system as to justify a constitutional amendment.

X. Taxation of New Judges

Identification of Problem

Newly appointed judges often face a serious cash flow problem in the two years following their appointment to the bench. The problem stems from the substantial income tax payments that may be required in those two years with respect to professional income earned prior to appointment. The problem is often compounded by actual or deemed dispositions that are unavoidable when a new judge withdraws from practice. Previously untaxed professional income would include not only professional income for the year, but also earnings from the last fiscal year-end to the date of appointment (" 'stub' period earnings"), unbilled work in progress ("WIP") and the 1971 accounts receivable reserve. Taxable capital gains and recaptured capital cost allowance on assets deemed disposed of and taxable capital gains on the disposition of the partnership interest may also result in a substantial income inclusion for tax purposes. Since these inclusions are added to judges' salaries, they are effectively taxed at the highest tax rate. The tax payments may, in some cases, exceed the net remuneration received by the judge. Appendix "F" illustrates this problem with an Ontario example that is not untypical.

Any solution must recognize that the problem is not strictly a taxation problem (although it does result in all previously untaxed amounts being taxed at the new judges' highest tax rate), but rather a cash flow problem arising from the acceleration of the recognition of income for tax purposes without a corresponding increase in cash flow. As a result, reducing the tax liability through tax shelters or Registered Retirement Savings Plans (RRSP) which require a cash outflow are not viable alternatives. While a reduction in the tax rate applicable to certain types of professional income which are included in taxable income in the year of or the year following appointment might mitigate the problem, the real solution would appear to lie in the deferment of the recognition of income to future taxation years.

Possible Solutions

Several possible solutions have been identified. The first three alternatives have been proposed in the past and may not address the real issue. These proposals together with their principal disadvantages are summarized below:

1. Tax Rate Reduction or Tax Credits

Proposal —

Certain types of deferred professional income which cause the "bunching up" of income in the year of or year following appointment would be subject to tax at one-half the normal rate of tax. Alternatively, the income would be subject to the normal rates of tax but a tax credit would be allowed to effectively reduce the tax to one-half of what would otherwise be payable on those sources of income.

Disadvantage —

While this will reduce the amount of tax payable and hence reduce the cash flow problem, it will not eliminate the problem altogether.

2. "Rollover" to RRSP

Proposal —

It has been suggested that certain amounts of deferred professional income be treated as a "retiring allowance" and therefore qualify for a transfer to a RRSP. Consequently, $3,500 per year of previous "employment" (partnership) could be transferred to a RRSP and escape immediate taxation.

Disadvantage —

Since the problem is normally one of cash flow, many newly appointed judges would not have sufficient funds to make a large RRSP contribution unless they had significant other capital.

3. Average the Tax Over the Previous Five Years

Proposal —

The aggregate of certain components of deferred professional income would be notionally added back to the incomes of the new judge for the five years prior to appointment and the additional taxes likewise aggregated as a tax liability. A variation on this proposal would be to compute the average rate of tax over the previous five years and apply this average to the previously untaxed professional income.

Disadvantage —

These proposals would not be of much benefit to most lawyers as they would likely be at the peak of their career during those years and would be taxed at the top marginal rate. Therefore averaging the income would not produce significant benefits and would do little or nothing to alleviate the cash flow problem. Also, those lawyers who had taken advantage of tax shelters might receive a benefit not available to others.

4. Permit Judges to Report Salary on a Fiscal-Year Basis

Proposal —

A new judge would have the option of reporting his or her salary income on a fiscal-year basis with the year-end corresponding to the fiscal period of the professional practice from which he or she retired. Assuming that the judge was a partner in a firm with a January 31 year-end, he or she would be allowed to report salary on that basis as well.

Disadvantage —

This would solve the major cash flow problem, but there would still be tax on unbilled WIP, 1971 receivable reserve and the other special inclusions which would come into income in the year following appointment to the bench. To be totally effective, this solution would have to be combined with a reserve, similar to that described below. This in turn might add undue complexity.

Recommended Solution — Tax Deferral over a Number of Years

The recognition of certain types of income could be deferred over a period of, say, 15 years. This could be accomplished by having all amounts included in income under the general rules and

allowing a judge to claim a special reserve for deferred professional income, 1/15th of which must be included in income each year. The balance of the reserve in the year of death or retirement from the bench would be included in income in that year, and in the case of death, subsection 159(5) of the *Income Tax Act* ("*ITA*") would be made applicable, allowing payment over a maximum period of ten years. This proposal would dramatically reduce the cash flow problems in the first few years and would spread the tax burden over 15 years. The structure could be as follows:

1. Income Inclusions

It is therefore **recommended that a judge be required to include in income in the year of appointment all of the following amounts relating to his or her professional practice:**

(i) professional income for the fiscal year (i.e., repeal s. 24.1 of the *ITA*)

(ii) professional income for the "stub" period (i.e., provide that s. 99(2) and s. 96(1.1) of the *ITA* not be applicable to judges in year of appointment)

(iii) unbilled work in progress (special rules would be required to include this in income in the year of appointment rather than in the subsequent year)

(iv) 1971 Accounts Receivable reserve (special rules would be required to include this in income in the year of appointment rather than in the subsequent year)

(v) taxable capital gains and recaptured capital cost allowance on professional assets deemed disposed of

(vi) taxable capital gain on disposition of partnership interest, and

(vii) judge's salary for calendar year.

2. Special Reserve

A special reserve could then be claimed for such of the above amounts as are listed below. 14/15ths of such amounts would qualify for a special reserve in the year of appointment, with 1/15th included in income in each of the following 14 years. The balance of the reserve would be included in income in the year of death or retirement should either occur within 15 years of appointment.

3. Qualifying Amounts for Reserve

The amounts which would qualify for the special reserve would be:

(i) a portion of the professional income for the fiscal year of the professional practice computed as follows:

$$\text{Income for fiscal year} \times \frac{\text{\# of months in calendar year while a judge}}{\text{\# of months in fiscal year}}$$

(This is similar to s. 24.1 of the *ITA*.)

(ii) professional income for the "stub" period

(iii) unbilled work in progress

(iv) 1971 Accounts Receivable reserve

(v) taxable capital gains and recaptured capital cost allowance on professional assets deemed disposed of, and

(vi) taxable capital gain on disposition of partnership interest.

Rationale

The solution recommended above would, as illustrated in Appendix "G", alleviate the cash flow problem in the early years and spread the tax burden over the 15 years following appointment, which is the usual minimum period in office before retirement at full pension. This solution would also ensure that over an extended period, all income is taxed at the judge's normal tax rates.

Information Booklet

We **recommend that the Minister of Justice have prepared an information booklet outlining the tax treatment of lawyers' income on their appointment to the bench together with details of judges' salaries, allowances, pensions and other benefits, and that such booklet be provided to all those who are approached to accept judicial appointment.**

XI. Conclusion

Judges are not in a position to make representations to or bargain with government for adjustments to their salaries, allowances and pensions. For this reason, Parliament has provided for the appointment of Triennial Commissions. Two of the purposes of Triennial Commissions are to reduce the element of partisan politics in the adjustment of judicial compensation and to reinforce the principle of judicial independence. The Commissions make recommendations to the Minister of Justice, not as it were on the judges' behalf, but certainly mindful of the needs of an independent judiciary.

It is in this context that we have made the recommendations contained herein, and we reiterate our concern that this report be read as a whole and that the main thrust of our recommendations not be so altered as to seriously compromise their interrelationships.

XII. Summary of Recommendations

1. That Parliament either agree promptly with and implement quickly the individual recommendations of this and subsequent Triennial Commissions or, if necessary, indicate promptly its disagreement with any of such recommendations (Chapter III).

2. That a new judicial salary base be established as of April 1, 1986, by applying the Industrial Composite Index to the 1975 salary level for the years 1976 to 1986, capped by a 6% and 5% increase for 1983 and 1984, respectively. The recommended salary levels as of April 1, 1986 are as follows (Chapter IV):

Judges, Federal Court of Canada and Superior Courts —	$127,700
Chief Justices and Associate Chief Justices, Federal Court of Canada and Superior Courts —	$139,700
Judges, Supreme Court of Canada —	$151,700
Chief Justice of Canada —	$163,800

3. That the differential of $5,000 between the salaries of judges of county and district courts and those of superior courts be maintained (Chapter V).

4. That the incidental allowance be increased to $2,500 annually (Chapter VI).

5. That the removal allowance be extended to retiring judges of the three section 101 courts who are required upon appointment to change their place of residence to the vicinity of the National Capital Region, and as well to the surviving spouses and eligibile children of these judges who die in office (Chapter VII).

6. That the removal allowance permit these retiring section 101 judges, and/or the family, to move to a place of residence in any one of the ten provinces or two territories (Chapter VII).

7. That there be a requirement whereby all removal allowances must be utilized within a reasonable period following the relevant event (Chapter VII).

8. That the present rates of judicial contributions towards the costs of both statutory annuities and supplementary benefits (indexing) be maintained (including the February 16-17, 1975 contribution rate differential) and that contributions of the judiciary not be reimbursed (Chapter VIII, Item A).

9. That retirement at full pension, but not the election of supernumerary status, be permitted at the following combinations of age and years of service on the bench: 60 years of age and 20 years of service; 61 and 19; 62 and 18; 63 and 17; and 64 and 16 (Chapter VIII, Item B).

10. That the mandatory retirement age be standardized at 75 for all federally appointed judges, and that the mandatory retirement age of judges on the Federal Court of Canada, the Tax Court of Canada and the county and district courts be raised to 75 (Chapter VIII, Item B).

11. That the supernumerary provisions be standardized for all federally appointed judges except the members of the Supreme Court of Canada (Chapter VIII, Item B).

12. That the surviving spouse of a judge who dies in office be entitled to an annuity equal to 40% of the judge's salary at the time of death (Chapter VIII, Item C).

13. That the surviving spouse of a retired judge who dies while in receipt of a pension be entitled to an annuity equal to 60% of the amount of the retired judge's pension at the time of death (Chapter VIII, Item C).

14. That compound interest be payable upon the return of all contributions at a rate to be varied as and when necessary to reflect the "prescribed rates", and that if no prescribed rate was in effect, then a rate comparable to the average yield obtainable during each year on 90-day Treasury Bills should be used (Chapter VIII, Item C).

15. That the lump sum gratuity payable to the surviving spouse of a judge who dies in office be made a statutory entitlement by provision in the *Judges Act* (Chapter VIII, Item C).

16. That a judge who has held office for at least ten years and who retires without being entitled to an annuity should have the option of receiving an annuity, payable at age 65 should the judge retire before that age (Chapter VIII, Item D).

17. That the annuity of a judge who has served for ten or more but fewer than 15 years, when payable, should be pro-rated on the basis of years of service as a proportion of 15, with the resulting fraction being multiplied by two-thirds of the salary which the judge was earning when he or she retired (Chapter VIII, Item D.)

18. That in the case of a deferred annuity payable to a former judge at age 65, there be no "banking" or accumulation of indexing credits during the deferment, and that indexing commence only when the annuity becomes payable (Chapter VIII, Item D).

19. That should the former judge die before attaining the age of 65, his or her surviving spouse should be entitled to an annuity equal to 60% of the annuity that the former judge would have received, payable when the former judge would have reached age 65 (Chapter VIII, Item D).

20. That a judge who has served on the Supreme Court of Canada for at least ten years and has attained the age of 70 years be eligible to retire and receive an income payable until age 75 equal to 90% of the salary that would have been received from time to time by that judge had he or she remained on the Supreme Court, and thereafter an indexed annuity equal to two-thirds of the salary annexed to the office formerly held by that judge at the time he or she attains the age of 75 (Chapter VIII, Item E).

21. That a retiring judge be given the one-time option of receiving an actuarially reduced annuity for a ten-year guaranteed period (Chapter VIII, Item F).

22. That the provisions for indexing judicial annuities, including those of surviving spouses and eligible children, and for the return of judges' contributions, should be transferred to the *Judges Act* from the *Supplementary Retirement Benefits Act* (Chapter VIII, Item H).

23. That subsection 25(3) of the *Judges Act*, which suspends a surviving spouse's annuity in the event of remarriage, and subsection 25(3.1) be repealed (Chapter VIII, Item I).

24. That the criterion of a child's marital status be eliminated in the consideration of eligibility for benefits (Chapter VIII, Item I).

25. That amendments consequential to the two recommendations immediately above be made in the terms of eligibility for applicable group insurance, medical and other benefit plans (Chapter VIII, Item I).

26. That a judge be required to include in income in the year of appointment certain amounts relating to his or her professional practice, and that a special reserve should then be claimable for 14/15ths of such amounts in the year of appointment with 1/15th included in income in each of the following 14 years (Chapter X).

27. That an information booklet be prepared and provided to all those who are approached to accept judicial appointment (Chapter X).

All of which is respectfully submitted this 27th day of February, 1987.

H. Donald Guthrie, Chairman

Edward H. Crawford

Jeannine M. Rousseau

Eldon M. Woolliams

APPENDIX "A"

Commission on Judges' Salaries and Benefits

OTTAWA, K1A 1E3

Commission sur le traitement et les avantages des juges

1986 COMMISSION ON JUDGES' SALARIES AND BENEFITS

NOTICE

This Commission was appointed on September 1, 1986 by the Minister of Justice and Attorney General of Canada, pursuant to section 19.3 of the Judges Act, to inquire into the adequacy of the salaries and other amounts payable under the Act to federally-appointed judges and into the adequacy of federally-appointed judges' benefits generally, including the granting of annuities provided to judges and to their surviving spouses and children.

The Commission invites written submissions in either official language concerning the matters within the Commission's terms of reference. Written submissions must reach the Commission by October 20, 1986, in eight copies. A party intending to file a written submission with the Commission may also request an opportunity to make a presentation at an oral hearing. The Commission must be notified by October 10, 1986 of the party's desire to appear at an oral hearing and if so, of the city and official language in which the presentation will be made. A party filing a written submission need not request to appear at an oral hearing, and any such request will not be considered if the party has not filed a written submission by October 20, 1986.

The Commission proposes to conduct oral hearings, if required, in the following cities and on the following dates:

Halifax	October 23
Vancouver	October 29
Edmonton	October 30
Montreal	November 21
Ottawa	November 27 and 28

Copies of the Commission's terms of reference are available upon request.

1986 Commission on Judges'
Salaries and Benefits,
110 O'Connor Street
Room 1114
Ottawa, Ontario
K1A 1E3

H. Donald Guthrie, Q.C.
Chairman

Commission on Judges' Salaries and Benefits

Commission sur le traitement et les avantages des juges

OTTAWA K1A 1E3

COMMISSION DE 1986 SUR LE TRAITEMENT ET LES AVANTAGES DES JUGES

AVIS

La Commission de 1986 sur le traitement et les avantages des juges a été instituée le 1er septembre 1986 par le ministre de la Justice et procureur général du Canada, en application de l'article 19.3 de la **Loi sur les juges**. Elle a pour mandat de déterminer si le traitement et les avantages des juges nommés par le gouvernement fédéral, et plus spécialement si les pensions auxquelles ceux-ci, leur conjoint et leurs enfants ont droit, sont satisfaisants.

La Commission invite toute personne intéressée à lui soumettre par écrit ses vues sur les sujets qu'elle a reçu pour mission d'examiner. Ces interventions doivent prendre la forme d'un document écrit, établi dans l'une ou l'autre des deux langues officielles, et être déposées auprès de la Commission en huit exemplaires au plus tard le 20 octobre 1986. Quiconque dépose un tel document écrit peut en outre demander à la Commission d'être entendu par celle-ci. En pareil cas, il convient d'aviser la Commission au plus tard le 10 octobre 1986 du souhait de présenter des observations orales, ainsi que de la ville et de la langue officielle dans lesquels cette intervention aura lieu. Il convient de noter que le dépôt de documents écrits n'oblige nullement à présenter les observations orales. Quoi qu'il en soit, nul ne se verra accorder l'autorisation d'exposer verbalement ses vues à moins d'avoir remis un document écrit à la Commission avant la date limite du 20 octobre 1986.

La Commission, s'il y a lieu, tiendra des audiences dans les villes et aux dates qui suivent :

Halifax	23 octobre
Vancouver	29 octobre
Edmonton	30 octobre
Montréal	21 novembre
Ottawa	27 et 28 novembre

Il est possible d'obtenir le texte définissant le mandat de la Commission sur simple demande.

Commission de 1986 sur le traitement et les avantages des juges
110, rue O'Connor
Bureau 1114
Ottawa (Ontario)
K1A 1E3

Le président de la Commission

H. Donald Guthrie, c.r.

APPENDIX "B"

LIST OF WRITTEN SUBMISSIONS

1. The Joint Committee on Judicial Benefits of the Conference of Chief Justices and Chief Judges and the Canadian Judges Conference
2. Justices of the Supreme Court of Ontario
3. The Honourable Mr. Justice Patrick T. Galligan (Supreme Court of Ontario (High Court of Justice))
4. The Honourable Mr. Justice Doane Hallett (Supreme Court of Nova Scotia (Trial Division))
5. The Honourable Mr. Justice Donald S. Thorson (Supreme Court of Ontario (Court of Appeal))
6. The Honourable Mr. Justice Thomas G. Zuber (Supreme Court of Ontario (Court of Appeal))
7. The Honourable Judge Fernand L. Gratton (District Court of Ontario)
8. The Honourable Judge Hugh M. O'Connell (District Court of Ontario)
9. The Canadian Bar Association Standing Committee on Pensions for Judges' Spouses and Judges' Salaries
10. The Law Society of Alberta (R.P. Fraser, Q.C., President)
11. The Nova Scotia Barristers' Society (L.K. Evans, Q.C., President)
12. Le Barreau du Québec (Mtre Serge Ménard, Bâtonnier, and Mtre Louis-Philippe de Grandpré, Q.C.)
13. The Patent Examiners' Group of the Professional Institute of the Public Service of Canada
14. M.F. Murphy, Calgary, Alberta
15. Winnifred M. Rogalsky, Chilliwack, British Columbia

APPENDIX "C"

PIONEER GRAIN COMPANY, LIMITED

HONOURABLE OTTO LANG, P.C., Q.C.

THE PIONEER

RICHARDSON BUILDING
ONE LOMBARD PLACE, WINNIPEG, MANITOBA R3B 0X8
TELEPHONE (204) 986-6861 TELEX 075-7814

February 27, 1986

Mr. Justice A. R. Philp
Judges Chambers
Law Courts
WINNIPEG, Manitoba
R3C OV8

Dear Allen:

On the basis of your research and the information you have obtained about the calculations made for the Commission which I chaired, I am convinced that you are right in your conclusions. In short, the philosophy and logic which our Commission applied in its report should have led to a different base salary figure for 1985. It would appear that your figure based on revised and accurate calculations of $123,500 for 1985 is correct.

Yours sincerely,

Otto Lang
Executive Vice-President

/lb

APPENDIX "D"

Valuation Summary of Annuities under the Judges Act as of December 31, 1985 (Including Indexation Pursuant to SRBA)

ACTIVES

	Males		Females		Both Sexes	
Contributors	754		45		799	
Total Payroll	$ 77,372,560		$ 4,705,330		$ 82,077,890	
Judges' Contributions*	3,910,132	(5.1%)	288,734	(6.1%)	4,198,866	(5.1%)
Government Costs	17,425,957	(22.5%)	753,335	(16.0%)	18,179,292	(22.2%)
Normal Cost	21,336,089	(27.6%)	1,042,069	(22.1%)	22,378,158	(27.3%)
Actuarial Liability	145,333,135		5,237,699		150,570,834	

* Judges' contributions expressed as a percentage of payroll represent a weighted average of the 1.5% and 7.0% judicial contribution rates.

PENSIONERS

	Number	Annual Benefit	Actuarial Liability
Healthy Pensioners (all males)	131	$ 8,191,284	$67,703,045
Disabled Pensioners (" ")	25	1,554,240	18,405,266
Spouse Pensioners (all females)	224	6,114,180	62,909,410
Children Pensioners (both sexes)	13	86,280	141,615
Total Pensioners	393	15,945,984	149,159,336

	Total
Total Members	1,192
Total Actuarial Liability	$299,730,170

Summary of Methodology and Assumptions used for the above valuation of benefits:

A. *Valuation Method:*

The accrued benefit cost method (or the unit credit method) was used to value the benefits under the *Judges Act*.

However, in respect of the judges' disability and pre-retirement survivor benefits (available without any service requirement), only the current year cost of those benefits was included in the normal cost (on one-year term basis). Therefore, the actuarial liability ignores those benefits.

B. *Assumptions:*

1. Interest: 6.5%

2. Indexation: 3.5%

3. General Salary Increases: 5%

4. Promotional Salary Scale: None assumed, since the only promotions available are elevation to a higher court or to a position of Chief or Associate Chief.

5. Funding age: 75, or earlier for those judges retiring according to the assumed retirement incidence rates.

6. Rates of decrement for active contributors (derived from actual experience between 1981 and 1985, except for mortality):
   (a) Return of contributions: assumed at 0.005 from age 30 to 54 inclusive and at 0.0 thereafter
   (b) Disability: assumed at 0.001 from age 30 to 60, increasing by .002 each year up to 0.019 at age 69, and at 0.0 thereafter
   (c) Mortality: GAM83 (different for males and females)
   (d) Retirement: assumed at 0 from age 30 to 64, at 0.02 from age 65 to 69, at 0.12 at age 70 (reflecting this compulsory retirement age for some judges), and at 0.08 from age 71 to 74, all remaining judges retiring at 75. Since these rates are applied only to those judges with at least fifteen years of service, the experience rates derived from the entire population of judges were adjusted to be applicable to only those with this service qualification, in order to reproduce the same expected number of judges retiring.

7. Accrual period for retirement benefits: for purposes of the accrued benefit method, retirement benefits are assumed to accrue over the period from appointment age to assumed retirement age, varying according to the assumed retirement incidence rates (for entry age below 65, full 2/3 pensions accrue equally over each year of the applicable period; for entry age over 65, the same is true but for pro-rated benefits only).

8. Rates of decrement for pensioners:
   (a) Mortality: GAM 83 (rated up 3 years for disabled)
   (b) Remarriage of surviving spouses: rates varying by age at widowhood and duration since widowhood (e.g. in fifth year of widowhood that began at age 40: 0.023 for widows and .069 for widowers)

9. Proportions of deceased contributors leaving eligible spouse and/or children and average age of spouses and average duration of children's benefits: all varying by age at death, as shown in the following sample:

Age at Death	Proportion Leaving Eligible Spouse	Average Age of Spouse		Average Number of Eligible Children		Average Remaining Duration of Eligibility
		Female	Male	Male Contributor	Female Contributor	
40	0.919	38	42	1.385	2.103	17
50	0.963	47	52	0.893	1.635	12
60	0.964	56	62	0.210	0.866	8
70	0.729	65	72	0.032	0.040	0
80	0.513	73	82	0.003	0.000	0
90	0.251	78	92	0.000	0.000	0

10. Residual benefit: ignored (considered negligible).

APPENDIX "E"

Average Age of Judicial Appointees on Assuming Office

1970	—	47	1978	—	49
1971	—	48	1979	—	50
1972	—	47	1980	—	50
1973	—	49	1981	—	50
1974	—	50	1982	—	51
1975	—	48	1983	—	49
1976	—	50	1984	—	51
1977	—	47	1985	—	52

Source: Commissioner for Federal Judicial Affairs

APPENDIX "F"

Taxation of New Judges

Illustration of Cash Flow Problems

Assumptions:

1. Lawyer is a member of a partnership with a January 31 year-end. His or her share of the partnership income for the year ended January 31, 1987 is $150,000. Lawyer claimed a reserve for 1971 accounts receivable of $10,000 on January 31, 1986.

2. Lawyer is appointed to the bench on June 1, 1987, at a salary of $107,500 per annum. $7,500 per annum is deducted at source under section 29.1 of the *Judges Act* in respect of his or her pension and is fully deductible from taxable income. Tax deductions of $36,000 are also made. Lawyer retires from law firm as of May 31, 1987. The partnership agreement specifies that the partnership is not dissolved on the retirement or admission of partners.

3. Lawyer's income for the stub period of February 1 to May 31, 1987 is $50,000. Lawyer has $25,000 of unbilled work in progress (WIP) on May 31, 1987. The partners will elect to treat these items as income to the lawyer rather than as capital.

4. Lawyer has drawn against his or her partnership income in order to make the necessary income tax instalment payments and to meet living expenses.

5. Lawyer's capital account is $50,000 which is equal to its adjusted cost base. Lawyer has borrowed $40,000 against his or her other partnership interest and this loan must be repaid on withdrawal from the firm.

6. Lawyer requires after-tax income of $56,000 to meet living expenses.

Illustration of Cash Flow Problems of New Judges

	June 1 to December 31, 1987	1988	1989	1990 and thereafter
Cash Flow				
From partnership				
Unbilled WIP	$ 25,000			
Capital interest	50,000			
Less: Loan repayment	(40,000)			
	10,000			
Net from partnership	35,000	—	—	—
Salary, net of tax	$37,000	$64,000	$64,000	$64,000
	72,000	64,000	64,000	64,000
Less:				
Tax instalments and final tax payments (see next page)	(12,000)	(13,000)	(79,000)	—
Available for living expenses	$60,000	$51,000	$(15,000)	$64,000
Required for living expenses	$33,000	$56,000	$56,000	$56,000
Excess (Shortfall)	$27,000	$(5,000)	$(71,000)	$ 8,000
Cumulative excess (Shortfall)	$27,000	$22,000	$(49,000)	$(41,000)
				reducing by $8,000 per year

Calculation of Taxable Income

Taxes Payable and Timing of Taxes Payable

	In year of Appointment 1987	Following Year 1988
Taxable Income		
Income for year ended January 31 (election made under s. 24.1 of the *ITA*)	$ 62,500	$ 87,500
Income for "stub" period (s.96.(1.1) of the *ITA* applies)		$ 50,000
Unbilled WIP		$ 25,000
1971 Accounts Receivable Reserve		$ 10,000
Capital	—	—
Judge's salary (net after pension contributions)	58,000	100,000
	$120,500	$272,500
Tax	$ 49,000	$128,000
Tax withheld on salary	(21,000)	(36,000)
Tax instalment	(16,000)	—
Balance to be paid out of judge's salary	$ 12,000	$ 92,000
To be paid as instalments on		
June 30, 1987	$ 4,000	
September 30, 1987	4,000	
December 30, 1987	4,000	
March 30, 1988		$ 3,250
April 30, 1988	0	
June 30, 1988		3,250
September 30, 1988		3,250
December 30, 1988		3,250
April 30, 1989		79,000
	$ 12,000	$ 92,000

APPENDIX "G"

Taxation of New Judges

Illustration of Recommendation

	1987	1988	1989	1990
Cash Flow				
From partnership				
Unbilled WIP	$ 25,000			
Capital interest	50,000			
Less: Loan repayment	(40,000)			
	10,000			
Net from partnership	35,000			
Salary, net of tax	37,000	$ 64,000	$ 64,000	$ 64,000
	72,000	64,000	64,000	64,000
Less:				
Tax instalments	(18,000)	(8,000)	(8,000)	(8,000)
(see next page)				
Available for living expenses	54,000	56,000	56,000	56,000
Required for living expenses	33,000	56,000	56,000	56,000
Excess	$ 21,000	$ nil	$ nil	$ nil
Cumulative excess	$ 21,000	$ 21,000	$ 21,000	21,000

Taxation of New Judges

Illustration of Recommendation

	1987	1988 and thereafter
Taxable Income		
Professional income for year	$150,000	
Professional income for "stub" period	50,000	
Unbilled WIP	25,000	
1971 Accounts Receivable reserve	10,000	
	235,000	
Judge's salary	58,000	100,000
	293,000	100,000
Add: Judge's Reserve claimed in prior year	—	161,000
Deduct: Judge's Reserve end of year (note)	(161,000)	(149,500)
Taxable income	$132,000	$111,500
Tax, say	$ 55,000	$ 44,000
Tax withheld on salary	(21,000)	(36,000)
Tax instalment made	(16,000)	—
	$ 18,000	$ 8,000
To be paid as follows:		
June 30, 1987	$ 6,000	
September 30, 1987	6,000	
December 30, 1987	6,000	
March 30, 1988		$ 2,000
April 30, 1988	0	
June 30, 1988		2,000
September 30, 1988		2,000
December 30, 1988		2,000
April 30, 1989		0
	$ 18,000	$ 8,000

Note:

Amounts included in Judge's Reserve

○ Professional income for year	$ 87,500
○ Professional income for "stub" period	50,000
○ Unbilled WIP	25,000
○ 1971 Accounts Receivable reserve	10,000
	$172,500

Reserve in 1987 14/15 x $172,500 = $161,000

1988 13/15 x $172,500 = $149,500