Department of Justice Canada
Ministère de la Justice Canada

REPORT AND RECOMMENDATIONS OF THE 1989 COMMISSION ON JUDGES' SALARIES AND BENEFITS

March 5, 1990
Submitted to the Minister of Justice of Canada

Canada

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Pursuant to Section 26 of the *Judges Act*, I am now tabling the Report and Recommendations of the 1989 Commission on Judges' Salaries and Benefits, appointed on September 30, 1989 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 32(5) of the House of Commons, this document shall be deemed to be referred to the Standing Committee on Justice and Solicitor General.

The Honourable Kim Campbell
Minister of Justice and
Attorney General of Canada

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1989 COMMISSION ON JUDGES' SALARIES AND BENEFITS

I. BACKGROUND

Members: E. Jacques Courtois, Q.C. (Chairman)
Laura Legge, Q.C.
David B. Orsborn, C.A., LL.B.

Executive Secretary: Harold Sandell

Terms of Reference

The 1989 Commission on Judges' Salaries and Benefits was appointed on September 30, 1989, by the Honourable Doug Lewis, then Minister of Justice and Attorney General of Canada, pursuant to subsection 26(1) of the *Judges Act*, and was given the following terms of reference:

> "The Commission shall, pursuant to section 26 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 R.S.C. 1985, c. 39 (3rd Supp.) and S.C. 1989, c. 8.
> 2. The granting of annuities provided to judges pursuant to section 42 of the *Act*.
> 3. The granting of annuities and other payments provided to surviving spouses and children having due regard for the adjustments made by R.S.C. 1985, c. 39 (3rd Supp.) and S.C. 1989, c. 8.

The Commission shall report to the Minister of Justice upon the results of the inquiry in accordance with subsection 26(2) of the *Act*."

The Commission held meetings and/or hearings as follows:

October 19, 1989 — Montreal
November 9, 1989 — Montreal
November 21 and 22, 1989 — Ottawa
December 14, 1989 — Montreal
January 11, 1990 — Montreal
January 31, 1990 — Montreal
March 5, 1990 — Ottawa

Notice to the Public, Submissions and Hearings

The Commission published a Notice in newspapers across Canada, inviting written submissions and presentations at oral hearings, in either official language, concerning matters within the Commissions terms of reference. Specific notice was also sent to a number of interested organizations and individuals, including all of the provincial and territorial Ministers of Justice and Attorneys General.

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
La Voix Acadienne
Halifax Chronicle-Herald
Le Courrier
Saint John Telegraph Journal
L'Acadie Nouvelle
Le Soleil
La Presse
Montreal Gazette
Le Droit
Ottawa Citizen
The Globe and Mail
The Lawyers Weekly
Winnipeg Free Press
La Liberté
Regina Leader Post
Saskatoon Star-Phoenix
Journal L'Eau vive

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".

Hearings took place on November 21 and 22, 1989, at the Canada Council Hearing Room, 99 Metcalfe Street, Ottawa, and on January 31, 1990, at the offices of Stikeman, Elliott, 3900-1155 René-Lévesque Blvd. West, Montreal. 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: D.M.M. Goldie, Q.C., Vancouver
Bernard A. Roy, Q.C., Montreal
Wilfrid Lefebvre, Q.C., Montreal

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

Counsel Appearing: George A. Allison, Q.C., Montreal
(Chairman of the Standing Committee)
J. Patrick Peacock, Q.C., Calgary
(Immediate Past President of the Association)

Previous Committees and Commissions

The 1989 Commission on Judges' Salaries and Benefits is the sixth 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 third "Triennial Commission" appointed pursuant to subsection 26(1) 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 subsection 26(1) 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. The 1986 Commission on Judges' Salaries and Benefits, which was the second "Triennial Commission", was chaired by H. Donald Guthrie, Q.C. (hereinafter, the "Guthrie Commission") and reported to the Minister in February, 1987.

Acknowledgements

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

We also thank G.W. Poznanski, F.C.I.A., F.S.A., Chief Actuary, P. Treuil, F.C.I.A., F.S.A., Director, Government Services Division and L.M. Cornelis, F.C.I.A., F.S.A., Chief, Government Services Division, of the Office of the Superintendent of Financial Institutions, for their valuable actuarial assistance.

The Commission is most grateful to Harold Sandell of the Department of Justice in Ottawa who was assigned to it as Executive Secretary. Mr. Sandell's enthusiasm and dedicated service as well as encyclopedic knowledge of the Canadian legal and judicial systems rendered our task much easier and made it possible for us to complete our mandate ahead of schedule.

II. INTRODUCTION

The primary role of the judiciary is to safeguard the supremacy of the law and to uphold its rule. In recognition of that role, the authors of our Constitution, as well as the executive and legislative branches of government and the courts, have been conscious of the need to preserve and enhance the independence of judges. As a result, the principle of the independence of the judiciary is imbedded in the constitutional history of Canada. The *Constitution Act, 1867* specifically acknowledges the concept of judicial independence through the Judicature provisions respecting tenure and removal and the fixing and payment of salaries, annuities and allowances.

The seemingly ponderous process and elaborate institutions whereby judicial salaries, allowances and annuities are considered, determined, fixed, provided and paid, serve a very clear purpose. They are all designed to preclude the arbitrary interference of the executive branch in the matter of judicial compensation — a statutory and independent Triennial Commission to make recommendations to the Minister of Justice of Canada following its thorough examination of the subject; Parliament having to enact public statutes, as required by our Constitution, to fix and provide judges' salaries, allowances and annuities; and the Office of the Commissioner for Federal Judicial Affairs, another creature of statute, to administer to, and pay, the judges and their survivors. They all underscore and reflect the fundamental importance which both the principle and the manifestations of judicial independence hold in our free and democratic society.

This report and our recommendations to the Minister of Justice comprise the first step in the process. We have undertaken this task mindful of the important objective which it serves.

III. THE REVIEW PROCESS

Section 26 of the *Judges Act* requires the Minister of Justice of Canada in every third year to appoint not fewer than three and not more than five commissioners "to inquire into the adequacy of the salaries and other amounts payable under [the] Act and into the adequacy of judges' benefits generally." The commissioners are required within six months of their appointment to submit a report to the Minister "containing such recommendations as they consider appropriate". The Minister is required to "cause the report to be laid before Parliament not later than the tenth sitting day of Parliament after he receives it."

Parliament has seen fit to impose strict time limits on the entire Triennial Commission process. In our view this reflects Parliament's intentions with regard to the significance of that process and distinguishes it from non-statutory *ad hoc* commissions generally. The imposition of statutory time limits also underscores the critical importance of a prompt response to the recommendations of Triennial Commissions.

The acknowledged purpose of the Triennial Commission review process is to reduce the element of partisan politics in the determination and 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. The process was instituted by Parliament in the public interest, which can only be fulfilled if the process functions effectively. Failure to adopt the recommendations of Triennial Commissions renders meaningless this independent review process and effectively thwarts the evident intention of Parliament.

The alternative to the Triennial Commission process would be to put the judiciary in the invidious position of having to engage in constant and ongoing discussions with the executive branch of government with regard to salaries and benefits. As that same branch of government also appears frequently in the courts, the mere appearance of the judges having to negotiate with the executive branch would only erode the public perception of judicial independence.

The Triennial Commission review process cannot prevent this highly undesirable result if the reports of the Commissions are not acted upon positively and with reasonable promptness. Otherwise, the integrity of the review process would be irreparably impaired, which not only would defeat the intentions of Parliament, but also would seriously attenuate the only means available to judges to provide meaningful input with regard to compensation and benefit issues.

We therefore **recommend that the Minister of the day promptly inform Parliament, following the tabling of the reports of this and subsequent Triennial Commissions, as to what action the Government proposes to take with regard to their individual recommendations or, if necessary, indicate promptly the Government's disagreement with any of such recommendations.**

We also **recommend that whenever legislation to implement Triennial Commission recommendations is introduced in Parliament, the Government should proceed to ensure its quick passage.**

IV. JUDICIAL SALARIES

The meaning of "judicial independence" is evolving. Traditionally, it has referred to the independence of the individual judge to decide an issue without interference, which implies that once a lawyer has been appointed to the bench he or she severs all professional and partisan connections and, dependent for a livelihood on his or her judicial salary alone, the judge dispenses justice with no other consideration than the facts as he or she finds them and the law as he or she interprets it.

Recently, the Supreme Court of Canada has broadened the meaning of the principle to include not only conditions which apply to judges as individuals, but conditions which must apply to the bench as a whole in its relationships to the other institutions of authority, in particular the executive and legislative branches of government.

The Court identified three objective criteria or conditions which it termed essential to the existence of an independent tribunal (in the context of paragraph 11(d) of the *Canadian Charter of Rights and Freedoms).* These conditions are security of tenure, financial security and the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of the judicial function.[1] The Court proceeded to define the second of these conditions, financial security, to mean security of salary or other remuneration and, where appropriate, security of pension.[2]

It is clear that financial security is one of the substantive cornerstones of judicial independence and of the public's perception of that independence; and the perception, as we know, is no less important than the independence itself. The Supreme Court of Canada, in the more recent *Beauregard* decision, affirmed this essentiality of financial security to the concept of the independence of the judiciary, and traced its constitutional roots to the *Act of Settlement* of 1701.[3]

The requirement for financial security within the context of judicial independence is apparent in both the design and content of the

[1] *Valente* v. *The Queen*, [1985] 2 S.C.R. 673.
[2] *Ibid.*, at 704.
[3] *The Queen* v. *Beauregard*, [1986] 2 S.C.R. 56, at 74-75.

compensation scheme for federally appointed judges. The entrenchment, in section 100 of the *Constitution Act, 1867*, of the requirement that Parliament fix and provide the salaries, allowances and pensions of judges, is the most discernible manifestation. Others include the Triennial Commission review process, the statutory annual salary adjustment (section 25 of the *Judges Act*) and the administration of Part I of the *Judges Act* by the Commissioner for Federal Judicial Affairs instead of by the Deputy Minister of Justice (who is also the Deputy Attorney General of Canada).

Another practical aspect of the reality and perception of judicial independence is that the actual monetary amounts involved should be sufficient to preserve the role, dignity and quality of our judges, and to reflect the esteem which the office deserves. A judge and his or her family are entitled to a standard of living commensurate with their position in Canadian society. They must be and be seen by society to be financially secure, particularly in view of the statutory requirement (at section 55 and subsection 57(1) of the *Judges Act*) that a judge devote himself or herself exclusively to judicial duties and not engage in any occupation or business.

Furthermore, the judicial salary and benefit package should serve to make appointment to the bench sufficiently attractive to the best qualified lawyers, and to enhance the morale of those who have accepted appointment.

Both the 1983 (Lang) and 1986 (Guthrie) Commissions recommended that the salary level established by amendments to the *Judges Act* in 1975 be restored by increasing salaries to allow for inflation since 1975, with a cap of 6% and 5% in 1983 and 1984, respectively, to reflect the limit on salary adjustments for all public servants during those two years under the *Public Sector Compensation Restraint Act*. (This salary level has been described as "1975 equivalence").

The salary increase granted by Parliament in 1985 (Bill C-78) as a result of the Lang Commission, went only part way to 1975 equivalence. The three-stage increase enacted in 1987 (Bill C-88), as a result of the Guthrie Commission, established salaries at the levels recommended by that Commission ($127,700 for superior court judges), but delayed full implementation to April 1, 1988, instead of making the entire increase effective on April 1, 1986, as recommended. The effect of that delay was that the salary of a superior court judge as of April 1, 1986 became $115,000, instead of the recommended $127,700; as of April 1, 1987 it became $121,300, instead of $131,200; and as of April 1, 1988 it became $127,700, instead of $135,500.

The present salary of $133,800, which became effective on April 1, 1989, is $8,200 below 1975 equivalence, which would be achieved at an April 1, 1989 salary level of $142,000. This shortfall resulted from delay in the face of continuing inflation, and the fact that the statutory salary indexing factor for 1987 and 1988 was subsumed in and superseded by the three-stage increase enacted by Bill C-88. Furthermore, the salary base level upon which the statutory indexing formula has been applied in other years was never raised sufficiently to reach 1975 equivalence.

The reasons given by the Lang and Guthrie Commissions for recommending 1975 equivalence are still very much applicable, and we fully subscribe to them. Both previous Triennial Commissions relied in part on the fact that the salary level being recommended for superior court judges would restore the historical relationship of rough equivalence between the salaries of judges and those of senior deputy ministers in the federal Public Service. The salary level established by the 1975 amendments to the *Judges Act* did not result in a new, historically high, salary level for judges, but simply allowed for inflation that had occurred in the years prior to 1975. The fairness of that level has not been disputed.

We note that 1975 equivalence would bring judges to within 2% of the mid-point of the salaries of the most senior level (DM-3) of federal deputy ministers. The DM-3 mid-point, we believe, reflects what the market place expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges.[4] The salaries of superior court judges are now materially below that mid-point and this situation should be rectified. It might be noted that failure to maintain 1975 equivalence from 1976 to 1989 has resulted in an accumulated shortfall for a superior court judge serving during those years of over $230,000.

The recommended levels of salary as of April 1, 1989 are therefore as follows:

- **Judges, Tax Court of Canada, Federal Court of Canada and Superior Courts— $142,000**

[4] The compensation and terms and conditions of employment for senior managers in the federal Public Service, including deputy ministers, are the subject of annual advisory reports prepared for the Prime Minister by the Advisory Group on Executive Compensation in the Public Service (Mr. James W. Burns, Chairman).

- **Chief Justices (Judge) and Associate Chief Justices (Judge), Tax Court of Canada, Federal Court of Canada and Superior Courts— $155,300**
- **Judges, Supreme Court of Canada— $168,600**
- **Chief Justice of Canada— $182,100**

V. SALARY DIFFERENTIAL BETWEEN THE COUNTY AND DISTRICT COURTS AND THE SUPERIOR COURTS

Bill C-78 (which received Royal Assent on December 12, 1985 as Chapter 48 of the Statutes of Canada, 1985) established as at April 1, 1985, an absolute differential of $5,000 between the salaries of judges of the county and district courts and those of superior courts. The Guthrie Commission recommended that the differential of $5,000 be maintained.

The matter arises again but in somewhat changed circumstances. Merger of the section 96 (of the *Constitution Act, 1867)* trial courts has occurred or is imminent in all provinces except Nova Scotia.

Furthermore, the salaries of judges and chief judges of the Tax Court of Canada, which is not a superior court, were increased in 1988 to the same levels as those of judges and chief justices of the superior courts. The salaries in the Tax Court had previously been at the same levels as those for judges and chief judges of the county and district courts.

We believe that there is no justification for different salary levels as between federally-appointed trial judges in the different courts.

We therefore **recommend that the salaries of judges and chief judges of the county and district courts be increased to the salary levels of judges and chief justices of the superior courts.** The result of such a recommendation, effective April 1, 1989, should be:

- **Judges, county and district courts— $142,000**
- **Chief Judges and Associate Chief Judges, county and district courts— $155,300**

VI. INDEXATION OF JUDGES' SALARIES

Judges' salaries are indexed pursuant to section 25 of the *Judges Act*. Under the section 25 formula, judicial salaries are automatically increased on April 1 of each year by the percentage amount which is equal to the change in the Industrial Aggregate Index of the previous year in comparison to the year before the previous year, to a maximum of 7%.

The Industrial Aggregate Index is published by Statistics Canada under the authority of the *Statistics Act*, and was adopted by statutory amendment in 1987 in lieu of the Industrial Composite Index as the basis for the salary adjustment formula for judges. The Industrial Aggregate was already in use for purposes of adjusting benefits under the *Canada Pension Plan*, and salaries under the *Parliament of Canada Act* and the *Salaries Act*. We note that in January 1990, the identical salary adjustment formula that applies to judges, namely the percentage change in the Industrial Aggregate Index to a maximum of 7%, was adopted by statutory amendment as the salary adjustment formula for the Governor General.

We feel that the percentage change in the Industrial Aggregate serves as a better adjustment formula for judicial salaries than would the Consumer Price Index. That is the case regardless of whether the Consumer Price Index would be used alone or in conjunction with the Industrial Aggregate Index on an averaging basis. We feel it is fairer and more consistent to tie judicial salary increases to variations in Canadian wages and salaries generally, as represented by the Industrial Aggregate Index, than to variations in the cost of living or the purchasing power of the dollar, as represented by the Consumer Price Index. Furthermore, the Industrial Aggregate Index, used alone, serves as the basis for the statutory salary adjustment formulae that apply to the Governor General, Lieutenant Governors, Senators, Members of the House of Commons and members of the federal Cabinet. We do not see the need or the desirability of incorporating the Consumer Price Index into the judicial salary adjustment formula.

The salary adjustment formula for judges, as well as for all of the other offices referred to in the previous paragraph, includes a cap on

annual salary increases of 7%. We feel that there are sound public policy reasons for maintaining a cap as part of an adjustment formula that provides for automatic annual salary increases. To put it simply, removing the cap would complicate the government's efforts to combat the wage-price spiral that affects virtually all periods of high inflation. Therefore, we are opposed to removing the 7% cap from the salary adjustment formula in section 25 of the *Judges Act*.

For the same reasons, we do not support any form of "banking" or "carry-forward" or inflation adjustment credits in years when the percentage change in the Industrial Aggregate Index exceeds 7%, which credits could then be applied to the salary increase in a future year or years when the Index fell below 7%. Moreover, in view of the Triennial Commission review process which (according to section 26 of the *Judges Act*) includes an examination of the adequacy of judicial salaries, we feel that a "banking" or "carry-forward" provision would be somewhat redundant.

VII. ALLOWANCE FOR NORTHERN JUDGES

The *Judges Act* was amended in 1981 to provide a non-accountable yearly allowance of $4,000 to each of the judges of the Supreme Court of the Yukon Territory and the Supreme Court of the Northwest Territories, as compensation "for the higher cost of living" in the two territories.

Subsection 27(2) of the *Judges Act* was amended in 1989 to increase the allowance to $6,000, at the same time as the annual allowance for incidental expenditures for all judges was increased from $1,000 to $2,500 per judge.[5] The reason for both increases was inflation.

In view of the 1989 increase in the allowance for northern judges, we do not recommend a further increase in that allowance for the present.

We are also opposed to extending the northern allowance to judges who are resident in remote and/or isolated areas within the provinces. This is partly due to the difficulty of determining the appropriate cut-off point for such an extension, and partly from a sensibility that the section 96 judges within a province should be accorded equal treatment to avoid problems relating to their independence and morale.

[5] The Commission notes that on December 21, 1989, the Governor in Council approved an Order in Council (P.C. 1989-2560) to amend the *Judges Act (Removal Allowance) Order* to allow home sale assistance to be paid to federally appointed judges. The Order was approved under the authority of subsection 40(2) of the *Judges Act*. Home sale assistance provides for the payment of up to 10% of the fair market value of the principal residence of a judge who suffers a loss on its sale occasioned by the necessity that he or she move elsewhere in Canada as a consequence of the requirements of service on the bench. The Commission endorses this amendment.

VIII. REPRESENTATIONAL ALLOWANCE

Chief justices and chief judges of both the section 96 and section 101 courts perform a number of functions and obligations in a representative role on behalf of their respective courts. As titular head of a court, or as symbolic head of the judiciary at the federal or provincial level, a chief justice or chief judge is invited or expected to attend state and other official and semi-official functions both within and outside the court's jurisdiction, and may be requested or expected to host certain functions, particularly those involving visiting judicial dignitaries from other countries.

Prior to 1975, expenses incurred by a chief justice or chief judge in connection with such activities were either paid personally or recovered from the departmental budget with the express permission of the Minister of Justice. The former solution was unfair, the latter undignified at best.

As a result, by virtue of amendments to the *Judges Act* in 1975, and subsequent amendments, an allowance is provided for representational expenses actually incurred by the chief justice or chief judge of a section 96 or section 101 court or by a judge acting on his or her behalf, by a puisne judge of the Supreme Court of Canada, and by the senior judges of the Supreme Court of the Yukon Territory and of the Supreme Court of the Northwest Territories. The annual aggregate representational allowance permitted for each eligible judge pursuant to subsection 27(7) of the *Judges Act* is currently as follows:

(a)	the Chief Justice of Canada	$10,000
(b)	each puisne judge of the Supreme Court of Canada	$5,000
(c)	the Chief Justice of the Federal Court of Canada and the Chief Justice of each province	$7,000
(d)	each other chief justice or chief judge of a court	$5,000
(e)	each senior judge of a territorial supreme court	$5,000

The representational allowance therefore serves to reimburse a judge for expenses actually incurred by him or her for travelling,

hospitality and related amounts in connection with the extra-judicial obligations and responsibilities that devolve upon the judge by virtue of the office.

In 1985, the *Judges Act* was amended to permit the reimbursement of expenses incurred by or on behalf of a spouse, in accompanying a chief justice or other judge entitled to the benefit of the allowance, at certain official and semi-official events. The use of the judge's representational allowance to reimburse his or her spouse is envisaged to cover situations where the presence or active participation of the spouse is required or expected. Examples of such situations are opening of the legislatures, opening of the courts, state dinners, entertainment of foreign legal dignitaries and certain conferences and seminars. The spouse's expenses are subject to the overall representational allowance limit applicable to the judge.

The amounts provided for representational allowances have not been adjusted since 1985, when the allowance was extended to cover the spouse's expenses. The amounts provided under the allowance have become generally inadequate, and some chief justices are being required to absorb expenses incurred on behalf of the court or on behalf of the federal government or of a provincial government.

We therefore **recommend that the annual representational allowance be increased to $15,000 for the Chief Justice of Canada, to $10,000 for the Chief Justice of the Federal Court of Canada and the Chief Justice of each province, and to $8,000 for each other chief justice, chief judge, senior judge or judge presently entitled to receive it.** We further **recommend that the *Judges Act* be amended to authorize the Minister of Justice of Canada to approve the payment of additional amounts as representational allowance in any given year.**

IX. CONFERENCE ALLOWANCE

Members of the federally appointed judiciary are required by federal or provincial law to attend annually a number of meetings relating to the administration of justice on their courts. In addition, there are a number of meetings, conferences and seminars relating to the administration of justice which members of the judiciary may be authorized by law to attend. Expenses incurred in connection with such meetings are properly reimbursable as a conference allowance pursuant to subsection 41(1) of the *Judges Act*. No ceiling is placed upon the amounts which may be reimbursed in any one year.

A number of other seminars, conferences and meetings are arranged by the county, district or superior court judges on a regional and a national basis for the purpose of exchanging information on court procedures, new developments in the law, and judicial education generally. As well, universities, law reform commissions and other organizations, including the new Canadian Judicial Centre, schedule conferences or seminars on particular areas of the law where it is beneficial that members of the judiciary be permitted to participate or to act as panelists or resource persons. Until 1975, there was no provision for the payment of expenses in connection with the attendance by a judge at any of these categories of conferences. Since the participation of the judiciary would enhance the quality of judicial services, subsection 41(2) [as it now is] of the *Judges Act* was enacted in that year to permit the reimbursement of reasonable expenses incurred in attending such conferences, subject to the certification of such expenses by the chief justice of the court of which the judge was a member, and to a fixed maximum for each court. This maximum was established as $250 per judge per year, with provision, however, for the reimbursement of expenses in excess of this amount (payable as an aggregate per court) with the approval of the Minister of Justice of Canada.

The section 41(2) conference allowance was amended in 1977 to permit reimbursement of the cost of obtaining materials or proceedings of such meetings, conferences and seminars in lieu of actual attendance. Also in that year, a special conference allowance of $1,000 per judge per year was established for the judges of the Supreme Court of Canada.

In 1980, the annual allowance was increased with respect to judges of the county, district and superior courts from $250 per judge to $350 per judge, payable as an aggregate per court. In view of the disadvantage experienced by some of the smaller courts in having the allowance payable on the basis of the number of judges on the court, a minimum per court was established of $3,000 per year. This minimum permitted the smaller courts to send their members to conferences which they might otherwise have been unable to attend by reason of lack of funds.

In 1985, in view of the continuing increases in the costs of travel, the allowance was increased by establishing a multiplier of $500 per judge on a court, with a minimum of $5,000 per court per year.

The establishment of the conference allowance has undoubtedly enabled federally appointed judges to improve their legal skills and knowledge through attendance at court meetings, law conferences and seminars. Frequent changes in the law brought about by judicial decisions due in large part to the advent of the *Charter*, and by legislative enactments, make it incumbent on all federally appointed judges to attend and participate in conferences and seminars to remain abreast of the law and to exchange ideas with their colleagues and members of the bar across the country.

However, the cost of travel and hotel accommodation has increased dramatically in recent years. Due to the present limitation of $500 per judge on a court (with a minimum of $5,000 for any one court), the medium-sized and larger courts in particular have had to establish individual priorities for attendance at such conferences among a great number of judges.

In order that judges maintain their standard of excellence, we **recommend that the annual conference allowance for the Supreme Court of Canada be increased to $1,500 per judge and the annual allowance for all other courts be increased to $750 per judge with a minimum of $7,500 per court.**

X. JUDICIAL ANNUITIES

Annuities Granted to Judges

Section 42 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 mandatory retirement age of 75, if he or she has held office for at least ten years.

If a judge reaches the 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.

Supernumerary Judges

In addition, the option exists pursuant to sections 28, 29 and 30 of the *Judges Act*, for a judge to elect supernumerary status. Under this arrangement, a puisne judge who is at least 65 years of age and has served as a federally appointed judge for a minimum of fifteen years, or has reached the age of 70 years and has held office for at least ten years, may opt 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 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 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 12% of the federally appointed bench are currently supernumerary judges.

A. Judges' Contributions toward Annuities

In 1975, judges for the first time were required to contribute toward the cost of their statutory annuities. The 1975 amendments to the *Judges Act* (now section 50) require judges who were appointed before February 17, 1975 (the date of First Reading of the amendments) to contribute at a rate of 1½% of their annual salary to help defray the cost of improved annuities for their surviving spouses and other dependants. These judges are not required to contribute in respect of their own annuities or for indexing the pensions to the cost of living. Judges appointed on or after February 17, 1975 must contribute at a rate of 6% of annual salary toward the cost of their own annuities as well as those of their surviving spouses and other dependants. They also contribute a further 1% of salary to help pay for indexing the pensions to the cost of living. Pension indexing is provided for by the *Supplementary Retirement Benefits Act* (R.S.C. 1985, c. S-24).

The constitutional authority of Parliament to compel reasonable contributions by judges toward their annuities, as well as the legality of the differential in contribution rates which is based on date of appointment to the bench, were settled by the Supreme Court of Canada in the *Beauregard* decision.[6]

For more than a century following Confederation, and for many years prior to Confederation, annuities were paid to Canada's federally appointed judges who had retired, or who had resigned after suffering a permanent disabling infirmity. These annuities were paid out of the Consolidated Revenue Fund. Until the enactment of section 50 of the *Judges Act* in 1975, no contribution was required from the judges for the purpose of funding their annuities.

Reference has already been made to section 100 of the *Constitution Act, 1867*, under which Parliament is required to fix and provide the salaries, allowances and annuities for judges. By an Act which

[6] *Supra.*, chapter IV, footnote 3.

received Royal Assent on May 22, 1868, Parliament acted pursuant to section 100 of the *Constitution Act, 1867* by fixing and providing the salaries, allowances, annuities and other sums of money payable to the judiciary in the Provinces of Quebec, Ontario, Nova Scotia and New Brunswick, in accordance with the schedules annexed to that Act.

With reference to annuities, it was provided that in case any of the judges therein mentioned "has continued in the Office of Judge of one or more of the Superior Courts of Law or Equity or of the Court of Vice-Admiralty, in any of the said Provinces for fifteen years or upwards, or becomes afflicted with some permanent infirmity, disabling him from the due execution of his office, then, in case such Judge resigns his office, Her Majesty may, by letters patent under the Great Seal of Canada, reciting such period of office or permanent infirmity, grant unto such Chancellor, Vice-Chancellor or Judge an annuity equal to two-thirds of the salary annexed to the office he held at the time of his resignation, to commence immediately after his resignation, and to continue thenceforth during his natural life, and to be payable pro rata for any period less than a year, during such continuance, out of any unappropriated monies forming part of the Consolidated Revenue Fund of Canada."[7]

These salaries and annuities were to replace the salaries and retirement allowances which had been previously provided under Chapter 10 of the Consolidated Statutes of the former Province of Canada.

None of the enactments of the Parliament of Canada in pursuance of the provision of section 100 of the *Constitution Act, 1867*, in the years between 1868 and 1975, a period of 107 years, required any contribution from the judges for the purpose of funding their annuities. Neither was any contribution required from judges in respect of death benefits to spouses and dependent children.

Before March 1961, the judges of the superior and county courts were not subject to a compulsory retirement age. Compulsory retirement at age 75 was introduced by a constitutional amendment enacted by the United Kingdom Parliament on December 20, 1960, to take effect on March 1, 1961.[8] A decade later, the retirement age for county and district court judges was fixed at age 70 except for judges of the county and district courts who held office on October 6, 1971, for whom the retirement age remained at 75.

[7] S.C. 1868, c.33, s.2 and 3. See also R.S.C. 1886, c.138, s.14 and 15; S.C. 1875, c.11, s.7; S.C. 1903, c.29; and S.C. 1944-45, c.45.

[8] 9 Eliz. II, c.2 (U.K).

All this changed with the introduction on February 17, 1975, of the *Superannuation Amendment, 1975*, which received Royal Assent on December 20, 1975.[9] The introduction of section 50 into the *Judges Act* in 1975 provided an unprecedented change in the remuneration of Canada's superior and county court judges. It provided that judges who had been appointed prior to February 17, 1975, would be required to contribute 1½% of salary to the Consolidated Revenue Fund. Judges appointed after February 16, 1975, would be required to contribute 6% of salary to the Consolidated Revenue Fund and, in addition, ½% to the Supplementary Retirement Benefits Account (to help pay for indexing the annuities to the cost of living), to be increased in January 1977 to 1%, making the total contribution for these judges 7% of salary.

By a letter from the then Minister of Justice dated February 17, 1975, judges then in office were informed that their contributions of 1½% were "in respect of the improved annuities for widowed spouses and other dependents". The letter also indicated that "with respect to a person appointed to judicial office after to-day" the annual contribution towards the annuities that may be paid subsequently to the judge as well as to his dependents would be fixed at 6½%, to rise to 7% on January 1, 1977.

This development has been the subject of criticism in the reports of two previous advisory committees and one Triennial Commission appointed by the Minister of Justice. In fact, the issue of judicial contributions toward the cost of annuities has been studied by every committee and commission appointed subsequent to the 1975 amendments to the *Judges Act*. The Dorfman Committee (1978), the de Grandpré Committee (1981) and the Lang Commission (1983) recommended either reducing (Dorfman and Lang) or eliminating (de Grandpré) contributions. The Guthrie Commission (1986) recommended that judicial contributions remain at their present levels.

We agree with the recommendation of the de Grandpré Committee that judicial contributions toward the cost of annuities, survivors' benefits and the indexing of annuities be eliminated, and in doing so we subcribe to the reasons given by that Committee.

We note that the effect of the 1975 change was to engender a disruption in the morale of the judges and disharmony between what was perceived by many as two categories of judges. Judges who carried the same workload and often occupied adjoining offices suddenly found

[9] S.C. 1974-75-76, c.81, s.100, amending the *Judges Act* by adding thereto the new section 29.1 (now section 50).

that the net salaries which they received were no longer the same. This malaise continues today, only now the difference in annual contributions is over $7300. As the Dorfman Committee stated at page 31 of its report:

> "The Committee is troubled by the effects of the amendments to the Judges Act in 1975, which required contributions to the Consolidated Revenue Fund from those appointed after the 16th day of February, 1975, of six per cent of total salary, and from those appointed prior to the 17th day of February, 1975, of one and one-half per cent of total salary. The amendment had the effect of reducing the salaries granted to judges and did so unevenly. The disparities thus created in the net income of judges presiding in the same courts has had a disquieting effect on a number of judges...".

In a letter dated December 20, 1979 (see Appendix "C"), the Minister of Justice at the time, Senator Jacques Flynn, advised the judges that the Government had earlier taken the decision to introduce on December 17, 1979, amendments to the *Judges Act* which would have implemented the recommendations of the Dorfman Committee. He expressed regret, however, that the dissolution of Parliament had intervened to prevent the implementation of that decision.

The de Grandpré Committee, at pages 14 and 15 of its report, stated that:

> "... it has resulted in two classes of judges, but for remuneration purposes alone. It is clear that these judges will frequently be doing not only the same *kind* of work, but indeed, the *same* work, hearing the same case. Their powers, prerogatives and status are identical. Until 1975, the compensation conditions of judges at the same level of court were identical. Now it is clear that on an appeal heard by a panel of three judges, one or two may be receiving 5.5% less in net compensation because they were more recently appointed and therefore contribute 7%, rather than 1.5%. Surely, judicial compensation should be on a footing of equal pay for equal work. Furthermore, this resulting differential has been destructive of morale."

The Lang Commission also referred to the disruptive nature of the uneven contributions required from judges based on the date of appointment to the bench. At page 9 of its report, the Lang Commission stated:

> "The Commission views judges' annuities as an important part of their total compensation. We do not consider the issue of contribu-

tions to annuities as in any way affecting the independence of the judiciary. As has been the conclusion of previous advisory committees, however, we consider a long-standing differential between judges doing the same work to be inappropriate, and as leading to the creation of two classes of judges."

We agree with the above noted comments from the Dorfman, de Grandpré and Lang reports. We would also emphasize that even the Guthrie Commission, which recommended maintenance of the *status quo* in so far as judicial contributions are concerned, predicated that recommendation on the totality of its recommendations being adopted, which they were not.

We believe that a further effect of the introduction in 1975 of judicial contributions toward the cost of annuities was that it detracted from the non-contributory annuity conditions which, before 1975, had served as an attractive inducement to accomplished and experienced lawyers to forego the most lucrative years of private practice and accept appointment to the bench.

In providing life-long security, the non-contributory annuity was a reasonable trade-off for a lawyer whose income from practice was virtually always higher than the salary of a judge. The value of the annuity as an inducement to judicial office was substantially reduced by the imposition of contributions.

The judges were never compensated for the loss of the contribution-free annuity benefit. It should not be thought that the increases in judicial salaries which took effect in 1975 had the effect of offsetting in part the requirement of deductions for the cost of annuities. The salary level for judges had been seriously eroded by inflation during the period from 1971 to 1975, and the salary increase to $53,000 in 1975 merely coincided almost exactly with that which would have resulted from adjusting the 1971 salary by the change in the Consumer Price Index. The result of the deduction for the cost of annuities, therefore, was to build into the salary structure a reduction of 1½% for the pre-1975 judges and 7% for those appointed after February 16, 1975, thereby reducing salaries below the level (as adjusted by the annual percentage change in the Industrial Aggregate Index) that had been accepted in 1975 as fair in order to allow for inflation since 1971.

There are further compelling reasons why judges' annuities should be non-contributory. These reasons lie in the nature of judicial annuities, which do not derive from a funded pension plan.

Judges in Canada, like their counterparts in other jurisdictions with the traditions of the English commmon law, are generally appointed from about the mid-point and beyond in their legal careers from those lawyers who have established reputations for professional ability (see Appendix "D"). They are not career judges, unlike the case in many civil law jurisdictions, and they do not serve in the office for a period long enough to provide, by their contributions, for a funded pension. Essentially, the size of annuities for judges and their surviving spouses does not depend upon length of service or the total contributions made by a judge. These contributions do not vest, and they are not and cannot be directed into a funded pool designed to pay for judicial annuities.

It is clear that the attributes of the payments made to retired judges or surviving spouses are more in the nature of annuities than pensions. As such, treating or even conceiving of these payments as pensions merely clouds the issue of responsibility for contributing to them. It follows that judicial annuities cannot and should not be equated with the pension plans of employees in the public and private sectors, and these differences would remove any valid reason for delaying the improvements in judges' annuities recommended by this report on the basis of the need to consider broader reforms of public service pension arrangements.

It might be noted that historically, federal Public Service pension plans have been contributory from at least as early as 1870 whereas judges, as we have seen, enjoyed non-contributory annuities until 1975. This historical difference is eminently reasonable and justifiable on the basis of the unique status of judges in our society and their position of independence from the other branches of government.

The Commission has also considered, within the context of contributions to judges' and survivors' annuities, the matter of contributions toward the cost of supplementary retirement benefits, commonly referred to as the indexing feature of annuities. Like the de Grandpré Committee, this Commission believes that the full package of retirement security benefits should be non-contributory and that as a matter of consistency, judges should not contribute towards the supplementary retirement benefits. We note that judges and the Governor General, alone out of all the groups whose pensions were indexed under the *Supplementary Retirement Benefits Act*, were not required to contribute towards indexing of annuities when the new benefit was introduced in 1970. Judges appointed prior to February 17, 1975, still do not contribute towards the cost of indexing yet they continue to be entitled to the indexing benefit. So the distinction between judges and other groups who have the indexing benefit under the *Supplementary Retirement Benefits Act* already exists.

A further reason why the Commission feels it is reasonable at this time to remove the requirement that judges contribute toward the cost of annuities is that upon the enactment and coming into force of Bill C-52, which comprises amendments to the *Income Tax Act* introduced in the House of Commons on December 13, 1989, judges would lose all but $600 of their tax deductible "contribution room" toward a Registered Retirement Savings Plan (R.R.S.P.). Judges are currently entitled to contribute toward an R.R.S.P., and deduct for income tax purposes, up to the limit applicable to self-employed taxpayers (currently $7,500, and expected to increase to $15,500 by 1995) and they have had this right since 1978. Pursuant to the proposed subsection 8308(9) of the Regulations under the new *Income Tax Act* amendments, the deductibility of their R.R.S.P. contribution would be limited to $600 a year.

There are a number of reasons why an R.R.S.P. has been attractive to a judge. The most important reason is to supplement the annuity of a surviving spouse of a judge who dies in office (where the annuity is one-third of the judge's salary) or to supplement the annuity of a surviving spouse on the death of a retired judge (where the annuity is reduced by 50%). The deductibility and flexibility in amount of the R.R.S.P. contribution is also a positive factor in attracting qualified lawyers to the bench.

For the individual judge who is now contributing to an R.R.S.P., the implementation of the Bill C-52 tax proposals would mean the virtual elimination of a benefit heretofore available to judges — the right to accumulate tax deferred benefits to supplement their annuities and the reduced annuities of their surviving spouses. We feel that the elimination of judicial contributions toward annuities would help to compensate judges for the imminent loss of almost all of their long-standing entitlement to tax deductible R.R.S.P. contributions.

The imposition of judicial contributions in 1975, which was contrary to the traditions of the common law judiciary, also sets our federally appointed judges apart from their counterparts in the United Kingdom, the United States and Australia, whose annuities are contribution free.

For all of these reasons, the Commission is of the view that the restoration of non-contributory annuities is correct from the point of view of pensions policy; as a matter of history and tradition; and from the unique perspective of judicial compensation, recruitment and retention, with respect to which it would serve as an inducement for lawyers to accept appointment to the bench and for serving judges to delay their retirement and continue to provide public service.

With regard to this latter point, delaying judicial retirement, we would point out that some judges who are entitled to resign with a full annuity of two-thirds of salary, but have not yet reached the mandatory retirement age of 75, continue to serve for a number of years, often until they reach age 75. (This service beyond initial pension entitlement is frequently undertaken as a supernumerary judge.) There is currently no provision in the *Judges Act* removing the obligation of these judges to continue to contribute toward the cost of their annuities, at the rate of either 7% or 1½% of salary, notwithstanding that they have reached the age and completed the service required to qualify for a full annuity. These judges receive no additional pension benefit for their continuing contributions, apart from the marginally higher annuities they will eventually receive when they do retire on two-thirds of their indexed salary.

The Commission **recommends that judicial contributions toward the cost of annuities, survivors' benefits and the indexing of annuities be eliminated**. We do not recommend the reimbursement to judges of the pension contributions heretofore paid.

B. "Rule of Eighty"

The "Rule of Eighty" is a measure that balances age and years of service in determining retirement eligibility. The *Judges Act* presently adopts the "Rule of Eighty" to a limited extent. A judge who has attained the age of 65 years and has continued in judicial office for at least fifteen years is eligible to retire, or elect supernumerary status. A judge who has attained the age of 70 years and has held office for at least ten years is entitled to elect supernumerary status (but not to retire).

The Guthrie Commission recommended that the "Rule of Eighty" be extended to permit retirement at full pension, but not the election of supernumerary status, 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. The Joint Committee on Judicial Benefits and the Standing Committee of the Canadian Bar Association both suggested that this Committee extend the recommendation of the Guthrie Commission to include the election of supernumerary status.

We do not agree with the recommendation of the Guthrie Commission or with the submissions made to us with respect to the "Rule of Eighty". We accept that the present law was premised on the expectation of the appointment of the more senior members of the bar

and does not readily take into account those who accept an appointment to the bench in the early forties or younger. However, we view that expectation to be eminently reasonable and well-founded.

Furthermore, the young lawyer who applies for an appointment to the bench is mindful of the expectation, and the requirement, to serve until age 65 in order to be eligible for an annuity or election of supernumerary status. We feel that 65 years should remain as the age threshold for these benefits, and with the minimum service requirement of fifteen years, together reflect the important premise that a lawyer who accepts judicial appointment does so with the expectation that he or she is accepting a lifetime commitment. In addition, we would be opposed to a judge serving more than ten years on supernumerary status.

We therefore **recommend that the combination of 65 years of age and 15 years of service on the bench remain as the eligibility criteria for a judge's annuity or election to serve as a supernumerary judge, and that election of supernumerary status continue to be permitted at 70 years of age following 10 years of service.**

C. Annuities Granted to Surviving Spouses

Subsection 44(1) 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 subsection 44(2) 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 half of the amount of the retired judge's annuity. Both these types of survivor's annuities are indexed pursuant to the provisions of the *Supplementary Retirement Benefits Act.*

We feel, as did the Guthrie Commission, that survivors' benefits under the *Judges Act* should better reflect current values of survivors' benefits provided by many private pension plans and by federal and provincial pension benefits and standards legislation. We therefore **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 an annuity, be entitled to an annuity equal to 60% (instead of one-half) of the amount of the retired judge's annuity 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 annuities upon the coming into force of the necessary amendments to the *Judges Act.*

D. Return of Contributions toward Annuities

The *Judges Act* (at subsections 51(1), (2) and (3)) and the *Supplementary Retirement Benefits Act* (at section 6) provide for the return of a judge's contributions toward annuities in specified circumstances. Pursuant to subsection 51(4) of the *Judges Act*, interest is payable upon the return of contributions made under that Act, at the rate of 4% compounded annually.

Like the Guthrie Commission, we believe this rate is unfair and quite often unrealistic. Therefore, 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".**[10] 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.

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 extending the existing supernumerary scheme to members of the Supreme Court would create very real problems and would undoubtedly prove to be inappropriate. While to do so would make additional judges available to the Court, the finality of its decisions might be undermined to the extent they were made by supernumerary rather than "full" members of the Court. In addition, supernumerary status might upset the collegiality of the nine-member Court.

In view of the immense workload and heavy responsibility which are inherent in membership on the Supreme Court of Canada, a number of options have been advanced over the years which would inject additional flexibility into the retirement provisions of the *Judges Act* as they apply to members of the Supreme Court. The Guthrie Commission recommended a special provision for Supreme Court judges, given their ineligibility for supernumerary status. That Commission recommended that a Supreme Court judge who reached age 70, with at least ten years on the Court, be entitled to retire at 90% of salary until age 75, at which time the annuity would reduce to the standard two-thirds of salary.

We are not persuaded that the Guthrie Commission recommendation is necessarily the preferred means of dealing with the fact that Supreme Court judges cannot elect supernumerary status; accordingly, we do not recommend it at this time.

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

F. Guaranteed Annuity Option

The Guthrie Commission recommended that a retiring judge be given the one-time option of receiving an actuarially reduced annuity for a ten-year guaranteed period. The recommendation was designed to mitigate the harshness of the consequences resulting from the death, shortly after commencing retirement, of a former judge. As matters now stand, the retirement annuity to which the deceased retiree would have been entitled would be halved (or reduced by 40% if our recommendation in Item C above is implemented) in the hands of the surviving spouse, with the former judge having received very little of what otherwise would have been payable over the years.

We agree with the Guthrie Commission that it would be desirable to proceed with a guaranteed annuity option for retired judges. 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, the surviving spouse's annuity would be reduced to 50% (or 60% pursuant to our recommendation in Item C above) of the amount of the initial (actuarially reduced) annuity. The initial annuity amount would continue for a ten-year period in favour of the surviving spouse, eligible children or the estate, as the case may be. We note that there would be no additional cost for an option of this kind.

G. Indexation of Annuities

Judicial annuities, including those of surviving spouses and eligible children, are indexed pursuant to, and in accordance with a complex formula set out in, the *Supplementary Retirement Benefits Act*. That Act also applies to pensioners from many branches and groups of the public service, as well as to retired Members of Parliament, Lieutenant Governors and Governors General. The Act is administered by the President of the Treasury Board.

The Guthrie Commission recommended that the provisions for indexing judicial annuities should be transferred to the *Judges Act* from the *Supplementary Retirement Benefits Act*. We do not agree. We feel that the constitutional requirement for Parliament to fix and provide the "pensions" of judges, in so far as that obligation bears upon the indexation of annuities, is met regardless of whether indexing of judicial annuities is provided for by the *Supplementary Retirement Benefits Act* or by the *Judges Act*. The principle of indexing as it applies to judicial annuities is no more secure, or vulnerable to modification for that matter, in the one Act as in the other. We also note that the Standing

Committee on Justice and Solicitor General, which examined the report of the Guthrie Commission after its tabling in Parliament in 1987, did not accept the recommendation to transfer the judicial annuity indexing provisions to the *Judges Act*.

XI. FORMER CHIEF JUSTICES SERVING AS SUPERNUMERARY OR PUISNE JUDGES

The *Judges Act* provides at subsections 29(4) and 30(4) that a chief justice or chief judge, or an associate chief, who elects supernumerary status is entitled to receive the salary of a puisne judge during his or her supernumerary service. Subsections 31(4) and 32(4) provide that a chief justice or chief judge, or an associate chief, who has served in that position for at least five years and who reverts to the status of a puisne judge is also entitled to receive the salary of a puisne judge following the reversion. It has been suggested to this Commission that a former chief justice or chief judge who has elected to serve as a supernumerary judge or as a puisne judge should continue to receive the salary of a chief justice or chief judge. We do not agree. We feel that the salary should match the office, and the duties, then being performed.

We note that when these former chief justices or chief judges retire, pursuant to subsections 43(1) and (2) their annuities are based on the salaries then in effect of a chief justice or chief judge. This makes eminent sense because, by virtue of their having served as chiefs, they have earned the higher annuities.

XII. TAXATION OF NEW JUDGES

When a lawyer in the private practice of law is appointed to the bench, he or she is likely to be faced with an unusually large income tax burden in the year of appointment. This considerable tax burden results from the combination of professional income earned during the fiscal year prior to the appointment, taxable capital gains and recaptured capital cost allowance on assets deemed disposed of and taxable capital gains on the disposition of the partnership interest. In addition, earnings from the last fiscal year-end to the date of appointment ("stub period earnings"), unbilled work in progress and the 1971 accounts receivable reserve (if any) would also have to be included in taxable income.

It might be noted that lawyers appointed to the bench are, generally speaking, professionals of some standing in the legal community who are at or near the peak of their earning powers. As such, the aforementioned amounts are likely to represent substantial taxable items which must be added to the judicial salary itself. This results in an unusually high taxable income for that individual in the year of appointment and places the great proportion of that taxable income within the highest marginal tax bracket.

The tax situation confronting judges upon appointment used to be even more onerous. Section 24.1 of the *Income Tax Act*, enacted in 1984 following the Lang Commission report, provides some relief by way of permitting a newly appointed judge to defer the reporting of a portion of his or her income from the final year of practice until the year following the appointment to the bench. In other words, section 24.1 permits the tax burden arising in the year of appointment to the bench to be spread over that and the following taxation year.

Notwithstanding section 24.1, the lawyer considering an appointment may still be hesitant due to an unavoidable and extensive tax indebtedness in the first year or two on the bench if the offer of an appointment is accepted. In our view, an essential element in recruiting the best qualified lawyers to the bench is a comprehensive financial package which not only includes attractive salaries and benefits, but also avoids imposing financial or tax disincentives to accepting judicial appointment. We therefore **recommend that discussions between the Department of Justice and the Department of Finance continue with a view to alleviating the tax burden on newly appointed judges.**

XIII. CONCLUSION

The Triennial Commission review process was instituted by Parliament to reduce the factor of partisan politics in the determination and adjustment of judicial compensation and to reinforce the principle of judicial independence. Delay in implementing or substantial disregard of the recommendations of a Triennial Commission threatens the integrity of the review process and considerably reduces its effectiveness. For that to happen would be contrary to both the intentions of Parliament and the public interest.

XIV. SUMMARY OF RECOMMENDATIONS

1. That the Minister of the day promptly inform Parliament, following the tabling of the reports of this and subsequent Triennial Commissions, as to what action the Government proposes to take with regard to their individual recommendations or, if necessary, indicate promptly the Government's disagreement with any of such recommendations (Chapter III).

2. That whenever legislation to implement Triennial Commission recommendations is introduced in Parliament, the Government should proceed to ensure its quick passage (Chapter III).

3. The recommended levels of salary as of April 1, 1989, are as follows (Chapter IV):

   - **Judges, Tax Court of Canada, Federal Court of Canada and Superior Courts— $142,000**
   - **Chief Justices (Judge) and Associate Chief Justices (Judge), Tax Court of Canada, Federal Court of Canada and Superior Courts— $155,300**
   - **Judges, Supreme Court of Canada— $168,600**
   - **Chief Justice of Canada— $182,100**

4. That the salaries of judges and chief judges of the county and district courts be increased to the salary levels of judges and chief justices of the superior courts. The result, effective April 1, 1989, should be (Chapter V):

   - **Judges, county and district courts— $142,000**
   - **Chief Judges and Associate Chief Judges, county and district courts— $155,300**

5. That the annual representational allowance be increased to $15,000 for the Chief Justice of Canada, to $10,000 for the Chief Justice of the Federal Court of Canada and the Chief Justice of each province, and to $8,000 for each other chief justice, chief judge, senior judge or judge presently entitled to receive it (Chapter VIII).

6. That the *Judges Act* be amended to authorize the Minister of Justice of Canada to approve the payment of additional amounts as representational allowance in any given year (Chapter VIII).

7. That the annual conference allowance for the Supreme Court of Canada be increased to $1,500 per judge and the annual allowance for all other courts be increased to $750 per judge with a minimum of $7,500 per court (Chapter IX).

8. That judicial contributions toward the cost of annuities, survivors' benefits and the indexing of annuities be eliminated (Chapter X, Item A).

9. That the combination of 65 years of age and 15 years of service on the bench remain as the eligibility criteria for a judge's annuity or election to serve as a supernumerary judge, and that election of supernumerary status continue to be permitted at 70 years of age following 10 years of service (Chapter X, Item B).

10. 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 (Chapter X, Item C).

11. That the surviving spouse of a retired judge who dies while in receipt of an annuity, be entitled to an annuity equal to 60% (instead of one-half) of the amount of the retired judge's annuity at the time of death (Chapter X, Item C).

12. 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" (Chapter X, Item D).

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

14. That discussions between the Department of Justice and the Department of Finance continue with a view to alleviating the tax burden on newly appointed judges (Chapter XII).

All of which is respectfully submitted this 5th day of March, 1990.

E. Jacques Courtois, Q.C., Chairman

Laura Legge, Q.C.

David B. Orsborn

APPENDIX "A"

Commission on Judges' Salaries and Benefits

CANADA

OTTAWA, K1A 1E3

Commission sur le traitement et les avantages des juges

1989 COMMISSION ON JUDGES' SALARIES AND BENEFITS

NOTICE

This Commission was appointed on September 30, 1989 by the Minister of Justice and Attorney General of Canada, pursuant to section 26 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 December 31, 1989, 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 December 31, 1989 of the party's desire to appear at an oral hearing. A party filing a written submission need not request to appear at an oral hearing.

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

1989 Commission on Judges'
Salaries and Benefits,
110 O'Connor Street
Room 1114
Ottawa, Ontario
K1A 1E3

E. Jacques Courtois, Q.C.
Chairman

Commission on Judges' Salaries and Benefits

CANADA

Commission sur le traitement et les avantages des juges

OTTAWA, K1A 1E3

COMMISSION DE 1989 SUR LE TRAITEMENT ET LES AVANTAGES DES JUGES

AVIS

La Commission de 1989 sur le traitement et les avantages des juges a été instituée le 30 septembre 1989 par le ministre de la Justice et procureur général du Canada, en application de l'article 26 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 ainsi que 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 31 décembre 1989. 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 31 décembre 1989 du souhait de présenter des observations orales. Il convient de noter que le dépôt de documents écrits n'oblige nullement à présenter les observations orales.

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

Commission de 1989 sur le
traitement et les avantages
des juges
110, rue O'Connor
Bureau 1114
Ottawa (Ontario)
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Le président de la
Commission

E. Jacques Courtois, 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. The Honourable Judge Stephen Borins (District Court of Ontario).

3. The Honourable Judge Marie Corbett (District Court of Ontario).

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

5. The Law Society of Alberta (Peter Freeman, Q.C., Secretary).

6. The Law Society of British Columbia (R. Paul Beckmann, Q.C., Treasurer).

7. The Nova Scotia Barristers' Society (Bruce T. MacIntosh, President).

8. Le Barreau du Québec (André Gauthier, Bâtonnier).

9. The Honourable Margaret Joe, Minister of Justice of the Yukon Territory.

10. Terry Billings, Hartland, New Brunswick.

11. James Thachuk, Barrhead, Alberta.

APPENDIX "C"

Minister of Justice and Attorney General of Canada

Ministre de la Justice et procureur général du Canada

December 20, 1979.

I am writing to inform you of the decision that the Government had reached on amendments to the *Judges Act* that were planned to be introduced in Parliament on Monday, December 17th. However, as you know, the dissolution of Parliament prevented this from being done. Nevertheless, I wanted you to be aware of the recommendations that the Government was about to make to Parliament for salary increases for all judges and to improve the overall compensation package provided for them and their dependants.

The Government had agreed on salary increases that would have been in line with those recommended in the *Dorfman Report on Judicial Compensation and Other Related Matters*, to be effective April 1, 1979 and again on April 1, 1980. It was also decided to rationalize the salary structure by removing the additional salary for "extra-judicial services" in subsection 20(1) of the Act and adding that amount to the basic judicial salary. I think you will agree that this would be a much more straightforward way of recording judicial salaries.

A further decision was to provide for each judge a new accountable allowance of up to $1,000 a year for expenses required for the fit and proper execution of the office of judge. This would be to ensure that the necessary expenditures for robes, books and the like are not borne by judges personally, but would be met out of specific funds provided by Parliament for this purpose. The recommendations made by the Dorfman Committee regarding conference expenses, representational allowances and an increase in the allowance for the judges in the Northwest Territories and the Yukon Territory were also adopted by the Government.

On the matter of a salary review mechanism for judicial salaries, the Government directed a comprehensive study of this issue, with the aim of legislation before April, 1981, to implement an effective method of reviewing judicial salaries, in keeping with the provisions of the *BNA*

Act and the independence of the judiciary, without having continually to resort to the legislative process.

The Government also directed the Minister of Finance to study the transitional income-tax problems frequently experienced by new appointees to the bench and others who leave self-employment or a profession for salaried office or employment, in order to develop a comprehensive approach to a rational and equitable solution to the problem so clearly outlined in the Dorfman Report.

The final issue of real significance in the Government's decisions related to annuities. The Government wished to ensure that the minimum annuity to be received by the spouse of a deceased judge would not be less than $13,900. This base figure would have been "indexed", and was adopted as being the group average received by all such spouses as of October 1, 1979.

There is finally the matter of contributions towards annuities. The Government decided to seek the abolition of the requirement that some judges contribute towards the cost of their basic annuities, while others contribute only towards annuities for their dependants. The Government's decision was that the abolition of basic contributions would be retroactive to the date of introduction in 1975 and the present system of contributions would be replaced by a uniform contribution, to be paid by all federally-appointed judges, for the "indexed" aspect of annuities, that is, the Supplementary Retirement Benefit. That contribution would be at the standard rate, now 1%, although it is expected that an increase in the contribution would be required before too long. The result of this decision would have been a refund of the excess contributions paid heretofore, with interest.

It is my view that this proposed overall package of improvements in judicial compensation would be most adequate, having regard to the need for financial restraint, and I am truly sorry that we have been unable to secure its enactment at this time.

Yours sincerely,

Jacques Flynn

Ministre de la Justice et procureur général du Canada | Minister of Justice and Attorney General of Canada

Le 20 décembre 1979

Monsieur le juge,

La présente a pour but de vous faire part des décisions prises par le gouvernement ayant trait aux amendements à la *Loi sur les juges* qui devaient être introduits au Parlement, lundi le 17 décembre. Toutefois, comme vous le savez, la dissolution du Parlement a empêché ceci d'être fait. Néanmoins, je voulais que vous preniez connaissance des recommandations que le gouvernement était sur le point de faire au Parlement pour augmenter le traitement de tous les juges et améliorer les avantages prévus pour eux et les personnes à leur charge.

Le gouvernement avait approuvé des augmentations de traitement qui auraient été conformes aux recommandations du *Rapport Dorfman sur la rémunération des juges et autres questions connexes.* Celles-ci seraient entrées en vigueur en deux étapes, soit le 1er avril 1979 et le 1er avril 1980. Il avait aussi été décidé de rationaliser la structure du traitement des juges en retranchant le traitement supplémentaire pour «services extrajudiciaires» visé au paragraphe 20(1) de la *Loi sur les juges* et en ajoutant ce montant au traitement de base. Je crois que vous conviendrez que ceci serait une façon plus juste de comptabiliser le traitement des juges.

En plus, la décision avait été prise d'accorder à chaque juge une nouvelle indemnité annuelle d'au plus 1 000 $, dont il serait tenu de rendre compte, en contrepartie des frais accessoires à la bonne exécution de ses fonctions. Cette mesure aurait visé à assurer que les juges n'auraient pas à payer eux-mêmes certaines dépenses entraînées par leur charge, comme par exemple l'achat de toges et de livres, ces dépenses devant être acquittées à même les fonds fournis par le Parlement. Les recommandations du Comité Dorfman sur les frais de représentation, les frais de déplacement pour assister à des conférences et l'indemnité de vie chère pour les juges des Territoires du Nord-Ouest et du Territoire du Yukon avaient aussi été adoptées par le gouvernement.

Le gouvernement a demandé qu'une étude en profondeur soit faite sur la possibilité de mettre en place un mécanisme de révision du traitement des juges en vue d'une législation qui serait prête avant avril 1981. Notre but était de mettre au point une loi efficace portant sur la révision du traitement des juges, qui aurait été conforme aux dispositions de l'A.A.N.B. et au principe de l'indépendance de la magistrature, sans avoir à faire continuellement appel au processus législatif.

Le gouvernement avait en outre donné instruction au ministre des Finances d'étudier les problèmes d'ordre fiscal auxquels font souvent face les nouveaux juges aussi bien que les personnes quittant la pratique privée ou leur profession pour accepter une charge ou un emploi rémunéré. Cette étude aurait permis d'apporter au problème si clairement exposé dans le rapport Dorfman une solution rationnelle et équitable.

La dernière question importante qui fut l'objet des décisions du gouvernement fut celle qui a trait à la pension. Le gouvernement tenait à s'assurer que la pension minimale versée au conjoint d'un juge décédé ne serait pas inférieure à 13 900 $. Ce chiffre de base aurait été «indexé». Ce montant fut adopté comme étant la moyenne des pensions reçues par les veuves, en date du 1er octobre 1979.

Pour terminer, j'en viens à la question des contributions des juges à leur pension. Le gouvernement avait décidé d'abroger la disposition portant que certains juges doivent participer à leur pension de base alors que d'autres ne contribuent qu'à la pension payable aux personnes dont ils ont la charge. Ainsi, il avait été décidé que l'abolition des contributions de base serait rétroactive à la date de leur entrée en vigueur en 1975, et que le présent système de participation serait remplacé par une contribution uniforme qu'auraient versé tous les juges nommés par le gouvernement fédéral relativement à l'«indexation» de leur pension, c'est-à-dire en ce qui concerne la prestation de retraite supplémentaire. Cette contribution aurait été au même taux de un pour cent qui est présentement versé par les autres personnes quoiqu'une augmentation du tarif de contribution est à prévoir.

En conséquence, les juges auraient reçu un remboursement des cotisations qu'ils ont versées en trop jusqu'à maintenant, avec intérêt.

J'estime que dans l'ensemble ces améliorations proposées pour la rémunération des juges auraient été très satisfaisantes, compte tenu des restrictions budgétaires auxquelles nous sommes tous soumis. Je suis navré que nous n'ayions pu obtenir l'adoption des ces propositions en ce moment.

Veuillez agréer l'expression de mes sentiments les meilleurs,

Jacques Flynn

APPENDIX "D"

AVERAGE AGE OF JUDICIAL APPOINTEES ON ASSUMING OFFICE

1970	—	47	**1980**	—	50
1971	—	48	**1981**	—	50
1972	—	47	**1982**	—	51
1973	—	49	**1983**	—	49
1974	—	50	**1984**	—	51
1975	—	48	**1985**	—	52
1976	—	50	**1986**	—	49
1977	—	47	**1987**	—	50
1978	—	49	**1988**	—	52
1979	—	50	**1989**	—	48

Source: Commissioner for Federal Judicial Affairs.