Department of Justice Canada
Ministère de la Justice Canada

REPORT AND RECOMMENDATIONS OF THE 1995 COMMISSION ON JUDGES' SALARIES AND BENEFITS

September 30, 1996

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 1995 Commission on Judges' Salaries and Benefits, appointed on September 30, 1995, 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 Legal Affairs.

The Minister of Justice and
Attorney General of Canada

Allan Rock

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I. Introduction

The undersigned were appointed pursuant to section 26 of the *Judges Act*, the Triennial Review Commission, to enquire into the salaries and benefits of Her Majesty's judges and to make recommendations to the Minister of Justice to be laid before Parliament in accordance with the statutory arrangement. We were appointed on the 6th day of October, 1995, and are the fifth such Commission since the institution was created in 1981.

Subsequent to our appointment, Bill C2 was introduced in Parliament extending the mandate of this and succeeding Commissions from 6 to 12 months. We were specifically invited at the time of our appointment to give particular consideration to problems associated with the process by which Triennial Commission Reports are received and ultimately tabled in Parliament and the extent to which the Constitutional responsibility of Parliament to fix and provide judicial salaries, allowances, and pensions is facilitated by the process. Our inquiry has confirmed that there is much legitimate cause for concern about the Triennial Review process and a very serious question as to whether it is, in practice, serving the system.

To the extent that the Triennial Commission's inquiry is intended to facilitate the discharge of Parliament's obligation pursuant to section 100 of the *Constitution Act, 1867*, there are germane and serious questions as to whether the process is functioning as intended. By the delivery of this Report, we invite the Government to address this aspect of the question as a matter of first priority in the interest of maintaining the integrity of the system for the future.

During the process of discharging our mandate and in the course of gathering the requisite information we have, not unexpectedly, been most impressed with the dignity and dedication of the members of the various courts who addressed us on their own behalf and on behalf of their colleagues. We are of the view that Canadians are well served by a committed, independent and impartial judiciary. In this respect, we enjoy the benefits of

an extraordinary resource which must be nurtured and supported in our own collective interest and the interest of those who follow.

II. Summary of Recommendations

1. That section 26(3) of the *Judges Act* be amended to require that the Minister, after a fixed period of time (three months), shall cause the Report of the Triennial Commission to be tabled in the House of Commons, together with the Government's response to the Report and a Government Bill incorporating those matters requiring legislative change as part of the process of implementing the same; both the Response and the Bill to be filed within a fixed number of sitting days (30 days) after the expiry of the initial period noted above.

2. That commencing April 1, 1997, the Government introduce an appropriately phased upward adjustment in judicial salaries such as to ensure that the erosion of the salary base caused by the elimination of statutory indexing is effectively corrected.

3. That retirement at full pension be permitted when a judge has served on the Bench for a minimum of 15 years and the sum of age and years of service equals at least 80.

4. That, in addition to the existing retirement provisions and our recommendation concerning the Rule of 80, judges of the Supreme Court of Canada be permitted to retire with a full pension after serving a minimum of ten years on the Court.

5. That provision be made in the *Judges Act* for a surviving spouse's annuity to be paid, in legally appropriate circumstances, to a common-law spouse.

6. That provision be made in the *Judges Act* to enable a retired judge who marries after retirement to provide for joint and survivor benefits.

7. That section 51(4)(b) of the *Judges Act* be amended to provide that interest be

payable upon the return of all pension contributions in respect of the 1996 contribution year, and each contribution year that is subsequent to 1996, calculated at the rates prescribed by the Income Tax Regulations, and compounded annually.

8. That the government paid life insurance coverage for judges be brought more closely into line with that provided to Deputy Ministers.

9. That section 54(1) of the *Judges Act* be amended to authorize Chief Justices to approve leaves of absence of up to six months, including maternity/parental leave and study leave.

III. The Review Process

A. INTRODUCTION

Section 26 of the *Judges Act* requires the Minister of Justice of Canada to appoint a Commission every third year "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 Commissioners are required within twelve months of their appointment to submit a report to the Minister of Justice "containing such recommendations as they consider appropriate." The Minister is required by the Act to "cause the report to be laid before Parliament not later than the tenth sitting day of Parliament after the Minister receives it."

A reader of the past four Triennial Review Commission reports will note that the issue of process is the first item dealt with in every case. Successive Commissions have stressed that the process is flawed by reason of the failure of governments to act with reasonable dispatch to introduce and enact legislation in response to the recommendations of Triennial Commissions. Bill C-50, which died on the Order Paper, is the sole piece of legislation introduced in Parliament since the third Commission was held in 1989.

The Minister of Justice has recognized that there are serious problems with the present system. In an address to the Canadian Judicial Council in March 1994, he noted:

> **"...I regard it as unacceptable that two triennial commission reports have been received and not yet acted upon, that Bill C-50 died on the Order Paper, and that a third triennial commission exercise will soon be upon us. I know, I can sense strongly, that things are reaching the point where the very legitimacy of the system itself is in question, where confidence of judges is being seriously undermined. But there are implications for the morale of judges, for frayed relations with Government, and it is made all the worse and all the more damaging because of the very few ways that judges have for speaking out. There is a perception that I know is growing that the system which was designed to be non-political and above the fray is not working. This is where I come in."**

The Minister has specifically mandated this Commission through our terms of reference to include:

> **"...recommendations for improvements to the process by which judicial compensation is established."**

In his letter of August 1995 appointing each of us as Commissioners, he drew our attention to this specific responsibility:

> **"As the attached terms of reference indicate, I would like the Commission to deal with the issue of the process for establishing judicial compensation and to recommend any changes that could improve the process."**

What follows is our response to this aspect of our mandate.

B. THE PROCESS AND ITS REFORM

It has been repeatedly noted by past Triennial Review Commissions, and by students of the subject, that the matter of establishing judicial remuneration in a parliamentary democracy has much to do with the separation of powers in general, and the independence of the judiciary, in particular. Western democracies rooted in English constitutional tradition have been at pains to ensure that judicial independence, which ensures accountability on the part of the executive branch of Government, is uncontaminated by uncertainty (and thus preoccupation) on the part of the judges with their economic security. Under our Constitution the obligation is upon Parliament to "fix and provide" the salaries and benefits of judges. It is implicit in this constitutional imperative that the process be undertaken in an environment in which judicial independence is enhanced and the consequences of dependency eliminated.

Each parliamentary democracy has its own method of achieving these goals. In Canada, prior to the establishment of the Triennial Review Commission, the process was both

unstructured and unsatisfactory. It was characterized by the judiciary, in a supplicant's role, petitioning the Government through the responsible minister, usually with the support of related institutions in the judicial process, including the Bar, urging the Government to petition Parliament to do what was necessary to fulfil its constitutional obligation with respect to economic security for the judges. The imperfections in the system, largely dictated by dependence upon the commitment and goodwill of the Minister gave rise, in 1981, to the passage of section 26 of the *Judges Act* establishing the institution of the Triennial Review Commission.

The purpose of the Commission was to ensure that, through the creation of a body which would be independent both of the judiciary and Government, Parliament would be presented with an objective and fair set of recommendations dictated by the public interest, having the effect of maintaining the independence of the judiciary while at the same time attracting those preeminently suited for judicial office. The theory was that, by way of such recommendations, emanating from regularly convened independent commissions, the process would be de-politicized and judicial independence would be thus maintained.

While the idea was sound, the underlying assumptions appear to have been naïve. The result has been a failure in practice to meet the desired objectives. Since the first Triennial, there have been four Commissions (Lang (1983), Guthrie (1986), Courtois (1989) and Crawford (1992)). In spite of extensive inquiries and exhaustive research in each case, recommendations as to the establishment of judicial salaries and other benefits have fallen almost totally upon deaf ears. The reasons for this state of affairs have been largely political.

Prior to the establishment of the present process, the dictates of section 100 of the *Constitution Act* have required successive Ministers, on a regular basis, to ensure that Governments discharge their constitutional responsibilities. Success has frequently been mixed. An unanticipated and unintended result of the establishment of the present Triennial process has been the insulation of Ministers from the otherwise pressing requirements of the Constitution with respect to salaries and benefits. Upon delivery of successive reports,

political debate in Committee has followed with governments behaving as though, "having caused the Report to be laid before Parliament," they were thereby absolved from their constitutional responsibilities. This situation represents not only an unexpected, but a highly undesirable, result of the establishment of the Triennial Review Commission model. What was seen as a positive step has in many ways proved to have been negative. In spite of thorough recommendations by successive Commissions, Parliament has failed, in a proactive sense, to fix judicial salaries and benefits for many years. Furthermore, successive reports have failed to generate any meaningful response from Government. The whole subject of judicial salaries and benefits has, in spite of the best intentions, been politicized. The present Commission has detected in its hearings and consultations a very definite impact on judicial morale caused almost entirely by the fruitlessness of the present process.

When the *Act* was amended to establish Triennial Review Commissions in 1981, judicial expectations were elevated, in large measure, by prognostications on the part of Government as to improvements in judicial affairs which would flow from the creation of an independent Commission. The then-Minister of Justice noted:

> **"But there comes a time when the inaction on the salaries of judges in inflationary period begins to have profound effects, not only on the morale of those sitting on the Bench *but also on the attractiveness of judicial appointment to the more highly qualified lawyers who we would like to see appointed to the Bench.* At some stage, subtly and slowly, no doubt, a failure to maintain judicial compensation in line to some degree with inflationary tendencies must come to affect the quality of our judiciary. I have no doubt about the correctness of that proposition and I venture to suggest that there is a real concern about judicial compensation that underlies section 100 of the *British North America Act.***
>
> **That section, which deals with the provision of salaries, allowances and pensions of the federally appointed judiciary, is unique. It is the sole section of the B.N.A. Act which casts an affirmative obligation on Parliament to enact legislation. In recent economic circumstances, this obligation serves to secure not only the independence of the judiciary, *but also requires Parliament to take action to mitigate the debilitating effects on the judiciary that flow from undue delay or default in securing legislation on judicial compensation.* Bill C-34 seeks to fulfil that constitutional responsibility and to improve the structure of compensation for the**

federally appointed judiciary.

...The Bill provides for the appointment of a commission made up of no more than five members which will be asked to examine every three years the adequacy of judicial compensation." [emphasis added]

In effect, what judicial appointees since 1981 were promised by the establishment of the Triennial Commission was an independent, rational, depoliticized procedure for the determination of their compensation. The perception abounds that what they got was an abdication by the Government of its constitutional responsibilities. Furthermore, the ramifications of the failure to fulfil this promise will be significant and detrimental if the shortcomings in the process are not soon rectified.

The problem is not simply that the report of the Triennial Review Commission is laid before Parliament as the *Judges Act* requires but that the Government has, by the process of referral, excused itself from responding to its recommendations in the clear and nonpartisan way that was promised. One could argue that the establishment of the Commission has created an imperative obligation on the Government to consider Commission reports and make recommendations to Parliament thereupon, apart altogether from the adoption of any of the specific recommendations contained in the report. Continued indifference on the part of Governments (and through such Governments successive Parliaments) to recommendations made by Review Commissions has undermined the system and the expectations which accompanied its creation in 1981. Not only has inaction on the part of the Government disheartened the judges, but of greater concern is the fact that it will undoubtedly have a negative effect, over the course of time, upon candidates for the judiciary best suited for judicial appointment, candidates who are required almost inevitably to make significant economic sacrifice in order to accept appointment. Judicial despondency, interestingly, is not attributable so much to Parliament's failure to accept the recommendations of successive Commissions as it is to the Government's failure to react to such recommendations in advance of general debate or, indeed, at all. Regrettably, it would appear, the appointment of successive Commissions has simply served to distance the

Government from the performance of its obligations when it was thought that it would ensure a prompt and practical response to Parliament's constitutional obligations.

If evidence of the failure of the present system were required, it would come directly from the history of the work of successive Commissions. In each case, Triennial Review Commissions have made recommendations for change in the process to overcome the same obstacles identified in this report. In every case, the recommendations for change have equally fallen upon deaf ears. The utterances of successive Commissions have become like trees falling in the forest. The Lang Commission (1983) recommended a negative resolution solution such as exists in several Australian states. The Guthrie Commission (1986) recommended mechanisms to ensure prompt adoption of acceptable recommendations by the Government. The Courtois Commission (1989) proposed setting a time limit within which Government ought to respond. The Crawford Commission (1992) recommended obliging the Government to introduce legislation within a specific time frame as a reaction to the Commission's recommendations. The fact that none of these were accepted, nor even commented upon by Government, is compelling evidence of institutional indifference to the statutory process and its shortcomings.

Your Commissioners make their own recommendations hereunder with respect to procedural and structural changes designed to convert the Triennial Review process from a peculiar anomaly to a practical instrument for change as was originally intended. Failing change, this section of the Report is intended to forewarn our successors that by their appointment they will become instruments in a process which, far from ensuring an independent and positive response to constitutional obligations, will, in all probability, have the opposite effect.

Presently, after the report is laid before Parliament by the Minister of Justice, it is referred to the Standing Committee on Justice and Legal Affairs which conducts its own review of Commission recommendations prior to the Government formulating its position. The consequences of this are that a process that was designed to be "depoliticized" is not. The Government, upon receipt of the Standing Committee's report on judicial salaries and

benefits, is left in an awkward situation when inclined to take a different view. This in turn has a negative impact on the prospect of the introduction of any constructive legislation. In order to overcome this situation, we have concluded that the *Judges Act* should be amended to require that within a fixed time frame, consideration by Parliament of the Commission's report should coincide with the introduction of a government bill incorporating desired changes to the salaries and benefits of the judges. We are advised that this proposal can be accommodated within the existing standing orders of the House of Commons (ref. Standing Order 32(5)). If a regime along these lines were created, the public in general, and the judiciary in particular, could be confident that Commission recommendations would be responded to by Government and those recommendations considered desirable, of which there are surely many examples in the past, would thereby, and promptly, be the subject of legislative change.

Your Commission has also considered the possibility of recommending even more substantive change. Several suggestions emerged during the Commission's inquiry process. That most frequently repeated was the adoption of the so-called "negative resolution regime" which has been adopted in certain jurisdictions, notably by the Government of New South Wales. Under this regime, the Commission's recommendations would be by statute considered binding upon Government and, through Government, Parliament unless Parliament adopted a form of "negative resolution" within a specified period of time. This approach has substantial appeal in that it appears to resolve the irksome issue of failure on the part of Governments and Parliaments to act on the recommendations of successive Commissions. On the other hand, there is a down side in the form of a risk that if a negative resolution process were adopted, reports of future Triennial Commissions might well, by the passage of a negative resolution, be discarded in their entirety. In the final analysis, and while the negative resolution approach has much to recommend it, it is the impression of your Commission that it is not likely that this model would be considered seriously by the Government. Accordingly, we confine ourselves to the more modest proposal outlined above.

If these or similar corrective measures are not introduced, the statutory scheme will collapse of its own weight with the attendant damage to the institution of the judiciary which can be expected to occur.

<u>It is therefore recommended that</u>: section 26(3) of the *Judges Act* be amended to require that the Minister, after a fixed period of time (three months), shall cause the Report of the Triennial Commission to be tabled in the House of Commons, together with the Government's response to the Report and a Government Bill incorporating those matters requiring legislative change as part of the process of implementing the same; both the Response and the Bill to be filed within a fixed number of sitting days (30 days) after the expiry of the initial period noted above.

IV. Judicial Salaries

The independence of the judiciary, the attractions of the Bench for highly qualified and experienced men and women, financial security and the preservation of the enviable standards of our Courts are all important features of the judicial component of our system of administration of justice in Canada. The *Constitution Act, 1867*, confers on Parliament the duty to fix and provide judicial salaries, allowances and pensions. The *Judges Act* prescribes the Triennial Commission review process, the statutory annual salary adjustment plans and, pursuant to Part I, the administration of the *Act* by the Commissioner for Federal Judicial Affairs. A properly functioning system requires a high level of synergy between these inter-dependent elements.

As a result of amendments to the *Judges Act* in 1975, the salary level of superior court puisne judges was brought to within 2% of the mid-point of the salary range of the most senior level (DM-3) of federal deputy ministers. As the Guthrie (Commission 1986) reported:

> **"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 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."**

At the present time the salaries of superior court puisne judges are $155,800 while the mid-point of the DM-3 salary range is $155,300 (there are currently nine deputy ministers at the DM-3 level which is the most senior level of federal public servant).

Triennial Commissions subsequent to the 1975 amendments to the *Judges Act* have endorsed this measure of equivalence, not as a precise measure of "value," but as one that appeared to them to:

> **"...reflect(s) what the market place expects to pay individuals of outstanding character and ability, which are attributes shared by**

deputy ministers and judges."

The Courtois Commission Report (1989)

Or, as stated in the Crawford Commission Report (1992):

> **"Rough parity of this nature between judges and top-level public servants finds support in the comparative salary figures from a number of other common law industrial democracies."**
>
> **The Crawford Commission Report** (1992)

A strong case can be made for the proposition that the comparison between DM-3's and judges' compensation is both imprecise and inappropriate. The Canadian Judicial Council and the Canadian Judges' Conference made extensive submissions in this connection. Your Commissioners choose not to focus on this aspect of the matter, but rather to address a far more significant aspect of judicial compensation, specifically the relationship between judicial income and income at the private Bar from which candidates for judicial office are largely drawn.

Section 25 of the *Judges Act* provides a statutory mechanism for the annual adjustment of judges salaries whereby they may be increased in accordance with the "Industrial Aggregate Index formula" to a maximum of 7%. However, salaries have been frozen since December 1992 and will remain so until March 31, 1997 as reflected in the *Public Sector Compensation Restraint Act.*

The provisions of s.25 of the *Judges Act* are reflective of much more than a mere indexing of judges' salaries. They are, more specifically, a statutory mechanism for ensuring that there will be, to the extent possible, a constant relationship, in terms of degree, between judges' salaries and the incomes of those members of the Bar most suited in experience and ability for appointment to the Bench. The importance of the maintenance of this constant cannot be overstated. It represents, in effect, a social contract between the state and the judiciary. By its statutory terms, the judges, who by acceptance of judicial office close the door, on a permanent basis, to any real prospect of a return to their previous lives at the

Bar, can at least be certain that their commitment in accepting a judicial appointment will not result over the years in a less favourable financial situation as between judicial service and practice at the Bar than that which prevailed at the moment of their appointment.

Seen in this light, the freezing of salaries, which has had the effect of neutralizing the operation of s.25 of the *Judges Act*, has, in the absence of corrective action, permanently altered the relationship described above. When the freeze is lifted, the section will have been inoperative for five years.

The judges in the Joint Brief noted, at page 39:

> **"It is accepted that as an aspect of judicial independence, judges must be financially secure. This can only be achieved if both the executive and legislative branches of Government respect the integrity of the provision of the *Judges Act*. It is indeed to be remembered that those provisions dealing with statutory indexation constituted an important part of the terms and conditions of appointment. It may be said that many judges would have refused an appointment to the Bench, had it not been for the security provided by the statutory indexation."**

Your Commission agrees with this submission.

What are the effects of the salary freeze? Over the four year period to April 1996, one year prior to the end of the freeze, judicial salaries, absent indexation, have been reduced by approximately 8%[1]. Furthermore, by reason of the failure of governments to introduce 1975 equivalency, notwithstanding recommendations of successive Triennial Commissions, judicial salaries have been further eroded. In terms of the clear intent to establish a

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[1] The percentage change for the Industrial Aggregate Index for the years 1993–1996 has been as follows:

to April 1, 1993	3.4%
to April 1, 1994	1.7%
to April 1, 1995	1.9%
to April 1, 1996	0.95%

Source: Office of the Commissioner for Federal Judicial Affairs

relationship between Bench and Bar, or even a relationship with DM-3's, the judiciary is in an accelerating backward slide. This has serious and troubling implications for the long term attraction of suitable candidates for office. Indeed, the removal of indexing has resulted in the anomalous situation in which judges retiring prior to the freeze in 1992 are enjoying a significantly higher annuity than that which can be expected for those who retire tomorrow.

Accordingly, your Commission, rather than engaging in an elaborate analysis of DM-3's and their comparability with judges, or indeed the available statistics with respect to earnings of candidates in the private sector at the Bar, chooses to focus on the most significant factor, the withdrawal of indexing. It is this government initiative which has been, and if not checked will continue to be, the most significant contributor to distancing judicial salaries from those of the practising Bar. Corrective action is clearly called for.

It is recommended that: commencing April 1, 1997, the Government introduce an appropriately phased upward adjustment in judicial salaries such as to ensure that the erosion of the salary base caused by the elimination of statutory indexing is effectively corrected.

V. Judicial Annuities

A. Rule of 80

There can be no doubt that the time has come for the Government to consider the need for some more contemporary form of retirement option for judges, such as the Rule of 80, the adoption of which is recommended in this report. This subject enjoys the highest priority in the view of the judiciary. Informed observers, including responsible members of the Bar, are unanimous in the view that the ability of ordinary mortals to function in the judicial mode is finite in terms of time. The judge's role is a unique one, as is the case with all fact-finders and dispute-resolvers. Their task, which is to sit, to listen and to decide, while sometimes appearing unremarkable, requires mental discipline of a kind which in most human beings has its limitations. Where the requisite mental discipline is lacking or exhausted, the result is, or can be, a tendency to undermine, in a serious way, public acceptance of judicial decision making in individual cases. Furthermore, in a changing world, there is a constant need for rejuvenation of the Bench by younger persons expressive of current views. Renewal must be systemic so as to ensure that the profile of the Bench is expressive of contemporary societal values. The result is, as has been recognized by successive Governments, that the appointments process can no longer be seen as a mere matter of finding suitable candidates for office who are at the end of their careers.

There is also the important question of gender balance. Your Commissioners were offered very strong representations on this subject from women judges, many of whom have been appointed at much younger ages. Under the present system, by reason of their age at appointment, they are being required to continue in office for what may, in some cases, be unacceptably lengthy periods of time before retirement. The notion, implicit in the present *Act*, that a period of 15 years service represents an appropriate judicial lifespan may be inapplicable for many women judges who are appointed at younger ages. We were provided with statistics which would suggest that well over 80% of women judges presently

sitting were appointed before age 50 and almost 25% before age 40. It is a matter of real concern on the part of many women judges and, no doubt, candidates for judicial office, that unreasonably long periods of service may be required before retirement with any pension is possible. This concern may seriously affect the already difficult task of attracting qualified women candidates from a pool whose numbers have yet to grow to that of male lawyers. Gender and age ranges have already broadened but the terms of the annuity are focused largely at males appointed to the Bench at or after age 50.

The Crawford Commission (1992) described the Rule of 80 retirement option:

> **"...as particularly appropriate in view of the changing age profile of judges. By permitting retirement with a full pension at earlier ages, in a flexible and fair manner which recognizes the unique service conditions and requirements of the judiciary, the Rule of 80 would not be inconsistent with pension reform standards."**

Early retirement plans are increasingly common in society. In many ways they are even more defensible in the case of the judiciary. As noted above, such plans could contribute to the overall quality and efficiency of the Bench by affording long-serving judges, who may be suffering from "burn-out," the opportunity to retire at a time when their judicial energy may have been sapped, thereby opening the way for renewal with younger, more representative judges many of whom will, logically, be women.

It should also be noted that judicial responsibilities are not amenable to constructive change during a judge's tenure on the Bench. The institution affords no opportunity to assume an alternative role as a basis for maintaining one's usefulness such as is the case in almost all other institutional and business settings.

Furthermore, as pointed out elsewhere, a serious concern which was raised before the Crawford Commission was the impact of the changes in the RRSP arrangements disentitling the judiciary to plan for retirement by investments in RRSPs. In particular, women members of the Bench who are generally appointed at a younger age, make the point that during their

most productive years, and as young judges, they are no longer able to contribute to RRSPs even though they cannot be certain that they will be able to continue to occupy the Bench to age 65. The present regime deprives them of the opportunity to make arrangements to forestall disaster in the event of premature retirement. It is argued, with some force, that the decision on the part of the Government to withdraw the right to invest in RRSPs was, in all probability, made without consideration of the impact on younger, and in most cases, female appointees.

No data was presented in the Crawford Commission report (1992) to illustrate the magnitude of this "loss." In their submission to the present Commission, the judges presented a report from William M. Mercer Limited, a consulting actuarial firm (tabled with the Commission on May 15, 1996), which provided estimates of this loss. Prior to 1992, judges could contribute to a personal RRSP in the maximum allowable amount, but are now restricted to a $1,000 annual maximum. The differences in tax savings and investment accumulations taken together or separately over a 30 year period were obviously quite staggering whatever actuarial assumptions are utilized. Mercers estimated that the difference in accumulation over 30 years before tax was in the amount of $1.7 million but the loss due to the elimination of tax benefits on an after tax basis was in the neighbourhood of $437,000.

We have sympathy with these concerns, nonetheless, we are of the view that if the Government reacts rapidly and introduces the Rule of 80, much of the negative impact of the RRSP changes, particularly on younger judges, will be minimized.

These are some of the reasons why modified criteria for retirement, in general, and the Rule of 80 in particular, have been considered and offered broad support for a number of years. In assessing the Rule of 80 itself and how it might be implemented, it was noted that various formulae might be utilized to achieve the combination of years of service and age totalling 80. The judges, and the Canadian Bar Association, in their submissions argued that the Rule of 80 should not be encumbered by a minimum age or service requirement. Others argue that a judge should be required to serve a minimum of 15 years on the Bench in order to

qualify for retirement under the Rule of 80. This would be consistent with the prescribed minimum of 15 years of service for retirement at age 65 pursuant to section 42 of the *Judges Act*.

Interestingly, present incumbents who are somewhat older and largely male would argue that an unencumbered Rule of 80 is desirable in order to ensure that judges who are appointed after age 50 can retire at age 65. Women judges, on the other hand, and in particular younger women, have argued that shorter minimum periods than the traditional 15 years in the present legislation ought to be considered having in mind the situation confronted by women who are appointed in the early years of their careers. It has been argued on behalf of younger women judges that fairness is better served with more weighting for length of service and less for age.

There have been extensive discussions with successive Ministers and other interested groups with respect to the Rule of 80 and support for its adoption is virtually universal. In addition, studies have been conducted by the Superintendent of Financial Institutions Canada. It has been concluded that the cost associated with the introduction of this scheme would be negligible. More specifically, it was noted that:

> **"...the increase in the pension plan's accrued liability and normal cost caused by the Rule of 80 would in practice be almost entirely offset by the payroll decrease arising from the removal of partially-productive judges from the bench."**
>
> **Correspondence from L.M. Cornelis (OSFIC) to H. Sandell (Department of Justice) dated June 16, 1995**

We are of the view that on balance a Rule of 80 with a 15 year period of service best meets the requirements of the public interest in the present profile and state of maturity of the Bench. For most younger women, a 15 year minimum will still enable those who have reached their limit of useful service to retire at an appropriate age.

The adoption of this reform was eloquently defended and recommended in the Crawford

Report. We cannot but believe that the failure of the Government to implement this constructive recommendation was more likely due to process deficiencies referred to elsewhere in this report than to substantive reservations or objections.

<u>It is recommended that</u>: retirement at full pension be permitted when a judge has served on the Bench for a minimum of 15 years and the sum of age and years of service equals at least 80.

B. PENSION CONTRIBUTIONS BY JUDGES WHO ARE ELIGIBLE TO RETIRE ON FULL PENSION

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. Judges are eligible to proceed to pension at age 65 if they have accumulated 15 years service. The majority (about 75%) do not retire but opt to continue as supernumerary judges at full pay until they leave office either before or at the mandatory retirement age of 75. All judges are expected to make pension contributions at the rate of 7% of salary until they take their retirement.

The requirement to continue pension contributions after eligibility for retirement is the source of much disquiet on the part of the judiciary. The Conference and the Council consider this requirement a levy for which there is no corresponding benefit; inconsistent with other pension plans which provide for discontinuance of contributions when pensions are paid up and actuarially inappropriate in requiring continued contributions beyond the age of eligibility for retirement. .Essentially it is argued that contributions beyond retirement entitlement provide no corresponding benefit.

It is important to remember in weighing these considerations that there is a marked difference between the pension scheme for public servants and the annuity for the judiciary. The pension of a judge is two-thirds of the final years' salary following 15 years service. On

the other hand, a career public servant must accumulate 35 years of pensionable service and reach the age of 55 in order to receive the maximum pension. Quantum is based on 70% of the individual's average salary for the best six consecutive years. A Deputy Minister who qualifies as a career public servant is entitled to an additional 2% pension income per year for each year served as a Deputy Minister to a maximum of ten years. Differences between pension and annuities are important.

Information derived from the Office of the Superintendent of Financial Institutions Canada in December 1995 demonstrates that the sum of the annual pension contributions of 7% made by judges to retirement are modest relative to the final costs borne by the Crown. For example, the cost to provide an annuity to a judge at age 75 with 20 years of service would require an annual contribution by the state of 36.9% of his or her salary. Based upon the judge's contributions of 7%, it follows that the Crown bears the remainder of the burden which, in this example, would be 29.9%. This is illustrative of the distinction between an annuity and a funded pension.

We therefore agree with the conclusions of the Crawford Commission (1992) which supported the continuation of judges' contributions toward the cost of their pensions until those who are entitled to retire, do so. Any perception of inequitable treatment is surely tempered by the benefits afforded the annuitant under the present arrangement.

C. Retirement for Judges of the Supreme Court of Canada

Successive Triennial Commissions have all recommended a special regime for the retirement of judges of the Supreme Court of Canada. Notwithstanding the retirement regime which we are recommending by the adoption of the Rule of 80, we are also persuaded that judges of the Supreme Court of Canada ought to be permitted to retire with full annuity after 10 years service.

Judicial service on the Supreme Court of Canada, is of course, unique, not so much in terms of the prestige associated with the office, as with the depth of responsibility and onerous workload which is peculiar to the Court of last resort in our system. Review of cases emanating from the highest appellate courts in the provinces and the Federal Court of Appeal is an enormous burden. The criteria for leave to appeal to the Court defines this responsibility. Only those cases involving issues of national importance reach the Court, thus each case that the members of the Court consider is a matter of special significance. There are no routine matters on the Court's calendar.

It is well to reflect on the capacity of individuals, other than the most extraordinary, to cope with the relentless intellectual self-discipline associated with the work of the Court. There are surely limits as to the capacity of the judges to maintain the requisite focus over many years. Furthermore, the responsibilities associated with the *Charter* militate in favour of an atmosphere of renewal on the Court. All of these circumstances lead to the conclusion that, insofar as the Supreme Court is concerned, in particular circumstances, 10 years of service may be all that can reasonably be expected. Thus, this period ought to represent the threshold for retirement. Flexibility at this level is clearly in the public interest.

It is recommended that: in addition to the existing retirement provisions and our recommendation concerning the Rule of 80, judges of the Supreme Court of Canada be permitted to retire with a full pension after serving a minimum of ten years on the Court.

D. SPOUSAL SURVIVOR BENEFITS

Pursuant to section 44 of the *Judges Act*, the surviving spouse of a deceased judge is provided with an annuity equal to one-third of the judge's salary and the surviving spouse of a retired judge, who was in receipt of an annuity at the time of death, is provided with an annuity equal to half of the amount of the retired judge's annuity. These annuities are

indexed pursuant to the provisions of the *Supplementary Retirement Benefits Act.*

There has been a long-standing effort on the part of the judiciary to have each of these annuities increased to 40% and 60% respectively. These higher values, it is argued, would better reflect present federal, provincial, and many private sector pension benefits. However, judges' annuities, unlike the provisions of other pension plans, are based on the salary for the last year in office and not on the average salary for the best six years of employment. There are many features of the benefits currently in place which are equal to, if not better than, those afforded most others.

We are advised that the cost to implement this reform would be in the neighbourhood of $2 million over five years escalating accordingly thereafter. Changes along these lines have been recommended by previous Triennial Commissions. We consider that while these increases may be warranted, the reestablishment of an appropriate salary base for the judiciary is of greater importance. If priorities are being set, we would locate the reestablishment of this salary base of the highest level of importance and, accordingly, for the present, would recommend that there be no change in spousal survivor benefits.

E. COMMON-LAW SPOUSES

Section 44 of the *Judges Act* does not currently contemplate that the surviving spouse's annuity will be paid to common-law spouses. This is no longer a reflection of contemporary values. Furthermore, this deficiency is inconsistent with most provincial family law regimes. In addition, we have been advised that it is inconsistent with public sector policy. Reform is clearly indicated. Presumably, statutory change would be no more elaborate than definitional amendment to include a common-law spouse in the definition of spouse in the *Act* with entitlement to be dictated by conventional family law principles.

<u>It is recommended that</u>: provision be made in the *Judges Act* for a surviving spouse's annuity to be paid, in legally appropriate circumstances, to a common-law spouse.

F. JOINT AND SURVIVOR PENSIONS

There is currently no provision in the *Judges Act* to allow a retired judge who marries after retirement to elect to have his or her annuity paid on a joint-and-survivor basis. Again, this is an issue about which there is no contention from any quarter. Statutory reform is clearly indicated.

<u>It is recommended that</u>: provision be made in the *Judges Act* to enable a retired judge who marries after retirement to provide for joint and survivor benefits.

G. INTEREST ON JUDGES' PENSION CONTRIBUTIONS

Pursuant to section 51 of the *Judges Act* and section 6 of the *Supplementary Retirement Benefits Act*, under certain conditions a judge's contributions toward his or her pension (annuity) may be returned to the judge upon retirement from the Bench where payment of the annuity is not otherwise triggered. In the event interest is payable, it is presently calculated at the rate of 4% compounded annually. This is the rate applicable under the circumstances for the return of pension contributions for all federal public servants.

Your Commissioners fail to appreciate the logic in utilizing a fixed rate of interest when calculating the amount of money to be returned to an individual who has made contributions to a pension plan and is about to withdraw those contributions. As the judges pointed out, this arrangement is "manifestly inequitable." Both the Guthrie Commission (1986) and the Courtois Commission (1989) recommended the adoption of "...a rate to be varied as and when necessary to reflect the 'prescribed rates'." The Government of the day

recognized the necessity for this reform by including in Bill C-50 a provision which would have amended section 51 of the *Judges Act* to allow for a rate "prescribed by the Income Tax Regulations." This method of dealing with the anomaly in question is fair and appropriate and we would recommend its adoption.

It is therefore recommended that: section 51(4)(b) of the *Judges Act* be amended to provide that interest be payable upon the return of all pension contributions in respect of the 1996 contribution year, and each contribution year that is subsequent to 1996, calculated at the rates prescribed by the Income Tax Regulations, and compounded annually.

VI. Insurance

This is a non-statutory benefit. Federally appointed judges are covered for life insurance under the Public Service Management Insurance Plan in contrast to Deputy Ministers who are covered by what is described as an "Executive" plan. Essentially, Deputy Ministers receive basic coverage at twice their salaries, while judges only qualify for insurance equal to one- times their salaries. Supplementary insurance coverage at the individual's cost and at one-times salary is available to both groups.

It is the position of the judiciary that they should have equivalent insurance coverage, particularly if the utilization of Deputy Ministers as the comparable group for judges is to continue. If the judges were afforded equivalency of coverage, they would have coverage at two times salary in the form of group term life insurance with coverage to continue until retirement without reduction. Furthermore, the judiciary argues that this enhanced coverage is of even greater importance bearing in mind the removal of the right to make full RRSP contributions, in addition to what are described as the "relatively low" survivor benefits under the *Judges Act*.

These suggestions have much to recommend them. Economics aside, there is no reason why judges should be treated less favourably than the comparator group in question. We are advised that government officials have recognized this disparity and that a great deal of work has been undertaken to ascertain what might be done to address this situation. One of the difficulties is that the age profile of the judges is so vastly different from that of the five thousand or so senior public servants who are covered by the "Executive" plan, that it is, in the first place, not possible to incorporate them into this group, and in the second, a very expensive proposition to create an independent plan to provide like coverage. For example, because of the age profile of senior public servants, insurance for Deputy Ministers costs approximately 25 cents per month per $1000 units of insurance coverage. By reason of their present age profile, comparable insurance for the judges is estimated to be about

four times as costly. However, implementation of the Rule of 80 and gender balancing will both serve to normalize the age of active judges over a relatively short time period.

Notwithstanding these cost considerations, it is clearly inequitable to continue in the present mode indefinitely. It is premature to make a detailed recommendation presently, but we are of the view that even if it must be a staged program based on manageable age criteria, efforts should be made to offer equivalent life insurance coverage for the judiciary.

It is recommended that: the government paid life insurance coverage for judges be brought more closely into line with that provided to Deputy Ministers.

VII. Leaves of Absence

Under section 54 of the *Judges Act,* leaves of absence in excess of 30 days require the approval of the Governor in Council. The Crawford Commission (1992) recommended that in every Superior or Appellate Court the Chief Justice be permitted to grant maternity or parental leave of up to six months. This is essentially a "management" issue and delegation of authority ought to have occurred long before this. There also appears to be an opportunity to broaden the scope of the study leave program and this we would encourage.

It is recommended that: section 54(1) of the *Judges Act* be amended to authorize Chief Justices to approve leaves of absence of up to six months, including maternity/parental leave and study leave.

VIII. Salary Differential Between Trial and Appellate Judges

As our report was in the final stages of preparation, a submission was received from the judges of the Court of Appeal of the Province of Quebec. In substance, the members of the Court urged the Commission to recommend that the existing system of remuneration for judges be fundamentally altered by striking salaries which would differentiate between those federally appointed judges who sit on Provincial Courts of Appeal and those who sit in the Trial Divisions. Higher pay for appellate judges, lower for trial judges. We are firmly of the view that the submission comes too late in the day for this Triennial Commission to address it. The notion of differential salaries requires very careful assessment. While some interesting points, in substance, in favour of the concept are advanced, a very persuasive case would have to be made to depart from the present regime which assumes that the burden of judicial office, while different in nature as between the trial and appellate levels of our courts, nonetheless requires an equivalent discipline and dedication on the part of the judges at both court levels. The cultural impact on the system in the event of such differentiation would have to be very carefully weighed. The submission, while welcome, simply came too late to be given the attention that this subject deserves.

IX. Conclusion

As has been noted by a succession of our predecessors, the Triennial Commission review process was instituted by Parliament to reduce the presence of political partisanship in the course of determining judicial salaries and benefits. To date, the process has been a failure. Your Commissioners are of the view that the principal reasons for this state of affairs are outlined in this Report. There is an opportunity, nonetheless, to rescue the statutory scheme and to restore it to the stature originally envisioned. The public interest in the effective administration of justice would be well served by modest, but meaningful, reform to achieve this objective.

All of which is respectfully submitted this 30th day of September 1996.

David W. Scott, Q.C.
Michel Vennat, Q.C.
Barbara Rae

Appendix A

Background

1. **Members:** Mr. David W. Scott, Q.C. (Chairperson)
Ms. Barbara Rae, Order of Canada
Maitre Michel Vennat, Q.C., c.r., Order of Canada

Executive Secretary: Charles G. Watt

2. **Terms of Reference**

The Commission shall, pursuant to s.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.

The Commission shall report to the Minister of Justice within six months of the Commission's appointment, with such recommendations as the commission considers appropriate, including recommendations for improvements to the process by which judicial compensation is established.

The same Commissioners will make a second report to the Minister by November 30, 1996, recommending specific changes that should be made when economic circumstances allow. The report would be given by the Minister to the Canadian Judicial Council and the Canadian Judges Conference, and made public.

In carrying out its mandate, the Commissioners should:

1. **Take into account:**
   - (a) **the principle of judicial independence, and in particular the constitutional requirement of financial security for judges**
   - (b) **the overall economic and fiscal situation, including the compensation freeze reflected in the *Public Sector Compensation Restraint Act***
   - (c) **comparative factors, including the relative compensation of judges in other jurisdictions, lawyers, persons paid out of public funds, and Canadians generally**
   - (d) **the need to attract strong candidates for judicial appointment.**

2. **Seek the views of judges and judicial organizations, the legal profession, and the Canadian public.**

NOTE: The mandate of the 1995 Commission was formally extended to September 30, 1996 with the enactment of Bill C-2 in March 1996. Subsection 26 (2) of the *Judges Act* was amended to provide that the report of this and all future Commissions shall be submitted to the Minister within 12 months of their appointment.

3. Meetings and Conference Calls

The Commission held meetings and/or telephone conference calls as follows:

December 6, 1995 – Toronto
January 10, 1996 – Ottawa
January 26, 1996 – telephone conference
February 12, 1996 – Toronto
May 15, 1996 – Ottawa
June 27, 1996 – Toronto
July 20, 1996 – telephone conference
August 13, 1996 – Calgary
September 5, 1996 – Toronto

4. Notice to the Public

The Commission published a Notice in newspapers across Canada, inviting written submissions and presentations at an oral hearing, in either official language, concerning matters within the Commission's terms of reference. Specific notices were 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 and a listing of the newspapers in which they were placed are reproduced at annex "A" to this Appendix.

5. Written Submissions and Public Hearing

Written submissions were received from the organizations, groups and individuals listed in Appendix "B". A public hearing took place on January 11, 1996, in Hearing Room Three, of the Canadian International Trade Tribunal, 333 Laurier Avenue West, Ottawa. The following organizations appeared before the Commission:

- the Canadian Judges' Conference and the Canadian Judicial Council[2]; and
- the Canadian Bar Association[3]

The Commission held two other meetings with delegates from the Conference and Council; Mr. Andy Watt of the Department of Justice also attended. These meetings were held in Ottawa and Toronto on May 15, and June 27, 1996 respectively. Additionally, the Commissioners met with Chief Justice C.A. Fraser and a group of women judges in Alberta on August 13, 1996.

6. Previous Committees and Commissions

The 1995 Commission on Judges' Salaries and Benefits is the eighth federal committee or commission established in recent years to inquire into and make recommendations to the Minister of Justice with respect to judicial compensation. It is the fifth Triennial Commission appointed pursuant to subsection 26(1) of the *Judges Act*.

For the Conference and Council: The Hon.Mr. Justice Guy Kroft, Chief Justice Constance Glube, The Hon. Mr. Justice Coulter Osborne, The Hon. Mr. Justice Douglas Lambert, The Hon. Madam Justice Susan Lang, L'hon.juge André Brossard, The Hon. Mr. Justice Stuart Leggatt and Chief Judge Jean-Claude Couture

For the Canadian Bar Association: Mr. Ronald Pink, Q.C., and Ms. Joan Berkovitch

7. Acknowledgments

The Commission wishes to thank Guy Goulard, Q.C., Commissioner for Federal Judicial Affairs (Ottawa), and members of his staff, in particular Denis Guay, Joan Lamoureux, Marie Burgher, and the Finance Office for their cooperation and support. We also thank Andy Watt, Senior General Counsel and Harold Sandell, Legal Counsel of the Department of Justice; L. M. Cornelis Office of the Superintendent Financial Institutions Canada; and Charles Watt who served as the Executive Secretary to the Commission.

Annex A

Notices to the Public

List of Newspapers

1. St. John's Evening Telegram
2. Charlottetown Guardian
3. La Voix Acadiene
4. Halifax Chronical-Herald
5. Le Courrier
6. Saint John Telegraph Journal
7. L'Acadie Nouvelle
8. Le Soleil
9. La Press
10. Montreal Gazette
11. Le Droit
12. Ottawa Citizen
13. The Globe and Mail
14. The Toronto Star
15. The Lawyers Weekly
16. Winnipeg Free Press
17. La Liberté
18. Regina Leader Post
19. Saskatoon Star-Phoenix
20. Journal L'Eau Vive
21. Calgary Herald
22. Edmonton Journal
23. Le Franco-Albertain
24. Vancouver Province
25. Le Soleil de Colombie
26. The Yellowknifer
27. Whitehorse Star

Commission on Judges' Salaries and Benefits

Commission sur le traitement et les avantages des juges

OTTAWA, K1A 1E3

1995 COMMISSION ON JUDGES' SALARIES AND BENEFITS

NOTICE

This Commission was appointed on September 30, 1995, 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 process by which judicial compensation is established.

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 20, 1995, in ten 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 8, 1995, 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.

David W. Scott, Q.C.
Chairman

1995 Commission on Judges'
Salaries and Benefits
Room 1114
110 O'Connor Street
Ottawa, Ontario
K1A 1E3

Commission on Judges' Salaries and Benefits

CANADA

OTTAWA, K1A 1E3

Commission sur le traitement et les avantages des juges

COMMISSION DE 1995 SUR LE TRAITEMENT ET LES AVANTAGES DES JUGES

AVIS

La Commission de 1995 sur le traitement et les avantages des juges a été instituée le 30 septembre 1995 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 incluant le processus d'établissement du traitement des juges 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 dix exemplaires au plus tard le 20 décembre 1995. 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 8 décembre 1995 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 1995 sur le
traitement et les avantages
des juges
110, rue O'Connor
Bureau 1114
Ottawa (Ontario)
K1A 1E3

Le président de la Commission

David W. Scott, c.r.

Appendix B

List of Submissions

1. The Canadian Bar Association
2. The Canadian Judges Conference
3. The Canadian Judicial Council
4. The Law Society of Alberta
5. The Law Society of British Columbia
6. The Law Society of Manitoba
7. The Ontario Superior Court Judges Association
8. The Hon. Edward D. Bayda, Chief Justice (Saskatchewan)
9. The Hon. Marie Corbett (Ontario)
10. The Hon. N.A. Drossos (British Columbia)
11. The Hon. C.A. Fraser, on her own behalf and on behalf of a group of women judges (Alberta)
12. The Hon. Elizabeth A. McFadyen (Alberta)
13. The Hon. Margaret J. Trussler (Alberta)
14. The Hon. Rosemary Vodrey, Minister of Justice and Attorney General (Manitoba)
15. Colin L. Campbell (Ontario)
16. Mr. W. Chapman (Prince Edward Island)
17. Mr. W. T. Metzger (Ontario)
18. Mr. John T. Nilson, Minister of Justice & Attorney General (Saskatchewan)
19. Mr. & Mrs. E. Toker (Manitoba)
20. Mr. R. Walker (Saskatchewan)