

## SUBMISSION TO THE JUDICIAL COMPENSATION AND BENEFITS COMMISSION

Section 75 of the *Judges Act* provides that the Registrar of the Supreme Court of Canada is the administrator of the *Act* for the judges of the Supreme Court of Canada. As such, I would like to make the following recommendations to the Commission:

1. amend s. 27(1) of the *Judges Act* (Incidental Allowance)
2. amend s. 27(6) and (7) of the *Judges Act* (Representational Allowance)
3. amend s. 28 of the *Judges Act* and amend s. 9 and 27 of the *Supreme Court Act* (Status of retiring Supreme Court of Canada judges)

### 1. Incidental Allowance

#### 1.1. Legislative History

- First introduced by S.C. 1980-81-82-83, c. 50 s. 20(1), the incidental allowance was set at \$1,000 per year for incidental expenditures actually incurred for the fit and proper execution of the office of a judge.
- By S.C. 1989, c. 8, the amount was increased to \$2,500 per year.

#### 1.2. Triennial Commissions

- **1979: the Dorfman Commission:** Under its proposal for “Compensation for Extra-Judicial Services and Incidental Expenditures”, the Commission recommended that “judges be given an allowance of \$1000 for expenditures on text books, law reports, court attire and other incidental expenditures that the fit and proper execution of their office as judges may require”. The Commission added that it should be tax exempt.
- **1983: the Lang Commission:** The Commission did not recommend any change to the incidental allowance. The categories of expenditures that were originally included, that is, "law books and periodicals, court attire, membership in legal and judicial organizations, and the like expenditures" had been broadened to other expenses not recoverable under any other provision of the *Judges Act* but related to the execution of judicial functions.
- **1986: the Guthrie Commission:** The Commission recommended that the allowance be increased to \$2,500 annually.

#### 1.3. Current Situation

The amount of the incidental allowance has not kept up with inflation (26,84% since 1989). Judges' needs have evolved over the years and while they must still acquire traditional tools such as books and maintain memberships in many organizations, they also need expensive electronic communication tools, such as personal computers, telephone line costs, software for research, access to data banks. From an administrative perspective, the management of the allowance is costly. The section prescribes that the reimbursement be given for expenses actually incurred. This requires the processing of numerous claims for small amounts each.

#### **1.4. Recommendation**

It is recommended

- that the allowance be readjusted by the inflation rate, which would bring it to \$3200;
- that the allowance be indexed annually using the formula established for judges' salaries (s. 25 of the *Judges Act*);
- that the allowance be paid as a yearly lump sum, accountable once a year by the judge's certification that the allowance compensated for the incidental expenditures that the fit and proper execution of the office of a judge may require.

## **2. Representational Allowance**

### **2.1 Legislative History**

- First introduced in the *Judges Act* by S.C. 1974-75-76, c. 48, under s. 20(4) and (5), the allowance for expenses incurred by a judge in the discharge of special extra-judicial obligations and responsibilities not otherwise reimbursed under the Act was set at a maximum of \$3,500 for the Chief Justice of Canada and did not include anything for the puisne judges. For the provincial Chief Justices and the Federal Court Chief Justice, the allowance was set at a maximum of \$2,500 and \$1,500 respectively.
- The *Judges Act* was amended by S.C. 76-77, c. 25, to grant an allowance of up to \$1,500 to the puisne judges of the Supreme Court of Canada under the same conditions.

- The section was repealed and replaced by S.C. 1980-81-82-83, c. 50. This new version clarified who was entitled to the allowance and increased the amount to \$5,000 for the Chief Justice of Canada and to \$2,500 for the puisne judges.
- The next amendment, R.S.C. 1985 (1st Supp), c. 50, added that under the representational allowance, reasonable expenses, incurred by the judge and the judge's spouse in discharge of extra-judicial obligations and responsibilities of the judge would be reimbursed to a maximum of \$10,000 per year for the Chief Justice of Canada and \$5,000 per year for the puisne judges of the Supreme Court of Canada.

## 2.2. Triennial Commissions

- **1979: the Dorfman Commission:** At page 28, under item C, Representational Allowance, it was recommended among other things that there be an adjustment to the amount of the allowance “in view of the rising costs of travel and accommodation and the enlarged extra-judicial obligations of such judges”. It was proposed that it be increased from \$3,500 to \$5,000 for the Chief Justice of Canada, and from \$ 1,500 to \$2,500 for the puisne judges.

Parliament acted upon these recommendations a few years later when it amended the *Judges Act* by S.C. 1980-81-82-83, c.50.

- **1983: the Lang Commission:** The Commission pointed to the inadequacy of the scale applied then (\$5,000 for the Chief Justice and \$2,500 for the puisne judges). It recommended that in place of a ceiling on representational allowances, actual expenses certified by the Chief Justice be reimbursed under this head and that guidelines be developed.
- **1989 : the Courtois Commission:** Under chapter VIII, Representational Allowance, the report captured the essence of the representational allowances. It noted that the amounts had not been adjusted since 1985 and that they “have become generally inadequate”. It recommended an increase to \$15,000 for the Chief Justice of Canada and to \$8,000 for the puisne judges. As well, it added that the Minister of Justice be authorized to approve the payment of additional amounts in any given year.

These recommendations, as well as a recommendation that a representational allowance equal to half the yearly amount be made available to a retired judge of the Supreme Court of Canada during the first six months of the retirement, were incorporated into Bill C-50,

tabled on December 12, 1991.

- **1993: the Crawford Commission:** In Chapter XIII, Judicial Allowances, the Commission noted that by the time Bill C-50 or its equivalent would be enacted, the allowances would be adequate. However, no such Bill was passed.
- **1995 : the Scott Commission:** The Report of the Scott Commission did not deal with this issue.

### 2.3. Current Situation

This brings us to the current situation in which existing allowances are blatantly inadequate to meet the needs of the members of the Supreme Court of Canada. What was said in the Courtois Commission is even more pressing 10 years later, i.e., higher visibility, increasing costs of travelling, and the sharp increase in the demands put on the members of the Court.

Further, the Supreme Court is considered as a model to be emulated by many courts the world over. Its judges are therefore called upon to participate in many activities both within and outside Canada. The reality is that Supreme Court judges play an important representational role for the whole of Canada in many goodwill activities. As well, they are called on more and more, primarily by accepting speaking engagements across the country, to communicate personally with Canadians who increasingly expect their public institutions to be visible. It is only fitting that the judges' spouses be able to assist them without incurring financial hardship, particularly for activities taking them far away, and which often assume quasi-diplomatic characteristics.

The increase in the price index (Industrial Aggregate) since 1985 (the last increase in the allowance) is 24.84%. If the allowances had been indexed, the 1985 allowance of \$10,000 would be \$14,814 and that of \$5,000 would now be \$7,407. Even then, this would not take into account the increased demand put on judges of the Supreme Court of Canada, the increase in the cost of air travel or unpredictable future increases. Representational allowances should reflect both the inflation rate and the increased demands put on judges.

## 2.4. Recommendations

It is recommended:

- that effective April 1, 2000, the representational allowance be as follows:

Chief Justice of Canada	\$22,500
Puisne Judges	\$15,000

- that the allowance be indexed annually using the formula established for judges' salaries ( s. 25 of the *Judges Act*).

## 3. Retirement of Supreme Court Judges

### 3.1 Legislative History

The *Supreme Court Act* provides that a judge who has resigned or ceased to hold office can, within six months of the resignation, participate in the judgement on appeals he or she has heard. The wording of the section, first enacted by S.C. 1923, c.58, s.27, has remained unchanged over the last sixty years even though practice has evolved. The current wording in the *Supreme Court Act* is unclear in the context of the other subparagraphs of the section and constitutes a legacy from processes no longer followed by the Court, such as the oral delivery of judgments in open court.

### 3.2. Triennial Commission

- **1992: the Crawford Commission:** In chapter VI, the Commission recommended that incidental and representational allowances be maintained for the retired judges of the Supreme Court of Canada. However it did not recommend that a retired judge receive his or her full salary for the six-month period.

### 3.3. Current Situation

Judges retire because they have reached the mandatory retirement age of 75, because they wish to retire earlier or for health reasons. After retirement, Supreme Court judges no longer sit on appeals, leave applications, or motions. However, they are called upon, for a six-month period, to participate in the decision-making process for appeals on which they sat. It is in the best interests of the litigants and of the Court to have the complete Bench which heard an appeal make the decision. In particular, this avoids potential gridlock

situations the Court could face with an even number of judges which could result in costly rehearings. Drafting, completing or contributing to decisions are essential and crucial tasks which impose a heavy workload on judges. Given the importance and complexity of the cases before the Court and considering the principle of collegiality, it cannot be envisaged that a judge who is approaching retirement should tailor his or her participation in hearings in order to have no reserved cases upon retiring. The flexibility the section provides is crucial to the proper administration of justice in the Supreme Court of Canada. However, the present system puts an unfair burden on retired judges who, while working under very tight deadlines and at a time where many external demands are put on them, receive only their pension and can no longer claim expenses under incidental or representational allowances.

### **3.4 Recommendations**

It is recommended

- that a retired judge of the Supreme Court of Canada be granted supernumerary status under the *Judges Act* for a maximum period of six months after the effective date of retirement for the sole purpose of participating in the decision-making process for reserved appeals on which he or she sat;
- that the Chief Justice certify that the retired judge will be working for a period of six months or less on the reserved appeals;
- that in the case of the Chief Justice, his or her own declaration grant him or her supernumerary status;
- that the representational and incidental allowances be proportionately granted to the retiring judge for the relevant period of time.

Respectfully,

Anne Roland  
Registrar

December 16, 1999