

CJC

Canadian Judicial Council

25
years

Annual
Report
1996 — 97

© Canadian Judicial Council

Catalogue Number JU10-1997

ISBN 0-662-63684-8

Canadian Judicial Council

Ottawa, Ontario

K1A 0W8

(613) 998-5182

(613) 998-8889 (facsimile)

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CHAIRMEN OF THE CANADIAN JUDICIAL COUNCIL

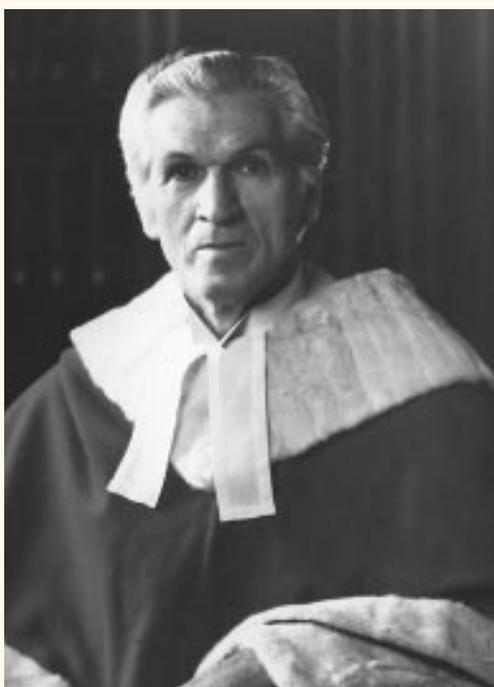
THE FIRST TWENTY-FIVE YEARS



The Right Honourable
Antonio Lamer,
P.C., C.J.C.
1990–



The Right Honourable
R.G. Brian Dickson,
P.C., C.J.C.
1984–1990



The Right Honourable
Bora Laskin,
P.C., C.J.C.
1973–1984



The Right Honourable
Gérald Fauteux,
P.C., C.J.C.
1971–1973

PREFACE

In a quarter of a century, most of those present when the Canadian Judicial Council came into being have passed on to lives beyond the judiciary. These founders of the Council were builders. They built well.

The Council, in its multiple activities, has become an increasingly important part of judicial life in Canada. Until almost a decade before the Council's creation, the chief justices of this country's superior courts had never met as a group. Most did not know each other except by name and reputation.

It is difficult to conceive there was such a time in our judicial life. Chief justices now meet regularly. The judges on their courts, through a myriad of activities, are increasingly a part of a national — and to some extent international — network for which the Council has been a focus. In terms of the Council itself, its members are brought together in more and more ways throughout the country — they meet in full plenary, in committees, in working groups and in ad hoc committees. They share ideas, concerns and working drafts by telephone, video-conference, fax and e-mail, not to mention old-fashioned "snail mail."

This is an institutional infrastructure that simply was not there 25 years ago. It has only matured fully in recent years as the importance of the Council's work has become more widely recognized, both among members of the public and within the judiciary itself.

But there is more than an institutional infrastructure here; there is also a superstructure of friendship, which is more than an acknowledgment of the mutual respect and admiration that characterizes the Council's membership. The reality is that the work of the judiciary, within the imperatives of law and precedent, is an intensely human undertaking requiring human qualities of a high order if it is to serve this

society, this country of laws, as it deserves to be served. Friendship allows the Council's members to debate and disagree in the atmosphere of civility that sustains the ongoing balancing of change and tradition that is the essence of a dynamic judiciary.

It is as well that this is the case. The problems and possibilities of today's judiciary could hardly have been conceived of 25 years ago except in barest outline. Devices such as the laptop computer and Internet access, now standard tools for many judges, were not even invented. Nor was there foresight of the challenges that might be associated with using these tools, in terms of the electronic protocols that might be involved or the computer classes that would become an essential aspect of ongoing judicial education. Nor was there recognition of the new resources that would be required to link the judiciary electronically.

It probably was not imagined how the Council by-laws and procedures would evolve, and what precedents would develop as the years passed. Yet, each time a serious complaint is made and considered, it invites an examination of the Council's processes to ensure that the way the complaint is treated is consistent with fairness to both complainant and judge but also with the independence of the judiciary that is the buttress of impartial justice.

Nor was it imagined how complex some of the broad issues would prove to be, even those identified when the Council was but a twinkle in a legislative drafter's eye. Among the issues of unexpected complexity has been the task of setting down the ethical principles that might serve to guide judges as they go about their daily lives and judicial work. Since 1994, a working group of the Council has sought to define these principles and, subject to the endorsement of the Council, set them down in words that might ultimately command the support of the judiciary and public alike.

The members of the group have worked with great diligence and have achieved great progress. It is not to diminish their effort in any way to say they have work still to do nor should it be a surprise how much time it takes to achieve consensus among nearly 1,000 judges who are independent in law and tradition but, even more, independent in spirit.

It is often difficult to see, except from the perspective of a quarter century, how much progress Canada's federally appointed judiciary has made, through the Council and other means, and how much the judiciary has contributed to the continued progress of this country. From the longer perspective, however, that progress is manifest. Through the work of the Council and, even more important, through the efforts of judges themselves, we have a stronger judiciary that is better able to meet growing and complex needs.

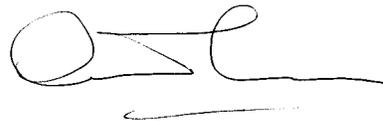
Against this progress, however, it is necessary to note that some nettlesome issues remain. In terms of the financial security of the judiciary — one of the most vital underpinnings of its judicial independence — the history of the last 25 years cannot be written in terms of unqualified success but can be written in terms of relative progress.

The *Judges Act* in 1971 included a provision that reflected a broad consensus (but not unanimity) that after a period when the compensation of judges had fallen behind, an increase in salary and benefits was necessary to maintain a judiciary able to be clear of concerns about financial security, and to continue to attract people of quality. That increase was provided. When similar circumstances arose a decade later, in 1981, the government of the day tried to restore the relative position of the judiciary through indexed salary increases and an independent commission to deal with other issues such as those associated with retirement. With the passing of another decade, in the

1990s, judges were asked to do their share to reduce government deficits and underwent salary freezes for five years. It is clear from the way financial issues affecting the judiciary have been addressed that the Government recognizes the need to correct the inequities that have been created. Indeed, the theory that maintaining the judiciary's relative financial position through processes independent of politics is now broadly, if not universally, accepted. While the practice remains to be perfected, there are grounds for optimism.

The work of the Council in this area and others, including judicial education and complaint procedures must, and will, continue. In doing so, we will build on the foundation built so well by the Council's founders and their successors since 1971.

As in each of the previous 25 years, a vital part of the Council's success is the result of the diligent work of my colleagues on the Council. I thank them and the staff of the Council for all they have done during a very challenging year. I can only assure them that the challenges ahead will be greater still.



The Right Honourable Antonio Lamer, P.C., C.J.C.
Chairman
Canadian Judicial Council
Spring 1998

THE CANADIAN JUDICIAL COUNCIL



Members of the Canadian Judicial Council at the September 1996 Annual Meeting in Halifax

Its birth had been somewhat difficult, its youth had known disquieting jolts at times, but the organism was now possessed of sufficient vitality to justify its adoption by the Legislature. . . . the foundations were laid for the organization of the Canadian Judicial Council which was to see the light of day on the 9th day of December, 1971.

— Remarks by The Honourable E.M. Culliton
Regina, March 20, 1981

GENERAL OVERVIEW

The Canadian Judicial Council was established in 1971. This report marks, therefore, the Council's 25th anniversary year. In that quarter century, the Council has evolved, grown and changed as the judiciary itself and the society it serves have changed.

Its statutory mandate, however, remains as it was established in the *Judges Act* (Appendix E) in 1971, and its objectives continue to be to “promote efficiency and uniformity, and to improve the judicial services” in superior courts, and, since 1983, the Tax Court of Canada.

In December 1971, when the first meeting of the Council was held, there was a membership of 22, who, because of their position, could attend. Not all did attend, the most notable exception being the then-Chief Justice of Canada, The Right Honourable Gerald Fauteux, who was concerned that his attendance might compromise him in his judicial function, should the Supreme Court of Canada be asked to sit on a case in which the Council's legislative authority was in question.

As a result of federal and provincial legislative and other changes, the Council now consists of 36 members — an increase of one member since 1995-96 with the addition of the Chief Justice of the Court Martial Appeal Court of Canada. The Council is regularly chaired by the Chief Justice of Canada and includes the chief justices and associate chief justices, chief judge and associate chief judge of all courts whose members are appointed by the federal government. In addition, the senior judges of the Supreme Court of Yukon Territory and the Supreme Court of the Northwest Territories share a seat, serving alternate two-year terms on the Council. The members serving during 1996-97 are listed in Appendix A. Past members are listed at Appendix C. As of March 31, 1997, the number of federally appointed judges totalled 989. In March 1972, the total was 447.

The breadth of the membership means that a Council member is able to share in the diverse judicial experiences of the whole country and become aware more quickly both of new ideas and emerging difficulties. This sharing of experience has been a consistent attraction of the Council through its existence, as it was for those attending the Council's precursor, the Conference of Chief Justices, which brought the country's chief justices together in the early 1960s for the first time.

Throughout its history, the Council's work has consistently fallen into four broad areas:

1. The continuing education of judges;
2. The handling of complaints against federally appointed judges;
3. The development of consensus among Council members on issues involving the administration of justice; and

4. The preparation of recommendations to the federal government, or advisory commissions, usually in conjunction with the Canadian Judges Conference, regarding judicial salaries and benefits.

The Council is required by statute to meet once a year. In the years since its inception, however, Council practice has evolved. Two meetings are now held each year, one in Ottawa in the spring, and the second outside Ottawa in the fall. The Council's autumn 1996 meeting was held in Halifax.

Much of the Council's work is carried on through committees, including ad hoc committees and working groups, which are established to deal with specific questions requiring concentrated effort and a considerable commitment of time on the part of members. The Council's response to the report of Dr. Martin Friedland was developed through such a working group, as is the continuing intensive work on developing a statement of ethical principles for judges.

Committee membership as of March 31, 1997, is found at Appendix B.

During 1996-97, the Council was served by an Executive Director, a legal officer and two support staff, all located at the Council's office in Ottawa. The expenditures for the year are set out in Appendix D.

COUNCIL MEMBERS' SEMINAR

The Council's practice since 1992, its 20th anniversary year, has been to hold a seminar for members in conjunction with the mid-year meeting in Ottawa. The March 1997 Seminar was focussed on Judges, Courts and Civil Justice Reform and drew heavily on the work of the Canadian Bar Association's (CBA) Systems of Civil Justice Task Force.

In introducing the seminar, Chief Justice Lamer, Chairman of the Council, said the subject matter was particularly timely not simply because of the work of the task force but because traditional approaches to civil justice in Canada have proven to be less than ideal for many litigants and reform is a matter of some priority.

The seminar, chaired by Professor Tom Cromwell of the Faculty of Law, Dalhousie University, included the following as participants:

Roberta Tish, a solicitor practising in London, England, who has been active in the reform of the civil justice process, particularly in the area of family law and legal aid, in England and through the International Bar Association;

Mr. Justice George Adams, of the Ontario Court of Justice (General Division), whose judicial career, following careers as an academic, writer, labour arbitrator and chair of a labour board, has had a special emphasis in the area of alternative dispute resolution;

Russell Lusk, QC, President of the Canadian Bar Association;

Eleanore Cronk, Chair of the CBA Systems of Civil Justice Task Force;

Associate Chief Justice Jeffrey J. Oliphant of the Court of Queen's Bench of Manitoba, and a member of the CBA Task Force Implementation Committee; and

Brian Crane, QC, Chair of the CBA Task Force Implementation Committee.

In the first session of the seminar, Ms. Tish provided context with a discussion of various reforms now under way as part of the "biggest shakeup to civil justice in English and Wales" and the problems that are arising in conjunction with these reforms, including questions of fees, costs and funding.

Mr. Justice Adams then described the critical role of the law and the courts in regulation and dispute resolution, as well as the interest courts and judges have taken in the settlement process. He noted, however, that there has been no public investment in the court facilities necessary to support negotiation, settlement and dispute resolution that is in any way commensurate with the priority placed on the settlement process. By comparison, he noted, the investment is "impressive" in provincial tribunals dealing with labour relations, landlord and tenant relations, workers' compensation and the like.

In the second session, Mr. Lusk set out the Canadian Bar Association's plans for making the Task Force's work known and for generating the government financial support necessary to implement the reforms proposed.

Ms. Cronk outlined the key themes of the CBA Task Force report and the complementary responsibilities of those who must necessarily be involved in reform of the processes of civil justice. These included the responsibility of the bar to ensure the competency of legal practitioners, the responsibility of governments to adequately fund and provide the administrative infrastructure to manage Canada's courts, and the responsibility of the judiciary to effectively manage and supervise the future court processes for dispute resolution.

Associate Chief Justice Oliphant described the need for public consultation to test the ideas and proposals of the judiciary, administration and legal profession against the perceptions, needs and wishes of those the civil justice system is intended to serve, and also to establish public confidence in that system.

Mr. Crane provided a brief overview of the implementation plan for the Task Force report, noting the main work will have to take place at the level of provincial courts, provincial bars and provincial governments but there will also be an increased need to monitor the programs being carried out in the provinces in the field of civil justice.

The broad common theme that has emerged, Mr. Crane said, is that the system of civil justice is shifting to a closer interface with the public, and the emphasis on mediation methods and other forms of alternative dispute resolution inevitably will bring judges and lawyers more directly into contact with the real interests of litigants. This underlines the need for the courts to provide more advice at the point where litigants enter the civil justice system, he said, and, in particular, the need for initiatives to assist unrepresented litigants, more of whom are appearing in every jurisdiction.

JUDICIAL EDUCATION

Chief Justice Gale had been very active since the 1967 meeting. Along with Chief Justices Wells and Challies he had met the Minister of Justice, Mr. Turner, and the Prime Minister himself, Mr. Trudeau, and had succeeded in convincing them both that the establishment of judicial seminars would be a happy initiative and the government agreed to cover the costs involved.

— Remarks by The Honourable E.M. Culliton
Regina, March 20, 1981

OVERVIEW OF RESPONSIBILITIES

From the Council's inception it was recognized that a judiciary in a dynamic and changing society had to be constantly renewing its intellectual resources.

This need is greater now than ever. But even in the early 1970s, when the Council came into being, change was in the air. A new *Federal Court Act* had been proclaimed, extensive changes had been recently made to the *Criminal Code*, legislation changing the laws relating to arrest and bail were before Parliament, and there was increasing resort to Canada's courts in civil matters. Constitutional reform, in the aftermath of a federal-provincial conference, seemed imminent, although it ultimately remained elusive and the issue faded for the remainder of the decade.

In 1982, however, the *Canadian Charter of Rights and Freedoms* was constitutionally entrenched. In 1994, a new *Civil Code* was enacted in Quebec after 40 years of work to update the code originally drawn together just before Confederation. More recently, and at an accelerating pace, new and evolving technology has changed both the judicial system and the society it serves, trailing in its wake new forms of crime, as well as new forms of punishment, new legal questions, and entirely new questions of civil justice.

In recognition of the dynamic context in which the judiciary would have to operate for the foreseeable future, the Council was given a leadership role, as it was described at the time, in encouraging the continuing education of judges. The nature of the leadership the Council provides has changed over time.

Following the Council's establishment, new institutions that focussed on judicial education arose and evolved. The Canadian Institute for the Administration of Justice (CIAJ) was established soon after the Council, in 1974. The Canadian Judicial Centre was created in 1988 and assumed its present name, the National Judicial Institute (NJI), in 1990. These institutes systematically provide educational programs for new and experienced, federally appointed and provincially appointed judges alike.

The Council continues to derive a leadership role, however, from paragraph 60(2)(b) of the *Judges Act*, which empowers the Council to hold seminars and conferences for "the continuing education of judges."¹

The voluntary character of the Council's leadership is made clear by the way it is described. It may offer, or arrange to offer, opportunities for judges — opportunities, not requirements — to further their education and stay abreast of legal and other changes. The responsibility to further their education ultimately falls on individual judges. They are encouraged, however, to spend up to 10 days a year on their continuing education.

Given the demands of the bench, this often is not possible. Increasingly, however, the dynamism of the justice system and the explosion of new legal scholarship points toward the imperative for educational time to be explicitly included in the calculation of judges' sitting time.

¹ See Appendix E, page 57

The Council carries out its role of providing opportunities for the continuing education of judges through its Judicial Education Committee, which recommends education conferences and seminars in Canada that should be designated for the attendance of judges and the reimbursement of their expenses under subsection 41(1) of the *Judges Act*.²

Until 1993-94, the Council organized annual summer seminars for superior court judges from across the country.

These seminars, building on experience prior to the Council's founding, began in 1972 with seminars for superior court judges and were extended to district and county court judges in 1973. The model developed then and followed in subsequent years was for discussion leaders to prepare papers which were distributed in advance so that participants could be fully involved in small-group discussions. As part of this, it became the practice to invite judges from other countries to each seminar.

The Council continued to offer two seminars each summer until 1990 when they were consolidated into a single seminar. In large part, this was done because, by then, only Nova Scotia had county courts and there were no longer district or county courts in other provinces. Thereafter, until the summer of 1993, a single seminar open to 100 federally appointed judges was organized by the Council. By this time, however, it was clear that the Council staff, whose other responsibilities were increasing, was too small to continue the onerous organizational work involved in the seminars.

Finally, as the National Judicial Institute had assumed responsibility for co-ordinating judicial education, the Council decided that it would no longer organize the summer seminars.

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

In addition to the support provided by the Council, individual chief justices, under subsection 41(2) of the *Judges Act*, can authorize the reimbursement of expenses that judges in their courts have incurred while attending certain other meetings, conferences and seminars.

The Commissioner for Federal Judicial Affairs provides assistance for second-language training for judges.

AUTHORIZATION FOR REIMBURSEMENT OF EXPENSES

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

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

The Office of the Commissioner for Federal Judicial Affairs administers the resulting claims.

² The *Judges Act*, subsection 41(1) provides as follows: "A judge of a superior court or of the Tax Court of Canada who attends a meeting, conference or seminar that is held for a purpose relating to the administration of justice and that the judge in the capacity of a judge is required to attend, or who, with the approval of the chief justice or chief judge of that court, attends any such meeting, conference or seminar that the judge in that capacity is expressly authorized by law to attend, is entitled to be paid, as a conference allowance, reasonable travel and other expenses actually incurred by the judge in so attending."

NATIONAL JUDICIAL INSTITUTE PROGRAMS

The National Judicial Institute (NJI) was established in 1988. The Council and the Institute have worked closely since then. The Council is represented on the NJI Board of Governors.³

In its initial years of operation, the NJI worked to establish standards for judicial education in Canada. In 1993, the Institute sought and received the Council's approval for a set of standards intended to help judges improve the administration of justice, achieve high standards of personal growth, official conduct and social awareness, and to perform judicial duties fairly, correctly and efficiently.

Central to these standards is the encouragement it provides to judges and their courts to set aside 10 sitting days a year to attend judicial education programs.

Through the Council's auspices, the NJI arranges to provide to each federally appointed judge — on his or her appointment — binders of the written material used in the most recent annual seminar conducted by the CIAJ for new judges. The NJI also provides introductory seminars for new judges to complement the annual CIAJ seminar for newly appointed judges and provides help to judges whose appointments do not conveniently coincide with that annual seminar.

During 1996-97, the Council authorized the following NJI seminars under subsection 41(1) of the *Judges Act*. Each was attended, on average, by 20 to 40 judges.

- **Appellate Court Seminar** in Ottawa April 21–23, 1996;
- **Civil Law Seminar**, St. Andrew's, May 15–17, 1996;
- **Early Orientation Seminars**, in Ottawa, May 27–29, and Nov. 25–29, 1996;

- **Recent Developments in the Law Seminars**, one held in Moncton from October 24–26, 1996, the other in Vancouver on November 14 and 15, 1996;
- **Seminar on Pre-Trial Settlement Skills**, in Toronto, December 4–6, 1996;
- **Family Law Seminar**, in Vancouver, February 12–14, 1997;
- **Criminal Law Seminar**, in Halifax, March 19–21, 1997;
- **Computer courses** were held in Sherbrooke, April 17–19; Ottawa, April 30–May 1; Moncton, June 12–14; and Toronto, October 29–30, 1996.

Jury Instruction Symposium

Eighty judges were authorized to attend a unique symposium conducted by the NJI on jury instruction. This was held in Toronto from March 5–7, 1997.

The aim of the symposium was to bring together a significant number of trial and appellate judges, representative of every province and territory, to discuss the strengths and weaknesses of existing approaches to criminal jury instructions with a view to improving and standardizing those approaches.

This type of activity, bringing together judges from every part of the country, only began to occur in the years immediately preceding the Council's founding, and was one of the main purposes — “to promote efficiency and uniformity and to improve the quality of judicial service,” in the words of the *Judges Act* — of the Council's creation.

³ The Council's representative in 1996-97 was The Honourable Lorne O. Clarke, Chief Justice of Nova Scotia.

A total of 51 trial and appellate judges attended the Toronto symposium, which was chaired by Mr. Justice David Doherty of the Court of Appeal for Ontario and Mr. Justice Wallace Oppal of the Supreme Court of British Columbia.

The keynote address was given by Chief Justice Antonio Lamer, the Chairman of the Council, who requested that the symposium be held.

Chief Justice Lamer stressed that the purpose of the symposium was to explore pressing questions and seek a consensus on how they might be dealt with. Criminal law had developed considerably over the past 30 years, he said, but the rules governing jury charges had remained essentially unchanged. At the same time, he said, jury charges were growing longer and more complex, were more often the subject of review at the appellate level and were more often found to be faulty.

The symposium ultimately identified an urgent need for reform of jury instructions. It proposed creating a national committee that would bring to bear the views of trial and appellate judges, Crown and defence counsel, linguistic and communications experts on the task of developing a model set of instructions to guide judges on a voluntary basis and a course on jury instruction that would supplement the committee's work.

The participants also recommended, on an interim basis, a number of steps to improve jury charges and increase jury comprehension. These included the following:

- Trial judges should give instructions at the beginning, during and at the end of a trial;
- Jurors should be permitted to take notes;

- Trial judges should continue to review the evidence for the jury, but the review should be issue-specific and as brief as possible;
- In addition to giving oral instructions, trial judges should provide a jury with a written copy of each charge;
- Where appropriate, trial judges should provide jurors with a "decision tree" to help them in their deliberations; and
- When an appeal is allowed because jurors have been misdirected, the appellate court should identify the error or errors in the instructions to the jury and indicate how instructions should be modified in future.

A full report on the symposium was prepared with a view to giving it wide distribution throughout the judiciary and governments.

CANADIAN INSTITUTE FOR THE ADMINISTRATION OF JUSTICE PROGRAMS

As in previous years, the Canadian Institute for the Administration of Justice (CIAJ) conducted two important seminars for federally appointed judges.

- The annual **Judgment Writing Seminar** was held in Montreal from July 2 to 5, 1996, with up to 50 judges authorized to attend.
- The **New Judges Seminar** was held at Manoir Saint-Sauveur, Quebec, from March 2 to 7, 1997.

The Council also authorized a total of 95 judges to attend, as participants or speakers, a CIAJ conference on **Human Rights in the 21st Century: Prospects, Institutions and Processes** in Halifax from October 16 to 19, 1996.

OTHER SEMINARS AUTHORIZED UNDER THE JUDGES ACT

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

- Up to 50 judges were authorized to attend the **Strasbourg Lectures** of the Canadian Institute for Advanced Legal Studies from June 30 to July 6, 1996, in Strasbourg, France.
- Up to 62 judges were authorized to participate in the Federation of Law Societies of Canada **National Criminal Law Program on Substantive Criminal Law** from July 15 to 19, 1996 in Winnipeg.
- Up to 45 judges were authorized to participate in the Federation of Law Societies of Canada **National Family Law Program** from July 15 to 18, 1996, in Ottawa.
- Two judges were authorized to attend the **New Appellate Judges Seminar** and two others the **Senior Appellate Judges Seminar** at the Institute of Judicial Administration, New York University School of Law, in July 1996.
- Sixty judges were authorized to attend the 11th **Commonwealth Law Conference** held in Vancouver from August 25 to 29, 1996.
- Twenty-three judges were authorized to attend the International Symposium on **The Province of Administrative Law** held at the College of Law, University of Saskatchewan, in Saskatoon, from October 17 to 19, 1996.
- Six trial judges whose duties include bankruptcy and insolvency work were authorized to attend the **International Judicial Colloquium** held in New Orleans from March 23 to 27, 1997 and sponsored by INSOL, a worldwide federation of national associations of accountants and lawyers engaged in insolvency practice and UNCITRAL, the United Nations Commission on International Trade Law.

SOCIAL CONTEXT EDUCATION INITIATIVE

In March 1994, the Council approved a resolution calling for “comprehensive, in-depth, credible” education on social context issues. This task was given to the NJI which engaged Professor Katherine Swinton of the University of Toronto Faculty of Law to prepare an operational plan for the program.

Following Professor Swinton’s report, two judges — Judge Donna Martinson of the British Columbia Provincial Court and Mr. Justice John McGarry of the Ontario Court of Justice (General Division) — were appointed as special directors of social context education at the NJI. Professor Rosemary Cairns-Way of the University of Ottawa was engaged in January 1997 to work with the judges and an advisory committee to implement the program.

This committee recommended that NJI consult with judges in courts across Canada to establish their individual needs and that it provide a special seminar to train faculty for the courses.

Involving judges at the local level is an essential aspect of the project. The advisory committee, which is made up of both judges and non-judges, plays an important role in this dimension. Along with its role in providing overall guidance

on the nature of programs and program design, and in reviewing the goals and objectives of the courses offered, it is also responsible for advising on the nature and extent of community consultation about social context issues.

The programs being developed are based on the following three streams:

- intensive programs;
- short programs that can be provided on a stand-alone basis or as part of other judicial education programs; and
- integrated programs that form part of general education programs as a result of working with courts to integrate social context programs into general courses.

STUDY LEAVE FELLOWSHIPS

Each year, a number of judges spend an academic year at a Canadian university for the purpose of research, study and, in certain cases, teaching.

The desirability of such study leave has long been recognized within and outside the judiciary. At least as early as 1968, three years before the Council came into being, there were discussions between academics and federal government officials regarding the principle of paid study leave for superior court judges. This principle was accepted by the Minister of Justice of the day, The Honourable John N. Turner.

However, implementation of such a program was a longer time coming. It was not until October 1980 that a three-member committee of the Council took up the idea of study leave and began the work that ultimately led to the first

Council recommendation to the Minister of Justice, The Honourable Mark MacGuigan. The Minister agreed to implement an experimental program of non-mandatory leave, but ultimately this proposal was not followed up and came to naught. In early 1984, however, the Governor in Council granted a five-month educational leave to an Ontario judge, apparently without Council involvement, and a year later the Council recommended a six-month leave for an Alberta judge. Cabinet approved this recommendation and, on the basis of this experience, the Council decided to establish some guidelines for educational leave.

The then-Chairman of the Council of Canadian Law Deans, Dean John McCamus, offered the assistance of the deans in finding appropriate places in law schools for judges on study leave. This and other academic initiatives ultimately led in March 1988 to the establishment of the National Judicial Study Leave Fellowship Program and to two judges taking the first leave under the program from July 1 to December 31, 1989. The program has evolved and as of March 31, 1997, 49 judges had participated in the leave program at 19 law schools and one cognate institution.

The fellowship program is now operated under the joint auspices of the Canadian Judicial Council and the Council of Canadian Law Deans. It is administered by a Selection Committee, which recommends judges for participation. The Committee is composed of three chief justices and two representatives of the Council of Canadian Law Deans, one representing common law and one civil law jurisdictions. The Governor in Council (Cabinet) is then asked to approve the leave; such approval is required under section 54 of the *Judges Act*.⁴

The program is tailored to the needs of each judge and to those of the host institution.

⁴ Subsection 54(1) states: "No judge of a superior court or of the Tax Court of Canada shall be granted leave of absence from his or her judicial duties for a period (a) of six months or less, except with the approval of the chief justice or senior judge of the superior court or of the chief judge of the Tax Court of Canada, as the case may be; or (b) of more than six months, except with the approval of the Governor in Council."

The aims of the program are:

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

During study leave, judges continue to receive their salaries, but must cover living, travel and other expenses from personal resources.

In December 1996, the Council's Study Leave Selection Committee met to consider changes that might be necessary because of the enactment of Bill C-42, which among its provisions allowed for leaves of absence from judicial duties for up to six months upon approval of a judge's chief justice or chief judge. The 1995 Triennial Commission, chaired by David W. Scott, QC, had recommended such leave include study leave as well as maternal and parental leave.

The Committee felt the new legislation potentially could have a significant impact on the program and recommended that guidelines for individual chief justices be developed so that the six-month grants of leave were compatible with study leaves of longer than six months that required approval of the Governor in Council.

The Committee recommended, among other proposals, that eligibility for study leave be reduced from 10 years to seven, that provision be made for study leaves outside Canada, and that the program be extended beyond law schools and cognate institutions to include other institutions, centres and courts where judges might study in disciplines other than, although related to, the law.

At its March 1997 meeting, the Council received the Committee's report but deferred consideration of its recommendations until it had received the response of the Minister of Justice.

During 1996-97, four judges took leaves of absence from judicial duties to participate in the fellowship program.

- Mr. Justice John Agrios of the Court of Queen's Bench of Alberta, who during his leave at the University of Toronto Faculty of Law wrote a handbook for Canadian judges on alternative dispute resolution (ADR) in the courts, co-authored with Marvin J. Huberman, a practising lawyer in Toronto, and posted it on the judicial electronic network. He also worked with the National Judicial Institute on programs related to ADR, judged a number of moot courts and served as a resource person for the faculty.
- Mr. Justice Archie Campbell of the Ontario Court of Justice (General Division), who during his leave at Osgoode Hall Law School of York University, acted as Judge in Residence participating in lectures and seminars in administrative law, civil practice, criminal law, ethics, evidence, advocacy and legal writing. As well, he served as an advisor to students, assisted them with course work and conducted preliminary research on the compact theory of Confederation.

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- Mr. Justice Mark MacGuigan⁵ of the Federal Court of Canada spent his leave at the University of Ottawa Faculty of Law. There, he researched the separation of powers into legislative, judicial and executive elements, both in theory and case law, work reflected in a paper presented at the Court at Nijmegen in the Netherlands in January 1997, and in a lecture at the University of Windsor in March 1997, in which he set out a comprehensive statement of the doctrine of separation of powers in Canadian law.
 - Madam Justice Christine Tourigny of the Quebec Court Appeal, whose leave was spent at l'Université Laval, where she taught a course in family law in co-operation with two professors, gave a course on pleading appeals for second and third year students, and participated in a number of other courses and seminars at the university.
 - A fifth judge, Mr. Justice Jacques Vaillancourt of the Quebec Superior Court, was approved for leave at l'Université de Montreal to study questions related to the independence of administrative tribunals and the evolution of the jurisprudence surrounding their work. However, illness unfortunately prevented him from pursuing his study leave.

During the year, on the recommendation of the Study Leave Selection Committee, the Governor in Council authorized study leave for 10 judges for the 1997-98 academic year.

⁵ Mr. Justice MacGuigan died on January 12, 1998.

COMPLAINTS

In considering complaints or allegations made in respect of a judge, the Council realized that it must carry out its function in such a way

(A) as to protect judges from unfair criticism and protect the independence of the individual judge; and

(B) as to ensure there is no “white-washing” or appearance of “white-washing” the improper conduct of a judge.

— Memorandum from
The Honourable E.M. Culliton
Dated August 9, 1983
Recalling the initial By-Laws adopted
by the Council in December 1971

OVERVIEW OF RESPONSIBILITIES

Since 1701, the most enduring balance between judicial independence and accountability has been found in the formulation that judges “shall hold office during good behaviour.” This formulation was developed in the years following the English revolution of 1688 which laid bare the need to ensure that judges required fundamental protection of their independence if they were to dispense fair and impartial justice.

It was not intended to guarantee tenure to a judge regardless of behaviour. It was intended to make it extremely difficult to have a judge removed from the bench because a monarch, influential people at court or political authorities might not like a particular decision.

The formulation became entrenched in law and practice with the *Act of Settlement, 1701* and proved an admirable form of protection for an independent judiciary and impartial justice. In the nearly three centuries since the *Act of Settlement* only a single superior court judge has been removed from the bench by the British Parliament.

The requirement of good behaviour was imported into the British North America Act, now the *Constitution Act, 1867*, as section 99. Section 99 established that in Canada “judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.”

In 1971, when legislation was presented to the Canadian Parliament to create the Canadian Judicial Council, section 99 received particularly close scrutiny to ensure that the *Judges Act* maintained the fundamental role of Parliament in such matters. Satisfied that it did so, all parties supported the legislation.

While judicial independence remained of primary importance, the need to ensure a balance between independence and accountability was also of concern to Parliament. In the years since Confederation, there had been only five petitions for removal of a superior court judge filed in the Canadian Parliament. Four had occurred in the 19th century. None came to a parliamentary vote. The fifth, known as the Landreville Case after the name of the judge involved, had been dealt with in 1966-67 through a commission of inquiry, and, although there was no parliamentary vote because of the judge’s resignation, the situation had exposed serious deficiencies in the process.

In large measure, the case gave impetus to finding new ways to examine the conduct of superior court justices. It also fostered the creation of the Council itself as a means of providing some distance between the judiciary and government in cases involving allegations that a judge may have breached the requirement of good behaviour.

At the same time, as the debate leading to passage of the *Judges Act* demonstrated, it was widely recognized that the removal of a judge was of such importance that ultimately it should only be done by Parliament. That requirement has remained through the life of the Council, as it had in the preceding 270 years of British, then Canadian, experience.

What has ensued during the life of the Council is a process of constant refinement to ensure that, as different circumstances arise and expectations change, the balance between independence and accountability is not only maintained but maintained in a context of greater public transparency and clear, concise and known procedure.

Parliament, 25 years after the creation of the Council, has yet to vote on the removal of a judge. It was, in fact, only in the Council's 25th year that the Council voted for the first time to recommend that Parliament remove a judge from the bench, a process that was halted when the judge resigned his office. Over the years, a number of other judges chose to resign before their behaviour came to be scrutinized by the Council, rather than subject themselves to such scrutiny by the members of the Council or, ultimately, by Parliament.

What is important is that the Council's role is tightly constrained by the written Constitution and legislation, as well as by tradition and its own rules, processes and precedents. The Council, for example, has no power to remove a judge from the bench; it can only recommend. It cannot sanction a judge for his or her behaviour in any way; it can only recommend removal or indicate disapproval. It cannot require any particular conduct of a judge; it can only lead and guide.

Above all, it cannot replace its judgment for that of a judge who is complained about; only appellate courts can do that. The Council, in sum, is not a court; it is an administrative instrument, charged with carrying out the responsibilities it is assigned under the *Judges Act* and confined, even in the most egregious cases where the requirement of good behaviour is breached, to advising the Minister of Justice of its findings and recommendations. To provide the Council with greater powers than this would be to replace Parliament's judgment with that of the Council in one of the most vital decisions a democracy can take, the removal of a judge from office. This was never intended; it is not the case.

In the matter of considering complaints, then, the role of the Council is to examine the behaviour of the judge whose conduct is in question, not decisions the judge may have made even while evidencing the behaviour under question. That role comes into play when a complaint or allegation is made that a judge in some way has breached the requirement of good behaviour and, by his or her conduct, has, in the words of the *Judges Act*, "become incapacitated or disabled from the due execution of the office of judge."

The line between the judge's decisions and the judge's conduct is a strict one. Decisions are subject to review by appellate courts; only these courts have the power to confirm or reverse a decision. Conduct alone is for the Council to examine and consider, and ultimately for Parliament to decide as to whether it breaches the requirement of good behaviour.

This distinction is not always clear to those who complain about a judge. But it is the essence of the Council's role in maintaining the balance between judicial independence and judicial accountability that has been maintained in our system.

THE PROCESSING OF COMPLAINTS

The statutory role of the Council in considering complaints is set out in the *Judges Act*, which can be found at Appendix E.

Complaints about federally appointed judges come from a variety of sources, most of whom are individuals who are involved in some way in court proceedings. Occasionally, complaints will be made about judges by people who have attended court sessions out of interest or because a friend or relative is involved, or by people who have become aware of some act through the media.

The Council requires that a complaint be in writing and that it name a specific judge or judges before a complaint file will be opened. There is no requirement that a complainant be represented by counsel or that a complaint be made in a specific way or on a specific form. Occasionally, this results in judges being exposed to unjust accusations and unwarranted public questioning of their character. Judges cannot easily refute such accusations and sometimes resent the questioning of their character and what they see as damage to their reputations. This is particularly true when a complaint is found to be unjustified and this finding is not given the same public prominence as the original accusation often is.

Fundamental protection for superior court judges lies, however, in the credibility of a process that examines each complaint seriously and conscientiously and addresses the fundamental issues involved in a complaint, not simply the technicalities that might surround it or the form in which it was made. The credibility of the process also depends on its being seen as open and fair.

In that regard, the report of Dr. Martin Friedland of the University of Toronto Faculty of Law reached an important conclusion following his examination of complaint files of the Council:

The Council gave me full access to all of their complaint files. My overall opinion is that the Judicial Conduct Committee and the Executive Director have dealt with the matters received carefully and conscientiously. I never sensed that any matter was being “covered up” by the Council after a complaint was made of it. The descriptions in the Annual Report — at least for the past few years — in my view appear accurately to reflect the complaints that have been received by the Council.⁶

This said, the process can be a painful one, especially for a judge who feels unfairly criticized or complainants whose deeply felt sense of having been wronged may be found to be without merit or without sufficient merit to represent a breach of the constitutional requirement of good behaviour.

The stresses and disappointments of the process notwithstanding, it is vital that those who feel aggrieved by a judge’s conduct have an avenue of recourse. Equally, it is vital that a judge whose conduct is in question know that the matter will be resolved in as timely and fair a fashion as possible.

In addition to considering complaints from members of the public, the Council also undertakes formal inquiries initiated by the Minister of Justice of Canada or by a provincial attorney general when a complaint relates to a federally appointed judge. Most complaints, however, come from members of the public.

⁶ See *A Place Apart: Judicial Independence and Accountability in Canada*, Pp 94-95. The report is discussed on page 33 of this Annual Report.

The Council considers each letter that complains about the conduct of a specific judge. It has no basis for investigating generalized complaints about the courts or the judiciary as a whole, or specific judges that complainants have not or do not want to name. Where warranted, and it rarely occurs, the Council initiates a formal investigation and reports its findings to the Minister of Justice. Even more rarely — it has happened only once in the Council's first 25 years — the Council may recommend that a judge be removed from the bench.

Under subsection 65(2) of the *Judges Act*, there are four grounds on which the Council may base a recommendation for removal as the result of an investigation of a judge that determines that the judge has become incapacitated or disabled from the due execution of the office of judge by reason of:

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

Under the Council by-laws made pursuant to the *Act* only the full Council can order a formal investigation of a judge's conduct under subsection 63(2), and only the full Council can recommend to the Minister of Justice the judge's removal from the bench. However, the initial responsibility for dealing with complaints rests with the Chair or one of two Vice-Chairs of the Judicial Conduct Committee of the Council. Their authority and responsibility are established by the by-laws, reproduced at Appendix F.

The Chair or Vice-Chair reviews each complaint and decides on its disposition. He or she may seek comments from the judge and the judge's chief justice but, with or without such comments, may close a file with an appropriate reply to the complainant.

The Chair or Vice-Chair may also refer the matter for consideration by a Panel of up to five members of the Council. The Chair or Vice-Chair, or a Panel, may also request that an independent counsel make further inquiries on an informal basis. The Panel may conclude that no further action by the Council is warranted and direct that the file be closed with or without an expression of disapproval or regret at the conduct of the judge in question. In essence, an expression of disapproval represents the Panel's view that a complaint has a measure of validity but is not sufficient to lead to a recommendation to remove the judge involved from the bench.

If the complaint is considered sufficiently serious, the Panel may recommend that the Council formally investigate it under subsection 63(2) of the *Judges Act* to establish whether a recommendation for removal is called for.

Only rarely does a complaint result in a formal investigation. By far the largest proportion of complaints are dealt with by the Chair or Vice-Chair. A much smaller proportion go to Panels.

In prior years, these Panels were made up of members of the Judicial Conduct Committee. During 1996-97, however, the provision in the Council's by-laws under which Panels are established was changed to allow the Panels to be made up of other members of the Council. This also increased the pool of potential Panel members available to consider complaints.

THE HISTORICAL PATTERN OF COMPLAINTS

The number of complaint files opened in 1996-97 was 186, compared to 200 opened in the previous year. The number of files closed in 1996-97 was 187, compared to 180 files closed in 1995-96.

The decline in the files opened this year compared to the previous year, marked the first yearly reduction in the number of files opened by the Council in 10 years. In 1986-87, the Council opened 45 files as a result of complaints it received; the year before 61 files had been opened. Since that time, there had been a gradual increase each year in the number of complaint files opened.

It is difficult to judge whether this represents a new trend or simply the normal fluctuation to be expected when nearly 1,000 judges are making tens of thousands of decisions yearly, each one affecting the interests, and often the emotions, of those appearing before the judge making it.

However, in the 25 years of the Council's existence, a number of developments are clear.

The number of complaints has risen as the existence of the Council has become better known and awareness has grown of the possible recourse it can provide for what complainants consider unacceptable conduct. In the first five years of the Council's life, no more than a dozen complaint files were opened in any one year. In the next five years, the highest yearly total was 33 files opened, in 1978-79. The highest yearly total in the next five years was 61, in 1985-86; in next five-year period 85 files in 1990-91; in the next five 200 files, in 1995-96.

TABLE 1 COMPLAINT FILES OPENED SINCE CREATION OF THE COUNCIL

Fiscal Year	Number of Files Opened
1971-72*	3
72-73	10
73-74	4
74-75	7
75-76	12
1976-77	25
77-78	30
78-79	33
79-80	23
80-81	26
1981-82	18
82-83	26
83-84	47
84-85	56
85-86	61
1986-87	45
87-88	47
88-89	71
89-90	83
90-91	85
1991-92	115
92-93	127
93-94	164
94-95	174
95-96	200
1996-97	186

* From December 10, 1971 to March 31, 1972

A second development is the increasing use of the Council's processes by individuals, almost all of whom were parties to litigation and almost half of whom were not represented by counsel in the court processes that gave rise to the complaint. In brief, the Council is incorrectly believed, by many, to provide an avenue for continuing a legal case with little financial outlay, which makes it attractive at a time of increasing costs of litigation. There is also a widespread and incorrect belief that the Council can reverse decisions and/or compensate complainants for what they consider unfair treatment. The Council can do neither. It is only a recourse for someone unhappy with a judge's behaviour as it relates to his or her ability to execute the duties of judicial office.

Finally, those involved in marital or family disputes, particularly those related to divorce, maintenance and access to children, have made increasing use over the years of the complaints process. In the first five years of the Council's existence, a total of five files were opened because of complaints involving family matters. By 1993-94, this had risen to 67 complaints — compared to 20 complaints involving criminal matters. This was the highest in the Council's history, 27 cases more than the previous highest total in a year and nearly double the 34 cases in 1992-93.

In 1996-97, the number of complaints involving divorce, maintenance and access questions declined to 60 files. While this represents a decline from the peak in this decade, the number of files opened in family matters during the year still represents a total two to three times higher than the highest total in any previous decade.

While the number of complaints has risen over the years, the number closed by the Chair or Vice-Chair of the Judicial Conduct Committee — because the Council lacks jurisdiction over the matter, because the complaint is, in effect, an attempt

to use the Council rather than appellate courts to reverse a decision, or because a complaint is patently without merit — has risen in tandem.

What has remained fairly constant is the small number of cases that are found to warrant an independent fact-finding or the establishment of a Panel of Council members. Only rarely is an investigation initiated under subsection 63(2) of the *Judges Act*, or an inquiry directed under subsection 63 (1).

There have been nine cases since 1971 where a formal inquiry or investigation has been initiated under the *Judges Act*. Four of these have been under subsection 63(1), one at the request of a provincial attorney general, two at the request of Minister of Justice and one, the Bienvenue inquiry, at the request of both federal and provincial ministers. Five other cases were under subsection 63(2), all, interestingly enough, the result of complaints and allegations by other judges, including chief justices. Six of these nine inquiries took place in the first decade of the Council and were conducted in private.

Only in the case of Mr. Justice Jean Bienvenue, the most recent, did the Council recommend, following public hearings and a recommendation from an Inquiry Committee, that the judge be removed from office. In three cases, the Inquiry Committees made no recommendation for the judge's removal from office, and the Council agreed with the Committees' decisions; in one case an Inquiry Committee recommended removal, but the judge resigned before the Council had an opportunity to consider the report; in the four remaining cases, the judges resigned or died before or during the Committee proceedings. Most of these cases have not been previously recorded publicly by the Council because they occurred before the Council began to publish an annual report in 1987-88.

The following four inquiries were directed by ministers under subsection 63(1):

- In the 1970s a Minister of Justice, acting on a police report, requested an inquiry into the conduct of a judge who had admitted using the services of a company which provided private, strip-tease performances. A three-member Inquiry Committee emphasized the “utterly unfortunate nature” of the judge’s actions but found that removing him from office “would be a punishment out of all proportion to his imprudent action,” that he was not guilty of misconduct within the meaning of the *Act* and that proceedings to effect his removal would do the administration of justice “a wrong infinitely greater than any good that might be achieved.” The Council unanimously concurred.
- The Minister of Justice requested an inquiry into the conduct of a judge after a report that said the judge’s behaviour on the bench was arbitrary and autocratic and that he had shown questionable judgment in his statements to police on being given a speeding ticket and in subsequent judicial hearings. Before the Inquiry Committee commenced its work, the judge resigned.
- The Attorney General of Nova Scotia requested an inquiry in 1990 into the conduct of the five judges who had heard the Donald Marshall Jr. reference. A five-member Inquiry Committee made up of three chief justices appointed by the Council and two lawyers appointed by the Minister of Justice was established. Two of the five judges left the bench before the Inquiry commenced and were not, as a result, a part of the Inquiry Committee’s jurisdiction. The Committee did not question the three remaining judges but, rather, assessed the conduct of the judges on the basis of the evidence the judges had before them when they decided on the appeal reference. The unanimous

recommendation was that the judges should not be removed from the bench. Four members of the Inquiry Committee said they could not condone or excuse the severity of the reference Court’s condemnation of Mr. Marshall and its observation that the miscarriage of justice in his case had been “more apparent than real.” The fifth member, while agreeing with the majority conclusion, disagreed on some of the majority’s reasoning.

- In 1995, the Attorney General of Quebec and the Minister of Justice of Canada directed an inquiry into the conduct of Mr. Justice Bienvenue of the Quebec Superior Court. That case is described at greater length further on in this report.⁷

The five investigations conducted under subsection 63(2) of the Act were as follows:

- A judge was cited for contempt of court for having refused to comply with the terms of a court order made in his own divorce proceedings. The matter was raised with the Council by the judge who presided over the contempt hearing but was treated as a normal complaint until the Minister of Justice requested (but did not direct) that the Council consider it. The matter was held in abeyance pending appeal of the contempt order. When the appeal was lost, the Council designated an Inquiry Committee of three members but the Committee’s work was discontinued when the judge resigned for medical reasons two weeks after a serious motor vehicle accident.
- The Council, acting on the request of a chief justice, established a one-member Inquiry Committee to investigate a judge’s long-standing pattern of delayed judgments after the failure of efforts by the chief justice and the associate chief justice to resolve the matter in discussions with the judge. The judge was given time to

⁷ See page 30.

bring his judgments up to date, and rendered judgment in all cases. In light of this development, the Inquiry Committee recommended that the file be closed but before that occurred the judge died.

- A judge of the Federal Court complained about public comments made by Mr. Justice Thomas Berger of British Columbia regarding constitutional questions being considered at the time. The Council initiated an investigation and designated a three-member Inquiry Committee which conducted private hearings. Mr. Justice Berger refused to attend these hearings on the basis that no facts were at issue. The Committee's report said that "We view (Mr. Justice Berger's) comments seriously and are of the view that it would support a recommendation for removal from office" but concluded that it would be unfair to set standards *ex post facto* and it did not make a recommendation for removal. A majority of the Council, at a special meeting, called Mr. Justice Berger's public comments "an indiscretion" but said these comments did not constitute grounds for removal from the office of judge.
- A lawyer complained of the improper conduct of a judge in the context of a divorce action while the action was under way and before judgment had been rendered. The complaint was based on an affidavit from the son of one of the parties. The Council designated a three-member Inquiry Committee. It conducted a private hearing and concluded that no evidence had been adduced to suggest the judge had been influenced to alter his decision in the case. Nonetheless, the Committee found the judge was guilty of misconduct which placed him in a position incompatible with the due execution of his office. A resolution which would have recommended the judge's removal from the office of judge was prepared but was not voted on by the Council because the judge resigned office for health reasons.

- In 1993-94, a five-member Inquiry Committee was established to investigate an allegation of a chief justice that a judge of his court, Mr. Justice F.L. Gratton, had become "incapacitated or disabled from the due execution of the office of judge by reason of age or infirmity," the first time the Council had undertaken a formal investigation of such an allegation. Mr. Justice Gratton retained counsel and challenged the validity of the investigation on constitutional grounds. These challenges were rejected by the Inquiry Committee. Mr. Justice Gratton's counsel then sought judicial review of the Committee's rulings by the Federal Court of Canada where the Inquiry Committee's jurisdiction to hear the matter was upheld. The Committee proceedings were terminated when the judge resigned.

The number of such serious cases, in comparison to the large numbers of complaints that are found to be without basis or beyond the Council's jurisdiction, demonstrate two contrasting realities.

On the one side, there has been greater use made of the Council's complaint processes over the years, reflecting the higher standards of conduct expected of judges by the public and closer scrutiny than ever of judicial behaviour. This is reflected in a general rise in the number of complaint files opened annually over the years, each of which is examined with care by a Council member to see if it has a basis in fact.

On the other side, the number of times when complaints of misconduct warrant a formal inquiry or investigation has remained very small.

THE 1996-97 COMPLAINTS

As set out in Table 2, 187 files were closed in 1996-97 compared to 180 files closed the previous year. The number of files opened was 186, compared to 200 opened in 1995-96.

TABLE 2 COMPLAINT FILES CLOSED IN 1996-97

	Closed by the Chair/ Vice-Chair of the Committee	Closed by Panels	Closed by Council
Without requesting response from the judge	86	–	
After response from the judge	90	5	1
Files “Discontinued”	5	–	
Total	181	5	1*

* *Bienvenue*

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

- Each letter naming a federally appointed judge in a complaint results in a separate file being opened, unless there are multiple complaints about the same matter, in which case they all go into a single file.
- Letters that complain of a federally appointed judge’s behaviour or decision but do not name him or her, and letters that express a generalized grievance about judges, the courts or the judicial system, or about provincial judges, lawyers, masters and other officials will not result in complaint files being opened.

FILES CLOSED BY THE COMMITTEE CHAIR OR VICE-CHAIR

The Chair or Vice-Chair of the Judicial Conduct Committee considers each complaint in which a federally appointed judge is named.

By far the largest proportion of these complaint files are closed on the basis of either the information contained in the complainant’s letter or the comments of the judge concerned, or a combination of both.

Of the 187 complaint files closed during the year, 176 or 94 percent were closed by the Chair or Vice-Chair. In more than half of these, 90 files, comments were sought from the judge whose conduct was complained of and his or her chief justice before the file was closed. The remaining 86 files were closed without seeking the comments of the judge.

Most often, the reason for closing a file without seeking comment or conducting further investigation is because the complainant, either explicitly or implicitly, has asked that a judge’s decision be reversed or altered, that a new trial or hearing be held, or that the complainant be compensated for an allegedly incorrect or unlawful decision. For the most part, these are matters that must be considered by an appeal court; the Council has no power to deal with them. All files requesting such relief are closed without further action, other than to provide a copy of the complaint to the judges as required by Council by-laws.

When it is not certain whether a matter falls within the jurisdiction of the Council or when the nature of the proceeding that gave rise to the complaint is not clear, the judge and chief justice concerned will be asked for comment. When these comments are received, the Chair or Vice-Chair will be able to decide what further action, if any, may be warranted. To ensure that this process is fair and impartial,

Council requires that the Chair or Vice-Chair not screen complaints involving judges from their own courts or provinces.

As an additional safeguard, all complaints against members of the Council are reviewed by independent counsel, even if the complaint is without any apparent merit. In 1996-97, independent counsel reviewed eight files involving Council members closed by the Chair or Vice-Chair of the Committee.

The files summarized below show the range of complaints dealt with by the Chair or Vice-Chair of the Committee during the year.

Allegations from Unrepresented Litigants

The following are representative of more than 30 complaint files involving litigants who appeared in various court proceedings without legal counsel and who complained of their treatment by a judge:

- A complainant alleged that during a family law proceeding the judge laughed at him, refused to grant an adjournment, took sides with the other parties and had decided the case before he was able to present his arguments. The judge, asked for his comments, said the trial had been adjourned a number of times to allow the complainant to retain counsel and that a further adjournment would have been unacceptable. The judge said that laughing at the complainant would have been unacceptable and he had not done so. He noted as well that he had listened to the complainant's arguments but had called him to order when they became repetitive.
- The president of an association that helps people to represent themselves complained that a judge had treated him like a "charlatan" during a hearing of a client of the

association. The judge was asked for comments, and said that certain of the procedures used by the association were frivolous and abusive and there had been several proceedings for illegally practising law. The complaint was found to be without merit and the complainant was advised that there was no basis for action under with the *Judges Act*.

- A complainant alleged that a judge was guilty of misconduct for suggesting that he should retain counsel in his tort action against the Crown. He also made a number of allegations regarding several lawyers who he had retained or acted against. The complainant was told that the judge acted within his jurisdiction in suggesting that he should retain counsel. There was no evidence of any misconduct.

Alleged Gender Bias

The following files among those involving alleged gender bias were closed during the year:

- A complainant in a stalking case wrote that she found it "highly inappropriate and scandalous" that, in acquitting the accused, the judge had expressed the view that the complainant was "over-reacting," and that she felt "further victimized, minimized and invalidated by this insensitive comment." The complainant was advised that it would be for an appeal court to judge whether the inference of "over-reacting" that the judge drew from the evidence was justified, but the Council did not have jurisdiction to retry the case.
- The complainant, a party to family law proceedings, requested a judicial review of a judge's decision on a motion for interim support on the basis that "men do not receive fair treatment in Family Law." The complainant was advised that there was no evidence of judicial misconduct.

- A complainant alleged that a judge was biased against men and that “she often argued in favour of the women’s positions, acting as prosecutor,” that she had refused to hear his side of the case and those of several applicants ahead of him, and that “she had habitually ignored pleas from the advocates of all the fathers.” The judge noted that the complainant had earlier been granted access but there was a restraining order in place at the time of the hearing, that there was an outstanding order requiring a psychological assessment which had not been completed, and in view of affidavits on file with the court, the uncompleted assessment and allegations of sexual abuse, she thought it prudent to receive the assessment before access was granted. The complainant was advised there was no evidence of judicial misconduct or that the judge “in any way exhibited bias against men.”
- A woman seeking to deny her ex-spouse access to their daughter complained that, at a case conference prior to trial, a judge was biased against her and made demeaning comments in the presence of her ex-spouse and counsel. Among the comments complained of was an allegation that the judge said that “all children that are in a situation where the family has been denied access end up on the streets.” The judge denied saying this and noted cases where denying access to one party or the other was in the best interest of the child. The judge said there was never any intention of making damaging and deliberately hurtful comments and she regretted that the complainant had misinterpreted her remarks. The complainant was advised that, while the Council regretted the complainant’s dissatisfaction, judges during case conferences are expected to step out of their traditional roles and act in a less formal and more conversational way.
- A complainant alleged that the judge was biased against her because she was a woman, that he had prejudged her case and could not be impartial. No evidence was found to

support her allegations or that interruptions of counsel by the judge represented anything more than a trial judge performing his judicial function.

- A complainant alleged that the Court “helps perpetuate a vicious circle leading non-custodial parents to poverty” and questioned whether a judge endorsed “some hidden agenda approved by some gender-related movement geared toward enriching the habitual custody recipients.” He said the judge was the “author” of a minimum child support payment of \$400 — which the Council was advised was a reference to a figure set in another judgment by the judge — and asked for an investigation of the judge’s cases, as well as “draconian” enforcement procedures and the whole family law system. The complainant was advised that his letter provided no basis for an investigation of the judge, that child support was a major issue for governments, including the provinces who were responsible for the maintenance enforcement programs in each province.

Alleged Racial Bias

The following are examples of complaint files in which judges were alleged to have demonstrated racial bias:

- The complainant was the respondent in a motion by the father of their child for a change in interim custody. The father brought the motion because the complainant had unilaterally removed their son from a Jewish school and enrolled him in a Christian school. The woman alleged the judge demonstrated bias against her because he was Jewish and refused to disqualify himself on the basis of bias. The judge, asked for his comments, said that in the best interest of the child he felt the status quo should be maintained until the matter came to trial. He gave the complainant the choice of maintaining custody of the child and keeping her son in the Jewish school, or giving interim custody to the father. The complainant agreed she

should have custody and to keep him enrolled in a Jewish school. Subsequently, however, the judge received a letter from the school saying it could not accept the child because the mother had insisted on having the child repeat that he hated the school and loves Jesus. The letter formed the basis of a motion to find the complainant in contempt. The Council informed the complainant that there was no evidence of judicial misconduct.

- A complainant appealed a decision from a small claims adjudicator ordering payment to the respondent, saying the judge had told him loudly to “shut your mouth” and he believed he was treated in a different way because “I am East Indian . . .” The judge provided a transcript in which the complainant said he would make sure that “Mr. (X) won’t get a penny from me.” At that point, the judge said, “Sir, you better just keep your mouth shut and I mean that, you keep your mouth shut.” The judge said his choice of words was inappropriate but the complainant had either crossed the line of committing contempt of court or was approaching it in saying that notwithstanding the decision of the court or the earlier decision of the adjudicator the respondent would not see a penny from him. The judge said he could not recall an occasion when there had been such an open challenge to a decision. The judge said he was upset the complainant would not believe his comments were unrelated in any way to his being East Indian. The judge agreed that his letter should be provided to the complainant. The file was closed because there was no basis for action by the Council.
- A complainant, a citizen of both Jamaica and Canada, represented himself in proceedings concerning access to his children. He sought an order allowing him to take the children to Jamaica for a summer vacation, a motion opposed by his former wife who stated in her affidavit that he would not return to Canada with the children, that

Jamaica was a violent country and that the children’s safety would be endangered in such a visit. The complainant alleged that the judge dismissed the motion because friends had told him Jamaica was unstable and violent and that the judge had “a very prejudiced view of what men’s relationships with their children are like or ought to be.” The judge confirmed that the complainant’s wife had made submissions regarding the safety of the children and he had based his decision on the arguments from both sides. He denied that his comments reflected prejudice in any way for or against generous access for fathers. He apologized for any offence he might have inadvertently given. The complainant was provided with a copy of the judge’s letter and was informed that the Council had no basis for concluding that the judge’s alleged comments had constituted the basis for his decision.

- A party to a custody trial and his girlfriend alleged that a judge in his decision had stereotyped racial views and had portrayed the complainant as an Aboriginal who is a binge drinker and is irresponsible. They were offended that the judge had required the complainant to drive a long distance to pick up his children on the basis that men are able to drive longer distances than women. Following a review of the transcript, the complainants were informed that there was no basis alleging the judgment was biased or discriminatory, although the judge had found the father’s past behaviour of concern. The judge, the complainant was advised, took into account in determining the arrangements for the complainants picking up the children that his former partner did not have a car. They were also informed that, if they did not wish to accept the decision, the appropriate recourse was through appeal but that, in discussing possible alternatives with legal counsel, they might also consider using family counsellors to find ways to help the children have healthy relationships with all concerned.

Alleged Conflict of Interest

The following are examples of complaints alleging conflict of interest on the part of a judge or judges:

- A complainant, party to a judicial review of a decision to expel him from a university, alleged that the judge had a conflict of interest because he had been a member of a law firm representing the university and had acted on behalf of the university while a partner of the firm. The judge, asked for his comments, said he had indeed acted for the university before he was appointed to the bench but that, after 15 years as a judge, he did not believe it necessary to disqualify himself in matters involving either his old law firm or the university. The complainant was advised that the judge had acted appropriately and this was not a case where he should have disqualified himself from hearing the matter, given that he had no involvement with the university and the amount of time that had elapsed since becoming a judge.
- A complainant, the mother of two alleged victims in a sexual assault case, alleged that the judge had acquitted the accused because he knew the accused through past association with a political party. The judge categorically denied any prior knowledge or association with the accused. He said he was aware of the presence of two persons with past political connections at the trial but the courts are open to the public and their presence did not affect his decision in any way. The complaint was found to be without basis in that there was no evidence of any past knowledge or past association with the accused on the judge's part.
- The complainant, the subject of disciplinary proceedings before the College of Physicians and Surgeons for which he was seeking judicial review, alleged that three judges had a conflict of interest. He alleged that one judge had sat some years earlier on a previous matter where he was a

party and might be related to opposing counsel in that they had the same name, that a second judge was formerly in the same law firm as his lawyer, and that a third judge had prior knowledge of the complainant and the history of his proceedings before the court. The judges' comments were sought. The first judge said he had sat on an unrelated matter involving the complainant but that the complainant's counsel did not object, and that he was not related to the opposing counsel. The second judge had practised in the same law firm as the complainant's lawyer but that was before the judge was named to the bench 15 years previously. And the third judge said he had no prior knowledge of either the complainant or his past proceedings in the courts. The complaint was found to be without basis and there was no evidence of misconduct or impropriety.

- The complainant alleged that a judge, who sat on the appeal panel which set aside her son's conviction for murder and ordered a new trial, also sat on an appeal panel 10 years later that dealt with a collateral matter. She alleged that sitting on the second panel was a conflict of interest. After a review of her complaint, the complainant was advised that there was absolutely no reason why the judge would decline to sit on an application that was made nearly 10 years later on a matter involving the same case. There was no suggestion of a personal interest by the judge.

Miscellaneous Complaints

A variety of other complaint files were closed during the year, of which the following are representative:

- A complainant who had been awarded costs by one judge in a motion in his divorce proceedings brought a motion before another judge against his ex-spouse's lawyer personally for non-payment and added the lawyer's name to the style of cause in the divorce proceedings. The second judge dismissed the motion and ordered the complainant to pay costs. The complainant alleged that

the judge had said the first judge “should go to dumb judge’s school” for having awarded costs against the solicitor, since the complainant had represented himself. The judge, asked to comment, said he was wrong to criticize the first judge, that he had apologized and the apology had been “graciously accepted.” The complainant was advised that the awarding of costs is a matter for a judge’s discretion and cannot be reviewed by the Council. He was also advised that as the judge had recognized the impropriety of his comments regarding the other judge’s order, there was no basis for further action by the Council.

- The complainant, the chair of a volunteer organization that administers a minor hockey program, alleged that a newly appointed judge sought to use his judicial position to achieve personal objectives by using his judicial letterhead to complain about the geographical boundaries of the league and declare that “I will not tolerate this situation” next year. The judge advised the Council that he had discussed the matter with senior justices who advised him he should not have used his official letterhead when writing personal correspondence. He apologized, saying he had not used the official stationery with a view to gaining personal advantage. The complainant was advised that “it was most regrettable that this incident arose” but, in that the judge had apologized for failing to consider the implications of using official letterhead for private correspondence, there was no basis for further action by the Council.
- A similar complaint involved the neighbour of a judge who objected to the judge’s using court stationery to raise personal objections about the complainant parking his drywall truck in the neighbourhood. He felt the use of the letterhead was “indicative of his intent to intimidate” and was a misuse of his judicial position. The judge apologized for using the stationery saying he had not intended it to intimidate the complainant and, in fact, the possibility had not crossed his mind. The reason for using

it, he said, was that it was the only notepaper immediately available when he wrote the note. The complainant was advised that it was preferable that judges not use official stationery for private purposes but the incident was not sufficiently serious to deserve further action on the part of the Council.

- A complainant, an expert witness at a trial, said that he has a very low and soft voice. A judge, he alleged, appeared to be angry when he could not hear what was said and spoke rudely to him in asking him to speak up. He said he was shocked at the judge’s manner. The judge explained that the Crown’s first witness was a 12-year-old who had spoken in a very low voice. The second witness was also hard to hear. A transcript of the proceedings recorded the ensuing exchange with the complainant. In the exchange, the judge told the Crown: “I’m afraid you don’t seem to be having very good fortune with your witnesses. I expect that this witness would have the wit to speak up. What did he just say?” The judge then told the complainant to “speak into the microphone and you’re to speak loudly and clearly: Do you understand what I’ve told you?” The judge unreservedly apologized to the complainant and said he wanted to “assure him that my only intent was to have him speak up.” The complainant was provided with a copy of the judge’s letter and advised that the Council regretted the judge’s lack of courtesy and welcomed his unreserved apology.
- A complainant took issue with a judge’s comments as reported in a newspaper. The judge was reported as abruptly ending a hearing before closing arguments were completed and telling the counsel for one of the parties as she began her closing arguments that “you’ve got six minutes to sing.” He also said he was a “one-day judge” and said nothing in the law required him to deliver a decision within a set period. The complainant objected to the judge’s arrogance and asked that the judge be removed from the bench. The judge, asked to respond, apologized

for his conduct, acknowledging that he had “reacted in an intemperate and inappropriate manner.” He said that, following the hearing in question, he had arranged to complete the hearing the following week although he was not scheduled to sit, and had apologized to counsel and his colleagues at the start of that hearing. Counsel for all parties indicated that they were content to have the judge continue on the case. A letter to the complainant noted both the judge’s regrettable lack of courtesy and his unqualified apology. There was no basis for further action by the Council.

- The complainant, the mother of a young female victim in an alleged sexual assault, sexual exploitation and incest case where the judge found the accused not guilty, alleged that the judge was wrong to come to the conclusions that he did. She believed there had been a miscarriage of justice and asked the Council to investigate the reasons the judge gave for his verdict and his ability to preside over other sexual assault cases. The complainant was advised that her letter paralleled what a Crown counsel might outline in the case of an appeal but the Council had no basis for further action in that “an unpopular decision does not amount to judicial misconduct that would engage the jurisdiction of this Council.”

Complaints Against Council Members

Council members themselves are, of course, not immune from complaints. There were eight files closed by the Chair or Vice-Chair of the Committee during the year which involved one or more Council members. Accordingly, independent counsel reviewed the files before they were closed. In all cases counsel concurred in the disposition by the Chair/Vice-Chair. Some examples of these files follow:

- The complainant alleged that an Associate Chief Justice had exhibited bias and a lack of impartiality in administration of the case management process in rendering a decision that a corporation in a bankruptcy matter had to be represented by counsel. He complained that following a meeting with his Chief Justice, the Associate Chief Justice

had taken certain actions and had continued to sit as a judge in the bankruptcy proceedings although he had been served with a notice of appeal as the respondent. The complainant was advised the Council has no authority to direct a judge in the exercise of his or her judicial functions. The fact that the complainant was fundamentally in disagreement with certain decisions and that they had a major impact on his rights and those of the creditor he was representing do not amount to bias and partiality. The Associate Chief Justice denied the implication that he had acted as a result of influence from his Chief Justice. The complainant was also advised that judges are not required to disqualify themselves because appeals are taken.

- The complainant, a party in a landlord-tenant dispute, alleged that a judge who presided at trial was “either incompetent or had an undisclosed interest” but provided no particulars regarding the allegation of conflict. The complainant had written to the Chief Justice and Associate Chief Justice of the court complaining about the judge and, when he received no response, complained to the Council about all three judges. In his material, he alleged the Chief Justice was a close friend of the landlord and had presided at a mini-trial. The judge, responding to queries, said that the complainant had been the defendant in the landlord-tenant matter and had lost. His counterclaim against the landlord was dismissed with costs against him. He appealed and lost on appeal. The judge noted that the Chief Justice had not presided at the mini-trial as alleged. The complaint was found to be without merit.
- A complainant wrote 10 letters alleging conflict of interest against a number of judges. One judge was alleged to be in conflict because, when she was president of a provincial law society, she declined to meet the complainant regarding his allegations about a lawyer. The letters provided no information in support of his allegations against various other judges. A number of the complaints appeared, however, to relate to the disposition of previous complaints. The complaints were found to be without merit.

- A complainant, dissatisfied about the decisions of three judges related to his claims against the Ministry of Social Services in his province, had sent an application directly to the Chief Justice of the province and complained that the Chief Justice did not respond directly to him. The Chief Justice, asked for comment, said that the complainant had a history of multiple claims against the ministry and was under an order requiring leave before commencing further proceedings to preclude frivolous and vexatious proceedings. The complainant, the Chief Justice said, had ignored proper procedure in sending the application directly to him and he had assigned the matter to another judge, against whom a complaint was also made. The complaint was found to be without merit.

Files Discontinued

Of the five files closed as discontinued during the year, three related to the conduct of Mr. Justice Jean Bienvenue but were distinct from the subject of the inquiry into the judge's conduct. The files were closed as discontinued after the resignation of the judge.

The remaining files involved the following complaints:

- A number of complaints relating to an apparent pattern of inappropriate conduct on the part of a judge led to a request for an independent fact-finding. These inquiries were never commenced, however, as the judge died suddenly and the file was closed as discontinued.
- A file was opened following a complaint by a Council member involving the conduct of a member of the chief justice's court. The complaint involved the actions of a judge when his wife was driving him home from a party and she was stopped by police. The judge was subsequently charged with two offences involving the obstruction of a police officer and obstruction of justice. Soon after, the Governor in Council accepted the judge's resignation and the file was closed and classified as discontinued.

FILES CLOSED BY PANELS OF COUNCIL MEMBERS

A total of five files were closed after consideration by Panels of the Members of the Council. Panels are normally designated to deal with a particular file when the Chair or Vice-Chair managing the file feels that an expression of disapproval might be warranted or, in more serious cases, that there might be reason for a Panel to recommend to the Council that there be a formal investigation of the matter.

Two of the five files were referred to three-member Panels, one to a two-member Panel and two to one-member Panels.

These cases referred to Panels were as follows:

- Two complaint files, opened as a result of media coverage and questions in the House of Commons concerning the implications of contacts between a senior member of the Department of Justice and Chief Justice Isaac of the Federal Court of Canada, were assigned to the same Panel by the Chair of the Judicial Conduct Committee. The complaints were unique in that they were initiated in letters from the Chair of the Council's Judicial Conduct Committee. In the first file about Chief Justice Isaac a complaint was subsequently received from an individual having an interest in the litigation of concern. The complaint of the Committee Chair was that allegations had been made in court proceedings that Chief Justice Isaac had "entertained representations on behalf of one party in such proceedings" and that such representations had led "directly or indirectly" to Associate Chief Justice Jerome removing himself as presiding judge. In the second file, the Committee Chair requested that the Associate Chief Justice comment on allegations that he had "seriously delayed the conduct of the proceedings." After responses were received, the files were referred to a three-member Panel which asked that an independent fact-finding be conducted with regard to both complaint files. On the basis of this fact-finding, the Panel concluded that an expression of disapproval was warranted in each case.

Because of the public interest in the matter, press releases were issued when the files were closed.

- A woman seeking interim joint custody and/or access to a child adopted by another woman complained that a judge admitted to being prejudiced in such cases, did not take her case seriously and a motion to dismiss her application was granted within five minutes of the start of the hearing. The judgment was reversed on appeal and returned to the trial court. Subsequently, the judge wrote an open letter to a newspaper as there had been considerable media coverage about the case. The one-member Panel concluded that a formal investigation was not justified but that an expression of disapproval was warranted. The Panel found there was no evidence that the judge was prejudiced in the sense understood by the complainant, but the complainant had grounds for believing her application was not taken seriously by the court.
- A complainant in a civil action complained that a judge had delivered her judgment only in English when all parties to the proceeding were French-speaking and the trial had been conducted in French. The judge's understanding of court policy, based on the recognized jurisprudence, was that the judge could write a judgment in the language of choice and, in this case, the choice was English because the judgment was long, it was preferable to render judgment quickly and the judge could prepare the judgment more quickly in the language in which she was most at ease. The two-member Panel concluded that there was no evidence of misconduct and no reason for an expression of disapproval. The Panel noted, however, that it was preferable that a judgment be pronounced or written in French if that were the language used in a hearing or, alternatively, written in English and translated into French prior to its being rendered. The complainant was also

informed of provincial government directives providing that, on request, judgments rendered in English may be translated without cost to litigants into French. The Panel also said that it would also have been preferable for the judge to inform the parties when, as in this case, the language of the trial would not be used in the judgment so that the parties could engage the services of an interpreter for simultaneous translation if they wished to do so.

- A complainant, a member of an association that advises persons unrepresented by legal counsel, alleged that a judge had not allowed him to say anything about a motion for corollary relief, had become angry and had ordered him to get legal counsel. The complainant indicated that his pleadings had been prepared by a member of the association who was not a member of the bar. The association was also named as an intervenor in the proceeding. The judge was asked for comment. The judge said that in referring to the preparation of the pleadings if the complainant needed legal assistance he must retain the services of licensed legal counsel and the complainant, who had no legal training, might have found it difficult to understand that his motion had been dismissed because it was not in accordance with the law. A one-member Panel found that the complainant's lack of experience with the courts may have led to difficulty in indicating that he wanted to argue a point of law relating to his motion, or that he wanted to request a postponement to prepare himself accordingly. It was unfortunate, the Panel found, that the complainant had interpreted the judge's intervention as being unfair or critical but it was not within the jurisdiction of the Council to reverse the court's decision. The complainant had subsequently exercised his right to appeal the matter to a higher court. The Panel concluded that no action was warranted under the *Judges Act*.

THE BIENVENUE INQUIRY

In December 1995, during the trial and sentencing of Tracy Théberge in Trois-Rivières, Quebec, Mr. Justice Jean Bienvenue of the Quebec Superior Court made a number of widely publicized comments which offended women and Jews and which led to a request from the Attorney General of Quebec, The Hon. Paul Bégin, for a formal inquiry under subsection 63(1) of the *Judges Act* and a subsequent, similar request from the Minister of Justice of Canada, The Hon. Allan Rock. In addition to these requests, the Council received about 100 complaints from the public about the conduct of the judge.

As set out earlier, a request under subsection 63(1) of the *Act* requires the Council to establish an Inquiry Committee and submit the Council's report to the Minister of Justice. This was the first time an attorney general of a province and the Minister of Justice of Canada had both directed the Council to conduct such an inquiry.

The five-member Inquiry Committee, consisting of three Council members and two lawyers appointed by the Minister of Justice of Canada, conducted hearings in March and April, 1996. The hearings, which were chaired by The Honourable Pierre Michaud, the Chief Justice of Quebec, and conducted in public, attracted widespread attention and heightened public awareness of the Council's role, procedures and its powers with regard to formal inquiries into a judge's conduct.

During his sentencing of Ms. Theberge, who was found guilty of second-degree murder for killing her husband, Mr. Justice Bienvenue said that ". . . when women ascend the scale of virtues, they reach higher than men . . ." but ". . . when they decide to degrade themselves, they sink to depths to which even the vilest men could not sink." He also said that "even the Nazis did not eliminate millions of Jews in a painful or bloody manner. They died in the gas chambers, without suffering."

In addition to these much-criticized comments, the judge criticized the jury and questioned the jurors' decision to find Ms. Theberge guilty of second-degree murder, referring to them in front of an officer of the court as "idiotic and incompetent." He also made comments to a female juror, remarks about those contemplating suicide, about a parking attendant and to a female reporter about her attire.

The Inquiry Committee made public its 90-page report on July 4, 1996. Four members of the Committee recommended that Mr. Justice Bienvenue be removed from the bench. These members were the Chair of the Committee, Chief Justice Michaud; Chief Justice Joseph Z. Daigle of the New Brunswick Court of Queen's Bench; and the two appointees of the Minister, The Honourable Paule Gauthier and Professor Nathalie Des Rosiers, both members of the Quebec Bar.

The fifth member, Chief Judge J.-Claude Couture of the Tax Court of Canada, did not recommend removal and submitted a 28-page minority report.

In its 62-page report the majority said that "like anyone else, a judge can have a bad day. In this case, the breaches of ethics brought to our attention — the judge's repeated remarks about women and the comment he made to the jurors after their verdict are serious and, as with the other incidents alleged against him, have not been retracted by him. We are therefore not dealing here merely with strong language. The judge's remarks about women and his deep-seated ideas behind these remarks legitimately cast doubt on his impartiality in the execution of his judicial office."

His remarks, the Committee found, had the effect of creating two classes of individuals — "men, who, since they are less elevated, supposedly do not fall as far, and women, who are subjected by such an idea to a more exacting standard of

conduct and whose offences, which may or may not be more serious, would deserve more severe punishment.” This is a bias that denies the principle of equality before the law, the Committee said.

The Committee said it “seems unthinkable that a judge would, after serious thought, make the remarks about women made by Mr. Justice Bienvenue in a sentence, repeat them the following day in the media, make a late, rather meaningless apology to ‘all women who may have been shocked or offended by (his) statements . . .’ and, finally, restate before this Committee, and expand on, the statements the judge had already made.”

The Committee concluded that Mr. Justice Bienvenue “has breached the duty of good behaviour under section 99 of the *Constitution Act, 1867* and has become incapacitated or disabled from the due execution of the office of judge.

“. . . we believe that if Mr. Justice Bienvenue were to preside over a case, a reasonable and informed person, viewing the matter realistically and practically — and having thought the matter through — would have a reasonable apprehension that the judge would not execute his office with the objectivity, impartiality and independence that the public is entitled to expect of a judge.”

In his minority report, Chief Judge Couture noted Mr. Justice Bienvenue’s “impressive career” on the bench and the fact that no evidence was submitted to the Committee that prior to the Théberge case the judge had ever done anything incompatible with the office of judge, “whether through his behaviour or actions, or ever displayed sexist or anti-Semitic attitudes in his writing or speech, as claimed by certain people who filed complaints against him with the Canadian Judicial Council.”

In the absence of such evidence, Chief Judge Couture said, “I find it difficult to accept that when sentencing the accused, Mr. Justice Bienvenue suddenly became imbued with sexist and anti-Semitic opinions or that he deliberately intended through his remarks to denigrate women in general and to maliciously attack the Jewish community.”

The remarks made by the judge were unfortunate in that they lent nothing to the sentence, Chief Judge Couture said, and it was regrettable they were badly received by some members of the public. “Unfortunately, such a situation is not sufficient to recommend Mr. Justice Bienvenue’s removal,” he wrote. The application of the *Judges Act*, he said, must be subordinate to the doctrine of judicial independence and meet the standards applicable to this doctrine.

“As far as Mr. Justice Bienvenue’s remarks about women and Jews are concerned, I am of the opinion, in light of the evidence we must assess, the case law and the opinions of authors who have considered this issue, these remarks cannot amount to misbehaviour by Mr. Justice Bienvenue under section 99 of the *Constitution Act, 1867*,” he wrote. “The combination of a number of such grounds cannot lead to a conclusion that the judge was guilty of misbehaviour in the same way that a number of violations of a municipal by-law cannot make a person guilty of a criminal offense.”

In September 1996, at its meeting in Halifax, the Council considered the report of the Committee and voted 22–7 to recommend to the Minister of Justice of Canada that Mr. Justice Bienvenue be removed from the bench.

The Majority found that the “totality of the matters dealt with by the Inquiry Committee demonstrably support the majority Committee’s conclusion” that the judge had shown an “almost complete lack of sensitivity to the communities and individuals offended by his remarks.” The majority drew particular attention to the Inquiry Committee’s view that

“in addition — the evidence cannot be any clearer — Mr. Justice Bienvenue does not intend to change his behaviour in any way.” The public must have confidence in judicial impartiality, the Council majority concluded. “We agree with the majority of the Inquiry Committee that the public can no longer reasonably have such confidence in Mr. Justice Bienvenue.”

See Appendix G for the majority, concurring and minority reasons.

Before Parliament was required to consider the matter, the judge resigned from office, effective September 30, 1996.

ISSUES

... I am of the firm belief that there has long been a need in Canada to make provision for affording the judiciary regular opportunities for informal discussion of common problems and of possibly resolving by these means some of the defects in our system of criminal law . . .

— Memorandum dated November 2, 1964
from Professor John Edwards,
Director, Centre of Criminology
University of Toronto

On organizing meetings of chief justices following the first Conference of Chief Justices, which he organized and the university hosted

THE FRIEDLAND REPORT

In August 1995, the Council released the report of Dr. Martin Friedland of the University of Toronto Law School on the conflicting requirements on Canada's judiciary to be both independent and accountable. The report, entitled *A Place Apart: Judicial Independence and Accountability in Canada*, had been commissioned by the Council two years earlier.

The immediate reasons for the study lay in public concerns about the judiciary and, particularly, the administration of superior courts, and the processes for handling the complaints about the conduct of judges. However, these issues were not new. The Council itself came into being partly in response to concerns raised at the time that the then-existing way of handling complaints — through the Department of Justice and the Minister, and, in cases of particular public notoriety, through public inquiry — brought into question the requirement for judicial independence.

There was a widely held belief, reflected in the positive parliamentary response to the original legislative proposals for the Council, that the judiciary should become a self-

disciplining body while always maintaining the existing constitutional requirement that ultimately a judge can only be removed from the bench by Parliament.

The question for Dr. Friedland was whether the procedures and approaches developed by the Council since 1971 to carry out these responsibilities met the complementary need for accountability.

To answer this question, Dr. Friedland was given full access to the Council files and having examined the handling of complaints, particularly in recent years, his conclusion was clear and unequivocal: "My overall opinion is that the Judicial Conduct Committee (of the Council) has dealt with the matters received carefully and conscientiously. I never sensed that any matter was being 'covered up' by the Council after a complaint was made to it. The descriptions in the Annual Reports . . . in my view appear accurately to reflect the complaints that have been received by the Council." At the same time, he made a number of suggestions that would give greater visibility to the Council's complaints processes.

With the public release of the report, the Council established a working group chaired by Chief Justice Richard Scott of Manitoba to examine Dr. Friedland's proposals on this and other issues. As well, the Council continued with work already under way, for example on proposals to set out ethical principles to guide the judges in their behaviour on and off the bench.

With the conclusion of this work, the Chairman of the Council, The Right Honourable Antonio Lamer, wrote to each federally appointed judge providing him or her with a copy of the working group's report and advising them that he had written to the Minister of Justice to convey the Council's position as it had been drawn from the views set out in the working group's report.

The recommendations were comprehensive and diverse and the Council's response was equally so. The issues raised by Professor Friedland's report, for example, include issues such as the financial security of judges; their retirement age; whether the constitutional requirement for a Joint Address by simple majority vote by both Houses of Parliament should be changed to require a two-thirds majority; whether the Chief Justice of a judge whose conduct is in question should deal first with the complaint or, as at present, an out-of-province Chief Justice should do so; whether there should be lay or lawyer representation on Panels investigating a judge's conduct; and whether the Council should be authorized to sanction judges for conduct not deserving a recommendation for removal from the bench, in addition to expressing disapproval as is done at present.

The Council deferred consideration, approved or opposed these proposals on a case by case basis. It suggested that a two-thirds House of Commons and Senate majority was probably preferable to a simple majority for removal from the bench but a constitutional amendment requiring this was unlikely and, absent such an amendment, it was a matter for Parliament itself. It opposed lay representation on panels investigating a judge's conduct and opposed as well the suggestion that the Council should have greater powers to sanction judges for conduct not warranting removal.

Other issues had already been studied by the Council — for example, on a recommendation for outside monitoring of its complaint files, the Council approved the idea but noted that it had already invited the Canadian Bar Association to examine the files to satisfy itself as to the fairness of the process before adopting a position proposed as a response to its *Report of the Task Force on Gender Equality in the Legal Profession*. This invitation had not been accepted.

Equally, the Council had begun work on how to provide guidance to judges on the conduct that might be appropriate in certain circumstances. Professor Friedland had proposed the preparation of a code of conduct but the Council's working group ultimately came to the view that defining and setting out the ethical principles that should guide judicial conduct was more appropriate and consistent with an independent judiciary than a code of conduct *per se*.

ETHICAL PRINCIPLES FOR JUDGES

The idea of codifying behaviour as suggested by Professor Friedland is a long-standing one, not confined to judges or to judicial conduct. It is also an idea beset by difficulties when the effort is made to set down what conduct is appropriate and acceptable, and what is not.

One of the most evident difficulties is that behaviour changes over time but, more to the point, standards of what is acceptable change even more and more often. Codifying "good" behaviour in any context is difficult enough. A judicial context that is constantly evolving multiplies the difficulty. Nonetheless, the idea's appeal has considerable endurance. It appeared, for example, in the debates on the legislation that gave the Council a statutory basis in 1971.

But, if it appeared in the debate, it did not appear in the legislation. Canada, in consequence, not only has no code of conduct for federally appointed judges but it has no evident statutory basis for such a code. This does not eliminate the desire for, or the desirability of, codifying judicial behaviour. But, inevitably, it leads to the prescription of appropriate conduct being voluntary in nature, a matter of guidance rather than requirement, of acceptance rather than obedience.

This was true of the first effort to develop a code of conduct in the 1970s. Ultimately the effort led to retired Chief Justice J.O. Wilson's *A Book For Judges* and retired Chief Justice Gerald Fauteux's *Le Livre du Magistrat*, both published by the Council in 1980. Another attempt, begun in 1985, resulted in 1991 in the publication of *Commentaries on Judicial Conduct*. Thus, the search led to the publication of three distinguished works of scholarship but not to a code.

In 1994, the effort began again and it quickly became clear, as a discussion document in the autumn of 1995 noted, that "the word code may not be the best one to describe what is intended." What was intended, the document noted, was "not a list of prohibited behaviours with attached sanctions" but an "emphasis on the maintenance of a high level of judicial conduct rather than on cataloguing misconduct." Its purpose was to assist judges in resolving ethical and professional dilemmas and help the public understand the legitimate expectations they may have of judges as they carry out their public duties and live their lives in their communities. It was to have no formal link to the judicial conduct processes of the Council.

Members of the judiciary and the legal community were to be consulted as drafts reached the point they would benefit from additional views. New drafts of the suggested text of the ethical principles that should guide judges would reflect the views that were expressed and the complexity of issues raised. This process of development and refinement was expected to continue for some time and to involve more members of the judicial community and the public.

TECHNOLOGY AND THE COURTS

The Judges Computer Advisory Committee examines new information technologies and advises the Council of appropriate applications in the judicial system and emerging issues. Through a newsletter, *Computer News for Judges (CNJ)*, the Committee advises judges of what is available, may be of use and how it may best be used to advantage.

The Committee played the lead role in developing the electronic standards discussed below, and during the year was asked to consider the matter of copyright on judgments. The Committee also conducted an informal survey of the extent of technology usage in the judiciary and, partly as a result, recommended greater support by federal and provincial governments for computer use and technical assistance in the courts. For example, the Committee said such support was particularly important because federal statutes and regulations were being updated on CD-ROMS, to which few judges have access, while no longer being published in easily accessible, hard-copy format.

Most of the members of the Committee are puisne judges, which makes it unique among Council committees. Generally, the Committee meets twice a year. See Appendix B for membership. Other meetings are conducted by conference call.

Some 550 federally appointed judges are on the mailing list for the newsletter, including a majority of the members of the Council. Another 650 copies are sent to territorial and provincial court chief judges for distribution to interested judges on their courts.

During 1996-97, two editions of the newsletter were published, Numbers 21 and 22.

In Number 21, *CNJ* dealt with:

- Questions regarding the use of systems for scanning hard copy for computer storage, including the problems with storage capacity when this technique is used regularly to store both hard copy and e-mail images, the problems associated with conversion by existing Optical Character Recognition (OCR) software — OCR technology is 98 per cent accurate, requiring a fine edit to ensure full accuracy — and the differences between hand-held, desk-top and flat-bed scanners in capabilities and prices;
- The pros and cons of converting to Windows 95 in older laptop computers instead of continuing to use Windows software, including considerations involving disk space, the use of the Internet and the value a user may place on various macro applications that have been collected or developed by the user;
- Tips for MAC users, including ways to affix your “real” signature on letters created for facsimile transmission, how to add watermarks to regular paper, and how to keep track of which word processor was used on a particular document; and
- An article originally published in *CyberNews* on the use of Standard Generalized Markup Language (SGML) in managing legal documents.

In Number 22, *CNJ* included articles on:

- The use of speech recognition technologies such as Automatic Speech Recognition (ASR) by legal practitioners, including the problems that have plagued this technology as it has been made more sophisticated, as well as the normal problems associated with speech recognition systems;
- A report on the adoption or prospective adoption of the *Standards for the Preparation, Distribution and Citation of Canadian Judgments in Electronic Form* in a number of provinces, the Tax Court of Canada and the Supreme Court of Canada, as well as an article on British Columbia’s experience in using the standards to put judgments on the Internet;
- A device allowing the use of courthouse telephone lines by providing a way to convert the analog signal on a telephone handset to digital so that it can be used on a computer; and
- An article that originally appeared in the Canadian Bar Association, Manitoba Branch, newsletter in which a practising lawyer reviews available computer hardware and system requirements for various components.

ELECTRONIC CITATION OF JUDGMENTS

In June 1996, the Council published the *Standards for the Preparation, Distribution and Citation of Canadian Judgments in Electronic Form* prepared by the Judges Computer Advisory Committee. These standards set out the basic features that all judgments in electronic form should share whether using disk or CD-ROM or communicated by modem or any other digital means.

The development of these standards will allow courts to take advantage of the increasing capability for electronic distribution for courts, publishers, lawyers and the public, including the significant reduction in time between when a judgment is rendered and when it is published, the capability of much broader distribution of judgments, lower costs for reproduction, distribution and storage, and the ability to search full text and quote accurately without re-keying.

The standards are not intended to replace existing publication standards or place the courts in the position of competing with private publishers. Rather, the standards cover the format of judgments in terms of the display on a computer screen and the appearance of a page printed as the output of a computer file. The standards apply only optionally to printed law reports.

In that court systems worldwide have the same technological opportunities and similar problems in integrating traditional and electronic legal publication, storage and retrieval systems, the standards have attracted considerable worldwide interest since their publication. As well, by providing consistency throughout the court system, the standards allow for easier and more efficient public access to the law and streamline procedures by which different courts prepare and disseminate their judgments.

While, in future, electronic or machine-readable text may supplant print-on-paper, the fact that the standards are intended only to supplement printed law reports reflects both the high standards of accuracy adhered to by publishers of existing law reports and the difficulty in ensuring the authenticity of reports in electronic form using technologies now in widespread use.

In an electronic environment, judgments may be downloaded, even from a secure system, altered by the user, then uploaded to a bulletin board or Web site, or distributed through a news group or electronic mail, in a form in which the alterations are undetectable without reference to the original, unaltered version. Before judgments in electronic form could supplant printed law reports, it would be necessary to incorporate methods such as validation coding and electronic signatures, for securing authenticity into electronic standards. Eventually, this may be done.

CONTEMPT OF COURT GUIDELINES

In 1989, Guidelines on the Use of Contempt Power were prepared for the Council by Chief Justice Allan McEachern, then Chair of the Council's Administration of Justice Committee.

The decision to develop guidelines came as a result of the Council's concern that codifying contempt of court rules would likely be ineffective in anticipating all of the circumstances in which contempt might arise and would limit the wide discretion judges require to deal quickly and decisively with conduct that might disrupt proceedings. At the same time, because the contempt power had on occasion been abused, Council wanted to take steps to ensure scrupulous care in the use of this power.

The 1989 Guidelines emphasized the importance of judicial restraint and suggested ways in which to sever contempt questions from the issues at trial and to avoid difficulties that might arise from judicial remarks that could be construed as a prejudgment.

These Guidelines were updated in 1992, then again in September 1996 when the new version was approved for distribution to all federally appointed judges and all new judges in either hard copy or, if requested, disk format.

SYSTEMS OF CIVIL JUSTICE TASK FORCE

Council members discussed the various recommendations of the CBA Systems of Civil Justice Task Force Report, released in August 1996, which dealt specifically with judges and the courts.

In particular, the Council endorsed the following three recommendations (22, 23 and 24) in the Task Force report:

- Every appellate court should initiate appeals within 30 days after the filing and service of the trial judgment, hear appeals within nine to 12 months of notice of appeal, render judgments promptly and, except in complex cases or where new legal questions arise, no later than six months from completion of the appeal, and establish procedures to monitor performance in relation to these goals;
- Every appellate court should actively supervise the progress of appeals;
- Appellate courts, including the Supreme Court of Canada, should be given greater control over their civil dockets by all of the relevant jurisdictions.

WORKPLACE COMPLAINTS POLICY

Working with the Equality Committee of the Canadian Judges Conference, the Council's Special Committee on Equality in the Courts completed a model procedural policy for dealing with workplace complaints involving federally appointed judges. The policy was adopted by the Council early in 1997.

The Council urged chief justices throughout Canada to discuss the model policy with members of their courts and, if adopted by individual courts, communicate the policy to members of the court and to all staff potentially affected by it. Adoption of the policy would be voluntary.

The model policy recognized the right of judges and those who work with and for them to work in an atmosphere free of harassment. The policy defines harassment as any inappropriate or unjustified behaviour that might reasonably be expected to demean, insult or offend another person. The policy provides for an optional informal process allowing a complainant to seek to resolve a problem in confidence through the chief justice of a court or, where a chief justice was the subject of the complaint, through another chief justice. It also provides for a formal process where the complainant or his or her representative could submit a complaint in writing under subsection 63(2) of the *Judges Act*.

JUDICIAL BENEFITS

. . . the time is past when potential judges are likely to have independent means, and a responsible potential appointee who has no outside income cannot accept an appointment that does not carry with it, to some substantial extent, a replacement for the means of providing for his family that he would give up if he accepted such an appointment.

- December 1971 Memorandum for the Minister of Justice
Signed by The Right Honourable Gerald Fauteux
And 22 other chief justices of the day

THE TRIENNIAL COMMISSION

The legislative amendments creating the Canadian Judicial Council in 1971 were accompanied by legislation increasing judges' salaries. This salary legislation, which was in line with proposals of the Canadian Bar Association Committee on Judges' Salaries and Pensions, proved the most contentious element of the legislative package. The debate over how and how high to set judges' salaries continues.

The 1971 salary proposals reflected the view of the Canadian Bar Association Committee that increases were necessary to return judges to the financial position they had enjoyed since 1967 but which had been eroded by inflation. The objectives of the 1971 exercise notwithstanding, the inflation of that period proved to be mild compared to what was experienced in the remainder of the decade, and judges fell still further behind. Finally, in 1981, judges' salaries having fallen further behind, the Government established a process based on the triennial, independent review of judges salaries with a measure of automatic annual adjustment based on the Industrial Composite (Aggregate) Index.

The Minister of Justice of the day told the House of Commons on second reading of the legislation establishing automatic indexing and the Triennial Commission that the process should "avoid difficulties flowing from the dependence of the judges on salary adjustments by statute."

By the summer of 1994, however, the Chief Justice of Canada, The Right Honourable Antonio Lamer, in his annual address to the Canadian Bar Association, suggested that other approaches should be examined. The Triennial Commission "looks good on paper," he said, "but it has one problem: it just does not work." By 1994, the indexing of judges' salaries had been prevented for two years through a government imposed freeze of judicial salaries. Initially, this freeze was for two years but it still applied in 1996-97.

The work of five triennial commissions, meanwhile, remains largely unimplemented by a succession of governments. In their submission to the 1995 Triennial Commission, chaired by David Scott, an Ottawa lawyer, the Council and the Canadian Judges Conference argued as follows: "The failure to deal with the recommendations of the Triennial Commissions renders virtually meaningless the independent review process."

The Scott Commission noted in its report, delivered to the Government on September 30, 1996, that only one piece of legislation dealing with commission recommendations had been introduced in Parliament since the third Commission reported in 1989 and that legislation, Bill C-50, had been allowed to die on the Order Paper.

The 1995 Commission, like previous commissions, began its report with a critique of the process. The Triennial Commission approach, it said, was established because the previous process was "unstructured and unsatisfactory. It was characterized by the judiciary, in a supplicant's role, petitioning the

Government through the responsible minister . . . urging the Government to petition Parliament to do what was necessary to fulfil its constitutional obligation with respect to economic security for judges.” The 1981 reforms were supposed to create an independent body that could make “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 pre-eminently suited for judicial office.” The theory, the 1995 Commission said, was that the process would be “de-politicized and judicial independence would be thus maintained.”

The idea was sound, the Commission concluded, but “the underlying assumptions appear to have been naive. The result has been a failure in practice to meeting the desired objectives. In spite of extensive inquiries and exhaustive research, 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.”

The conclusion of the Commission was threefold:

1. “. . . appointees (to the bench) since 1981 were promised . . . an independent, rational, depoliticized procedure for the determination of their compensation.”
2. “The perception abounds that what they got was an abdication by the Government of its constitutional responsibilities.”
3. “. . . the ramifications of the failure to fulfill this promise will be significant and detrimental if the shortcomings in the process are not soon rectified.”

To remedy the problems it identified, the Commission recommended changes to the *Judges Act* requiring that the Government introduce a bill incorporating the changes it wishes to make to judges’ salaries and benefits at the same time as it asks Parliament to consider the report of a triennial commission. This should be required within 30 sitting days after the expiry of a three-month period. This, the Commission said, should remedy the existing problem whereby the consideration of a report by Parliament before the Government has made known its response has had “a negative impact on the prospect of the introduction of any constructive legislation.”

With regard to issues more directly related to judicial salaries, the Commission recommended:

Judicial Salaries

Judicial salaries be adjusted upward so as to ensure that the erosion of the judicial salary base caused by the elimination of statutory indexing (in 1992) be effectively corrected.

Judicial Annuities

Retirement on 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 — the so-called “rule of 80” long sought as a means of introducing a measure of flexibility and fairness into the judicial annuity system.

Retirement Provisions for Supreme Court of Canada Justices

In addition to existing retirement provisions and qualification for the rule of 80, Supreme Court justices should be permitted to retire with full pension after a minimum of 10 years’ service.

Spousal Survivor Benefits

That priority be given to the re-establishment of the appropriate judicial salary base and that there be no change to spousal survivor benefits for the time being.

Common-Law Spouses

Provision be made in the *Judges Act* to provide for a surviving spouse's annuity to be paid to a common-law spouse in legally appropriate circumstances.

Joint and Survivor Benefits

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

Interest on Judges' Pension Contributions

Changes should be made to the *Judges Act* to provide that interest be payable upon the return of all pension contributions made in 1996 and thereafter at the rates prescribed by the Income Tax Regulations and compounded annually.

Insurance

Government-paid life insurance coverage for judges be brought more closely in line with that provided to deputy ministers of the federal government.

Leaves of Absence

The *Judges Act* be changed to authorize chief justices to approve leaves of absence of up to six months, including maternity/parental leave and study leave.

The Council was advised as the fiscal year ended, prior to a federal election being called, that the Government intended to accept all the recommendations except those involving salary changes and reform of the triennial commission process. These latter questions, the Government advised, would be deferred until the fall of 1997.

