SUBMISSION TO THE 1999 QUADRIENNIAL REVIEW COMMISSION

By Mr. Justice Douglas Lambert

(Court of Appeal for British Columbia and
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I N D E X

1. The Purpose of this Submission

The purpose of this submission is to address the illegality and unfairness of requiring judges who have become entitled by age and length of service to retire on full pension to continue to make full pension contributions if they continue in service.

2. The Background for this Submission

This submission is intended to emphasize not only the unfairness of requiring judges who are eligible to retire on full pension to continue to make pension contributions, but, most importantly, to stress what I submit is the illegality and unconstitutionality of that requirement under the principles enunciated by Chief Justice Dickson, for the majority of the Supreme Court of Canada, in ***The Queen v. Beauregard***, [1986] 2 S.C.R. 56.

The position of the 1992 Triennial Commission on this question is set out at p.19 of their report. That position is simply that, on balance, the judges as a whole, at that time, paid about one-fifth of the cost of their pensions and that, in consequence, judges who are eligible to retire on full pension should go on contributing so as to make the judiciary, as a whole, contribute more, and the taxpayers, as a whole, contribute less, of the total cost of judicial pensions.

The position of the 1995 Triennial Commission on this question is set out in their report at pp.21-22. It is substantially the same in approach as the position of the 1992 Commission. The 1995 Report seeks to meet the issue of unfairness for judges eligible to retire on full pension who are required to make continuing contributions by comparing their lot with that of career public servants. The public servants must serve 35 years before being eligible to retire on full pension, (less for the R.C.M.P., the Canadian Forces, and Members of Parliament), whereas a judge who is appointed before age 50 can expect to receive a pension equal to two-thirds of judicial salary on attaining age 65, after as little as 15 years of service. It was also said in the 1995 Report, as in the 1992 Report, that the judiciary as a whole pays significantly less than one-half of the total cost of all judicial pensions.

A supplementary submission was made to the 1995 Triennial Commission about the relevance of the ***Beauregard*** case to the constitutionality of requiring judges eligible to retire on full pension to continue to make full pension contributions, but the 1995 Triennial Commission did not address that question. I suggest that the failure of the 1995 Triennial Commission to address such an important point when it was placed squarely before them heightened the prospect that the point about illegality through unconstitutionality would eventually be thrust into the courts in unseemly litigation between the judges of longest service, on the one hand, and the federal Crown, on the other.

The essential points contained in this submission received the support of the Canadian Judges Conference and the Canadian Judicial Council in submissions to the 1992 and the 1995 Triennial Commissions. I have not seen the current written submission of the Canadian Judicial Council and the Canadian Judges Conference to this 1999 Quadrennial Commission, but I have seen an outline. The point being made in this submission is consistent with the broader submission of the Council and the Conference that pension contributions ought to cease after 15 years service. This submission is more limited in scope and it depends more precisely on the illegality and unconstitutionality of the present requirement to make continuing contributions after eligibility to retire, as established by the ***Beauregard*** case. But I think that similar unfairness exists in relation to requiring judges to contribute to their annuities for markedly different periods. So I support the submission of the Canadian Judicial Council and the Canadian Judges Conference. However, there is no separate organization representing supernumerary judges or judges otherwise eligible to retire on full pension. And since I believe that the illegality and unfairness to which I have referred are most acute with respect to judges eligible to retire on full pension, I feel compelled to make this submission on my own behalf, though I believe it would be supported by all other judges in my position.

So that my own interests in this matter are clear, I should say that I am 69.5 years old; that I have been a judge of the British Columbia Court of Appeal for 21.5 years; that I have been making pension contributions throughout that period; and that

I elected supernumerary status with effect from 1 July, 1995 when I became eligible to retire on full pension. For the first ten years that I was on the Court of Appeal, from 1978 to 1988, I was the only one of the 13 judges of the court who was making pension contributions of seven percent of stipend. The other judges, having been appointed as judges before February, 1975, were only paying one and one-half percent.

3. Eligibility to Retire on Full Pension

The provisions of the ***Judges Act*** governing supernumerary status are ss.28 and 29, and the principal section governing judicial annuities is s.42.

Upon attaining the age of 65 or more, and having served for 15 years, a judge has three alternatives. The first is to continue working as a regular judge with a full share of the workload of the Court. The second is to retire completely and to start drawing an annuity equal to 2/3 of the judicial stipend at the time of retirement, indexed for some inflation. (This alternative may now arise earlier under the rule of 80). The third is to elect to become a supernumerary judge, to be paid the same salary as a regular judge, and to work an agreed share of the workload of the Court.

A judge who continues as a regular judge, and a judge who elects supernumerary status both forego the opportunity to do no further judicial work but to receive an annuity of 2/3 of their final judicial salary, indexed. In effect, they are

working for one-third of the current judicial salary. It is those judges who are, in my submission, unconstitutionally, unlawfully, and unfairly treated by being required to make continuing contributions to their judicial annuities at a time when they could be drawing those very annuities and making no contribution.

Of course, all judges must retire at age 75. So, at present, the illegality and unfairness which I am addressing continue for the ten years from age 65 to age 75, or less, if the judge does not attain 15 years service when he or she reaches the age of 65, or if the judge finally retires before reaching age 75. I would like to note also that a judge may elect supernumerary status on attaining the age of 70, if that judge has 10 years service by then. But the alternative of retiring on full pension is not available at that time and does not become available until 15 years of service have been completed.

4. The Allocation of the Cost of Public Service Pensions

Since the concept of trying to achieve equality of pension contributions as between the potential beneficiaries and the public purse seems to have guided the judicial annuity considerations of the 1992 and the 1995 Triennial Commissions, even to the extent of continuing to support the illegal and unfair result of requiring the continuation of contributions from those judges eligible to retire on full pension, I would like to note, as a preliminary point, that equality of contributions is not the

standard that is actually set for the public service pension plans, or that is actually achieved.

The conclusion (or assumption) that judges contribute only 20% of the cost of their pensions may be accurate for judges who retire at age 65 and thus start drawing pensions at age 65 but it is not accurate for judges who start making pension contributions at or before age 50, who contribute until age 65, and who do not retire at age 65 but defer retirement until as late as age 75. A judge's most usual career-retirement pattern (though it is sometimes interrupted by death) is to continue sitting after being eligible to retire, most frequently to age 75, the age of mandatory retirement. The average age of retirement is 71. This, however, takes into account judges who continue to sit after age 65, but who die before age 75. Consequently, to say that judges only contribute 20% of the cost of their pensions is inaccurate and misleading. In the usual career pattern a judge may contribute more than the public purse contributes.

In January 1995, the Pensions and Benefits Division of the Treasury Board provided the Commissioner for Federal Judicial Affairs with these figures about cost sharing in other public service pension plans:

> As requested, the following is the "employer" contribution, expressed as a multiple of the employee contribute rate, for the major federal public service pension plans:

Public Service Superannuation Act		1.38
Canadian Forces Superannuation Act	2.66	
RCMP Superannuation Act		2.05
Members of Parliament Retiring Allowances Act:		
HoC, basic plan		1.95
HoC, RCA		5.77
Senate, basic plan		1.72
Senate, RCA		2.84

Those ratios indicate that equality of contributions between the plan members, on the one hand, and the public purse, on the other, is not the guiding principle in any public service pension plan. That is particularly so with the House of Commons and Senate plans where the plan members, like the judges, are likely to enter the plan in middle life. If the 1992 Triennial Commission figure is correct then the multiple for the "employer" contribution to the judges' pension plan would be 4.0.

5. The Illegality of Continuing Contributions: The *Beauregard* case

The principal issue that was decided by the Supreme Court of Canada in ***The Queen v. Beauregard***, [1986] 2 S.C.R. 56 was whether the legislative requirement that federally appointed judges make compulsory pension contributions by deduction from their remuneration was constitutionally valid. In the course of his reasons, for the majority, Chief Justice Dickson said this, at p.77:

> As I have earlier indicated, the essential condition of judicial independence at the individual level is the necessity of having judges who feel totally free to render decisions in the cases that come before them. On the institutional plane, judicial independence means the preservation of the separateness and integrity of the judicial branch and

> a guarantee of its freedom from unwarranted intrusions by, or even intertwining with, the legislative and executive branches. It is very difficult for me to see any connection between these essential conditions of judicial independence and Parliament's decision to establish a pension scheme for judges and to expect judges to make contributions toward the benefits established by the scheme. At the end of the day, all s.29.1 of the ***Judges Act*** does, pursuant to the constitutional obligation imposed by s.100 of the ***Constitution Act, 1867***, is treat judges in accordance with standard, widely used and generally accepted pension schemes in Canada. From that factual reality it is far too long a stretch, in my opinion, to the conclusion that s.29.1 of the ***Judges Act*** violates judicial independence.
>
> I want to quality what I have just said. The power of Parliament to fix the salaries and pensions of superior court judges is not unlimited. If there were any hint that a federal law dealing with these matters was enacted for an improper or colourable purpose, or if there was discriminatory treatment of judges *vis-à-vis* other citizens, then serious issues relating to judicial independence would arise and the law might well be held to be *ultra vires* s.100 of the ***Constitution Act, 1867***.
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> (my emphasis)

The ***Judges Act*** requires that judges appointed on or after 17 February, 1975 must continue to contribute 7% of their annual salary as pension contributions even after they are eligible to retire on full pension, whereas all other public service pension plans, namely ***The Public Service Superannuation Act, The Canadian Forces Superannuation Act, the Royal Canadian Mounted Police Superannuation Act,*** and ***The Members of Parliament Retiring Allowances Act***, provide that when a plan member continues in service after attaining eligibility for retirement on full pension that plan member ceases to make plan contributions and makes only contributions at the rate of 1% of salary. So, in that respect, the judges are treated differently from, and adversely to, all other members of public service pension plans.

Formula pension plans in the private sector do not provide for the continuation of contributions from employees who continue to work after becoming eligible to retire on full pension. So again, the judges are treated differently from, and adversely to, members of private sector formula pension plans.

The requirement that judges continue to contribute 7% of their salaries as pension contributions after they have fulfilled the eligibility conditions for retirement on full pension, when that requirement is not imposed on plan members of other public service pension plans, or formula private plans is, it is submitted, a requirement that does not "…treat judges in accordance with standard, widely used and generally accepted pension schemes in Canada.", and which imposes "…discriminatory treatment of judges *vis-à-vis* other citizens…".

It is not suggested that the annuity provisions of the ***Judges Act*** were enacted for an improper or colourable purpose. But the provisions requiring the continuation of contributions after eligibility for retirement tend to encourage premature retirement and are so conspicuously unfair by requiring contributions without any compensating benefits, that they find no place in any public or private pension plan.

It is submitted that the unfairness of the continuing contribution provisions and the absence of any such provision in any other plans constitute the very kind of discriminatory treatment that was specifically contemplated by Chief Justice Dickson in the ***Beauregard*** case as leading to unconstitutionality and therefore illegality.

6. The Unfairness of Continuing Contributions: A Relevant Comparison

It is worthwhile to compare the net stipend of a judge who continues in office, either as a regular judge, or as a supernumerary judge, after eligibility to retire on full pension, with the net annuity of a judge who decides to retire.

	Continuing Judge	Retiring Judge
Stipend & Annuity	178,100	118,740
Annuity Contribution	12,500	NIL
Stipend after Contribution	165,600	118,740
Income Tax (approx.)	70,000	42,000
Net Stipend or Annuity	95,600	66,740

So the total additional compensation paid to a continuing judge for judicial work, over and above the amount that judge would be receiving as an annuity, is approximately $29,000 after tax, or about 30% of the net compensation of a regular judge. If a judge who is eligible to retire on full pension is continuing as a regular judge on a full load, he or she is doing so for only 30% of the net judicial salary. In British Columbia, and I know in other provinces where the workload is very heavy, judges who are eligible to go supernumerary are urged to do so, because by doing so they create a vacancy on their Court and so reduce the work pressure for their colleagues. By the same token, they are encouraged to work as close to a full load as possible and, in any case, not less than half of a full load. (In my case, in the 4.5 years

I have been a supernumerary judge, I have sat three-fifths the load of a regular judge, and I have given the reasons of the Court at a rate of at least three-quarters of the rate of a regular judge.

In short, when the foregoing of annuity payments is taken into account, judges who are eligible to retire on full pension are being compensated at only 30% of the compensation of their regular colleagues, but, in busy jurisdictions at least, are carrying a much higher percentage of the judicial workload.

It would do much to ameliorate the unfairness inherent in this comparison if judges who are eligible to retire on full pension were not required to make continuing annuity contributions.

7. The Unfairness of Continuing Contributions: Contributions without benefits

Since a judge may retire on full pension at age 65, after 15 years of service, a judge who continues to hold office, either full-time, or as a supernumerary judge, and who is required to continue to make pension contributions, receives absolutely no benefit from those continuing contributions. Since there is no longer any relationship between either pension entitlement or quantum, on the one hand, and pension contributions, on the other hand, the continuing pension contributions are not truly contributions to the judge's pension but are instead a tax, levied only on judges who are eligible to retire on full pension.

In this connection see ***Re Eurig Estate*** (1998), 165 D.L.R. (4^{th}) 1 (S.C.C.) where the distinction between a fee or mandatory contribution for a service, on the one hand, and a tax, without direct benefit, is discussed.

8. The Unfairness of Continuing Contributions: Shrinking Pension Value

A judge who is eligible to retire at age 65 in 1999 will have a pension entitlement with an actuarial value of about $1,800,000. That constitutes an asset of that value at that time. It can be utilized only by retirement. If a judge does not utilize the asset but instead elects to continue in judicial office until age 75, the value of the asset will have shrunk so that at age 75 the asset represented by the judge's pension entitlement will only have a value of about $1,200,000, subject to possible salary increments. So, by continuing in office, a judge's assets will have shrunk by about $600,000 due to the lessened life expectancy at age 75, compared to the life expectancy at age 65.

In the same period, the value of the judge's contributions made before age 65, but retained in the plan for an additional 10 years, would have more than doubled and would have almost tripled, even with no additional contributions after age 65. With additional contributions the increase in the value of that judge's total contributions both from the period before age 65 and the period from age 65 to age 75 will have

significantly more than tripled.

To require continuing contributions from a judge eligible to retire on full pension at the same time as the value of the asset represented by the pension benefit shrinks by some $600,000 is to require more and more contributions for something that is worth less and less.

That is no doubt among the reasons why no public service pension plans and no private sector pension plans require continuing contribution for employees who are eligible to retire on full pension.

9. The Public Service Contribution for Salary Enhancement

Other public service plans require only a contribution of 1% of earnings after the plan member becomes eligible for retirement on full pension. A contribution of 1% of judges' salaries after age 65 to cover the possibility of judicial salary increases being greater than the indexation of judicial pensions would be consistent with other public service plans.

10. Conclusion and Submission

I understand that the submission of the Canadian Judicial Council and the Canadian Judges Conference proposes that the maximum contribution period required for entitlement to a full judicial annuity on retirement should be fifteen years. There are considerations of equity through equality of treatment, which underlie that submission.

I support the submission of the Council and the Conference with respect to the maximum period of pension contributions and, indeed, in all other respects.

If the contribution limit proposed by the Council and the Conference were adopted, then my own submission, contained in this document, would be entirely within the ambits of the Council and Conference's proposal. So this submission is made in contemplation that there is no certainty that the Council and the Conference proposal will be recommended by the Commission. But a total or partial rejection of the Council and Conference proposal, while I would deplore it, would not vitiate this submission.

The unfairness in relation to demanding full pension contributions from judges eligible to retire on full pension demonstrates why similar provisions are not contained in any public service plan or in any private sector plan, and that fact, in

turn, demonstrates that in this respect, at least, judges are discriminated against by comparison with other citizens. It is this discrimination which leads to the unconstitutionality and unlawfulness of demanding continuing contributions from judges eligible to retire on full pension contrary to the principles enunciated by Chief Justice Dickson in the ***Beauregard*** case.

I consider it unseemly for senior judges to sue the Federal Crown over the question of unlawful pension contributions. I would hope that this issue of legality flowing from unfairness would be dealt with explicitly by this 1999 Quadrennial Commission. And I would hope that this submission would be supported by the Federal government before the Commission.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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The Honourable Mr. Justice Lambert

25 November, 1999