December 15, 2003

TO: THE JUDICIAL COMPENSATION AND BENEFITS COMMISSION 2003

SUBMISSION REGARDING SURVIVORS' BENEFITS
AND THE SINGLE JUDGE

FROM: Hon. Alice Desjardins, J.A.
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INTRODUCTION

At the hearing of the 1999 Quadrennial Judicial Compensation and Benefits Commission (the 1999 Commission), dated February 14, 2000, 1 submitted the proposition that single judges be allowed to register a close family member under the Public Service Health Care Plan, even if that family member was neither in a conjugal relationship with the judge nor a dependent.

At the time I made my submission, the Association of Canadian Superior Court Judges (the Association) had filed with the 1999 Commission a recommendation No. (X) which stated that:

> Single judges be entitled to benefits equivalent to those that are received by judges with survivors.

(See Judicial Compensation and Benefits Commission, Report, May 31, 2000, paragraph 4.3, recommendation No. (X), page 67).

The Association subsequently abandoned its recommendation No. (X). The 1999 Commission was therefore never called up to express its views on it.

With regard to my own submission dealing with the Public Service Health Care Plan, the 1999 Commission, in its Report, "felt that a change of this nature would have such far-ranging implications for so many social programs that they were not able to recommend it". (See Judicial Compensation and Benefits Commission, Report, May 31, 2000, paragraph 5.2 *in fine,* page 97.)

My greatest concern, as a single judge, had always been the unequal treatment of single judges with regard to survivors' benefits.

I therefore bring this issue to the attention of the Commission.

PROPOSITION

Under the present state of affairs, married judges, those living as common law couples and same-sex couples enjoy benefits that are denied to single judges.

Common law couples and same-sex couples were given, as a matter of principle, survivors' benefits traditionally reserved to married couples following the adoption of section 15 of the *Charter* and its interpretation by the Supreme Court of Canada in cases such as ***Miron v. Tradel,*** [1995] 2 S.C.R. ***418, Egan v. Canada,*** [1995] 2 S.C.R. 513, and M. v. H., [1999] 2 S.C.R. 3.

At no time has anyone ever raised the monetary or social consequences of such inclusiveness in the legislation.

Single judges, which comprise, inter-alia, unmarried judges, widows and widowers, continue however to be deprived of such benefits.

I submit that single judges should be treated equally to other judges. Marital status includes the single judges. There should bean end to this underinclusiveness in the judges' pension scheme.

Single judges should be permitted to designate a member of their family close to them as beneficiary of the same actuarial value as those received by survivors of married judges, of those living in same-sex or in common law relationships. Economic dependency should not be a criterion since spouses or partners are not always economically dependent. Living together should not be a criterion either since spouses or partners do not necessarily always live together but retain their privileges when they do not. Some emotional ties or emotional dependency should suffice. A duty of assistance could also be considered.

ANALYSIS

Peter W. Hogg in *Constitutional Law of Canada,* Fourth Student Edition, (Toronto: Carswell 1996) at § 52.7(b) captures well the irrationality of excluding non-sexual couples from government programs when he states:

> With respect to tax and benefit programmes (at least), it is unlikely that the constitutionally-required extension of spousal recognition to common-law couples *(Miron)* and same-sex couples *(Egan) will* end the constitutional challenges based on underinclusiveness. What is the justification for excluding those people who live in relationships of mutual support and dependence, but without a sexual aspect? Households comprising two friends, or two siblings or a parent and child (for example) will probably have to be added to those programmes that now make use of concepts such as spouse or family. Their exclusion is based on something like marital status and sexual orientation, involving as it does stereotypical assumptions as to what counts as a marriage or a family, and an irrational preference for sexual relationships over others that may be just as deserving of support. [Emphasis added]

The Law Commission of Canada has made an extensive study of a need for revision in the law in its recent report entitled *"Beyond Conjugality"* (December 21, 2001). At page ix of the Executive Summary, the Commission states:

> Canadians enjoy a wide variety of close personal relationships – many marry or live with conjugal partners while others may share a home with parents, grandparents or a caregiver. The diversity of these relationships is a significant feature of our society, to be valued and respected. For many Canadians, the close personal relationships that they hold dear constitute an important source of comfort and help them to be productive members of society.
>
> The law has not always respected these choices, however, or accorded them full legal recognition. While the law has recently been expanding its recognition beyond marriage to include other marriage-like relationships, it continues to focus its attention on conjugality. The Law Commission believes that governments

> need to pursue a more comprehensive and principled approach to the legal recognition and support of the full range of close personal relationships among adults. This requires a fundamental rethinking of the way in which governments regulate relationships.

The Law Commission of Canada, after having quoted McLachlin J. (as she then was) in *Miron v. Trudel* (see its recent report entitled "Beyond Conjugality", (December 21,200 1) at page 15) states:

> "McLachlin J.'s comments remind us that the principle of relational equality requires more than equal treatment of conjugal couples."

I fully endorse this statement of the Law Commission of Canada.

Married judges and those living in common law or same-sex relationships have made a personal choice with regard to their partners. This choice entails legal consequences with regard to survivors' benefits. The single judge should also be able to make a personal choice with regard to the person who should be entitled to receive his or her share of survivors' benefits.

All judges contribute equally to the judges' pensions scheme and should be treated equally.

CONCLUSION

Single judges cannot go to court and have this matter resolved in their favour.

They can only address the Commission which, I submit, has the duty to ensure that the judges' pension scheme reflects the values embodied in the *Charter*.

RECOMMENDATION

Single judges should be able to designate a family member as beneficiary of their share of the survivors' benefits under the *Judges Act*. This is a question of principle which cannot be overlooked indefinitely.

Alice Desjardins J.A.

CONSTITUTIONAL LAW OF CANADA

Fourth Student Edition

PETER W. HOGG

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1996

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