March 24, 2000

Privileged and Confidential

Mr. Richard Drouin, O.C., Q.C.
Chair
Judicial Compensation and Benefits Commission
8th Floor
99 Metcalf Street
Ottawa, ON K1A 1E3

Dear Mr. Drouin,

Re: Proposed Amendments to *Judges Act*:
Bill C-23

You have asked for my advice concerning the proposed amendments to the [1] set out in Bill C-23, [2] in light of the recent decisions of the Supreme Court of Canada in *Miron v. Trudel*[3] [4] and [5] and the submissions to the Commission by various parties concerning survivor annuities.

Bill C-23

Bill C-23 is an omnibus bill that amends 68 federal statutes so as to extend benefits and obligations to same-sex couples on the same basis as common-law opposite-sex couples. The bill is designed to bring federal legislation into compliance with recent decisions of the Supreme Court of Canada holding that governments cannot limit benefits or obligations to opposite-sex common[6]

Under the current *Judges Act,* annuities and certain other payments are provided for the surviving spouse of a judge. However, these payments are only provided to married spouses, and do not extend to unmarried partners of the same or opposite sex. The proposed amendments in Bill C-23 would add a new definition of 'survivor' to section 2 of the *Judges Act,* which would include both a person who was legally married to the judge immediately before his or her death and a person who has cohabited with the judge in a conjugal relationship for a period of at least one year immediately before his or her death. Bill C-23 further provides that 'survivors' are entitled to payment of an annuity under section 44(1), a removal allowance under section 40(1), and a lump-sum payment under section 46.1. Bill C-23 also provides a method of apportioning an annuity in circumstances where there are two survivors with an entitlement to the annuity. There are further provisions ensuring that any children of survivors are treated on an equal basis in terms of their rights and entitlements under the *Act.*

In this opinion I propose to deal only with constitutional issues in relation to the *Judges Act* arising from the recent Supreme Court decisions in *Miron, Egan* and *M. v. H.* Except as expressly set out herein, I do not consider other potential constitutional issues that might be raised in relation to the *Judges Act.*

Recent Section 15 Jurisprudence

The Supreme Court of Canada has developed a complicated test for determining the circumstances in which legislative provisions will be found to be 'discriminatory' within the meaning of section 15(1) of the *Charter*. However, for purposes of the present opinion, it is unnecessary to review the details of this test. I will simply assume that the existing provisions in the *Judges Act* which restrict the entitlement to certain payments to married spouses are discriminatory within the meaning of section 15(1) of the *Charter*, both on grounds of marital status (in that they exclude common law partners) and sexual orientation (in that they exclude same-sex partners). Proceeding on the basis of this assumption, the issue which you have raised for my consideration can be resolved through an analysis of the proposed amendments in Bill C-23 in light of the reasoning and result in the key recent decisions of the Supreme Court dealing with discrimination on the basis of marital status and sexual orientation.

I turn now to a brief summary of the reasoning in these recent cases.

In *Miron* (supra) there were three separate opinions written, with no single opinion attracting the support of a majority of the Court. Madam Justice McLachlin, in an opinion concurred in by Sopinka, Cory and Iacobucci JJ., found that "marital status" was an analogous ground of discrimination for purposes of section 15(1). (The Supreme Court had earlier determined in "nstitute "discrimination" for purposes of section 15(1), there must be a denial of "equal protection" or "equal benefit"[8] violated section 15(1) and could not be justified under section 1. As an appropriate remedy, a revised definition of "spouse" which had later been adopted by the Legislature (and which included heterosexual couples who had cohabited for three years or who had lived in a permanent relationship with a child) was retroactively 'read in'[9]

I note that only four of the nine members of the Court in *Miron* endorsed Madam Justice McLachlin's conclusion that "marital status" is an analogous ground of discrimination for purposes of section 15(1). However, as noted above, I will assume, for purposes of this opinion, that marital status constitutes an analogous ground of discrimination for purposes of section 15(1). I will further assume that the existing provisions in the *Judges Act*, which restrict the entitlement to an annuity or certain other payments to married spouses and which exclude common law spouses is discriminatory within the meaning of section 15(1).

In *Egan* (supra), a majority of the Supreme Court (consisting of L'Heureux-Dubé, Sopinka, Cory, McLachlin and Iacobucci JJ.) agreed that legislation which provided a benefit to a "spouse", defined *inter alia* as a person of the opposite sex (and excluding same-sex couples) violated section 15(1). Although a majority of the Court found the impugned legislation to be contrary to section 15(1), the legislation was ultimately upheld under section 1 since Sopinka J. concluded that the limitation on section 15(1) rights could be demonstrably justified in a free and democratic society.

More recently, in *M. v. H.* a majority of the Supreme Court held that provincial legislation which defined "spouse" as including a "man and a woman who are not married to each other and have cohabited...continuously for a period of not less than three years"[10] violated section 15(1) and could not be justified under section 1. The Court held that excluding same-sex couples from this legislative definition was based on the view that same-sex relationships generally were less worthy of recognition and protection, with this exclusion perpetuating the disadvantages suffered by individuals in

same-sex relationships. The majority of the Court was of the view that the relevant legislative provision should be declared to be of no force and effect, with the effect of the declaration being suspended for a period of six months.

Applying these cases to the provisions in the existing *Judges Act,* I assume that the existing entitlements under the *Act* providing for annuities and certain other payments to married spouses of judges violate section 15(1) of the *Charter*. The relevant issue is whether the amendments proposed in Bill C-23 cure the constitutional difficulty posed by the existing provisions.

Section 159 of Bill C-23 proposes to add the following definitions to section 2 of the *Judges Act*:

"common-law partner", in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year;

"survivor", in relation to a judge, means a person who was married to the judge at the time of the judge's death or who establishes that he or she was cohabiting with the judge in a conjugal relationship at the time of the judge's death and had so cohabited for a period of at least one year;

These definitions become the basis for determining the entitlements of "survivors" and "common-law partners" to annuities or various other payments under the *Judges Act.*

<u>Discrimination on the basis of 'sexual orientation'</u>

It is apparent that these definitions place same-sex and heterosexual common law partners on an equal footing. That is, the proposed definitions make no distinction between same-sex and heterosexual common law partners, treating both as being eligible for inclusion within the definition of "common-law partner" and "survivor".

Therefore, in my view there is no basis for concluding that the proposed definitions constitute discrimination in relation to same-sex common law partners, as distinct from heterosexual common law partners.

<u>Discrimination on the basis of 'marital status'</u>

However, the definitions do continue to provide somewhat different treatment for married persons as opposed to partners cohabiting in a conjugal relationship outside of marriage. Two continuing distinctions are relevant. First, a common law partner must have cohabited for a period of at least one year in order to fall within the definition of common law partner or survivor. Second, the common law partner must have been cohabiting in a conjugal relationship at the time the right to an annuity or other payment arises (which in most cases will be upon the death of the judge.) In contrast, a married spouse need not be actually cohabiting with the judge at the relevant time in order to qualify for an annuity or other payment. Therefore the question that arises is whether these continuing distinctions between married and unmarried common law partners constitute discrimination against common law partners.

Considering first the requirement that common law partners must cohabit for a period of at least one year before falling within the relevant definitions, it is apparent that it is an inevitable feature of any such definitions that some determinate period of cohabitation be selected as the basis for inclusion or exclusion. Thus various provincial and federal statutes which include definitions of common-law partners or spouses generally require cohabitation for periods ranging from one year to three years, or define the relationship in terms of being parents of a child. The Supreme Court of Canada, in its recent consideration of such requirements, has commented favourably on legislative provisions which include criteria of this kind, without commenting specifically on the particular criteria or length of time set out in the relevant statutes.

For example, in *Miron*, Madam Justice McLachlin, after finding the existing definition of spouse in the *Insurance Act* to be of no force and effect, 'read in' to the *Insurance Act* a definition of "spouse" which included, *inter alia*, persons who "have cohabited continuously for a period of not less than three years, or have cohabited in a relationship of some permanence if they are the natural or adoptive parents of a child."[11] Earlier in her reasons in *Miron*, Madam Justice McLachlin had commented favourably on a definition of "spouse" found in the Ontario *Human Rights Code*[12] Madam Justice McLachlin made no comment as to significance of the fact that a three-year cohabitation period was required under the revised version of the *Insurance Act*, as opposed to the one-year period under the *Human Rights Code.*

In *Egan*, at issue was a definition of "spouse" in the '[13] which provided as follows:

"spouse", in relation to any person, includes a person of the opposite sex who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife.

"tion 2 of the

> *Act* the definition of "spouse" should be read down by deleting the words "of the opposite sex" and reading in the words "or as an analogous relationship" after the words "if the two persons publicly represent themselves as husband and wife."

As in *Miron*, the fact that the amended definition of "spouse" would have required a one- year cohabitation period attracted no comment from these members of the Court.

Other recent court decisions have also upheld as valid similar definitions of 'spouse' providing for a one[15]

I conclude that, although these decisions have not commented specifically on the requirement of a one-year cohabitation period in the context of the definition of common law relationships, the courts have upheld as valid legislative provisions that have included such a

requirement. I also note that the courts have been prepared to uphold requirements of cohabitation for as long as three years in order to fall within the definition of a common law spouse; thus the less onerous one-year requirement set out in Bill C-23 should pose no constititional difficulty. I conclude that the inclusion of a one-year cohabitation requirement in the definitions of "common-law partner" and "survivor" does not raise any constitutional difficulty.

This leaves for consideration the other distinction that is drawn between common-law partners and married spouses in the proposed definitions, namely, the requirement that the common law partner must have been cohabiting in a conjugal relationship at the time the right to an annuity or other payment arises. In contrast, there is no such requirement in respect of a married spouse who, although legally married, may be living separate and apart from his or her spouse and yet fall within the definition of a survivor.

[16] Moreover, I note that in a number of recent cases the courts have indicated that legislative definitions of 'spouse' which included a requirement that the partners be cohabiting at the time an entitlement or obligation arises (as opposed to at some point in the past) have been upheld as valid. For example, the provision considered by the Supreme Court in *Egan* defined a "spouse" as including a person "who *is* living with [another] person" (my emphasis). The provision in the *Income Tax Act* considered by the Ontario Court of Appeal in *Rosenberg*[17] While in neither instance did the courts comment specifically on the requirement of current cohabitation in order to fall within the relevant definition, they were prepared to uphold provisions including such a requirement.

Accordingly, I conclude that the requirement that a person be cohabiting at the relevant time in order to fall within the definition of "common-law partner" or "survivor" in the proposed amendments to Bill C-23 is fully consistent with the recent judicial consideration of similar legislative provisions.

In my view, therefore, the proposed amendments represent an appropriate response to the recent Supreme Court of Canada decisions relevant to these amendments.

Federalism Arguments

The remaining issue is whether the proposed amendments raise any constitutional concerns in terms of the division of legislative powers between Parliament and the provinces. I note that in 1998 the government introduced amendments to the *Judges Act* which would have introduced a definition of "surviving spouse" into section 2 of the *Act*[18] This definition included a person of the opposite sex who had cohabited with a judge in a conjugal relationship for a period of at least one year immediately prior to the judge's death. Surviving spouses would have been entitled to an annuity and certain other payments under the *Act*.

When these amendments reached the Senate, an expert witness raised questions as to whether these amendments represented an intrusion into provincial jurisdiction over "property and civil rights" under section 92(13) of the *Constitution Act, 1867*[19] It was suggested that the attempt to legislate the division of family assets such as an annuity through the definition of "surviving spouse" may amount to legislation in relation to "property and civil rights" rather than in relation to the pension entitlements of judges. It was also pointed out that certain provincial statutes provided for a

cohabitation requirement in respect of common law spouses that differed from the period set out in the proposed federal legislation. Ultimately the proposed definition of "surviving spouse" was deleted from the bill.

In my view, any suggestion that Parliament lacks jurisdiction to provide for the entitlements of "common-law spouses" or "survivors" in the manner proposed in Bill C-23 is unfounded. Section 100 of the *Constitution Act, 1867* provides express legislative authority for Parliament to provide for the "Salaries, Allowances, and Pensions" of the federal judiciary. In *Beauregard v. Canada*[20] the Supreme Court of Canada had occasion to consider the scope of this provision, in the context of an amendment to the *Judges Act* which required the federal judiciary to make a contribution towards the cost of their annuity or pension entitlements under the *Act*. One of the arguments that was raised against the validity of the requirement for a contribution was that this represented an intrusion into exclusion provincial jurisdiction over the "administration of justice in the province".

[21] Chief Justice Dickson, whose opinion on this point was endorsed by all members of the Court, held that section 100 represents a "subtraction

> d provided by the Parliament of Canada. It is difficult to conceive of clearer words. *To attempt to create a provincial role in the determination of the salaries and pensions of superior court judges is blithely to ignore this clear mandate* . Indeed it turns s. 100 on its head...Both the intent and the actual wording of s. 100 are clear. *There is no 'federalism' limitation on Parliament's capacity to change the basis of pensions for superior court judges from non-contributory to contributory.* (my emphasis)

Later, Dickson C.J. commented that s.100 does not impose on Parliament the duty to continue to provide judicial pensions on precisely the same basis as was the case in 1867 and that s. 100 "can today support federal legislation based on a different understanding of 'pensions'."[23] He also noted that s. 100 supports federal jurisdiction to provide for a "scheme

> 'ons' in s. 100 specifically authorizes Parliament to deal with this subject-matter. In exercising that jurisdiction Parliament must legislate with respect to both the quantum and the scheme of judicial pensions. The 1975 law dealt with the scheme. Since the scheme chosen was a widely used and accepted one and since it was introduced in conjunction with other changes to judicial benefits in 1975, I see no objection to it on the ground contended for by the respondent.

I note that it is a standard requirement of pension schemes to provide for entitlements to surviving spouses or partners. Indeed, the version of the *Judges Act* that was before the Supreme Court in *Beauregard* provided for entitlements to "surviving spouses", defined in terms of legally married spouses. If Parliament can provide for such an entitlement, it necessarily follows that it must also be able to define the class of persons who have a right to claim it and provide a basis for resolving any conflicts that might arise in circumstances where there is more than one claimant. Thus there can be no suggestion that in legislating for survivors' benefits (including enacting apportionment rules designed to allocate rights in instances where there is more than one survivor) or entitlements for common-law

spouses Parliament is acting for a colourable purpose. Rather, the proposed amendments set out in Bill C-23 are clearly and properly part of the "scheme" for judicial pensions.

In short, based on the reasoning of the Supreme Court in *Beauregard*, it is my opinion that there is no federalism objection that could successfully be raised against the amendments in Bill C-23. The definition of the class of person entitled to receive an annuity or other payment under the *Judges Act* as well as the provision of apportionment rules in cases where there are competing claims fall within the exclusive jurisdiction of Parliament, as necessarily incidental to federal jurisdiction to provide a judicial pension scheme. This jurisdiction represents a "subtraction" from provincial jurisdiction under section 92. To attempt to provide for a provincial role in relation to the scheme of judicial pensions would, as Dickson C.J. stated in *Beauregard*, turn section 100 of the *Constitution Act, 1867 "on its head".*

I trust that the foregoing responds to the questions you have raised in relation to Bill C-23. I would be happy to elaborate on any matters discussed in this opinion at your convenience.

Yours very truly,

Patrick J. Monahan
Professor of Law

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85, c. J-1, as amended.

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einafter "Bill C-23").

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[1995] 2 S.C.R. 418 ("Miron").

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R. 513 ("Egan").

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2 S.C.R. 3 ("M. v. H.").

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Canada, "Government of Canada to amend legislation to modernize benefits and obligations" (News Release), February 11, 2000.

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8The policy was prescribed by the *Insurance Act* and, on this basis, the exclusion was subject to review under the *Charter*.

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eux-Dubé wrote separate reasons, she concurred in the result proposed by McLachlin J., resulting in a majority of five judges for this remedy.

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0See section 29 of the *Family Law Act*, R.S.O. 1990, c. F-3.

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1See section 224(1) of the *Insurance Act,* R.S.O. 1990, c. I-8, as read in to the statute in *Miron* by McLachlin J. at paragraph 180.

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e was an alternative formulation of the definition of "spouse" that would have been less invasive of *Charter* rights.)

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9, s.2.

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erg v. Canada (Attorney General) (1998), 38 O.R. (3d) 577 (Ont. C.A.) ("reading in" to an existing definition of "spouse" the words "and same sex", and then upholding the amended definition, which provided for a one-year cohabitation period or a requirement that the partners be the parents of a child.)

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en common law spouses, it does not extend rights in relation to division of property.

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ides that "words referring to a spouse at any time of a taxpayer include the person…*who cohabits at that time with the taxpayer* in a conjugal relationship…" (my emphasis).

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8See *An act to amend the Judges Act and to make consequential amendments to other Acts,* 36th Parliament, First Session, Bill C-37.

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[9]See the testimony of Professor B. Jamie Cameron, at the Senate Committee on Legal and Constitutional Affairs, October 6, 1998 (*Proceedings of the Senate Committee on Legal and Constitutional Affairs*, Issue 34, October 6, 1998).

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[0][1986] 2 S.C.R. 56.

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of Rights, the Court was unanimous on the federalism issue.

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[3]*Ibid* at p.81.

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