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Montreal, March 31, 2000

**BY TELECOPIER AND
ORIGINAL BY COURIER**

Judicial Compensation and
Benefits Commission
99 Metcalfe
Ottawa, Ontario K1A 1E3

Attention: Deborah Lapierre,
Executive Director

Re: Judicial Compensation and Benefits Commission, 1999

Mr. Chairman, Commissioners:

Your Commission has asked that the parties file any final submissions by March 31, 2000. The purpose of this letter is to respond to additional questions which were directed to the Canadian Judges Conference and Canadian Judicial Council at the hearing on March 20, 2000 and to address certain additional issues which, in the course of proceedings, have arisen.

Trial Judges exercising appellate jurisdiction

At the commencement of proceedings on March 20, 2000, we were asked to provide statistics as to the number of judges who are called upon to sit in their respective courts of appeal, and how often they do so.

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We understand that this question arises as a result of submissions made to the Commission by certain provincial courts of appeal, the judges of whom believe that it would be appropriate for the *Judges Act* to establish a higher salary for appellate judges.

While the Conference and Council take no position as to the merits of those submissions, we are able to provide the statistics requested. Attached to this letter is a table which summarizes the situation in each of the provinces and the Federal Court of Canada.

Industrial Aggregate Increase

It has been the Government's position throughout these proceedings that the indexation of judicial salaries in accordance with the industrial aggregate, pursuant to s. 25 of the *Judges Act*, is sufficient and, moreover, would amount to a real increase in salary for judges.

The Judges have just been advised by the Commissioner for Federal Judicial Affairs that the industrial aggregate adjustment, for the coming year, has been set at 0.67%. The Consumer Price Index (CPI), however, increased 2.7% from February 1999 to February 2000.*

Life insurance

At the hearing on March 20, 2000, Commissioner Gorbet enquired as to whether the position of the Conference and Council as to the desirability of a one-time only opt-out option had changed in light of further information provided by the Government on March 14, 2000 (Transcript pages 135-136).

The Conference and Council maintain their initial proposal that life insurance be provided to judges who would form a distinct pool within the PSMIP. Existing judges would be permitted to opt out of the plan at inception. All judges appointed thereafter, however, would, in accepting appointment to the bench, become members of the plan.

The additional information supplied by the Government relates to participation in the EX and MP insurance plans within the PSMIP. In comparing the modalities applicable to other groups of persons covered under the Government plan, it is important to remember that there are distinct considerations relevant to the judicial population which have led to the present discussion. The judiciary, as a group, presents a unique demographic profile which

* Source: Statistics Canada website.

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factor, ultimately, has a direct bearing on premiums and thus the cost of the plan both to the Government and the judges individually.

Our clients are concerned that the life insurance scheme available to judges would ultimately be unattractive and ineffective were all the younger judges inclined to opt out, leaving only older judges within the pool. These younger judges might obtain insurance elsewhere until they, themselves, reach an age at which the PSMIP becomes a more attractive option, at which point they could then seek reinstatement in the plan. While this may provide greater flexibility to younger judges, it exposes existing members of the plan and other judges to increased costs.

In our view, any group plan will necessarily involve some disparity in age or gender. The very purpose of establishing a separate pool for judges within the PSMIP would be defeated were membership made optional on an ongoing basis. To the extent that there is concern about younger judges being required to adhere to the plan on appointment, other options, short of an opt-out, might be considered. For example, each new judge, on appointment, might have an option to elect 100% coverage instead of 200% coverage. This would result in a lower premium and thus a lower taxable benefit to the judge. The judge could then decide at what point he or she wishes to increase the coverage and assume a higher taxable benefit. Providing all judges with the option, on appointment, of opting out of the plan altogether, however, would, in our opinion, ultimately undermine the very viability of the plan.

We have been advised that the Commission would be interested in reviewing the legal opinion referred to on page 14 of the Reply Submissions of the Conference and Council concerning the legality of an opt-out provision in a group life insurance plan. A copy is attached.

Earnings of lawyers

At tab 41 of its book of further information, the Government has included a study prepared by Abdul Rashid entitled "Earnings of Lawyers". Counsel for the Government has not referred to this study nor have formal submissions been made concerning it.

For the purposes of the Commission's work, we submit it would be preferable to refer to the income survey filed by the Conference and Council, upon which issue was joined, and to which experts, retained by the Government, responded. Nevertheless, we make the following brief comments in respect of the Rashid survey.

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Firstly, the data upon which it is based was collected in 1995, five years ago, and arguably before Canada had fully recovered from the recession. More importantly, the Rashid survey does not identify the class of "outstanding" lawyers who form the pool of judicial candidates. Indeed, as table 2 indicates, the **average** earnings of lawyers are displayed, presumably on a Canada-wide basis. There is no focus on urban centres, nor is there any attempt to identify the top third or even the third quartile of income earners in the relevant age category from which judges are usually appointed. A mere Canada-wide average in any given age category, we submit, is not a useful means of establishing a reasonable relationship between judicial salaries and the income of outstanding legal practitioners.

Follow-up to our letter of March 16, 2000

At the hearing on March 20, 2000, Commissioner Cronk asked us to provide the remaining pages of the Appendix to Professor Winterton's study on judicial remuneration in Australia. This Appendix considers judicial remuneration in England and New Zealand. Appended to our letter of March 16, 2000 were those pages relevant to judicial remuneration in England which, in particular, discuss the 1992 and 1994 reports of the salaries review body. We attach herewith copies of pages 92 to 94 which concern judicial remuneration in New Zealand.

Costs

We undertook to provide a *pro forma* bill of costs to assist the Commission in identifying the costs of the Conference and Council. We are still in the process of collecting the necessary information, as there are still additional fees and expenses which have yet to be invoiced. We expect to be in a position to provide details of all costs incurred, with supporting invoices, some time before the end of April.

The Commission has also requested that we provide details as to the extent of the reimbursement of the costs sought by the Conference and Council, and how these two organisations have, as between themselves, arranged to assume these costs.

The Council is a statutory body under the *Judges Act* and is generally funded by Parliament through the Commissioner for Federal Judicial Affairs based on parliamentary appropriations. The Conference receives no public funding and is financed solely by its members.

The Conference and Council agreed to divide the costs of their joint submissions to the Commission, including experts and disbursements, equally. The

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Conference seeks reimbursement from the Government of the totality of its share of those costs. As far as the Council is concerned, its funds are already public funds. However, the participation of the Council is not an item which is necessarily budgeted for. In other words, as there is a finite amount of money voted annually for the Council's operations, any amount spent for participation in the Quadrennial Commission process is money that is not otherwise available for the Council's statutory operations. This could be remedied by the Government increasing the budget of the Canadian Judicial Council by the amount in question. For future Quadrennial Commissions, the Commissioner might be authorized by the Minister directly to pay the expenses of the Council. This would ensure that statutory activities of the Council suffer no adverse financial impact.

The whole is respectfully submitted.

L. Yves Fortier, C.C., Q.C.

Leigh D. Crestohl

LYF/LDC/lt

Encl.

c.c. : David Sgayias, Q.C.

b.c.c.: Hon. André Deslongchamps

Hon. Myra B. Bielby

Hon. Robert A. Blair

Hon. Guy J. Kroft