1999 Judicial Compensation and Benefits Commission

SUBMISSION OF MANITOBA JUSTICES KRINDLE, BEARD AND HAMILTON

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The parties

This submission is made on behalf of Justices Ruth Krindle, Holly Beard and Barbara Hamilton of the Manitoba Court of Queen's Bench. To the best of their knowledge, these justices are all of the federally-appointed judges in Manitoba who are living in opposite-sex or same-sex relationships that involve financial interdepency. None is legally married to her present conjugal partner, or to any other person.

Overview of Submission

This submission addresses the denial to judges' opposite-sex and same-sex conjugal partners of the survivor annuities and lump sum payments provided in ss. 44(l) and 46.l of the *Judges Act*, R.S.C. 1995, c. J-l.

It considers the impact of the decisions of the Supreme Court of Canada in *Egan v. Canada*, [1995] 2 S.C.R. 513, *Miron v. Trudel*, [1995] 2 S.C.R. 418, *Vriend v. Alberta*, [1998] 1 S.C.R. 493 and *M. v. H* (1999), 171 D.L.R. (4^{th}) 576 (S.C.C.).

It reviews the reasoning of the Supreme Court of Canada concerning the role of the judicial compensation commission: *Reference re Provincial Court Judges*, [1997] 3 S.C.R. 3

It asks as follows:

(a) that the Commission enunciate its view that prior recourse to the Commission process is not necessary in order to implement changes to judicial remuneration which bring that remuneration into conformity with the *Canadian Charter of Rights and Freedoms*, as interpreted by the Supreme Court of Canada.

(b) that the Commission clarify that extending benefits to judges in respect of their heterosexual or homosexual conjugal partners is, in light of the Supreme Court rulings in *Egan, Miron, Vriend* and *M v. H.*, a constitutional imperative which cannot be balanced off or traded against other improvements or enhancements in judges' remuneration. This imperative arose when the Supreme Court decisions were made, and is not a result of this Commission's process. Accordingly, a government decision not to implement such benefits cannot be justified on the basis of the simple rationality test contemplated in the *Reference re Provincial Court Judges*.

(c) in the alternative, if the Commission is of the view that prior recourse to its process is necessary even to implement Supreme Court rulings on *Charter* protections, that the Commission issue a strong recommendation that the government extend benefits to judges in respect of their

heterosexual or homosexual partners, as an immediate constitutional priority.

(d) that in arriving at its recommendations concerning the judges' total remuneration package, the Commission include these benefits as a fixed element, not balanced off or traded against any other remuneration enhancement. Such distinct treatment recognizes the constitutional status of the requirement to extend equity in this area, as found by the Supreme Court of Canada.

Discussion

I. The Supreme Court Cases with Respect to Opposite-Sex and Same-Sex Unions

In *Egan v. Canada*, [1995] 2 S.C.R. 513, the Supreme Court of Canada established that sexual orientation is an analogous ground for purposes of s. 15(l) of the *Charter of Rights*. In *Miron v. Trudel*, [1995] 2 S.C.R. 418, it established as well that marital status, including being in a heterosexual union, is an analagous ground.

In *Egan*, it was held by a majority of the Court that a restrictive definition of "spouse", limited to legally married persons and opposite-sex couples who had cohabited for at least a year, violates section l5 of the *Charter* by excluding same-sex couples. However, a constitutional violation was not found, since four justices disagreed with the majority's section l5 finding, and a fifth justice found the discrimination to be justified. In the later Ontario Court of Appeal decision of *Rosenberg v. Canada (Attorney General)* (1998), 38 O.R. (3d) 577, the Court noted as appropriate on the basis of the *Egan* holding, the Attorney General's concession of a section l5 violation in the case of section 252(4) of the *Income Tax Act*, R.S.C. l985, c.l (5th Supp.). It held that it is discriminatory to allow registration under the *Income Tax Act* of a private pension plan (and consequent significant tax benefits) only where the plan restricts survivor benefits to spouses of the opposite sex. The Court of Appeal held that the restriction could not be justified under section l of the Charter.

In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, the Supreme Court of Canada found a violation of section l5 where the *Individuals' Rights Protection Act* of Alberta failed to extend to homosexual persons protection against discrimination on the grounds of sexual orientation. The Court also held that the underinclusiveness of the legislation could not be justified under section l of the Charter.

In *M. v. H* (l999), 171 D.L.R. (4th) 576, the Supreme Court of Canada found a violation of section l5 of the *Charter* in the underinclusiveness of s.29 of the *Family Law Act* of Ontario. The section extended mutual support obligations to opposite-sex couples living in a conjugal relationship for a specified time, but did

not extend them to same-sex couples. The Court also found that the section failed to meet the justification test of section l of the Charter.

In this series of decisions, the Supreme Court of Canada has firmly established that section 15 of the *Charter* protects those in opposite-sex and same-sex conjugal unions, and that discrimination will be made out where a definition of spouse is underinclusive of these unions. Moreover, depending on the purpose of the legislation, it will be difficult to establish justification for underinclusiveness. Generally speaking, where the purpose can be seen, functionally, as recognizing the interdependence that arises in these conjugal unions, justification is not found.

The reasoning in these cases is directly applicable to the situation of federally-appointed justices living in opposite-sex and same-sex relationships. Such reasoning compels the conclusion that the *Judges Act* should be amended to include benefits for couples in such relationships on the same basis as they are available to legally married opposite-sex couples.

II. Government of Canada Position with Respect to this Commission

The Government of Canada has taken the position that it cannot extend these benefits to judges living with another in a heterosexual or homosexual union that is not a legal marriage without first going through the Commission process. The basis for that position is the decision of the Supreme Court of Canada in *Reference Re Provincial Court Judges*, [l997] 3 S.C.R. 3.

The federal position creates an untenable paradox. It is tantamount to saying that the Government of Canada cannot extend to federally-appointed judges the protection of the *Canadian Charter of Rights and Freedoms* in matters affecting their remuneration without first submitting its plans in this regard to the scrutiny of the Commission. A requirement of prior recourse to a salary commission intended by the Supreme Court as a protection for judicial independence is thus transformed into another hurdle which judges, alone of all Canadians, must surmount before receiving the protection of the *Charter*.

The point of departure for the Court's reasoning in the *Reference* is the constitutional imperative that to the extent possible the relationship between the judiciary and the other branches of government be depoliticized. This imperative lies at the heart of the Court's approach to the institutional financial security for the Courts which is the second great pillar of judicial independence, the others being security of tenure and administrative independence. Significantly, one of the goals of such financial security is to ensure that the courts be free and appear to be free from what the Supreme Court describes throughout the *Reference* as "political interference through economic manipulation."

The Court states that in order to guarantee that the courts can protect the Constitution, they must be protected by a set of objective guarantees against intrusions by the executive and legislative branches of government. The purpose of the collective or institutional dimension of financial security is not to set in place a mechanism to ensure fairness to the economic interests of judges, but rather, to protect an organ of the Constitution which in turn is charged with the responsibility of protecting that document and the fundamental values contained therein.

The three components of financial security for the courts as an institution are described in the *Reference*: first, that any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent effective and objective; second, that judges may not negotiate their remuneration, either individually or collectively; third, that reductions cannot take judicial remuneration below a basic minimum level. The first two of these elements provide the focus of the reasons.

As to the special process, the Court specifies that the imperative of protecting the courts from political interference through economic manipulation is served by interposing an independent body, a judicial compensation commission, between the judiciary and the other branches of government. Such a commission serves as an institutional sieve, to prevent the setting or freezing of judicial remuneration from being used as a means to exert political pressure through economic manipulation.

The commission envisioned by the Court in the *Reference* is to be independent, effective, and objective. The first guarantee of that effectiveness is that there is a constitutional obligation for governments not to change or freeze judicial remuneration until they have received the report of the salary commission. Changes or freezes secured without going through the commission process are unconstitutional.

This requirement is the source of the government's position that it cannot change the law relating to spousal benefits without prior recourse to this Commission. However, this position amounts to saying that if it implemented changes to judges' remuneration in order to bring it into line with constitutional requirements enunciated by the Supreme Court of Canada, the government would be behaving unconstitutionally unless it first consulted the Commission. Presumably, this logic would also mean that it would have to consult the Commission prior to legislating in response to a Supreme Court decision declaring the judges' remuneration package itself unconstitutional. Such a result would be inappropriate in the face of a clear declaration from the Supreme Court. It is no less inappropriate when the Court, in a series of decisions, leaves little or no doubt as to the *Charter* requirements applicable in these circumstances, even if none of those decisions deals directly with the judges' remuneration package.

Although there is considerable focus in the *Reference*, on the relationship between a commission and the government, it is highly significant that the Court also emphasizes that what s. ll(d) of the *Charter of Rights* requires is an institutional sieve between the judiciary and the other branches of government, and commissions are merely a means to that end. As long as the institutional arrangements for such a sieve meet the three cardinal requirements of independence, effectiveness, and objectivity, the requirements of s.ll(d) will be met. It is submitted that the requirements are more than adequately met when the Supreme Court has set forth the *Charter* principles directly on point, as it has done in the decisions reviewed above. In such a case, additional recourse to the Commission is not called for.

If the government of Canada did not bring the remuneration package into conformity with the decisions of the Supreme Court, a *Charter* challenge could be taken. In such a challenge, a court, and ultimately the Supreme Court, would apply the strict test of demonstrable justifiability developed under section l of the *Charter* to scrutinize the government's reasons for failing to proceed with constitutionally mandated changes. If the Commission were to recommend a change, and the government wished not to act upon it, it could assert that it must meet only the lower level of justification established in the *Reference re Provincial Court Judges*: simple rationality.

It would be unacceptable to use the "sieve" of the Commission to lower in this way the standard of constitutional behaviour expected of the government. It would be no less acceptable to permit the interposition of the Commission to cast doubt on what is the appropriate level of constitutional scrutiny for federal government behaviour. It is, quite simply, unnecessary in these circumstances for the government of Canada to insist on passing these changes through the Commission's process before it responds to the direction of the Supreme Court of Canada.

III. Priority to be Given to these Changes

It might, however, be suggested that the screen of the Commission's process is necessary to give an overall perspective on how changes to these benefits would fit in with, or impact upon, the other elements of the judges' remuneration package, or other potential recommendations for change. Such an argument conflates issues of rights with issues of economics.

The Commission process is intended to safeguard the courts from decisions about judicial remuneration which are based on purely political considerations, or enacted for discriminatory reasons. It is to prevent the exertion of political pressure through the economic manipulation of the judiciary. Changing judges' benefits to conform with Supreme Court decisions under section 15 of the *Charter* is not this sort of mischief. The Commission process is intended to replace the "head-to-head" negotiations which, in other contexts, determine

remuneration. It provides a forum in which members of the judiciary can raise concerns about the level of their remuneration that might otherwise have been advanced at the bargaining table. In the *Reference*, the Court describes negotiations over remuneration and benefits colloquially as "a form of horse-trading".

To say that the rights-based entitlement to benefits for opposite- and same-sex partners should go onto the notional bargaining table of the Commission process along with all other remuneration and benefits issues, most of which are not rights-based, is to countenance the transformation of rights into mere table-stakes in the bargaining process, which can be traded off against the other elements at issue. Such a transformation from rights to table stakes is, arguably, inappropriate in ordinary collective bargaining. It is, certainly, inappropriate in a process that is intended to safeguard the integrity of the courts as the keepers of the Constitution and its values.

The surest way to keep these issues of rights outside of even the notional bargaining of the Commission process is to find that implementation of judges' rights following decisions of the Supreme Court of Canada need not, as a matter of law, pass through the Commission's process. Alternatively, if the Commission does not wish to take such a step, it may honour the pre-eminence of these rights by recommending that they be implemented, in any event, and as a priority, and not balancing them off against other requested elements of the package.

Conclusion

It is, therefore, asked that the Commission issue recommendations as described above at (a), (b), (c) and (d).

Justices Krindle, Beard and Hamilton further request the opportunity to meet with the Commission, through counsel, for a further elaboration of this position. Such a presentation would be conveniently made at the February time scheduled for public hearings.

All of which is respectfully submitted.

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Mary Eberts