Submission to the
Judicial Compensation and Benefits Commission
for Hearing on February 14, 2000

The Canadian Judges Conference and the Canadian Judicial Council have already made submissions with regard to judicial annuities and single judges. I propose to bring another facet of the same discrimination to the attention of the Judicial Compensation and Benefits Commission and then, draw a general principle.

Let us consider first the inequality facing single judges under the Public Service Health Care Plan.

Single judges cannot register any member of their family in the Public Service Health Care Plan while married judges, those living with a common law partner or those living with a same-sex partner, can register their spouse or partner, and their children if they qualify.

Important advantages are therefore given to judges in a sexual relationship, but judges in a non-sexual relationship, such as a mother/daughter, a sister/sister, or a sister/brother relationship, do not benefit from the same advantages. These social groups represent nevertheless forms of domestic relationships which are also worthy of legal considerations.

Peter W. Hogg, in *Constitutional Law of Canada*, Loose-leaf Edition, vol. 2 (Toronto: Carswell, 1992) at 52-23 and 52-24, captures well the inequality which results from excluding non-sexual couples from government benefits in what he characterizes as "underinclusiveness".

> 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]

Mr. Roderick A. Macdonald, President of the Law Commission of Canada, in a study entitled 'In Search of Law', has made very pertinent comments in this regard. A copy of the study is attached.[1] In chapter III. New Concepts of the Law, after having noted that there are now many forms of stable domestic relationships other than the traditional one of marriage (see page 8), the author makes a number of comments on what he also characterizes as 'under-inclusiveness". He writes at pages 12 and 13:

> The traditional socio-cultural definition of marriage was, in the 19th and early 20th centuries, a reasonably effective and useful point of reference for Parliament to use when targeting the beneficiaries of its social policies. Since most married persons were (and today still are), most of the time, apt recipients of whatever benefit was intended, the concept of marriage became a surrogate for careful policy specification and explicit statutory definition. Today, the increasing diversity of stable, nurturing, adult relationships means that marriage is no longer the only point of reference. Rather, marriage has simply become an easy legislative tool for a Parliament or legislature that has neither the energy nor the political will to clearly articulate the precise situation that it seeks to target with any particular legislative programme.
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> The under-inclusiveness of the traditional moral-religious concept of marriage as a vehicle for advancing social policy is now too obvious to be ignored; and this under-inclusiveness has generated, over the past fifty years, two predictable responses. Many argue that other non-marriage relationships should be analogized to marriage for purposes of identifying who should be eligible to receive a given benefit.
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> [...]
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> ... others argue for an explicit expansion and redefinition of the concept of marriage that would remove from the idea two elements upon which it has heretofore rested: the notion of a relationship between two persons of opposite sexes; and the notion of a relationship that has as one of its potential outcomes, procreation. On this view, marriage would be redefined so as to cover all manner of non-traditional stable, adult relationships of dependence and

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> interdependence: sibling relationships; relationships between parent and child; relationships between old friends; same sex relationships; and so on.
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> [...]
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> ... In a modern socio-demographically diverse society, where the life projects of citizens can be multiple and highly different one from the other, legal definitions grounded in the moral-religious traditions of a particular group are no longer adequate.

The law, for some time, focussed its attention exclusively on the married couple. The Charter obliges us now, through court decisions, such as *Miron* and *Egan*, to widen this concept. As a result, beneficiaries have been extended to common law couples and to same-sex couples. Judges living in non-sexual relationships should also benefit from the law on an equal basis.

Single judges should be able to register a close member of their family under the Plan. It need not be an economically dependent person, since spouses or partners are not always economically dependent. But, it should be someone close to them.

A fundamental principle emerges from these considerations. Any government program under review by this Commission should be available to all judges on equal terms. Marital status includes the single judge.

The Judicial Compensation and Benefits Commission, I submit, should look into this matter.

Alice Desjardins
Federal Court of Appeal

Ottawa, February 4, 2000.