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Montreal, March 16, 2000

BY COURIER

Judicial Compensation and
Benefits Commission
99 Metcalfe
Ottawa, Ont.
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Attention: Deborah Lapierre,
Executive Director

Re: Judicial Compensation and Benefits Commission

Dear Madam:

At the hearing before the Commission on February 14, 2000, we were asked to provide the Commissioners with further clarification in respect of various elements of our oral presentation on behalf of the Canadian Judges Conference and the Canadian Judicial Council. Set out below are each of the outstanding issues, with our corresponding response.

Clarification regarding the Review Body on Senior Salaries Report
(Transcript, Vol. II, pages 219-220)

The Conference and Council argued before the Commission that, in determining the "adequate" level of judicial remuneration, consideration must be given to the fact that increases recommended by previous triennial commissions were ignored by the Government.

The Judges found support for this position in what appeared to be a recommendation by the U.K. Senior Salaries Review Body ("SSRB") to give effect to a previous, unimplemented recommended increase which had been rejected by

government. Although included at Tab 4 in our Book of Additional Documentation, we reproduce the relevant text relied upon:

> **Increases left over from previous years**
>
> In 1994 the Government accepted SSRB's recommendation (No 17 in the 1994 Report) that the Government should seek to achieve the salary levels for the judiciary proposed in the Top Salaries Review Body (TSRB) Report for 1992 by 1 April 1999 plus the regular annual upratings.
>
> For the five years from 1 April 1995 to 1 April 1999, judicial salaries are therefore being increased by an agreed fixed percentage uplift (between 0.6 and 2.5%) to achieve the 1992 recommended salary level, in addition to any further increases accepted from any other Reports in the period.

At the hearing, it was found that this passage was somewhat ambiguous and we were asked to verify the situation. Following our further inquiry, we confirm that, in 1994, the SSRB recommended the implementation of salary increases which, in 1992, had been rejected by government. Contrary to Mr. Sgayias' suggestion (transcript Vol. II, p. 219), the document at Tab 4 ~~does~~ provide a "precedent for going back and taking care of past injustices or past failures to compensate appropriately".

Although out of print, we have reviewed the *15th Report on Top Salaries* (1992) and the *16th Report on Senior Salaries* (1994) on microfiche. In accordance with a request by the U.K. Government, there was no report issued in 1993. We have also considered the appendix to Professor George Winterton's monograph, *Judicial Remuneration in Australia* (Australian Institute for Judicial Administration Inc., 1995), which more succinctly summarizes what transpired in the U.K. surrounding these two reports. A copy is enclosed.

In 1992, the Review Body on Top Salaries ("TSRB"), as it was then called, undertook a fundamental review of the salary structure for its remit groups, which include the judiciary, members of the senior public service and senior officers of the armed forces. At the time, the current salary of a High Court justice (group 4) was £84,250. The TSRB recommended that this salary be increased effective April 1, 1992 to £100,000, an increase of 18.7%.

The increases recommended by the TSRB were rejected by the government as being inconsistent with its policy of fiscal restraint. In the result, a smaller,

staged increase was implemented (see Winterton at p. 89). Events in the U.K. in 1992 therefore mirrored the fate of the Lang, Guthrie and Courtois recommendations in Canada.

At the time of the SSRB Report in 1994, the salary of a High Court justice had risen to £90,148, an increase of only 7% over the 1992 salary level before the fundamental review. In its 1994 Report, the SSRB renewed its recommendation of the salary level it had proposed in 1992 and stated:

> 149. We believe that the salary levels and differentials recommended in 1992 were valid and well reasoned. Whilst we recognize that the Government feels unable to fund substantial increases this year, we firmly believe it must accept the need for improvement over time of judicial salaries to the levels we have indicated. We appreciate that the required increases cannot practically be achieved in any one year. (…)
>
> (…)
>
> 151. *Recommendation 17.* We recommend that the Government should seek to achieve the salary levels for the judiciary proposed in the 1992 TSRB Report, plus regular uprating, by 1 April 1999. The acceptance of this recommendation would give present and prospective members of the judiciary reason to hope that the situation would be remedied over time. The increase to be paid on 1 April 1994 should be not less than 2.75 per cent over and above the final stage of the 1992 award.

As Tab 4 in our Book of Additional Documentation indicates, the U.K. Government accepted Recommendation No. 17 in 1994, and implemented it in 1999 by way of an agreed fixed percentage uplift to compensate for the years 1995 to 1999 in order to arrive at the 1 April 1999 salary indicated.

In the result, it is clear that "*increases left over from previous years*" refers to an intention to remedy the government's rejection of the full measure of salary increase recommended in 1992. The Conference and Council submit that it is appropriate that a similar route be followed in Canada to take into account the systematic rejection of increases recommended by the Lang, Guthrie and Courtois Commissions.

Commissioner Cronk asked a question about the frequency with which judicial salaries are reviewed in the U.K. The most recent report of the SSRB,

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Report No. 45, was presented to Parliament in February 2000. Appendix I indicates the previous reports of the same series (see copy attached). This Appendix indicates that there were reports previously from 1972 – 1974, and then annually from 1978 to 1999. The only exception was for 1993 in which, at the request of the U.K. Government, there was no review.

Explanation of the choice of the top third of the practising Bar as a relevant comparator compared to the third quartile chosen by the Lang Commission (Transcript, Vol. II, page 230)

Given the relatively brief comments found in the Lang Report (reproduced in our Additional Documentation at Tab 1) concerning the survey which it examined, it is difficult to identify any of the Lang Commission's underlying assumptions with certainty.

It is clear, however, that the survey presented to the Lang Commission by the Canadian Bar Association was divided into quartiles rather than the 12-tile approach adopted in the study which we have submitted.

The Lang Commission, not wishing to adopt the highest measure possible, likely settled on the third quartile as best representing the class of candidates from whose ranks judges are typically appointed. To this extent, the Lang Commission was restricted by the extent of the data presented to it.

While we would not go so far as to characterize that approach as being wrong, it nevertheless strikes us as a less than satisfactory indication of the pool of "outstanding" candidates from which judges are to be drawn. The third quartile, numerically, encompasses individuals in the 74th to 50th percentiles. Even the mid-point of the range covered by the third quartile is only the 62nd percentile. In our submission, accepting the 62nd percentile as equivalent to "outstanding" is very much like saying that a "C" grade is outstanding.

The survey which the Conference and Council have submitted, divided as it is into 12 tiles, is capable of yielding a more precise measure than what was before Lang. More specifically, it allows for the identification of a group of individuals within the top third who are more likely to be "outstanding" candidates than a measure which encompasses individuals below the 62nd percentile.

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Provide the number of judges who retired during the period of the salary freeze and the estimated cost of linking their annuities to increased salary (Transcript, Vol. II, pages 300 and 301)

We have been advised that 131 judges retired and 26 judges died while in office, in the period between April 1, 1993 and March 31, 1997. While our recommendation encompassed judges who retired during the freeze, the underlying principles of equity apply with equal force to survivors of judges who died while in office during the same period, as well as the survivors of retired judges who died.

The actuary retained by the Judges, Thomas Weddell of Eckler Partners Ltd., has attempted to calculate the cost of adjusting those annuities to take into account the "catch-up" increases recommended by the Scott Commission and implemented in Bill C-37.

The present value of the increase for the 131 retirees and surviving spouses would be $8,996,000 and $1,093,000 in respect of the 26 deceased judges. The actuarial assumptions used for these calculations are the same as those identified in Mr. Weddell's earlier report, copies of which were provided to the Commission.

It is, however, necessary to take into account the fact that these annuities must be increased retroactively back to April 1, 1997 based on what the judge's salary would have been at the time of retirement but for the freeze. This would entail an estimated additional $3,549,000 for the retirements and $384,000 for the 26 deaths.

The final estimated annual cost, as calculated by Mr. Weddell, is as follows:

Retired judges:	$13,558,630
Survivors of retired judges	$ 947,055
Survivors of judges who died in office	$ 1,530,444

A copy of Mr. Weddell's analysis is enclosed.

Confirm whether the joint survivor option has been dealt with in Bill C-23 (Transcript, Vol. II, pages 296-297)

There was some confusion during the oral hearing between the apportionment of benefits between two survivors and a joint survivor option. The new section 44.1 of the *Judges Act*, proposed in Bill C-23, is directed to the apportionment question. The proposed section 44.2 establishes the right to elect a form of joint annuity. The election contemplated by section 44.2, however does **not** deal with the specific improvement which the Conference and Council are seeking.

The recommendation sought by the Conference and Council envisages a situation whereby a retiring judge, who already has a spouse, could elect to receive an annuity during his or her lifetime calculated on an actuarial basis, in order to ensure that, after death, the survivor will have the maximum amount of income continuation.

By way of example, a retiring male judge, with a female spouse only a few years his junior, might receive a smaller annuity during the balance of his lifetime, calculated on the basis of relative life expectancies, while the surviving spouse would receive a larger annuity for life than might otherwise be the case under the current provisions of the *Judges Act*.

The joint survivor option urged by the Conference and Council is widespread in other legislative schemes, and is even mandatory for many Canadians. The advantage of the joint survivor option is that it can in many cases provide a greater measure of income continuation to the survivor.

The current section 44.2 in Bill C-23 addresses an altogether different situation. The Bill is concerned with providing for a survivor **who would not otherwise be entitled to an annuity** under section 44 of the *Judges Act*. Section 44(4) of the *Act*, taking into account proposed amendments in Bill C-23, has the effect of denying a survivor's annuity to a person who was not married to, a

common law spouse of, or cohabiting with the judge at the moment of retirement.

Proposed section 44.2 will mitigate this situation with respect to persons who become spouses or common law partners of retired judges, **after** retirement, by way of an election. A judge who makes this election will reduce his or her annuity to ensure that, after death, the spouse or partner will receive an annuity to which he or she would not otherwise be entitled under the *Judges Act*. This is very different from the situation envisaged in the recommendation by the Conference and Council where there is an entitlement to an annuity under section 44, but the retired judge elects for an actuarily established annuity to secure greater income continuation to the survivor after death.

We have reviewed the text of the proposed amendments to the *Judges Act* and have no particular comment except in respect of section 44.2(4). This section authorizes the executive to make regulations which, presumably, will provide the details of how the joint annuity is to operate. The language of section 44.2(4) is consistent with other parts of the Bill extending a similar right of election to members of the Canadian Forces, Members of Parliament, etc. Judges, however, are constitutionally in a different position than other persons affected by Bill C-23. Subsection 44.2(4)(b) specifically contemplates regulations which would reduce the amount of an annuity payable to a retired judge. We express no opinion as to whether such a provision, absent approval of a Quadrennial Commission, is constitutional or not. However, if the Government is to be consistent in its position that approval by the Commission is necessary to enact sections 44.1 and 44.2, then it must follow that such an arbitrary regulation-making power cannot be approved in the abstract— the regulations themselves will eventually have to be approved by the Commission before they can become operative. We suggest that the Commission recommend that proposed regulations under subsection 44.2(4) be considered by the Commission before they are formally adopted by the Governor in Council. This need not delay passage of Bill C-23 into law, other than to possibly affect the coming into force date of section 44.2.

In conclusion, while the Conference and Council are in agreement as to the terms of proposed sections 44.1 and 44.2, the proposed amendments do not provide for the form of joint survivor option urged by the Conference and Council. The Judges renew their request for a joint survivor option as outlined above. It is not a prohibitively expensive item and is currently available to many Canadians. In the absence of any legitimate objection to making such an option available to Judges as well, the Commission is invited to make an appropriate recommendation.

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Miscellaneous issues

At the hearing, we distributed a press article concerning the anticipated award of performance pay to senior managers in the Human Resources Development Department for the coming year. It is the Judges' position that it is a reasonable expectation, on the part of DM-3s, to receive performance pay in addition to their base salary. We attach a further press item from the *National Post* of January 27, 2000, which indicates that about 95% of the 3,300 public service executives received some kind of bonus in 1996. We conclude that while performance pay may, theoretically, be "at risk", it is nevertheless widespread among public service managers.

We are also enclosing a comprehensive summary of the submissions advanced at the oral hearing on February 14, 2000. As requested, the various improvements sought by the Conference and Council have been placed in order of priority.

We trust the foregoing is satisfactory.

Yours very truly,

Leigh D. Crestohl

LDC/lt
Enclosures
c.c.: David Sgayias, Q.C.
b.c.c.: Hon. André Deslongchamps, A.C.J.
Hon. Myra B. Bielby
Hon. Robert A. Blair
Hon. Guy J. Kroft
L. Yves Fortier, C.C., Q.C.