OSGOODE HALL LAW SCHOOL
York University
MEMORANDUM

PRIVILEGED AND CONFIDENTIAL

TO: Mr. Richard Drouin, O.C., Q.C.
Chair, Judicial Compensation and Benefits Commission

FROM: Patrick J. Monahan

RE: *Proposed Group Life Insurance*

DATE: April 28, 2000

1.0 Introduction

.1 Further to your request, this memorandum will set out my preliminary views on the following issue:

> in the context of the proposed life insurance benefits sought by the Canadian Judges Conference and the Canadian Judicial Council in their submission to the Commission, what are the *Charter* s.15 implications, if any, of a "one-time opt out" for current appointees?

1.2 As discussed, the purpose of this memorandum is to provide the Commissioners with my preliminary views only, with a view to determining whether further research and analysis of this matter is warranted.

2.0 Section 15 Test

2.1 As set out in my letter to you dated April 18, 2000 dealing with the criteria for retirement benefits in subsection 42(1)(a) of the *Judges Act*, the Supreme Court of Canada has articulated a three-step test for assessing equality rights claims under section 15 of the *Charter of Rights*. This test focuses on the following:

a. does a law impose differential treatment between the claimant and others, in purpose or effect?;

b. are one or more enumerated or analogous grounds of discrimination (i.e. those expressly identified in section 15, or grounds analogous to those identified) the basis for the differential treatment?; and

c. does the law have a purpose or effect that is discriminatory within the meaning of the equality guarantee?

(See generally, *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 (hereinafter *Law*) at paragraph 88.) The analysis which follows should be read in conjunction with my discussion of the *Law* test as set out in my April 18, 2000 letter, which discussion will not be repeated here.

3.0 Existing Life Insurance Options

3.1 Judges currently have the right to subscribe for life insurance at their own expense under the Public Service Management Insurance Plan (PSMIP). The 'Basic Life' benefit under this plan is a payment equal to 100 per cent of annual salary until they reach age 60. Insurance then reduces by 10 per cent of the original amount per year beginning at age 61. By age 69 the benefit has reduced to 10 per cent and remains at that level until retirement, when it reduces to zero. There is no medical requirement for the Basic Life benefit.

3.2 Judges also have the option of subscribing for Supplementary Life insurance under the PSMIP, with a benefit equal to 100 per cent of their annual salary, once again at their own expense and with the same reductions beginning at age 61. Supplementary Life is subject to satisfactory evidence of insurability.

3.3 Basic Life and Supplementary Life insurance are included in what is described as the "Main Plan" under the PSMIP. The purchase of insurance under the Main Plan is optional for those eligible to participate. Premiums vary by the age and gender of the subscriber. (See attached Schedule 1, setting out a summary of the premiums for different classes under the PSMIP.) Since insurance under the Main Plan is employee-paid, it does not give rise to a taxable benefit under the *Income Tax Act* ("*ITA"*).

3.4 The Main Plan under the PSMIP also provides subscribers with the possibility of purchasing life insurance for dependants, as well as accidental death and dismemberment insurance (AD & D) and long-term disability insurance (LTD). It is not clear to me, based on the evidence tendered to the Commission, whether Judges currently have a right to subscribe for these additional benefits.

3.5 There is also an "Executive Plan" under the PSMIP. The Executive Plan is employer-paid group insurance provided to Order in Council Appointees, with a benefit equal to 200 per cent of annual salary. Since this insurance is employer-paid, it gives rise to a taxable benefit under subsection 6(4) of the *ITA.* Under *ITA* Regulation 2700, the taxable benefit is a flat per capita amount per $1,000 of life insurance for each member of the group insurance plan, calculated with reference to the premiums paid for the insurance. Participants in the Executive Plan also have the right to apply for supplementary life

insurance under the Main Plan (i.e. an additional 1 times salary) at their own expense.

3.6 Premiums for basic life insurance under the Executive Plan do not vary by age or gender. Instead, as is set out in Schedule A hereto,[1] a flat monthly premium of $0.25 per $1,000 of insurance applies. I am advised by the actuarial experts with whom I have discussed this issue that flat premiums of this type are common in employer-paid group insurance plans.

3.7 The result is that in group life insurance there is necessarily some cross-subsidization of older participants by younger participants, and of males by females. This is because the mortality rate and therefore the risk represented by younger persons and women, respectively, is lower than that for older persons and for men. Despite these different risks, employer-paid life insurance results in the identical taxable benefit for all members without regard to age or gender, which creates the cross-subsidization described above.

3.8 The employer-paid group life insurance under the Executive Plan is optional. It is my understanding (based on informal discussions with the actuarial experts) that those opting out may reverse that decision and opt-in after five years, with evidence of insurability at that time.

3.9 In addition to these benefits under the PSMIP, it is my understanding that there is group life insurance also provided to all public servants under Part II of the *Public Service Superannuation Act* (the "*PSSA*"). Part II of the *PSSA* provides for a Supplementary Death Benefit ("SDB") equal to 200 per cent of the participant's annual salary.

3.10 The SDB is group life insurance. Participants are required to contribute to the Consolidated Revenue Fund at the rate of $0.05 per month for every $250 of the participants' benefit. There is no variation in contributions in terms of age or gender, which gives rise to the cross-subsidization of older participants and males by younger participants and females, as described in paragraph 3.7 above.

3.11 Unlike the PSMIP (where participation is optional), participation in the group life insurance plan under the *PSSA* is mandatory for virtually all those employed in the federal Public Service (those employed in or under any department or portion of the executive government of Canada) with very limited exceptions. (See sections 47(1) and 53 of the *PSSA*.)

4.0 Proposed Judges' Life Insurance

4.1 The Joint Submission of the Canadian Judges Conference and the Canadian Judicial Council proposed that judges be included in the employer-paid Executive Plan under the

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[1]See "Public Service Management Insurance Plan (PSMIP) Monthly Premium Rates at January 1, 2000".

PSMIP. However, the Government of Canada (the "Government") objected to this proposal on the basis that including judges within the Executive Plan would increase the premiums paid (and thus the taxable benefit) for each participant in the Plan. (See *Submission of the Government of Canada to the Judicial Compensation and Benefits Commission* (December 20, 1999) at paragraph 54.)

4.2 The Government submission raised the possibility of establishing a separate "stand alone" judicial life insurance plan within the PSMIP, for which the Government would assume the costs. The difficulty with this proposal, according to the Government, was that it could be open to the criticism that younger female judges who participate in the plan would be subsidizing older male participants. According to the Government submission, the taxable benefit to younger female judges could leave them worse off than if they were to purchase insurance coverage from their own funds. (See *ibid*, paragraph 57, and Appendix 19.) The Government suggested that there may be other plan designs that would provide improved coverage in an equitable fashion. These alternative plan designs were not identified.

4.3 In an attempt to address these concerns, the Conference and Council proposed to create a separate pool within the existing Executive Plan in the PSMIP, to be composed solely of judges. This would have the effect of eliminating any possible cross-subsidization between judges and existing members of the Plan. It was also proposed to grant existing judges a one-time opportunity to opt out of the plan upon its introduction. (See the *Reply Submissions of the Canadian Judges Conference/Canadian Judicial Council*, January 21, 2000 at p. 13-14.) However, judges appointed after the introduction of the plan would be required to participate, thereby giving rise to the cross-subsidization of older males by younger females, as described above.

5.0 Life Insurance Section 15 Issues

5.1 It is first necessary to identify the nature of the potential section 15 issue that might arise from the proposal in paragraph 4.3. There are two distinct ways in which this proposal might be thought to create an 'inequality' and thus a potential claim of discrimination under section 15:

a. the fact that only existing judges are granted a right to opt out, and that such a right would not be granted to judges appointed after the introduction of the plan, might be thought to constitute discrimination against future appointees as compared with current appointees;

b. the fact that younger female participants would be cross-subsidizing older male participants in the manner described earlier, and that participation in the plan would be compulsory for all future appointees, might be thought to constitute discrimination against these younger female appointees as compared to older male appointees.

5.2 In my view, the differential treatment described under paragraph 5.1(a) is not the kind of differential treatment that can give rise to a successful section 15 claim, for two reasons.

5.3 First, the Supreme Court of Canada has made it clear that only discrimination on an enumerated or analogous ground can give rise to a claim under section 15. The differential treatment described in paragraph 5.1(a) is between judges appointed prior to a certain date and those appointed thereafter. The class of judges that is subject to less favourable treatment (those appointed after the date of introduction of the life insurance plan) will include men and women of varying ages. Thus it seems difficult to see how they could be described as a group or class of person that is identified by one of the enumerated or analogous grounds in section 15. Further, since the differential treatment is not being imposed on the basis of an enumerated or analogous ground, it cannot give rise to a claim of discrimination under section 15.

5.4 A second relevant consideration in relation to this first section 15 argument is that it is common in both the private and public sectors when changing terms and conditions of an office or employment to permit existing office holders or appointees to opt out of the changes. This is because an employer has no right to unilaterally change the terms and conditions of appointment or employment.

5.4.1 One illustration of this approach is the manner in which the requirement that judges contribute towards the cost of their annuities was introduced in 1975. Judges appointed prior to the introduction of the legislation implementing this change were not required to contribute to the same extent as those appointed afterwards.

5.4.2 This differential treatment was challenged by a judge who had been appointed after the legislation implementing it had been introduced but before it became law. One of the grounds for the challenge was that it was contrary to the guarantee of "equality before the law" in the *Canadian Bill of Rights* to discriminate in this way against judges appointed after the date the legislation was introduced. This argument was rejected and the requirement for annuity contributions for future appointees upheld in the Supreme Court of Canada in *The Queen v. Beauregard*, [1986] 2 S.C.R. 56.

5.4.3 Thus, even if differential treatment between judges appointed before a certain date and those appointed afterwards were found to be differential treatment on the basis of an enumerated or analogous ground, the differential treatment is unlikely to constitute 'discrimination' as that term has been interpreted by the Supreme Court of Canada. (See the discussion at pages 20-22 of my letter of April 18, 2000 on section 42(1)(a) for the judicial interpretation of the term 'discrimination'.)

5.5 The concern identified in paragraph 5.1(b) does involve an allegation of differential treatment on enumerated grounds of discrimination (namely sex and age) and thus could potentially give rise to a successful claim under section 15 (assuming that the other elements of the *Law* test were satisfied.)

6.0 Differential Treatment by Age and Sex

6.1 There are a number of very difficult hurdles that would have to be overcome for the claim identified in paragraph 5.1(b) to succeed under section 15 and 1 of the *Charter*.

6.2 The first difficulty is that the discrimination arises from the provision of a government-funded benefit to a defined class of persons. Those cases in which government benefit programs have been successfully challenged under section 15 of the *Charter* have involved claims brought by persons who were excluded from the benefit in question. (See the cases discussed in my April 18, 2000 letter at pages 6-8.) The claim which is under consideration here is quite different and novel. This claim involves an allegation of discrimination on the basis that the person is being forced to receive a government benefit that they would prefer not to receive. The discrimination is said to arise from the fact that the benefit being provided gives rise to a tax liability that is greater than the "true cost" of that benefit for some of the participants at certain points in time. (Overall, the benefit is a net benefit to the participants as a whole, and is likely a net benefit to each individual participant taking into account the impact of the benefit over their career as a whole, as opposed to just considering their younger years. See more on this point below.)

6.2.1 On its face, it seems problematic to argue that the tax cost of all government benefit programs must be equal to or greater than the 'true cost' of the benefit, calculated on an actuarial basis, for all of the participants at all points in time. This proposition would have fairly wide implications, and could call into question the constitutionality of a wide variety of widely-used government benefit plans.

6.2.2 As is explained in my April 18, 2000 letter, equality rights claims are inherently comparative in nature. That is, the claimant must establish that they are subject to differential treatment vis-a-vis some other comparable group, and then argue that this differential treatment is discriminatory. In this instance, the argument that would have to be made is that younger female participants in this benefit program do not receive the same benefit as older male participants. In effect, the argument would be that a government benefit program that fails to deliver the same level of taxable benefit to all age groups or to men and women equally is a violation of section 15.

6.2.3 I know of no previous case in which this kind of argument has succeeded under section 15. As noted in paragraph 6.2 above, those claims that have successfully challenged government benefit programs under section 15 have been brought by persons who were excluded or denied the benefit in question. But courts have never held that all government benefit programs must deliver equal taxable benefits to all groups in society, for the obvious reason that such a requirement would render most government benefit programs unconstitutional.

6.3 What makes the argument here particularly novel is that the government is funding the benefit in question. The participant is not asked to pay anything directly. The discrimination is said to arise from the fact that the taxable benefit resulting from the provision of the benefit is greater than the 'true cost' of the benefit for some participants but not for others.

6.3.1 The proposition that the tax cost of all government benefits must be equal to or more than the 'true cost' of the benefit for all participants at all points in time requires a basis for calculating the 'true cost' of the benefit. Appendix 19 to the Government's December 20, 1999 submission includes a Worksheet B which seems to provide such a calculation, in a table entitled "Annual Gain (Loss) in the Compulsory Subsidized Plan". This calculation is based on comparing the "true annual cost of coverage" for a female judge appointed at age 40 with the judge's annual tax liability resulting from the conferring of a taxable benefit under the compulsory plan.

6.3.2 The column "true annual cost of coverage" represents the pure claims cost for $356,200 of coverage using the mortality assumptions for the judicial population. However, based on my informal discussions with the actuarial experts, it seems that no individual judge could currently purchase insurance at these rates.

6.3.3 For example, the premiums that female judges currently pay for life insurance under the PSMIP are significantly higher than those set out in the column 'true annual cost of insurance' on Worksheet B. By my calculation (based on the premiums set out in Schedule A for Basic Life and Supplementary Life under the Main Plan in the PSMIP, which judges currently have the option of purchasing) a female judge at age 56 who wants to purchase $356,200.00 of life insurance would currently pay a total of approximately $1,217.00 annually (not $784 as suggested on Worksheet B in Appendix 19), calculated as follows:

a. $662.16 annually for $178,000.00 of Basic Life (one times salary) based on a premium of $0.31 per month per $1,000.00 of insurance; and

b. $555.36 annually for $178,000.00 of Supplementary Life (one times salary) based on a premium of $0.26 per $1,000.00 of salary. (Note that the premium for supplementary life is lower due to the medical requirement associated with this coverage.)

6.3.4 Thus it would seem that this 56 year old female judge would be better off under the Compulsory Subsidized Plan than she is now with the option of purchasing insurance under the PSMIP. She gets more insurance at a lower price. Her costs decrease by about $100.00 annually, while she is no longer required to satisfy any medical requirement for the insurance. Moreover, the insurance under the Compulsory Subsidized Plan remains at $356,200.00 until retirement, at which point it gradually reduces to 25 per cent of the benefit, where it remains constant until death. (This compares with the existing insurance package under the PSMIP which, as described above, begins decreasing at age 61 and

reduces to zero at retirement.) Of course, as she grows older, there is no increase in her taxable benefit under the Compulsory Subsidized Plan, whereas premiums increase with age under the PSMIP.

6.3.5 It is not clear to me why, for constitutional purposes, it is necessary or appropriate to calculate the 'true annual cost of coverage' in the manner set out in worksheet B, as opposed to on some other basis (such as on the basis of what the judge would pay today under the PSMIP.)

6.4 Yet regardless of how the 'true cost' of insurance is calculated, the fact remains that there will always be some significant cross-subsidization of older male judges by younger female judges. This is because such cross-subsidization is inherent in group life insurance plans.. Could this cross-subsidization not be said to constitute discrimination under section 15?

6.4.1 The most obvious difficulty with the argument is that it focuses on the net gains or losses for an individual participant at one point in time only, namely, during their younger years. Yet when an individual decides whether to participate in a group life insurance plan (assuming for the moment such participation to be optional), they do not just take into account the net costs and benefits in the first year(s) of the plan. Taking a somewhat longer view, they will recognize that as they grow older, the value of the insurance will increase even though the taxable benefit will remain constant. Thus it is rational even for a very young person to elect to participate, if the net losses in the early years of their participation will be more than made up by net gains in their later years.

6.4.2 The further difficulty with the argument is precisely that such cross-subsidization is an inherent feature of all group life insurance plans. As explained above, these plans generally provide for a flat premium per $1,000 of life insurance for all members, with no variation by age or gender. Where the group life insurance is employer-paid, it gives rise to the same per-capita taxable benefit per $1,000 of life insurance under the *ITA*. Therefore, to the extent that cross-subsidization of older males by younger females through employer-paid group insurance is to be prohibited under section 15, it may render invalid the group insurance arrangements for significant numbers of employers and employees, including all those public servants who are required to participant in the *PSSA*. Further, Regulation 2700 under the *ITA*, which expressly requires that gender and age differences be ignored in calculating the taxable benefit arising from employer-paid group life insurance, may well be unconstitutional.

6.4.3 The section 15 argument would be made stronger if it could be shown that certain participants would suffer a 'net loss' through their participation in the group life insurance plan over their career as a whole. In other words, if it could be shown that the compulsory life insurance plan would make a participant worse off over their entire career (rather than simply in a particular year or years) such that the plan was not conferring a benefit at all but was imposing a net burden, then it would seem possible to argue that they were being subjected to 'differential treatment', as that term has been

defined in the context of section 15 claims under the *Charter*. However, no evidence has been provided to the Commission that would enable one to establish that this is or would be the case in respect of the proposed judicial group life insurance plan.

6.4.4 Note that in addition to the requirement of differential treatment, courts have held that there must be 'discrimination' before there is a violation of section 15. (See pages 8-9 of my April 18, 2000 letter on the interpretation of the term 'discrimination'.) Thus, even if it could be established that certain judicial participants were subjected to differential treatment, it would still be necessary to demonstrate that this treatment reflects the "stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration". (*Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497 at paragraph 88.)

6.5 What of the possibility of making a group life insurance plan optional? Could it not be argued that the difficulty with the proposed plan is simply its compulsory nature, particularly when participation in the Executive Plan under the PSMIP is optional?

6.5.1 In my informal discussions with the actuarial experts, the compulsory nature of the proposed life insurance plan is explained on the basis of the particular demographics of the judiciary. Since there are a greater proportion of older males in the judiciary as compared to the general population, there is a concern that making the plan optional will dramatically increase the premiums and thus the taxable benefit for participants. In an optional plan these increases could have a cascading effect since, as premiums and taxable benefits rise, fewer appointees may find it attractive to participate, causing more participants to opt out, which in turn will cause premiums and taxable benefits to increase even further, until a point of equilibrium is eventually reached.[2]

6.5.2 In any event, it is common for participation in group life insurance plans to be compulsory. (See, for example, the SDB under the *PSSA* described earlier.) Thus it seems difficult to conclude that the compulsory nature of the proposed judicial plan in itself could form the basis for a finding that it is unconstitutional.

6.6 At bottom, what seems to give rise to the difficulty here is not the existence of cross-subsidization itself but, rather, the degree of such cross-subsidy. In order for this to form the basis for a constitutional argument (as opposed to an argument relating to the most

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[2]If the plan were financed entirely by the members, the cascading effect would result in a rate spiral that would ultimately result in a membership consisting only of the very highest risks. The insurance principle would then be lost and the plan would cease to exist. However, since the plan would be effectively only 50% financed by members (i.e. the marginal tax rate), the rate spiral is halted at a certain point.

appropriate plan design) it would be necessary to find some principled basis for distinguishing the point at which cross-subsidization through group life insurance becomes unconstitutional. It is not clear to me that any such principled or judicially-manageable standard exists.

6.6.1 More fundamentally, the major difficulty with the constitutional argument is that it seems to be premised on the assumption that government benefit programs must provide equal taxable benefits to all groups who receive the benefit. As noted earlier, there is no legal authority recognizing such a constitutional requirement. Nor could such a requirement be recognized without significantly impacting the design of numerous government-funded benefit programs. It would also mean that the constitutional validity of various government programs would turn on actuarial calculations as to the 'true cost' of the programs, as compared with their tax cost. This seems an uncertain foundation upon which to base conclusions as to the validity of social benefit programs.

7.0 Conclusion

7.1 As noted, this memorandum sets out my preliminary observations with respect to the *Charter* section 15 implications of the matter raised. I would be happy to undertake a more detailed analysis of this issue should you or the other Commissioners regard that as appropriate.