FINAL SUBMISSION OF THE GOVERNMENT OF CANADA

TO

THE JUDICIAL COMPENSATION AND BENEFITS COMMISSION

I. PROCESS

1. The Commission has invited the Governments comments on possible improvements to the Commission process in relation to both written and oral submissions. It has asked that particular attention be given to the paucity of comprehensive information with respect to the comparators available to the Commission. The Government is pleased to have the opportunity to respond to this request.

a) The Nature of the Commission

2. The Judicial Compensation and Benefits Commission is not intended to function as an adversarial party/party dispute resolution mechanism. Rather, the Commission's mandate is to enhance public confidence in the independence of our judiciary by removing any perception of the "politicization" of the establishment of judicial compensation. Accordingly, the nature of the Commission process is in effect that of a public policy inquiry that provides for the participation of any interested person or group. While representatives of the judiciary and the Government are as a matter of history and practice the "principal parties" before the Commission, any person can raise issues for the Commission's consideration and recommendation.

3. The procedures established by the Drouin Commission, and largely followed by this Commission, reflect the public interest nature of the process. While the Commission has adopted the practice of communicating with the principal parties jointly and only through counsel, the Commission process is relatively informal and highly accessible through the Commission's website. Significantly, unlike conventional litigation, the Commission's function is not limited to addressing the issues and evidence as presented by participants. Rather the Commission can and does retain the assistance and advice of

its own experts in assembling and analysing information to be relied on in developing its recommendations.

4. It is in light of the nature of the Commission inquiry that we wish to explore whether it would be appropriate for the Commission to assume a more direct leadership role in the development of better information

b) The Challenge of Acquiring Good Information

5. The Government is acutely aware that determining appropriate comparators for judicial compensation has been a recurring challenge for all Commissions. The relevance and utility of reference to international or provincial judicial salaries has been generally discounted. As a result, the comparators most commonly used by past Commissions have been Deputy Ministers at the DM-3 level and private sector self-employed lawyers. It is worth noting that these two comparators present different challenges.

6. In terms of considering Deputy Ministers' compensation, the challenge is not with respect to the availability of reliable data or related information. Accurate and relevant information is available and has been provided to the judiciary and the Commission. Rather, the debate relates to the significantly differing nature of the respective functions of judges and DMs, and the appropriateness of including for purposes of comparison certain elements of DMs' compensation such as performance bonuses. The Government has said that DM compensation is a relatively poor comparator for judicial salaries and that in considering such compensation, only trends in the salary component should be considered.

7. The challenge with respect to the private sector lawyers' compensation has been more basic. It is in this area that the "paucity of information" to which the Commission refers lies.

(i) The Government's Experience to Date

8. The Drouin Commission also grappled with the difficulty of comparing the incomes of private practitioners with judicial salaries because of the "unavailability of current reliable income data relating to legal practitioners including, in particular, those in the private bar. In its "Reflections on the Process", the Drouin Commission specifically identified the need to develop a relevant income measure for lawyers in private practice that could be tracked over time.

9. In light of this identified need, the Government took steps to develop better information, both by study of private sector incomes and analysis of available CCRA data on income tax returns. The challenges faced in developing such information provide valuable lessons that may assist the Commission in its search for valid comparators.

10. Work to date has provided a good deal of valuable information which may usefully inform the design of future studies. The critical challenges that were encountered in the course of the exercise were as follows:

- The necessary data are not readily available from any existing data base, nor can they be easily generated. In particular, private legal practitioners appear reluctant to participate due to confidentiality concerns about individual and firm income data.

- Key assumptions used in ordinary compensation analysis do not appear to apply to the unique situation of the judiciary.

- It is not evident how a properly designed compensation study would address the way the legal profession is structured. At first blush, it may seem a straightforward exercise to survey the income of lawyers in private practice. However, anecdotal evidence suggests there are significant differences in private-practitioners' income depending on such factors as: size of firm, area of practice, geographic location, size of community and the extent to which a firm has a

specialized practice. The extent to which candidates come from particular segments of the legal profession may also be a relevant concern.

- The standard 'rough and ready' statistical methodology employed by compensation consultants seems insufficiently reliable when applied to the context of judicial compensation.

11. Since compensation specialists exercise a good deal of professional judgment in arriving at a recommendation, the credibility of that recommendation in large part derives directly from the individual specialist's credibility and professional reputation. The Government questions the appropriateness of such an expert opinion model in the context of judicial compensation.

(ii) The CCRA Exercise

12. The Commission has received submissions with respect to the efforts made by representatives of both the judiciary and the Government to develop a reliable set of data that would assist the Commission in its deliberations. Regretfully, despite these genuine efforts, the data generated by CCRA proved to be essentially unreliable and of questionable value to the Commission. Even if the data were deemed reliable, the Government and the judiciary were unable to agree on a statistical methodology that would generate appropriate comparators.

13. All of this suggests that there must be a more effective way to assemble the necessary data and to clarify positions in relation to methodology.

c) Observations and suggestions

14. The Quadrennial Commission process has overall worked well. Given the information available to it, the Drouin Commission was widely considered to have produced a strong, well-reasoned and persuasive report. However, the chronic challenges with respect to developing valid comparators in terms of private sector incomes must

now be addressed. In the Government's view, this objective can best be achieved through a "tripartite" approach, with direct involvement and leadership by the Commission.

15. In Chapter 7, "Reflections on the Process", the Drouin Commission identified areas where such a tripartite approach might be warranted. Of particular relevance to this Commission's inquiry are the Drouin Commission's observations under Section 7.2 The Role of Experts and Research:

> Our initial view was that the Commission might play a helpful role in working with the Judiciary and the Government to identify an agreed research agenda, and that we might then contract such research on behalf of the parties and the Commission. In the event, this idea became a casualty of our not being fully staffed and ready to commence an in-depth review of the issues…. We continue to believe that it is a concept that makes good sense and one worthy of pursuit by future Commissioners. There are several benefits: increased understanding of the issues considered by each party; economic use of research resources; and, hopefully, an accepted data-base that would be common to the Commission, the Judiciary and the Government.

16. It is worth noting that such an approach need not be limited to data and information gathering. Issues with complex social and economic implications may be better addressed in a less adversarial forum. There may be real value in the Commission's early involvement in the analysis and development of options in relation to technically complex policy issues that may affect broader interests than just the judiciary and the Government, for example, the division of judicial annuity on conjugal breakdown.

17. In the Government's view, a more direct and proactive involvement of the Commission in the collection and analysis of private sector income information would be more efficient and productive than the current approach. The active participation of the Commission at an early stage would reduce the areas of potential disagreement and focus the application of relevant information, or at a minimum help crystallize the areas of dispute to be addressed before the next Commission.

18. For example, the Commission might consider undertaking a survey of recently appointed judges to canvass such matters as income at date of appointment, the importance of non-compensation factors in accepting appointment, and so on. Arguably, concerns about judicial independence as well as the judiciary's concerns about confidentiality suggest that the Commission would be better suited to undertake this survey itself, rather than either of the principal parties individually.

19. The current structure of the Commission, and, in particular, the four-year term of the Commission, would allow for such work to be completed before the next quadrennial Commission. A study could be the subject of a reference by the Minister of Justice pursuant to s. 26(4) of the *Judges Act*.

II. DIVISION OF ANNUITY OF CONJUGAL BREAKDOWN

20. The Government wishes to advise the Commission that discussions with representatives of the judiciary aimed at developing a facilitative mechanism for the division of annuity benefits on conjugal breakdown are continuing. While it is hoped that agreement is near, whether a consensus will be reached at this time cannot be predicted. The Government therefore proposes that the parties deliver, by April 30th, either the details of a consensual agreement, or their respective submissions as to an appropriate mechanism. In the Government's view, further oral hearings on this issue are unnecessary. The parties will be best placed to explain the policy principles and technical aspects underlying this matter through written submissions.

III. RELOCATION EXPENSES WITHIN TWO YEARS OF RETIREMENT

21. The Joint Submission dated December 15, 2004 asked the Commission to recommend that the *Judges Act* be amended to permit reimbursement of relocation expenses incurred prior to but in anticipation of retirement or resignation of office.[1] The Joint Submission sought reimbursement of relocation expenses occurred within two years of eligibility to retire for certain judges[2].

[1] The Joint Submission, December 15, 2003, para. 89.
[2] The Joint Submission, December 15, 2003, para. 93

22. In its Reply submission dated January 23, 2004 the Government had indicated that it would not oppose the judges' proposal, provided certain conditions were met[3]. Briefly stated, the conditions were that: (1) the judge continue to fulfill any statutory residency requirements; (2) the removal entitlement be one-time only and not result in any additional expense to the public; and (3) any additional travel and living costs which might result from the judge's choice not be reimbursable.

23. The judiciary has now advised that it wishes to further refine its proposal. The judiciary now proposes that a judge be entitled to relocate within two years of eligibility for retirement, *but not submit the relocation expenses for reimbursement until actual retirement*. At the date of this writing the Government has not seen the written proposal.

24. The Government does not understand the purpose of this amended proposal. Waiting until retirement to submit expenses for reimbursement in relation to a relocation that occurred years earlier would be administratively complex to manage. If what is intended is to allow for a "partial move" immediately with the balance of the relocation and its claims on actual retirement, it seems inevitable that unanticipated questions and possible disputes will arise as to the application of the Order. In addition, additional costs to the public may result.

25. Accordingly the Government remains of the view that judges should have the option to "elect" to access their relocation entitlement within two years of eligibility to retire. If they do so, all relocation expenses connected with that relocation should be paid within the timeframes currently provided in the *Removal Allowance Order* and no later expenses should be reimbursed.

[3] The Government's Reply Submission, January 23, 2004, paras. 35-41.