REPLY SUBMISSION OF THE GOVERNMENT OF CANADA

TO

THE JUDICIAL COMPENSATION AND BENEFITS COMMISSION

I. INTRODUCTION

1. The Government of Canada offers the following comments in reply to the various submissions filed by other parties.

2. These comments focus on the principal proposals and arguments advanced by the other parties. No attempt is made to rebut each and every point of argument.

3. Most of the comments are directed to the Submission filed jointly by the Canadian Judges Conference and the Canadian Judicial Council. For ease of reference, that document will be referred to as the "Joint Submission".

II. PROCESS

4. Much of the Joint Submission is devoted to criticism of the process by which the Government responded to the recommendations of past triennial commissions, particularly during periods of fiscal restraint.

5. The Government recognized that there had been problems in the past and referred the process issue to the Scott Commission. At about the same time, the Supreme Court of Canada dealt generally with the subject of process in the *PEI Judges case*. Parliament amended s. 26 of the *Judges Act* to reinforce the independence, objectivity and effectiveness of the commission process, notably by requiring the Government to respond to the report within a prescribed time, namely six months.

6. The Government submits that the page has been turned. A new Commission, operating under an elaborated mandate, is now in place. The process for the Government's response to the Commission's report is established both statutorily and constitutionally. Any failings of the former process are quite irrelevant to the Commission's present task of developing public policy and making recommendations as to adequate judicial salaries and benefits.

III. SALARIES

(a) General Comments

7. The salary increase sought by the Joint Submission is excessive. An increase of $46,900, some 26%, cannot be justified. The Joint Submission seeks to take judicial salaries far beyond what is adequate within the meaning of s. 26(1.1) of the *Judges Act*.

8. The argument in the Joint Submission has as its starting point the proposition that, apart from indexing, there has been no real and substantive increase in judicial salaries since 1988. The argument fails to recognize that statutory indexing has delivered a real increase of 4.3% since 1992. That is discussed at paragraphs 17-18 of the Government's Submission filed December 20, 1999 ("the Principal Submission"). Taking the analysis back to 1988, judicial salaries have increased by 39.9% against a compounded increase in the Consumer Price Index of 33.2%: see Appendix 23 hereto. That amounts to a real increase of 6.7%.

9. Indexing should not be ignored. It sets judicial salaries apart. Neither private sector lawyers nor public servants enjoy a statutory guarantee that they will keep pace with earnings in the economy.

10. The central role of indexing was recognized by the Scott Commission. The Joint Submission invokes that Commission's comments with respect to maintenance of a constant

relationship between judicial salaries and incomes of members of the bar. The Scott Commission considered indexing of judicial salaries to be the mechanism to maintain that relationship. The Commission's only recommendation as to salary was to restore statutory indexing:

> commencing April 1, 1997, the Government introduce an appropriately phased upward adjustment in judicial salaries such as to ensure that the erosion of the salary base caused by the elimination of statutory indexing is effectively corrected.
>
> (Appendix 1, page 16)

That recommendation was fully implemented by Parliament, with the phased upward adjustments effective April 1, 1997 and April 1, 1998.

11. With the restoration of indexing, current salaries put judges in the 98th percentile of employment incomes earned by Canadians: see Appendix 24. Salaries are well beyond the level necessary to ensure public confidence in the independence of the judiciary.

12. It is within this context that the question must be asked: is a "quantitative leap" of 26% essential to ensure the adequacy of judicial salaries. The Joint Submission attempts to answer that question on the basis of comparisons to the earnings of the highest public servants, selected foreign judges, and high earners of the private bar. As elaborated below, the Government submits that those comparisons are of limited assistance and do not justify a 26% increase in judicial salaries.

(b) DM-3 Comparison

13. As explained in the Government's Principal Submission, comparison of the salaries of judges and senior deputy ministers must be approached with caution. It must be recognized that the comparison is not supported by any objective analysis of the nature of the responsibilities and

the value of the work of judges and senior deputy ministers. Indeed, their work and responsibilities may be so different as to make a principled comparison extremely difficult. It is in default of alternatives that comparison has been made to the DM-3 salary range. That comparison has not been based upon responsibilities and work, but upon the personal attributes of character and ability shared by judges and deputy ministers: see the Report of the Crawford Commission reproduced in Appendix 12, at page 11.

14. The Joint Submission fails to recognize the limits of the DM-3 comparison. Quite the opposite, the DM-3 comparison is given pride of place. That comparison is said to lead to a judicial salary of $225,000 and to further staged increments tied to any future changes in DM-3 compensation.

15. The Joint Submission takes the DM-3 comparison into new territory: performance incentives. Past commissions looked at the mid-point of the DM-3 salary range. Although performance pay has been in place since 1968, no commission chose to include performance pay in comparing deputy ministers' salaries and those of judges.

16. The Joint Submission would establish judicial salaries in relation to the maximum performance incentive available to individuals at the DM-3 level. The Joint Submission suggests that the amount is 20% of salary retroactive to 1999-2000. That is incorrect. The Strong Committee recommended that the maximum potential variable pay be 10% for the fiscal years 1998-99 and 1999-2000, to reach 20% only for the fiscal year 2000-01: see Appendix 14, at page 26. Consistent with the recommendations, the maximum available in respect of 1998-99 was 10% and is likely to be 10% for 1999-2000: see Appendix 25.

17. The more substantial misconception is as to the nature of variable pay. The Joint Submission refers to the Strong Committee's characterization of variable pay as "an integral part of total compensation." What the Strong Committee said was:

> This variable pay scheme is an integral part of total compensation. It is not paid or withheld as part of an annual review of salaries. It is paid or not paid on the basis of actual performance compared to agreed targets.
>
> (Appendix 14, page 23)

Against a chequered history of uncertain performance pay, the Strong Committee emphasized that variable pay is to be separated from salary. It is to be truly at risk, not an entitlement but paid solely on the basis of performance measured against agreed targets and the achievement of business plans. This at risk pay is even more distant from judicial salaries than performance pay under the former regime.

18. The Joint Submission proceeds to invite the Commission to go a step further and index judicial salaries to future increases, if any, in DM-3 compensation. This would be effected by "further staged increments" during the quadrennial period and would be in addition to the statutory indexing of judicial salaries. The Joint Submission argues that such increments are needed because of past delays in implementing salary increases for judges.

19. The Government's position is that tying judicial salaries to salary increases for deputy ministers is both unnecessary and inappropriate. The Commission should not assume that there will be undue delay by the Government in responding to the Commission's recommendations. As explained above, there is a new regime both statutorily and constitutionally.

20. Applying increases in DM-3 compensation to judicial salaries could result in "double indexing". Unlike judicial salaries, DM-3 salaries are not increased annually. The irregular periodic increases in the DM-3 salary range are the recognition of the effects of inflation and growth in productivity. Applying those increases on top of the annual indexing of judicial salaries would be double-counting.

21. Tying judicial salaries to those established by the Government for its senior public

servants might well offend the principle of judicial independence. It would seem inappropriate that judicial salaries could be increased by exercise of executive discretion in adjusting DM-3 salaries. On the other side of the equation, it would seem inappropriate that the Government be constrained in establishing the salaries of 10 deputy ministers by an obligation to pass any salary increase along to over 1000 judges.

(c) Other Comparisons

22. The information provided by the Joint Submission as to judges' salaries in other jurisdictions is not helpful. The numbers have no context. Any principled comparison would require a full range of reference points in the other jurisdictions, including relative earnings of others (such as public servants and members of the bar), the cost of living, the taxation regime. Absent such information, the attempt at a comparison should be ignored. See, to the same effect, the comment by the Guthrie Commission, reproduced in Appendix 26, at page 10.

23. In its Principal Submission, the Government has identified the difficulties inherent in assessing the relationship between the level of judicial salaries and the attraction of outstanding candidates from the legal profession. Those difficulties become apparent upon examination of the Joint Commission's attempt to compare judicial salaries to the incomes of private practitioners.

24. It should be noted that the Joint Submission is incomplete. The promised survey of lawyers' incomes has not yet been delivered. The factual foundation for several of the arguments advanced in the Joint Submission remains undisclosed.

25. The focus of the argument in the Joint Submission appears to be the gap between judicial salaries and the incomes of lawyers in private practice. The gap is described as having become considerable and significant.

26. The Government submits that any gap is significant only if it serves as a disincentive to such a degree that outstanding candidates cannot be found. There is no evidence of such an effect. Outstanding candidates are being attracted to the judiciary and appointments continue to be of the highest quality: see paragraph 29 of the Principal Submission.

27. Nor is there evidence of the widening of any gap. The Joint Submission offers no comparison of judicial salaries and lawyers' incomes over time. Absent such information, it cannot be said that the gap is growing.

28. The Joint Submission makes reference to urbanization. This is hardly a recent phenomenon in Canada. No data is presented to show that urbanization of the judiciary has increased over the past 10 or 15 years. There is no basis to assume that urbanization has widened the gap or had any effect at all on the ability to attract outstanding candidates to the judiciary. No case has been made for regional salaries. National salaries should not be set in relation to the cost of living in the most expensive city or cities in Canada.

29. The Joint Submission makes no attempt to compare judicial salaries to the incomes of the full range of candidates for judicial office. As explained in the Government's Principal Submission, outstanding candidates are drawn from all areas of the legal profession. Indeed, 30% of appointments do not come from private practice at all. The Joint Submission invites the Commission to ignore all members of the profession except the upper one-third of earners engaged in private practice. All others, whether employed in law firms, engaged in less remunerative areas of private practice, teaching at law schools, or working in the public sector, are excluded from the analysis.

30. The assumption of a direct correlation between high earnings as a lawyer and high qualification to serve as a judge is at best unproven and at worst stereotypical and discriminatory. No analysis has been offered to demonstrate that the attributes that lead to financial success as a lawyer are essential to success as a judge. A lawyer's choice not to pursue financial success

should not call into question that individual's qualifications to serve as a judge.

31. The Joint Submission invites the Commission to compare judicial salaries to the total income of private practitioners. This approach fails to recognize that private practitioners must fund their retirement entirely from their earnings. If such a comparison is to be made, despite its doubtful utility, the comparison must take into account the value of the retirement benefits to which judges are entitled. The Joint Submission offers no estimate of either the value of those benefits or the cost to a private practitioner of funding similar benefits. Absent such estimates, the income figures for private practitioners have little meaning.

32. The Government maintains the position set out in paragraph 40 of its Principal Submission. Current salaries, coupled with the statutory indexing, would appear to be adequate. Should the Commission consider it appropriate to have regard to compensation trends in the federal Public Service, the maximum increase that could be justified would be to take judicial salaries to the mid-point of the DM-3 salary range, inclusive of indexing as of April 1, 2000.

(d) Differential for Appellate Judges

33. The submission by Mr. Justice Michel Robert on behalf of the appellate judges of six courts of appeal asks the Commission to recommend the creation of a salary differential for appellate judges. It is argued that hierarchy and the nature of the work justify the differential.

34. The Government questions setting judicial salaries on the basis of judicial hierarchy. Hierarchy is a consideration that is foreign to the criteria prescribed by s. 26(1.1) of the *Judges Act*. It cannot be said that a salary higher than that of a trial judge is necessary to secure the independence of an appellate judge or to attract outstanding candidates for appointments to courts of appeal.

35. Additional responsibilities may justify differences in salary. That is the case with chief

justices and associate chief justices who carry management and administrative responsibilities. However, not all differences in responsibilities necessarily justify differences in salary. That may be the case when appellate and trial judges are compared. Their work may be different, but of equal value. The work may be different but equally onerous. That point is made by Mr. Justice Ronald Berger in his submission to the Commission.

36. The Commission should not recommend a salary differential absent demonstration that the work of appellate judges is more onerous or of greater value than that of trial judge. That demonstration would require an objective and principled assessment of the responsibilities of both appellate and trial judges.

37. Furthermore, the Commission should not recommend a salary differential absent consultation of the provinces. The creation of a salary differential may well have implications for the structure of the system of courts within the province, a matter of provincial responsibility under s. 92(14) of the *Constitution Act, 1867*.

IV. ALLOWANCES

(a) Indexing of Allowances

38. In the Joint Submission it is proposed that the incidental allowance not only be increased but also be annually indexed. In the separate Submission of the Canadian Judicial Council it is proposed that the representational allowances not only be increased, but also be annually indexed. The Registrar of the Supreme Court of Canada makes identical submissions for the incidental and representational allowances received by members of that Court. The Registrar also proposes that the indexation mechanism be that established in s. 25 of the *Judges Act* for judicial salaries.

39. The Government submits that indexation of these allowances is not necessary. While

judicial independence may require indexing protection to prevent the erosion of judicial salaries by inflation, the same cannot be said for allowances. It can hardly be argued that the incidental allowance is essential to the independence of the judge. That is even clearer with the representational allowance which is provided for "special extra-judicial obligations and responsibilities." Review of these allowances on a quadrennial basis is sufficient.

40. Indexation of the allowances presents conceptual difficulties. Any indexing mechanism should relate to the expenses reimbursed by the allowance. In the case of the incidental allowance, it is far from clear just what expenditures are required for the "fit and proper execution of the office of judge", as opposed to expenses that form part of the administrative costs of the court. Similarly, it would be difficult to identify the basket of expenses that fit within representational allowances. There is no logic in indexing these allowances to the Industrial Aggregate Index, a measure of earnings not expenses.

(b) Northern Allowance

41. The Government has invited the Commission to take up the subject of the allowance for northern judges. The Joint Submission urges that the current allowance be increased from the current $6000 to an amount in the range $16-20,000. In support of this proposal, reference is made to the allowances payable to public servants under the *Isolated Posts Directive*.

42. The *Isolated Posts Directive* is discussed at paragraphs 44-47 of the Government's Principal Submission and is reproduced in Appendix 17 thereto.

43. In drawing comparisons to the *Isolated Posts Directive*, the Joint Submission includes in the calculation the "environmental allowance." That allowance is an incentive for the recruitment and retention of employees at locations where the living environment is relatively unattractive due to physical conditions and lack of amenities. That allowance is not related to the cost of living. It should not be included in making comparisons to the judges' northern

allowance, which is expressly intended as "compensation for the higher cost of living in the territories" (s. 27(2) of the *Judges Act*).

44. Leaving aside the environmental allowance, and considering only the allowances related to the cost of living, the *Isolated Posts Directive* currently provides the following amounts:

Whitehorse	$ 3,088
Yellowknife	$ 5,338
Iqaluit	$10,108

Only in Iqaluit does the *Isolated Posts Directive* provide compensation for cost of living beyond that of the current northern allowance for judges.

V. LIFE INSURANCE AND OTHER BENEFITS

45. The central proposal advanced in the Joint Submission is that judges be included in the "Government's Order in Council Executive Plan." That is understood to refer to the Executive Plan discussed at paragraphs 51-52 of the Government's Principal Submission. That plan covers public service executives, deputy ministers, and some order-in-council appointees.

46. As explained at paragraphs 53-59 of the Principal Submission, the Government is prepared to assume the costs of providing judges with insurance coverage equivalent to that provided to public service executives and deputy ministers. However, the Government objects to including the judges in the Executive Plan, which would increase the tax burden of public service executives and deputy ministers and result in a cross-subsidy to judges.

47. As to health care benefits, there is no "Order in Council Executive Plan". Public service executives, deputy ministers and some order-in-council appointees are included in the general Public Service Health Care Plan ("PSHCP"). The difference is that the Government pays the full

premium for level III hospitalization benefits for the executives, deputy ministers and order-in-council appointees.

48. It is not open to the Government to make unilateral changes to the PSHCP. In November 1999 the Government entered into an agreement with all the public service unions to establish a trust to manage the PSHCP effective April 1, 2000. The parties agreed that no changes would be made in the interim. Changes thereafter rest with the trustees.

49. The Joint Submission seeks benefits for the families of judges who die on duty to the same extent as those provided to families of order-in-council appointees. There are no special provisions for order-in-council appointees, as explained in Appendix 27.

50. When it comes to dental benefits, the Joint Submission departs from the comparison to public service employees, deputy ministers and order-in-council appointees, and seeks enriched benefits by reference to undisclosed "comparable private sector plans." No explanation is offered as to why the current plan is not satisfactory, merely that some other unidentified plans are better.

51. The Joint Submission seeks to have the dental plan extend to retired judges. The Public Service Dental Care Plan applies only to active employees and appointees. However, the Government has proposed a plan for pensioners, which is expected to be finalized and in place later in 2000. The new plan would provide pensioners with benefits mirroring those of current employees, at least for the first two years following retirement. The new plan will be optional and will be funded on a shared basis, with the employer covering 60% of costs and participants the remaining 40% through premiums. It is anticipated that retired judges will be invited to participate in the new plan.

VI. ANNUITIES

(a) Preliminary Comments

52. It should be recognized from the outset that the existing judicial annuity scheme is very generous. Judges are entitled to an indexed annuity of two-thirds of a substantial salary after only 15 years, and in some cases 10 years, of service.

53. Judges retiring today are granted an annuity of nearly $120,000 per year. That places judges within the 98% percentile of retirement incomes in Canada: see Appendix 28.

54. It should also be recognized that the judicial annuity scheme is highly subsidized from public funds. Contributions by judges meet only about 20% of the estimated long term cost of the scheme.

55. The Joint Submission urges changes and improvements to the judicial annuity scheme which will substantially increase the level of public subsidization. The Office of the Chief Actuary has estimated the increased normal cost of the Joint Submission proposals to be $38.5 to 49.1 million in the first fiscal year: see Appendix 29. That is almost a 100% increase, or about $40,000 per judge.

56. One of the arguments put forward in the Joint Submission to justify the proposed changes is that there has been "a relative erosion in such benefits *vis à vis* other Canadians." That argument fails to recognize that judges enjoyed a generous annuity scheme long before pension plans became common in Canada. Indeed, even today only five million Canadians participate in some form of registered pension plan: see Appendix 30.

57. The Government submits that the adequacy of the judicial annuity scheme is to be determined in accordance with the criteria in s. 26(1.1) of the *Judges Act*. The annuity scheme, as part of the package of salary and benefits, should promote judicial independence and serve to attract outstanding candidates to the bench.

58. As to judicial independence, the Government agrees with the proposition in the Joint Submission that:

> Society is not well served if judges are required to have one eye on decision-making and another on how they are going to survive economically once their judicial career ends.

However, the Government submits that no judge could reasonably be concerned for his or her "economic survival" under the existing annuity scheme, which guarantees the retiring judge two-thirds of salary, plus annual indexation to the Consumer Price Index.

59. There is no evidence that the existing judicial annuity scheme, as part of the overall package of salary and benefits, has not been adequate to attract outstanding candidates. In fact, candidates of the highest quality continue to seek appointment to the bench.

60. It may well be that the existing annuity scheme continues to be adequate. As explained in the Government's Principal Submission, that question is best addressed by way of a comprehensive review undertaken separately from the current exercise.

(b) Comprehensive Review

61. The Government has urged that proposals for changes to the judicial annuity scheme would best be taken up within a timely comprehensive review of the structure and function of the scheme in the face of changing demographics and new demands. That position responded to the level of dissatisfaction with the current scheme expressed, and the fundamental changes sought, by members of the judiciary.

62. The number and scope of the changes proposed in the Joint Submission, along with the proposals advanced by other parties, confirm the Government's view that the judicial annuity scheme should not be subjected to piecemeal analysis and *ad hoc* changes.

63. Previous commissions have considered certain aspects of the judicial annuity scheme and some changes have been made over the years. However, there has been no thorough re-examination of the basic policy objectives and assumptions that underlie the annuity scheme. Those objectives and assumptions are now being called into question.

64. Several parties have pointed to changes in the demographic profile of the judiciary. Judges have been appointed at a younger age; these judges have been disproportionately women. Such demographic changes may be permanent or transitory. If transitory, the changes may not justify reform of the judicial annuity scheme. If permanent, the changes may call into question a fundamental design assumption of the existing scheme, namely that judicial appointment marks the culmination of the individual's career.

65. Proposals for early retirement, early supernumerary status, and early vesting of annuities would appear to contemplate service as a judge as a career stage of limited duration, coming somewhere in the course of a lawyer's professional life. Such changes could well encourage shorter judicial careers, lead to greater turnover in judicial ranks, and reduce the overall experience level of the judiciary. The possible effects of the proposed changes must be carefully studied to determine whether a re-designed scheme will nurture the levels of commitment and experience necessary for an effective judiciary.

66. It is not obvious that shorter judicial careers ought to be encouraged. The matter requires careful study. A balance may need to be struck between competing policy objectives of retaining a stable cadre of seasoned judges and of providing possible candidates for the judiciary with a greater range of career options. In any event, these are the sorts of issues that the Commission should not attempt to resolve within the limited time, and on the limited record, available in the current proceeding.

67. In the current review, there is a risk of approaching issues in isolation. For example,

early retirement is proposed as a solution to "burn-out" by long service under the current regime. However, there may be other possible solutions, such as sabbaticals or study leaves. There may be other aspects of the scheme, such as the disability provisions, which could be re-designed to deal with the problem. A comprehensive review would provide the opportunity to examine fully the nature and extent of the burn-out problem and to evaluate the full range of possible solutions.

68. The proposals advanced in the Joint Submission would leave very few of the elements of the existing annuity scheme unchanged:

(a) the minimum years of service would be abridged by an unqualified rule of 80;
(b) the age of entitlement to an annuity would be reduced;
(c) salary on retirement would no longer be the determinant of the amount of the annuity;
(d) the annuity could exceed two-thirds of salary;
(e) a new pro-rated annuity would be introduced;
(f) qualification for supernumerary status would be earlier; and
(g) the period of contributions to funding the annuity would be capped.

These changes would effect a fundamental re-design of the judicial annuity scheme. If that is to be attempted, the Government submits that the proper approach is to go back to square one and systematically re-examine each and every element of the scheme against the public policy objectives of judicial annuities.

(c) RRSP

69. The availability of income tax deductions for RRSP contributions is raised by the Joint Submission in the context of both salary and retirement benefits. It is contended that deductibility of RRSP contributions was a right that was "clearly entrenched" and then was "stripped" from judges.

70. The Joint Submission fails to acknowledge that judges are now subject to the same RRSP regime as other taxpayers who provide for their retirement through pension plans. This was identified by the Federal Court of Appeal in rejecting a constitutional challenge to the RRSP changes in *Trussler v. R.*, [1999] 3 C.T.C. 580. Mr. Justice Rothstein stated, at 582:

> the purpose was to bring the RRSP treatment of judges into line with the treatment accorded most, if not all, other taxpayers who earned salaries similar to those of judges.
>
> (Appendix 31)

71. The Minister of Justice of the day raised the RRSP change before the Crawford Commission. That Commission declined to take the change into account in establishing salaries: see Appendix 33, at 15-16.

72. The Joint Submission once again asks that the RRSP change be taken into account in determining judicial salaries. The Government submits that salaries are not intended to compensate judges for changes to the income tax system which place them in the same position as taxpayers generally. The RRSP regime is an irrelevant consideration.

73. The Joint Submission urges that RRSP contributions be deductible once a judge's contributions to the annuity scheme cease. However, the Joint Submission also urges that such a judge should be entitled to a larger annuity by reason of long service. The Government submits that a judge cannot have it both ways: if an annuity is being earned, deductibility of RRSP contributions is inappropriate.

VII. CONCLUSION

74. While the focus of the inquiry is the adequacy of judicial salaries and benefits, the Commission should consider the cost of the changes proposed. The package of increases and

improvements to salary, pensions and other benefits sought in the Joint Submission would cost $463 million over the four years: see Appendix 34. That represents more than $100,000 per judge per year.

75. Beyond their expense, the proposals in the Joint Submission raise the serious policy concerns discussed above. It has not been demonstrated that the proposed changes are essential to secure adequate compensation and benefits within the meaning of s. 26(1) of the *Judges Act*. The Government submits that an adequate scheme can be maintained by implementing the modest proposals advanced in its Principal Submission.