

IN THE MATTER OF THE *JUDGES ACT*, RSC 1985, c J-1, as amended

**2015 JUDICIAL COMPENSATION
AND BENEFITS COMMISSION**

SUBMISSIONS OF THE GOVERNMENT OF CANADA

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I. OVERVIEW

1. An independent judiciary is the “lifeblood of constitutionalism in democratic societies”.¹ Canada is privileged to enjoy the benefits of an independent judiciary, and the Government of Canada is committed to continuing to uphold the three components of the constitutional principle of independence – security of tenure, administrative independence, and financial security.

2. The current remuneration of both the superior court judges and the Federal Court prothonotaries is entirely adequate to ensure that Canada continues to enjoy an independent judiciary, and that outstanding candidates continue to be attracted to judicial office. An objective analysis of the statutory criteria supports the conclusion that salaries need only be increased annually to allow for a cost of living adjustment until the next quadrennial review.

3. First, Canada’s economic position and the overall state of the Government’s finances militate against increasing judicial salaries any more than the cost of living at this time. Canada continues to face uncertain economic times.

4. Second, there can be no suggestion that the current judicial salary of \$308,600 and the prothonotary salary of \$234,500 have fallen below an acceptable minimum such that judicial independence has been interfered with or compromised. Indeed, taking into account the generous judicial annuity, which is valued at approximately 36.5% of the judicial salary, it increases their total compensation significantly to approximately \$421,239 for judges and approximately \$320,093 for prothonotaries.

5. Third, there is no evidence of any difficulty in recruiting outstanding candidates to either office. A comparison of judicial and prothonotary salaries to the income levels of lawyers in both public and private sectors, who would be eligible for both offices, demonstrates that the salaries are fully adequate to continue to attract outstanding

¹ *Beauregard v Canada*, [1986] 2 SCR 56, p 70, **Government’s Book of Documents, Tab 1**

candidates. In addition, the generous judicial annuity is a further incentive and attraction which cannot be underestimated.

6. Finally, the continued benchmarking to the DM-3 group has no basis in logic or statute. The *Judges Act* does not specifically contemplate consideration of a formulaic benchmark – that is, the “mid-point of a DM-3 salary plus one-half maximum performance pay”. Given the comparability issues at play, there is no principled basis upon which to narrow the inquiry in such a manner. To the extent that public sector compensation trends are relevant to ensure salary relativity, they are properly considered as a whole under the residual criterion – “other objective criteria that the Commission considers relevant”. Here, a review of the salaries of high-ranking federal public servants shows that the judicial salary is set at an appropriate level which recognizes the importance of judicial office, while at the same time not receiving preferential treatment as compared to other individuals paid from the public purse.

7. Furthermore, the more appropriate and relevant indexation factor is the Consumer Price Index (CPI). Based on CPI forecasts, judicial and prothonotary salaries would increase by 6.8% over the next four years to \$329,500 and \$250,400 respectively.

II. COMMISSION MANDATE

8. The Commission’s mandate is informed by both constitutional principles and statutory provisions. The Supreme Court described the constitutional role of a judicial compensation commission in *PEI Reference*; its statutory mandate is defined in the *Judges Act*.

9. In *PEI Reference*, the Supreme Court likened judicial compensation commissions to “institutional sieve[s]” that would serve the constitutional function of preventing the “setting or freezing of judicial remuneration from being used as a means to exert political pressure through the economic manipulation of the judiciary”.² In this way, the

² *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3, [*PEI Reference*], para 170, **Joint Book of Documents, Tab 25**

Commission's mandate includes the imperative to preserve the independence of the federally-appointed judiciary, in particular their financial security.

10. In response to the decision in *PEI Reference*, the *Judges Act* was amended in 1998 to establish a federal Judicial Compensation and Benefits Commission to inquire into the adequacy of the salaries and other amounts payable under the *Judges Act* and into the adequacy of judges' benefits generally.³

11. Subsection 26(1.1) mandates that the Commission conduct its inquiry with reference to the following prescribed criteria: (1) the prevailing economic conditions in Canada; (2) the role of financial security of the judiciary in ensuring judicial independence; (3) the need to attract outstanding candidates to the judiciary; and (4) any other objective criteria that the Commission considers relevant.⁴

12. Pursuant to recent amendments to the *Judges Act*, the adequacy of Federal Court prothonotaries' compensation is now also considered as part of the same Commission process.⁵

13. The statutory criteria provide the analytical framework for the Commission's inquiry and assessment of the adequacy of judicial compensation. In that regard, it is useful to examine Parliament's rationale for mandating these specific criteria. As recognized by the Supreme Court of Canada, legislative history is relevant and admissible as evidence of specific legislative intent.⁶

³ *Judges Act*, RSC 1985, c J-1, s. 26(1), **Joint Book of Documents, Tab 24**

⁴ *Ibid.*, s. 26(1.1)

⁵ *Ibid.*, s. 2.1(1)

⁶ *Rizzo & Rizzo Shoes Ltd (Re)* [1998] SCJ No 2, [1998] 1 SCR 27, paras 31-36, **Government's Book of Documents, Tab 2**; *Re Canada 3000 Inc* [2006] SCJ No 24, [2006] 1 SCR 865, para 57, **Government's Book of Documents, Tab 3**; *Quebec v CP Desjardins De Montmagny* [2009] 3 SCR 286, paras 12-14, **Government's Book of Documents, Tab 4**. See also: Ruth Sullivan, *Sullivan on the Construction of Statutes*, Sixth ed (Markham, Ontario: LexisNexis Canada Inc, 2014), pp 679-698, **Government's Book of Documents, Tab 5**

14. It is important to note that when the 1998 Bill was first introduced in the House of Commons, statutory criteria were not proposed.⁷ However, when the Bill was considered by the Senate and the Senate Standing Committee on Legal and Constitutional Affairs, it was determined that the inclusion of express mandatory criteria was required to “help define and clarify the scope of the mandate” of the Commission’s inquiry.⁸

15. The Standing Senate Committee on Legal and Constitutional Affairs heard from numerous witnesses, including David Scott, the Chair of the 1995 Triennial Commission.⁹ Following those hearings, the Senate proposed two amendments, which included adding the four statutory criteria to the *Judges Act*.¹⁰

16. The first two criteria were added in direct response to the Supreme Court’s decision in *PEI Reference*.¹¹

17. According to Senator Joyal, who proposed the amendment to the Bill, the third criterion “the need to attract outstanding candidates” was added based on Mr. Scott’s testimony before the Senate committee.¹² He had spoken about a need to measure “how we compensate our judges against that body of people from which we are drawing to ensure that we are competitive”.¹³ As was noted in the House of Commons, the Scott Commission

⁷ *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue No 32, 1st Sess, 36th Parl, September 30, 1998 [Senate Committee September 30, 1998], pp 32:7-32:9, **Government’s Book of Documents, Tab 6**

⁸ *House of Commons Debates*, 36th Parl, 1st Sess, No 151 (6 November 1998) [Hansard November 6, 1998], at 9944 (Eleni Bakopanos), **Government’s Book of Documents, Tab 7**. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue No 37, 1st Sess, 36th Parl, October 22, 1998 [Senate Committee October 22, 1998], pp 37:20, **Government’s Book of Documents, Tab 8**

⁹ Senate Committee September 30, 1998, *supra*, pp 32:3-32:23, **Government’s Book of Documents, Tab 6**

¹⁰ Hansard November 6, 1998, *supra*, pp 9943-9944, **Government’s Book of Documents, Tab 7**; Senate Committee October 22, 1998, *supra*, pp 37:13-37:26, **Government’s Book of Documents, Tab 8**

¹¹ Senate Committee October 22, 1998, *ibid*, pp 37:18-37:21

¹² *Ibid*, at p 37:20

¹³ Senate Committee September 30, 1998, *supra*, pp 32:18-32:19, **Government’s Book of Documents, Tab 6**

based its recommendations “on the relationship between judges’ salaries and those of lawyers in private practice, since this is the source of most candidates”.¹⁴

18. Of additional relevance from the Senate committee hearings is the dialogue between Senator Joyal and Mr. Scott about whether judicial salaries should be measured against public servants’ salaries. Mr. Scott testified that the United States was, in fact, eliminating that type of “lock-step arrangement” and that his Commission had debated whether they were bound by some public service compensation level.¹⁵ Mr. Scott’s opinion was that if Parliament prescribed criteria tying judicial salaries to that of certain public servants, like deputy ministers, there would be no room for an independent Commission to make a recommendation.¹⁶

19. In the end result, a specific criterion that mandated consideration of public sector salaries was not added to the legislation. The fourth criterion, namely “any other objective criteria that the Commission considers relevant” was added to allow the Commission to consider other criteria “that are justified, ones that are measured on objective grounds”.¹⁷

III. ANALYSIS OF THE ADEQUACY OF JUDICIAL COMPENSATION

A. Total Compensation is Adequate

20. In light of the statutory criteria set out in s. 26(1.1) of the *Judges Act*, the current level of judicial and prothonotary salaries and benefits, coupled with automatic annual adjustments in accordance with the CPI, fully meets the “adequacy” test to be applied by this Commission.

¹⁴ Hansard November 6, 1998, *supra*, p 9947, **Government’s Book of Documents, Tab 7**. See also: *Proceedings of the House of Commons Standing Committee on Justice and Human Rights*, Issue No 70, 1st Sess, 36th Parl, May 13, 1998, pp 1555, 1600, 1615, 1620, **Government’s Book of Documents, Tab 9**

¹⁵ Senate Committee September 30, 1998, *supra*, pp 32:9, 32:17, **Government’s Book of Documents, Tab 6**

¹⁶ *Ibid*, pp 32:16-32:17

¹⁷ Senate Committee October 22, 1998, *supra*, p 37:21, **Government’s Book of Documents, Tab 8**

21. The current salaries are \$308,600 and \$234,500 respectively. The value of the judicial annuity increases those salary levels by approximately 36.5%¹⁸, resulting in a net judicial salary of approximately \$421,239 and a prothonotary salary of approximately \$320,093.¹⁹

1. Present Economic Situation Supports *Status Quo*

22. Based on the prevailing economic conditions in Canada, nothing more than annual indexation adjustments are justified. This first statutory criterion mandates the Commission to consider “the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government”.²⁰

23. The Canadian economy remains fragile. The most recent Update of Economic and Fiscal Projections sets out the Government’s assessment of the state of the Canadian economy and of the Government’s current and future financial position.

24. Since the previous Government’s budget of April 2015, Canada’s economic and fiscal outlook has deteriorated.²¹ Crude oil price are approximately one-third of the price prevailing in mid-2014.²² As a producer and net exporter of crude oil, Canada has seen these low prices result in sharp declines in capital investment in the energy sector, which contributed to the reduced real GDP over the first half of 2015. The real GDP declined by 0.8% in the first quarter and 0.5% in the second quarter and then increased by 2.3% in the

¹⁸ This assumes that the age profile of prothonotaries at appointment is the same as that of judges. If prothonotaries are generally younger than judges at appointment, the average value of their annuity benefit would be lower than 36.5% and *vice versa*.

¹⁹ Haripaul Pannu, Report on the Earnings of Self-Employed Lawyers for the Department of Justice Canada in Preparation for the 2015 Judicial Compensation and Benefits Commission dated February 25, 2016 [Pannu Report], p 13, **Government’s Book of Documents, Tab 10**

²⁰ *Judges Act, supra*, s 26(1.1)(a), **Joint Book of Documents, Tab 24**

²¹ Department of Finance Canada, Update of Economic and Fiscal Projections 2015, November 20, 2015, online: <http://www.budget.gc.ca/efp-peb/2015/pub/toc-tdm-en.html>, p 14, **Government’s Book of Documents, Tab 11**. See also: Letter dated February 24, 2016 from the Assistant Deputy Minister of Finance, Department of Finance Canada, p 1, **Joint Book of Documents, Tab 9**; Department of Finance Canada, Backgrounder – Canadian Economic Outlook, February 22, 2016, online: http://www.fin.gc.ca/n16/data/16-025_1-eng.asp, **Government’s Book of Documents, Tab 12**

²² Crude oil (West Texas Intermediate (WTI)) closed at USD\$32.78 per barrel on February 26, 2016. Crude oil (WTI) closed at USD\$103.17 per barrel on June 5, 2014 (see online: <http://www.nasdaq.com/markets/crude-oil.aspx>).

third quarter.²³ At the time of Budget 2015, the first two quarters were expected to show real GDP growth of 1.2% and 1.5%, respectively.²⁴

25. In his economic and fiscal update speech, the Minister of Finance said that it was “a challenging time for the global economy”.²⁵ Reflective of this, “global economic growth slowed in 2015 to its slowest pace since the end of the global recession in mid-2009”.²⁶ Forecasts for global growth have been revised down to 3.1% for 2015, 3.4% for 2016 and 3.6% in 2017²⁷ – rates that are “a far cry from headier pre-recession days”.²⁸

26. Speaking about the impact on the Canadian economy, the Minister of Finance has said that it is “sluggish” and “growing far more slowly than previously forecasted”.²⁹ Economists are projecting “a modest growth outlook for Canada” – 1.7% for 2016.³⁰

27. The CPI, which is widely used to determine cost-of-living adjustments, is projected to increase over the next four years as follows: 1.1% in 2015; 1.6% in 2016; 2.0% in 2017, and 2.0% in 2018 and 2019.³¹

²³ Letter dated February 24, 2016 from the Assistant Deputy Minister of Finance, Department of Finance Canada, *supra*, p 2, **Joint Book of Documents, Tab 9**

²⁴ *Ibid*, p 9

²⁵ Minister of Finance’s Economic and Fiscal Update Speech, November 20, 2015 [Minister of Finance’s November 2015 Speech], online: <http://www.fin.gc.ca/news-nouvelles/speeches-discours/2015/2015-11-20-eng.asp>, **Government’s Book of Documents, Tab 13**

²⁶ Letter dated February 24, 2016 from the Assistant Deputy Minister of Finance, Department of Finance Canada, *supra*, p 1, **Joint Book of Documents, Tab 9**

²⁷ International Monetary Fund, World Economic Outlook Update, January 19, 2016, online: <http://www.imf.org/external/pubs/ft/weo/2016/update/01/pdf/0116.pdf>, p 1 & 3, **Government’s Book of Documents, Tab 14**

²⁸ TD Economics, Quarterly Economic Forecast, December 17, 2015, online: https://www.td.com/document/PDF/economics/qef/qefdec2015_canada.pdf, p 2, **Government’s Book of Documents, Tab 15**. See also: Department of Finance Canada, Update of Economic and Fiscal Projections 2015, *supra*, p 8, **Government’s Book of Documents, Tab 11**.

²⁹ Minister of Finance’s November 2015 Speech, *supra*, **Government’s Book of Documents, Tab 13**

³⁰ TD Economics, Quarterly Economic Forecast, December 17, 2015, *supra*, p 1, **Government’s Book of Documents, Tab 15**.

³¹ Department of Finance Canada, Backgrounder – Canadian Economic Outlook, February 22, 2016, *supra*, **Government’s Book of Documents, Tab 12**; Letter from the Assistant Deputy Minister of Finance dated February 24, 2016, Department of Finance Canada, *supra*, p 1, **Joint Book of Documents, Tab 9**

28. Economic increases in the federal public sector since the last Quadrennial Commission were as follows: 2011-1.75%; 2012-1.5%; 2013-2.0%; 2014-1.5%. There have been no new agreements finalized since then.³²

29. For the fiscal year that ended March 31, 2015, a budgetary surplus of \$1.9 billion was reported as compared to a budgetary deficit of \$5.2 billion the previous fiscal year. As of March 31, 2015, the federal debt stood at \$612.3 billion – 31.0% of GDP.³³

30. Recent economic developments, however, are expected to push the Government back into a deficit, reducing the projected budgetary balance. It is expected to result in deficits of \$2.3 billion in 2015-16, \$18.4 billion in 2016-17 and \$15.5 billion in 2017-18.³⁴

31. The Government will table a new Budget on March 22, 2016, which will provide further information on the current status of the economy. The new Budget may have an impact on this statutory criterion. The Government will, if necessary, make further representations to the Commission on the present state of the economy in its reply submissions.

32. As recognized by the Supreme Court, the guarantee of a minimum salary is not a device to shield the judiciary from the effects of deficit reduction:

Nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times.³⁵

33. The critical factors mentioned above – (1) Canada’s weak economic and fiscal conditions; (2) the less optimistic outlook for growth; (3) the very low rate of inflation experienced in the past four years and as projected for the next four years; and (4) the low rate of wage growth experienced by other individuals paid from the federal public treasury

³² *Ibid*; See also: Treasury Board of Canada, “Negotiated Pay Increase, Restructure & CPI Movement, March 17, 2014, Table 1- Summary, **Joint Book of Documents, Tab 18**

³³ Letter from the Assistant Deputy Minister of Finance dated February 24, 2016, Department of Finance Canada, *supra*, p 3, **Joint Book of Documents, Tab 9**

³⁴ *Ibid*

³⁵ *PEI Reference, supra*, para 196, **Joint Book of Documents, Tab 25**

– suggest that an increase beyond statutory indexation based on CPI is not justified at this time.

2. Financial Security Respected

34. When assessing the “adequacy” of judicial compensation, s. 26(1.1)(b) of the *Judges Act* requires consideration as to whether the compensation level is such that it ensures the financial security of the judiciary. Financial security is an essential condition of judicial independence, its purpose being ultimately to protect the judiciary from economic manipulation by the legislature or the executive.³⁶

35. As articulated by Chief Justice Lamer (as he then was), in order to ensure financial security, judicial salaries must not fall below an acceptable minimum level:

I have no doubt that the Constitution protects judicial salaries from falling below an acceptable minimum level. The reason it does is for financial security to protect the judiciary from political interference through economic manipulation, and to thereby ensure public confidence in the administration of justice. If salaries are too low, there is always the danger, however speculative, that members of the judiciary could be tempted to adjudicate cases in a particular way in order to secure a higher salary from the executive or the legislature or to receive benefits from one of the litigants...³⁷

36. The current judicial salary of \$308,600 is far removed from the minimum level at which a need to protect the judiciary from political interference through economic manipulation would be relevant. Automatic indexing in accordance with the CPI offers sufficient protection against the erosion of judicial salaries.

3. No Difficulty Attracting Outstanding Candidates

(a) Consider the Pools from which Judges Drawn

37. It is under the third criterion that the Commission must consider the pools from which judges are drawn. In order to continue to attract outstanding candidates to the judiciary, judicial salaries must be set at a level that will not deter those candidates from applying. It must also be recognized, however, that the judicial salary is not the sole

³⁶ *Ibid*, para 131

³⁷ *Ibid*, para 193

motivating factor in applying for a judicial position. Other considerations, including the opportunity to make a contribution to public life, a career change, the security of tenure of a judge, the generous judicial annuity and the recognition, status and quality of life associated with judicial office, also play an important role.³⁸

38. Further, as acknowledged by the Block Commission, “the issue is not how to attract the highest earners; the issue is how to attract outstanding candidates” from both private and public sectors, from large and small firms and from large and small centres.³⁹ Or as the Drouin Commission noted, “no segment of the legal profession has a monopoly on outstanding candidates”.⁴⁰

39. Based on the evidence heard by the Standing Senate Committee on Legal and Constitutional Affairs, the third criterion – “the need to attract outstanding candidates to the judiciary” was prescribed when the *Judges Act* was amended in 1998.⁴¹ This criterion was intended to address recruitment – what was necessary in order to “attract” senior members of the Bar to judicial office.

However, taking the point about the criteria, we do always have to be measuring how we compensate our judges against that body of people from which we are drawing to ensure that we are competitive.⁴²

40. The first Quadrennial Commission, the Drouin Commission, understood that s. 26(1.1) expressly mandates consideration of this relationship:

The criterion identified in subsection 26(1.1)(c), for example, is directed expressly to the issue of recruitment of suitable candidates for the Bench. Traditionally, most judges in Canada are appointed from the ranks of private legal practitioners. Accordingly, those factors constituting incentives or disincentives to

³⁸ Report of the Fourth Quadrennial Judicial Compensation and Benefits Commission, dated May 15, 2012 [Levitt Commission Report], para 42, p 15, **Joint Book of Documents, Tab 31**

³⁹ Report of the Third Quadrennial Judicial Compensation and Benefits Commission, dated May 30, 2008 [Block Commission Report], para 116, p 37, **Joint Book of Documents, Tab 30**

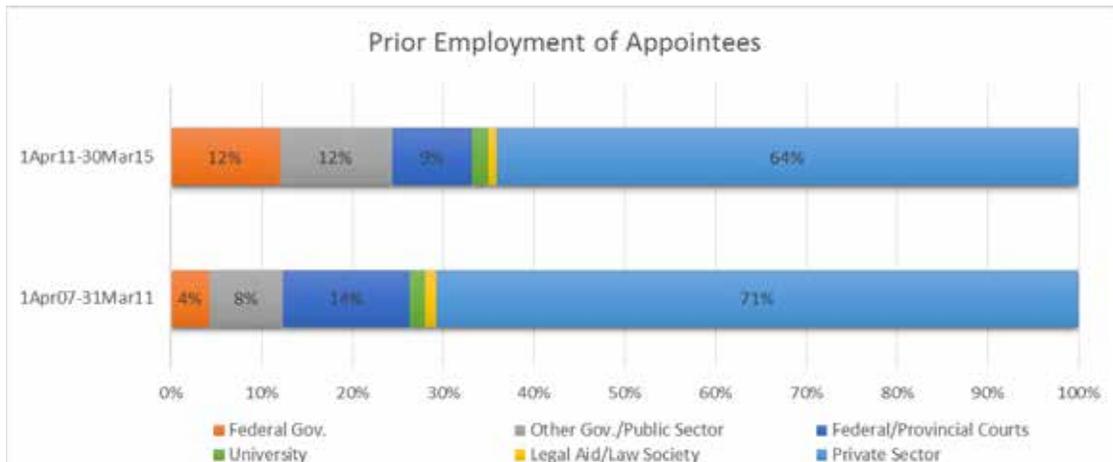
⁴⁰ Report of the First Quadrennial Judicial Compensation and Benefits Commission, dated May 31, 2000 [Drouin Commission Report], p 36, **Joint Book of Documents, Tab 28**

⁴¹ Hansard November 6, 1998, *supra*, p 1025, **Government’s Book of Documents, Tab 7**. Senate Committee October 22, 1998, *supra*, p 37:20, **Government’s Book of Documents, Tab 8**

⁴² Senate Committee September 30, 1998, *supra*, pp 32:18-32:19, **Government’s Book of Documents, Tab 6**

the seeking of judicial office by private legal practitioners are relevant to recruitment of judicial candidates.⁴³ (emphasis added)

41. Between 2011 and 2015, of the 226 lawyers appointed to the judiciary, 64% were from private practice and 36% from other sectors - federal and provincial government lawyers, legal aid lawyers, in-house counsel, academia and the provincial court judiciary. This is a significant increase from the last Quadrennial Commission process, where 29% of appointees were from other sectors.⁴⁴



42. On that basis, therefore, it is relevant to consider the income levels of the lawyers who are eligible for appointment to the bench from private practice, as well as outside the private sector.

43. While past Commissions have considered income levels of private sector lawyers, they have not fully considered the salary levels of lawyers from other sectors who are eligible for and are, in fact, appointed to the judiciary. Instead, under the rubric of “the need to attract outstanding candidates”, the past two Commissions have considered a public

⁴³ Drouin Commission Report, *supra*, p 23, **Joint Book of Documents, Tab 28**. See also: Drouin Commission Report, *supra*, p 35, **Joint Book of Documents, Tab 28**; Report of the Second Quadrennial Judicial Compensation and Benefits Commission, dated May 31, 2004 [McLennan Commission Report], pp 31 & 41, **Joint Book of Documents, Tab 29**.

⁴⁴ Statistics derived from Judicial Appointments Database Documentation provided by the Commissioner for Federal Judicial Affairs [CFJA Data], **Joint Book of Documents, Tabs 4 & 5(i)**. An increase from 29% during the last Quadrennial period to 36% during this Quadrennial period is a 23% increase.

sector comparator (the DM-3 group) and a private sector comparator (private sector lawyers).⁴⁵

44. The former, however, is not a relevant or equivalent comparator under this criterion. The DM-3 group is not a pool from which judges are drawn. The DM-3 group is not the analogous “public sector pool” as compared to the “private sector pool” of lawyers from private sector law firms.

45. As the legislative history demonstrates, this criterion is concerned with the relationship between judicial salaries and those salaries of the senior members of the bar from whose ranks the judiciary are drawn. In that respect, the salary level of the DM-3 group is not relevant to whether the judicial salary is adequate to “attract” or “recruit” outstanding candidates under s. 26(1.1)(c) of the *Judges Act*.

46. If consideration of the DM-3 salary level is a relevant factor, as noted by the Drouin Commission, it is properly considered under the fourth criterion under s. 26(1.1)(d) – “other objective criteria which the Commission considers relevant”.⁴⁶ As is fully explored below, however, the Government’s position is that the DM-3 salary alone is not an objective or relevant criterion that this Commission should take into account. Rather, the better approach is to consider public sector compensation trends more generally.

(i) Salary Adequate to Attract Outstanding Candidates from Public Sector

47. The Canadian judiciary must continue to be drawn from a broad background, in addition to private sector lawyers. As the Block Commission recognized, “it is important that there be a mix of appointees from private and public practice”.⁴⁷

48. In the last four years, 36% of judges were appointed from other than private practice. This included federal and provincial government lawyers, legal aid lawyers, law professors and judges from other courts.

⁴⁵ Block Commission Report, *supra*, para 93, **Joint Book of Documents, Tab 30**; Levitt Commission Report, *supra*, paras 22-43, **Joint Book of Documents, Tab 31**.

⁴⁶ Drouin Commission Report, *supra*, pp 9, 23, **Joint Book of Documents, Tab 28**

⁴⁷ Block Commission Report, *supra*, para 116, p 37, **Joint Book of Documents, Tab 30**

49. The current judicial salary of \$308,600 exceeds the salary levels of all those positions. Within the federal government, the highest paid rank in the Law Practitioner Group is LP5/Senior General Counsel at a maximum of \$193,377, with maximum performance pay of 10%.⁴⁸ Within the Law Management Group, the highest rank is that of LC4 with a maximum pay of \$199,700, with maximum performance pay of 26%.⁴⁹

50. The judicial salary is also significantly higher than the most senior law positions in provincial governments. The maximum rate of pay of the top-ranking Ontario provincial government lawyer (Crown Counsel 4) is \$211,553, inclusive of performance pay.⁵⁰ In British Columbia, a Legal Counsel Manager's salary is a maximum of \$210,571.70 with no performance pay.⁵¹

51. The current judicial salary also exceeds that of law professors at any Canadian law school. According to the 2014 list published pursuant to the Ontario *Public Sector Salary Disclosure Act*, the highest professor salaries at the two largest law schools – Osgoode Hall and the University of Toronto – were \$247,457 and \$299,695, respectively. In fact, the current judicial salary is significantly higher than all Canadian law school Deans, except for the Deans of the University of Toronto and University of Western Ontario, who earned slightly more.⁵²

⁴⁸ Treasury Board of Canada Secretariat, "Agreement between the Treasury Board and the Association of Justice Counsel", March 12, 2013, online: https://www.tbs-sct.gc.ca/pubs_pol/hrpubs/coll_agre/la/la-eng.pdf, Appendix C, **Government's Book of Documents, Tab 16**

⁴⁹ Treasury Board of Canada Secretariat, "LC-Law Management Occupational Group Rates of Pay", online: <https://www.tbs-sct.gc.ca/psm-fpfm/pay-remuneration/rates-taux/rapaceexunem02-eng.asp#Toc476385565b>, **Government's Book of Documents, Tab 17**; Treasury Board of Canada Secretariat, "Directive on the Performance Management Program (PMP) for Executives", online: <http://publiservice.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14226§ion=text%20-%20cha1#secD.1>, **Government's Book of Documents, Tab 18**

⁵⁰ 2009-2013 Collective Agreement between Ontario Crown Attorneys Association, The Association of Law Officers of the Crown and the Government of Ontario, art 41 & 42, **Government's Book of Documents, Tab 19**; Government of Ontario, Salary Schedules for Professional Bargaining and Professional Excluded Crown Counsel, **Government's Book of Documents, Tab 20**

⁵¹ Government of British Columbia, Human Resources, "Salary Look-up Tool", online: http://www2.gov.bc.ca/local/myhr/tools/salary_lookup_tool/salary_lookup/legal/legal_counsel_manager.html, **Government's Book of Documents, Tab 21**

⁵² Government of Ontario, Treasury Board Secretariat, "Public Sector Salary Disclosure for 2014: Universities", online: <http://www.fin.gov.on.ca/en/publications/salarydisclosure/pssd/orgs-tbs.php?organization=universities&year=2014>, **Government's Book of Documents, Tab 22**

(ii) *Salary Adequate to Attract Outstanding Private Sector Lawyers*

52. The judicial salary also compares very favourably to the income levels of self-employed lawyers in private practice. In 2014, the judicial salary of \$300,800 was higher than the net incomes of 78% of self-employed lawyers aged 35-69, without taking into consideration the judicial annuity.⁵³ In recent years the judicial salary has risen in relation to the net incomes of self-employed lawyers: in 2010 it was equivalent to the 75th percentile, the 76th in 2011, the 77th in 2012 and the 78th in 2013.⁵⁴

53. As past Commissions have recognized, the judicial annuity is a significant component of judicial compensation that must be considered in any comparison with private sector salaries.⁵⁵ In fact, the annuity has been valued at approximately 36.5% of the judicial salary.⁵⁶ When the judicial annuity is included as part of judicial compensation, it increases the 2014 judicial salary to \$410,592, which exceeded the net income of at least 85% of all self-employed lawyers in 2014.⁵⁷

a. **Proper Analysis of the CRA Data**

54. Similar to the last Commission process, the principal parties collaborated and worked with the Canada Revenue Agency (the CRA) for the purpose of jointly submitting a data set compiled by the CRA. The data provides income information for self-employed lawyers who declared professional income when filing their income taxes for the 2010-2014 taxation years.⁵⁸

55. While the principal parties have jointly produced this data, views differ on how to interpret the data, in particular on the use of filters in analyzing the data. Filters related to age, region and minimum income threshold have a significant impact on the resulting

⁵³ Pannu Report, *supra*, p 5, **Government's Book of Documents, Tab 10**

⁵⁴ *Ibid*

⁵⁵ Levitt Commission Report, *supra*, para 42, p 15, **Joint Book of Documents, Tab 31**; Drouin Commission Report, *supra*, p 42, **Joint Book of Documents, Tab 28**; McLennan Commission Report, *supra*, p 5, **Joint Book of Documents, Tab 29**

⁵⁶ Pannu Report, *supra*, p 13, **Government's Book of Documents, Tab 10**

⁵⁷ *Ibid*, p 15

⁵⁸ Statistics derived from Self-Employed Lawyers' data provided by the Canada Revenue Agency, [CRA Data], **Joint Book of Documents, Tab 1**

average income level. In addition, the appropriate and relevant percentile is an important consideration which the parties do not agree on.

56. The Government engaged Haripaul Pannu, an actuary with expertise in executive compensation, the analysis of employee data and the valuation of pension plans and retirement savings plans. His report analyzes the CRA data, identifies significant trends in the income of self-employed lawyers, compares the judicial salary with the income of self-employed lawyers and provides a valuation of the judicial annuity.⁵⁹

57. The Commission must consider which of the data points are relevant and appropriate to its inquiry into the adequacy of judicial compensation. Rather than making a determination in that regard, the Levitt Commission simply noted that the judicial salary was “at least on par with” the private sector comparator group advocated by the judiciary and “well above” that of the comparator group advocated by the Government.⁶⁰

58. In considering this evidence, the Commission should be cognizant of the fact that this data set is a “rough proxy” for private sector lawyer income levels in that it only provides information related to income levels of a certain segment of private sector lawyers: self-employed lawyers who earned professional income. It does not provide information about those private sector lawyers whose main source of income is employment income, such as non-equity law firm partners, law firm associates or those lawyers who operate as professional corporations.

i. *65th Percentile is the Appropriate Comparator*

59. The Government’s position is that the 65th percentile of self-employed lawyers’ incomes is the appropriate private sector comparator for judges for the following reasons: (1) the current economic conditions; (2) the ample pool of qualified applicants; and (3) self-employed lawyers are the highest-earning subset of outstanding candidates.

⁵⁹ Pannu Report, *supra*, **Government’s Book of Documents, Tab 10**

⁶⁰ Levitt Commission Report, *supra*, para 47(a), p 17, **Joint Book of Documents, Tab 31**

60. It is commonly accepted practice in compensation studies to benchmark against different percentiles of the peer group in order to gain a better understanding of what is competitive compensation.⁶¹ The particular percentile used depends on supply/demand issues, economic factors and the ability to attract individuals.⁶² While the 50th percentile is commonly used as a benchmark in recruiting suitable individuals, Mr. Pannu's report examines the 65th and 75th percentiles on the basis that "judges' salaries should not be based on the median".⁶³

61. An analysis of the incomes of private sector lawyers between 2010 and 2014 reveals that income levels have decreased in those four years. In 2010, the 65th percentile self-employed lawyer's income was \$198,030, whereas in 2014 it significantly decreased to \$188,138.⁶⁴ Conversely, in those four years, judicial salaries rose by \$29,400, an increase of 10.8%.⁶⁵ By 2014, the judicial salary was \$300,800 – \$112,662 higher than the 65th percentile of self-employed lawyers.⁶⁶

62. Even if the Commission is inclined to consider the 75th percentile as the appropriate comparator group, the judicial salary is still significantly higher. In 2014, the 75th percentile of self-employed lawyer's income was \$261,363 – \$39,437 less than the judicial salary of \$300,800. There has been a similar decline over the past four years in self-employed lawyers' incomes at the 75th percentile. In 2010, it was \$274,058 - approximately \$13,000 more than it was in 2014.⁶⁷

63. A comparison of the judicial salary and the 65th and 75th percentile self-employed lawyers' incomes between 2002-2012 shows that while judicial salaries have continued to increase at a steady rate, self-employed lawyers' incomes have been decreasing since

⁶¹ Frederick D Lipman and Steven E Hall, *Executive Compensation Best Practices* (Hoboken, New Jersey: John Wiley & Sons Inc, 2008), p 31, **Government's Book of Documents, Tab 23**

⁶² Pannu Report, *supra*, pp 3, 5, **Government's Book of Documents, Tab 10**

⁶³ *Ibid*, p 5

⁶⁴ *Ibid*

⁶⁵ *Ibid*

⁶⁶ *Ibid*

⁶⁷ *Ibid*

2010.⁶⁸ Thus, the current judicial salary now far outpaces that of the 65th and 75th percentiles of private sector lawyers.

Net Self-Employed Lawyer Incomes

	2002	2003	2004	2005	2006	2007	2008
65th Percentile	\$147,077	\$153,491	\$168,523	\$170,261	\$177,137	\$188,204	\$193,401
75th Percentile	\$198,950	\$207,429	\$229,797	\$233,932	\$242,006	\$257,762	\$264,550
Puisne Judge Salaries	\$210,200	\$216,600	\$232,300	\$237,400	\$244,700	\$252,000	\$260,000

	2009	2010	2011	2012	2013	2014
65th Percentile	\$196,790	\$198,030	\$189,995	\$192,658	\$187,833	\$188,138
75th Percentile	\$266,210	\$274,058	\$266,843	\$267,223	\$260,088	\$261,363
Puisne Judge Salaries	\$267,200	\$271,400	\$281,100	\$288,100	\$295,500	\$300,800



ii. *The Filters used by the Judiciary Skew the Results*

64. Before previous Commissions, the judiciary has advocated for the application of filters related to age, location and income exclusions which result in a significant reduction

⁶⁸ *Ibid*; Haripaul Pannu, Report on the Earnings of Self-Employed Lawyers for the Department of Justice Canada in Preparation for the 2007 Judicial Compensation and Benefits Commission, December 2007, p 17, **Government's Book of Documents, Tab 24**; Haripaul Pannu, Report on the Earnings of Self-Employed Lawyers for the Department of Justice Canada in Preparation for the 2011 Judicial Compensation and Benefits Commission [Pannu 2011 Report], December 13, 2011, p 7, **Government's Book of Documents, Tab 25**

in the size of the target group of self-employed lawyers. Historically, their position has been that the Commission should only consider the incomes of those self-employed lawyers who (1) are between 44-56; (2) practice in Canada's top 10 Census Metropolitan Areas (CMAs)⁶⁹; and (3) earn greater than \$60,000.

65. For the 2014 taxation year, applying these filters reduces the target group of all self-employed lawyers in the CRA data set to only 24%:⁷⁰



a) Age-Weighting is More Appropriate

66. Rather than wholly exclude incomes of those lawyers below and above the 44-56 age bands, it is more appropriate to factor in a further refinement related to age by age-weighting. This approach factors in that private sector incomes do vary with the lawyer's age and judges are appointed to the bench at various ages.

⁶⁹ A Census Metropolitan Area is an area consisting of one or more neighbouring municipalities situated around a core. A CMA must have a total population of at least 100,000 of which 50,000 or more live in the core. See: Statistics Canada, Census Dictionary, "Census Metropolitan Area", online: <https://www12.statcan.gc.ca/census-recensement/2011/ref/dict/geo009-eng.cfm>, **Government's Book of Documents, Tab 26.**

⁷⁰ Statistics derived from CRA Data, *supra*, **Joint Book of Documents, Tab 1**

67. Accordingly, the Government's expert age-weighted private sector incomes according to judges' ages of appointment from January 1, 1997 to March 31, 2015.⁷¹ This approach provides a single point of income comparison for a private sector lawyer who is hypothetically considering accepting a judicial appointment.

68. For 2014, age-weighting raises the 65th percentile income to \$208,306, which is still significantly less than the judicial salary of \$300,800.⁷² Age-weighting the 75th percentile income for 2014 increases it to \$267,041, which is still approximately \$33,000 less than the 2014 judicial salary.⁷³

69. A further reason to prefer age-weighting over simply considering the 44-56 age band is that ages of appointment have changed. As the chart below illustrates, there has been a statistically significant trend towards older appointees.⁷⁴



70. Finally, another reason to age-weight rather than wholly exclude age bands is that private sector lawyers' incomes decline after the median age of judicial appointment. On that basis, focussing on the average income of a self-employed lawyer between the ages of

⁷¹ Pannu Report, *supra*, pp 5-7, **Government's Book of Documents, Tab 10**

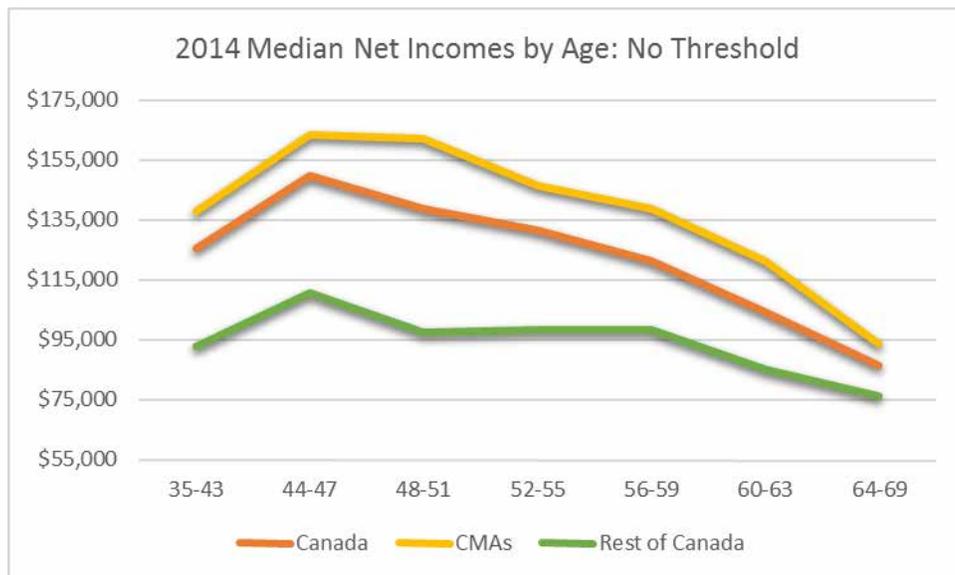
⁷² *Ibid*, p 6

⁷³ *Ibid*, p 7

⁷⁴ Statistics derived from CFJA Data, *supra*, **Joint Book of Documents, Tabs 4 & 5(i)**

44-56 is not an accurate portrayal of the income he/she would actually be giving up in future years in accepting a judicial appointment.

71. The CRA data set establishes a decline in private sector lawyer incomes as they age beyond the typical judicial appointment age. More particularly, the data shows that self-employed lawyers' incomes stagnate and/or decrease significantly after age 56. As illustrated below, this trend is particularly evident in Canada's major cities and at higher income brackets:⁷⁵



72. For the foregoing reasons, the Government submits that the incomes of all private sector lawyers who are eligible for appointment should be considered, with appropriate age-weighting. To focus solely on the 44-56 age bands excludes the incomes of 33% of appointees since 2004.⁷⁶

⁷⁵ Statistics derived from CRA Data, *supra*, Second Release, November 24, 2015, **Joint Book of Documents, Tab 1**

⁷⁶ Statistics derived from CFJA Data, *supra*, **Joint Book of Documents, Tabs 4 & 5(i)**

b) No Objective Basis for Salary Exclusions

73. There is no objective basis for applying any salary exclusions to the data. In the past three Commission processes, the judiciary applied a \$60,000 income exclusion.⁷⁷

74. This is not an accepted practice in compensation benchmarking.⁷⁸ The rationale of choosing a percentile above the median is to give less weight to lower-income earners within the data source. As Mr. Pannu explains, applying a salary exclusion distorts the results of the compensation analysis:

As incomes below \$60,000 and \$80,000 are excluded, the range of incomes are compressed, resulting in higher percentile values than if no salary exclusion was applied.⁷⁹

75. The impact of using a salary exclusion is significant. Applying a \$60,000 income exclusion and benchmarking to the 65th percentile of self-employed lawyers' incomes is really applying approximately the 75th percentile.⁸⁰ Applying the same salary exclusion and benchmarking to the 75th percentile results in an approximate percentile of 82%.⁸¹

76. Worthy of note is that the impact of applying a salary exclusion has increased over time. Excluding those with salaries under \$60,000 in 2014 results in excluding 30% of self-employed lawyers in the CRA data set from consideration.⁸² In 2010, it amounted to excluding 28% of those lawyers.⁸³

⁷⁷ Levitt Commission Report, *supra*, para 36, p 13, **Joint Book of Documents, Tab 31**; Pannu Report, *supra*, p 7, **Government's Book of Documents, Tab 10**

⁷⁸ Pannu Report, *ibid*, p 8

⁷⁹ *Ibid*, p 7

⁸⁰ *Ibid*

⁸¹ *Ibid*, p 8

⁸² *Ibid*, p 7

⁸³ Pannu 2011 Report, *supra*, p 7, **Government's Book of Documents, Tab 25**

c) *Confining the Income Analysis to the Top 10 CMAs Not Justified*

77. In past Commission processes, the judiciary has further suggested that the analysis is appropriately restricted to incomes of self-employed lawyers in the top 10 CMAs.⁸⁴ The Government's position is that such an approach is not justified.

78. The Drouin Committee properly concluded that it is not "responsible to suggest that the salary level of the Judiciary should be set so as to match the income of the highest earning lawyers in the largest urban centres in Canada".⁸⁵

79. In 2014, the judicial salary of \$300,800 placed it in the 78th percentile nationally.⁸⁶ Further, the 2014 judicial salary was in at least the 75th percentile in the CMAs, except Toronto and Calgary where it was at the 70th percentile.⁸⁷

80. Restricting the analysis to the CMAs results in ignoring a significant portion of lawyers' incomes. Between January 1997 and March 31, 2015, 39.3% of judicial appointees from the private sector bar were from the rest of Canada.⁸⁸

81. In addition, the incomes of self-employed lawyers are considerably lower outside the CMAs. Thus focussing exclusively on lawyers' incomes in the CMAs rather than considering the income levels from across Canada significantly increases the results. Using the 2014 CRA data as an illustration:

- a. At the 65th percentile, the all of Canada income is \$188,138 whereas the CMA income is \$218,400 – a difference of \$30,262 or 16%;⁸⁹ and
- b. At the 75th percentile, the all of Canada income is \$261,363 whereas the CMA income is \$306,810 – a difference of \$45,447 or 17%.⁹⁰

⁸⁴ Levitt Commission Report, *supra*, para 36, p 13, **Joint Book of Documents, Tab 31**

⁸⁵ Drouin Commission Report, *supra*, p 46, **Joint Book of Documents, Tab 28**

⁸⁶ Pannu Report, *supra*, p 5, **Government's Book of Documents, Tab 10**

⁸⁷ *Ibid*, p 15

⁸⁸ *Ibid*, p 10

⁸⁹ *Ibid*, p 9

⁹⁰ *Ibid*, p 10

82. An alternative way of approaching it would be to “CMA-weight” the income levels based on the percentage of judicial appointees from the CMAs as opposed to the rest of Canada. This approach would entail taking the distribution of judicial appointments by CMA and applying that distribution to lawyers’ incomes. The result is income percentiles that reflect that judicial appointments are distributed across different CMAs as well as outside CMAs. Using this approach, the 65th percentile actually declines to \$182,555 and the 75th percentile drops to \$249,317.⁹¹

b. The Value of the Judicial Annuity Raises Total Compensation Significantly

83. For those in private practice, the judicial annuity is a significant incentive to apply for a judicial appointment and must be factored in when comparing judicial and private sector lawyer compensation. As recognized by the Levitt Commission:

the superiority of the judicial annuity to the capital accumulation alternatives available to private sector lawyers to provide retirement income must be taken into consideration in order to arrive at a comparison of judicial and private sector lawyer compensation.⁹²

84. The judicial annuity comprises not only a retirement benefit, but a generous disability benefit as well. After 15 years on the bench, a judge is entitled to an annuity for life equal to two-thirds of salary, based on his or her last year serving as a judge.⁹³ Based on the current judicial salary, the retirement benefit is approximately \$205,733 for a *puisne* judge. A judge who becomes disabled is entitled to the full annuity for life, with no minimum service requirement.⁹⁴

85. The total annuity is valued at 36.5% of the judicial salary, with the retirement benefit being 32% and the disability benefit 4.5%.⁹⁵ Taking into account the total value of

⁹¹ *Ibid*

⁹² Levitt Commission Report, *supra*, para 42, p 15, **Joint Book of Documents, Tab 31**. See also: McLennan Commission Report, *supra*, pp 5, 15, 57, **Government’s Book of Documents, Tab 29**; Drouin Commission Report, *supra*, p.42, **Government’s Book of Documents, Tab 28**

⁹³ *Judges Act, supra*, s 42(1), **Joint Book of Documents, Tab 24**; Summary of Judges’ and Prothonotaries’ Compensation as of April 1, 2015, **Joint Book of Documents, Tab 34**; Pannu Report, *ibid*, p 11

⁹⁴ *Judges Act, ibid*, s 42(1)(c); Summary of Judges’ and Prothonotaries’ Compensation as of April 1, 2015, *ibid*; Pannu Report, *ibid*, p 11

⁹⁵ Pannu Report, *ibid*, p 13

the judicial annuity, the 2014 judicial salary increases from \$300,800 to \$410,592.⁹⁶ In comparison, that salary level exceeds the net income of at least 85% of self-employed lawyers nationally, who would still need to save for retirement and pay for disability insurance out of that income.⁹⁷

86. In its Report, the Levitt Commission addressed the difference between the principal parties' valuations of the judicial annuity, noting that such valuations are "extremely sensitive to the interest-rate assumptions used". In fact, the Commission's expert pointed out that if a rate that is more reflective of current market expectations for interest rates is used, the valuation of the judicial annuity would yield a much higher percentage than either of the principal parties had used – in the 40-50% range.⁹⁸ The obvious impact is that the prospect of a judicial annuity would be even more attractive to a private sector lawyer.

87. For this process, the Government's expert has examined an alternative way to value the retirement benefit, namely to determine the cost to a self-employed lawyer to fund a similar benefit. Based on the analysis, he determined that self-employed lawyers would have to contribute 43.7% of their annual income to fund a retirement benefit equivalent to the judicial annuity.⁹⁹

88. Using this approach provides another perspective of comparison between a judge's salary and a private sector lawyer's. Reducing the latter's annual net income by 43.7%, the amount needed to fund a pension equivalent to a judge's, the 2014 75th percentile income is reduced to approximately \$147,147, which is approximately 51% less than a 2014 judicial salary.¹⁰⁰

⁹⁶ *Ibid*

⁹⁷ *Ibid*, p 15

⁹⁸ Levitt Commission Report, *supra*, para 41, p 14, **Joint Book of Documents, Tab 31**

⁹⁹ Pannu Report, *supra*, pp 13-14, **Government's Book of Documents, Tab 10**

¹⁰⁰ *Ibid*, p 14

c. Supernumerary Status – An Important Incentive

89. Consideration of the third criterion – the necessity to attract outstanding candidates – must also factor in the option to elect supernumerary status.¹⁰¹ Although to date no Commission has attributed a monetary value to the ability to elect supernumerary status, its value to prospective judicial candidates is significant. Indeed, the Supreme Court recognized that it is an “undeniable economic benefit” that is taken into account “by candidates for the office of judge in planning their economic and financial affairs”.¹⁰²

90. While this is an option that would be attractive to all judicial appointees, it is particularly significant for a private sector lawyer. Increasingly, large private sector law firms are requiring retirement as equity partners at age 65.¹⁰³ In contrast, the mandatory retirement age for a judge is 75. Based on CFJA data, 48% of judges retired at 75 (excluding death and disability) and the average age of retirement since 1997 has been 71.5.¹⁰⁴

91. A judge can elect to become supernumerary if (1) he or she is eligible to retire with a full annuity; or (2) has served 10 years and attained the age of 70.¹⁰⁵ A supernumerary judge remains a member of the court and receives a full judicial salary, but is generally only expected to carry a 50% workload.¹⁰⁶ As such, they have the flexibility to ramp down as health and energy decline or other interests take precedence, but continue to maintain a full judicial salary until retirement.

92. In addition to the significant economic and lifestyle advantages supernumerary status offers, supernumeraries can continue to enjoy the personal satisfaction of doing fulfilling work and contributing to the operations of their court. The relative attractiveness

¹⁰¹ McLennan Commission Report, *supra*, p 5, **Joint Book of Documents, Tab 29**

¹⁰² *Mackin v New Brunswick (Minister of Finance)*; *Rice v New Brunswick*, [2002] 1 SCR 405, para 67, **Joint Book of Documents, Tab 27**

¹⁰³ Kevin Marron, “Just saying ‘no’ to retirement”, Canadian Lawyer Magazine, April 1, 2011, online: <http://www.canadianlawyermag.com/3673/Just-saying-no-to-retirement.html>, **Government’s Book of Documents, Tab 27**

¹⁰⁴ Data derived from the Judicial Personnel System database of the Office of the Commissioner for Federal Judicial Affairs, current as of September 23, 2015.

¹⁰⁵ *Judges Act*, *supra*, s. 28, **Joint Book of Documents, Tab 24**

¹⁰⁶ Pannu Report, *supra*, p 16, **Government’s Book of Documents, Tab 10**

of this benefit is supported by the fact that approximately 89% of judges entitled to elect supernumerary status do so.¹⁰⁷

93. The prospect of maintaining a high salary to age 75 is a significant inducement for attracting outstanding candidates from the private sector to the bench. Of particular relevance is the fact that, on average, as illustrated by the chart following paragraph 71, private sector income levels decrease precipitously in a lawyer's early to mid-50s.¹⁰⁸ On the other hand, judges' salaries increase year by year, and if they elect supernumerary status, as noted above a full salary can be maintained with a significantly reduced workload for many years past this point.

d. Other Generous Benefits Afforded to the Judiciary

94. Another aspect to consider in comparing the compensation of self-employed lawyers and the judiciary is the generous benefits package provided to the judiciary. Most self-employed lawyers would have to provide their own individual extended health and dental benefits and purchase life insurance.¹⁰⁹ The judges' premiums, on the other hand, are paid for by the Government.¹¹⁰

95. Members of the judiciary are entitled to an extensive benefits plan which includes:¹¹¹

- a. basic life insurance, supplementary life insurance, post-retirement insurance and dependents' life insurance;¹¹²
- b. accidental death and dismemberment insurance;¹¹³

¹⁰⁷ Data derived from the Judicial Personnel System database of the Office of the Commissioner for Federal Judicial Affairs, *supra*, current as of September 23, 2015

¹⁰⁸ Statistics derived from CRA Data, *supra*, Second Release, November 24, 2015, **Joint Book of Documents, Tab 1**

¹⁰⁹ Pannu Report, *supra*, p 16, **Government's Book of Documents, Tab 10**

¹¹⁰ Summary of Judges' and Prothonotaries' Compensation as of April 1, 2015, *supra*, **Joint Book of Documents, Tab 34**

¹¹¹ *Ibid*

¹¹² *Judges Act, supra*, s 41.2(1), **Joint Book of Documents, Tab 24**

¹¹³ *Ibid*

- c. health care plan;¹¹⁴ and
- d. dental care plan.¹¹⁵

(iii) Pre-Appointment Income Study

96. The Government renews its request that a study be conducted during this Commission process.¹¹⁶ With the benefit of the parties' principal submissions and a hearing, the Commission will be well-placed to undertake the study and request the requisite extension of time for providing its report to the Minister of Justice.

97. The Government maintains that the benefits of such a study are clear given the Commission's broad task to inquire into the adequacy of judicial compensation. The income levels of those actually appointed to the bench will supplement the evidentiary record before this Commission and will serve to validate the assumptions made by the principal parties about the income level required to attract outstanding candidates based on the CRA data.

4. Benchmarking to DM-3 not Objective, Relevant or Justified

98. The Government's position is that an exclusive focus on the DM-3 group is not an objective, relevant and justified consideration under s. 26(1.1)(d) of the *Judges Act*. Rather, a more objective and justified approach would be to consider trends in public sector compensation generally. This approach would allow the Commission to ensure that judicial compensation trends are relative to what other individuals of outstanding character and ability are paid in the public sector without establishing a formulaic link.

¹¹⁴ *Ibid*, s 41.3(1)

¹¹⁵ *Ibid*

¹¹⁶ Submissions of the Government of Canada on the Proposal for a Pre-Appointment Income Study, January 19, 2016, **Government's Book of Documents, Tab 28**

99. Formulaic benchmarking minimizes the purpose and import of the entire inquiry process.¹¹⁷ It neither fulfils the constitutional requirement of the Commission process as established in *PEI Reference* nor accords with legislative intent.

100. The McLennan Commission recognized the inherent dangers of simply linking the judicial salary to another group:

We were, and are, of the view that it **would be counter-productive to fix judicial salaries as having a pre-determined relationship to other salaries**, whether those of senior civil servants or senior legal practitioners. Those considerations represent dynamics at work in our society and they change constantly. We believe the proper approach was to consider these and other factors in light of the most current information. Were it otherwise, there would be no need to address this subject every four years, as contemplated by the *Judges Act*.¹¹⁸ (emphasis added)

Ultimately, the Commission determined that there was no “mandate in the statute or in logic to maintain” rough equivalence with any comparator.¹¹⁹

101. During the next Quadrennial Commission review process, the Block Commission did not take that approach. Instead, the Commission was focussed on identifying a “single consistent benchmark” within the public sector against which the judicial salary could be compared.¹²⁰ Indeed, the Commission’s salary recommendation was entirely founded on “what compensation increase is required, then, to bring the salary of *puisne* judges to rough

¹¹⁷ McLennan Commission Report, *supra*, p 91, **Joint Book of Documents, Tab 29**; Drouin Commission Report, *supra*, pp 13, 22, **Joint Book of Documents, Tab 28**; Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits, September 30, 1996 [Scott Commission Report], p 14, **Government's Book of Documents, Tab 29**; Report of the Special Advisory Committee on Judicial Compensation and Related Benefits, September 13, 1974 [Hall Commission Report], p 4, **Government's Book of Documents, Tab 30**; Report and Recommendations of the Advisory Committee on Judicial Compensation and Related Benefits, November 22, 1978 [Dorfman Commission Report], p 6, **Government's Book of Documents, Tab 31**; Report and Recommendations of the 1986 Commission on Judges' Salaries and Benefits, February 27, 1987 [Guthrie Commission Report], p 8, **Government's Book of Documents, Tab 32**

¹¹⁸ McLennan Commission Report, *supra*, p 8, **Joint Book of Documents, Tab 29**. See also: Drouin Commission Report, *supra*, p 22, **Joint Book of Documents, Tab 28**; Senate Committee September 30, 1998, *supra*, pp 32:16- 32:17, **Government's Book of Documents, Tab 6**

¹¹⁹ McLennan Commission Report, *ibid*, p 49

¹²⁰ Block Commission Report, *supra*, para 103, p 32, **Joint Book of Documents, Tab 30**

equivalence with the DM-3 salary range mid-point plus one-half of maximum performance pay?”¹²¹

102. The Levitt Commission also focussed exclusively on the DM-3 group finding that while it was not “ideal”, it was the “best choice”.¹²² It rationalized the benchmark on the basis that judicial candidates needed “certainty” about future remuneration.¹²³

103. A singular focus on the DM-3 group is misplaced for the following reasons: (1) the Commission’s statutory mandate; (2) comparability issues; and (3) the increased availability and reliability of evidence related to the salary levels of lawyers eligible for judicial appointment.

(a) Formulaic Linkage Inconsistent with Commission Mandate

104. Had Parliament intended that Commissions simply measure the adequacy of judicial salaries against a single, formulaic benchmark it would have specifically provided for that in the *Judges Act*. Instead, as previously discussed, it prescribed certain criteria to guide Commissions in their inquiry.

105. As explained in paragraphs 13-19, a deliberate decision was made not to specifically mandate Commission consideration of public service remuneration in the 1998 legislative amendments. That decision was informed by the 1995 Triennial Commission chair’s evidence regarding concerns about the benchmarking or linking judicial salaries to public servants’ salaries.¹²⁴

106. Before the 1998 amendments, pursuant to their Terms of Reference, past Commissions were specifically mandated to consider comparative factors, such as the

¹²¹ *Ibid*, para 120, p 38

¹²² Levitt Commission Report, *supra*, para 27, p 9, **Joint Book of Documents, Tab 31**

¹²³ *Ibid*, para 30, p 11

¹²⁴ Senate Committee September 30, 1998, *supra*, pp 32:16-32:17, **Government’s Book of Documents, Tab 6**

relative compensation of judges in other jurisdictions, persons paid out of public funds and Canadians generally.¹²⁵

107. Rather than continuing that approach, Parliament included a “catch-all” or residual provision which contemplates the consideration of other objective, relevant and justified criteria, in addition to the three enumerated ones:

If we are to allow the commission the capacity to do its work, then it must be able to consider other criteria, but in an objective manner. In other words, it must consider criteria that are justified, ones that are measured on objective grounds, that is why the word “objective” is so important.¹²⁶

108. In order for DM-3 remuneration to be a proper consideration under s. 26(1.1)(d) of the *Judges Act* it must be objective, relevant and justified. In present day circumstances, comparing judicial salaries to that of DM-3s does not satisfy that threshold. There is no principled basis upon which to continue this formulaic benchmark.

(b) Comparability Issues

109. The existence of a “historic relationship” between judicial and deputy minister salaries does not support its continuation. Benchmarks must be objective, relevant and justified. As the Scott Commission noted, “a strong case can be made for the proposition that the comparison between DM-3’s and judges’ compensation is **both imprecise and inappropriate**” (emphasis added).¹²⁷

110. The Courtois Commission justified the DM-3 salary as a comparator on the basis that it “reflects what the market place expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges”.¹²⁸

¹²⁵ Scott Commission Report, *supra*, Appendix A – Terms of Reference, p 32, **Government’s Book of Documents, Tab 29**; Report and Recommendations of the 1992 Commission on Judges’ Salaries and Benefits, March 31, 1993 [Crawford Commission Report], Terms of Reference, p 1, **Government’s Book of Documents, Tab 33**.

¹²⁶ Senate Committee October 22, 1998, *supra*, p 37:21, **Government’s Book of Documents, Tab 8**

¹²⁷ Scott Commission Report, *supra*, p 14, **Government’s Book of Documents, Tab 29**

¹²⁸ Report and Recommendations of the 1989 Commission on Judges’ Salaries and Benefits, March 5, 1989 [Courtois Commission Report], p 10, **Government’s Book of Documents, Tab 34**

111. While this rationale for relying on the mid-point of the DM-3 salary has been repeated and relied on by other Commissions, it has consistently been made with the caveat that a comparative analysis of the two positions is not appropriate.¹²⁹ Put another way, Commissions have determined the appropriateness of benchmarking or seeking rough equivalence with DM-3s based purely on “salary level”. They have not examined or evaluated commonly accepted compensable factors such as skill, effort, responsibility, working conditions or security of tenure in order to determine whether the DM-3 group is indeed an appropriate peer group.¹³⁰

112. The Levitt Commission criticized the Government for “submissions that focussed on job content” concluding that it was not relevant to “what the market place expects to pay”.¹³¹ With respect, the Government disagrees. That very question invites a comparative exercise or analysis of the commonalities in positions to determine whether benchmarking is in fact substantiated.

113. Jobs that are salary-benchmarked to other jobs necessarily have common tasks, skills, responsibilities and working conditions.¹³² For retention and recruitment purposes, jobs are commonly benchmarked to similar positions with equivalent responsibilities in the Canadian labour market.¹³³ Stating that judicial salaries should be the same as those paid to DM-3s because they share the attributes of outstanding character and ability fails to give sufficient consideration to all the relevant factors.

¹²⁹ Crawford Commission Report, *supra*, p 11, **Government’s Book of Documents, Tab 33**; Drouin Commission Report, *supra*, p 31, **Joint Book of Documents, Tab 28**; Block Commission Report, *supra*, para 103, p 32, **Joint Book of Documents, Tab 30**; Levitt Commission Report, *supra*, para 26, pp 8-9, **Joint Book of Documents, Tab 31**

¹³⁰ The McLennan Commission was not prepared to consider judges from other jurisdictions as appropriate comparators on the basis that there was no information about working conditions, annuities and security of tenure that would permit meaningful comparisons. McLennan Commission Report, *supra*, p 12, **Joint Book of Documents, Tab 29**

¹³¹ Levitt Commission Report, *supra*, para 26, pp 8-9, **Joint Book of Documents, Tab 31**

¹³² Kent Romanoff et al, “Pay Equity: Internal and External Considerations”, Compensation and Benefits Review, 18(6):17-25, November 1986, **Government’s Book of Documents, Tab 35**; Nan Weiner and Morley Gunderson, *Pay Equity: Issues, Options and Experiences* (Toronto, Ontario: Butterworths, 1990), pp 17-33, **Government’s Book of Documents, Tab 36**

¹³³ Kent Romanoff et al, “Pay Equity: Internal and External Considerations”, *ibid*; Frederick D Lipman and Steven E Hall, *Executive Compensation Best Practices*, *supra*, pp 25-31, **Government’s Book of Documents, Tab 23**

114. Further, the Levitt Commission’s failure to consider this approach, which is grounded in accepted compensation benchmarking practice, is inconsistent with the approach it took on the issue of including performance pay as part of DM-3 cash compensation. On that issue, the Commission determined that not including those amounts would be contrary to “customary compensation practice”.¹³⁴

115. There is nothing untoward or demeaning about the requirement to undertake a comparative analysis to support a continued benchmarking or linkage to the mid-point of the DM-3 group. Such an analysis will not undermine “the constitutional status and role of the judiciary and also the importance of its appearance and image to the effective performance of that role”.¹³⁵ Rather, it will confirm whether the mid-point of the DM-3 salary is an objective, justified and relevant consideration under s. 26(1.1)(d) of the *Judges Act*.

116. The formulaic linkage to the DM-3 group is not appropriate based on the following comparability issues: (i) the small size of the DM-3 group, (ii) differences in tenure of the respective positions, and (iii) differences in considerations informing DM-3 compensation. Indeed, all these factors made it difficult for the Block and Levitt Commissions to determine an objective reference point in the DM-3 salary range against which to measure judicial salaries.

(i) *Small Sample Size*

117. At the present time, there are only eight DM-3s compared to 1,165 judges. The McLennan Commission did not restrict its inquiry to DM-3s based, in part, on this factor – “a very small sample upon which to base the remuneration of more than 1,100 federally appointed judges”.¹³⁶

¹³⁴ Levitt Commission Report, *supra*, para 25, p 8, **Joint Book of Documents, Tab 31**

¹³⁵ *Ibid*, para 26, p 9

¹³⁶ McLennan Commission Report, *supra*, p 28, **Joint Book of Documents, Tab 29**

118. In fact, the size of the DM-3 group fluctuates. In the past 17 years, there have been anywhere from eight to thirteen individuals at the DM-3 level at any given time.¹³⁷ This fluctuation is due to the fact that the deputy minister rank is not tied to the position, but rather the individual. That is, one individual in a position (for example the Deputy Minister of Finance) could be appointed at the DM-3 level and the next day a new appointee could be appointed at a different level.

(ii) No Security of Tenure

119. The fact that deputy ministers do not have the security of tenure accorded to judges is also a relevant consideration.¹³⁸ Deputy ministers serve at the pleasure of the Governor in Council and, as such, are demonstrably at risk. On the other hand, pursuant to s. 99 of the *Constitution Act, 1867*, judges can only be removed from office on address of the Senate and the House of Commons.

120. Among the 35 individuals who served as a DM-3 and whose tenure as a DM-3 or higher ended between 2000 and 2015, the median tenure at the rank of DM-3 or higher was 4.4 years. Since 2000 the longest tenure was 12 years, and among active senior deputies the maximum tenure to date at the DM-3/4 level is 8.7 years.¹³⁹

121. In contrast, the 710 judges who retired between 2000 and 2015 had spent a median of 20.8 years as a judge, with the maximum tenure of 37.5 years. Indeed, only 10% retired with less than 12 years of service, which was the maximum DM-3 tenure.¹⁴⁰

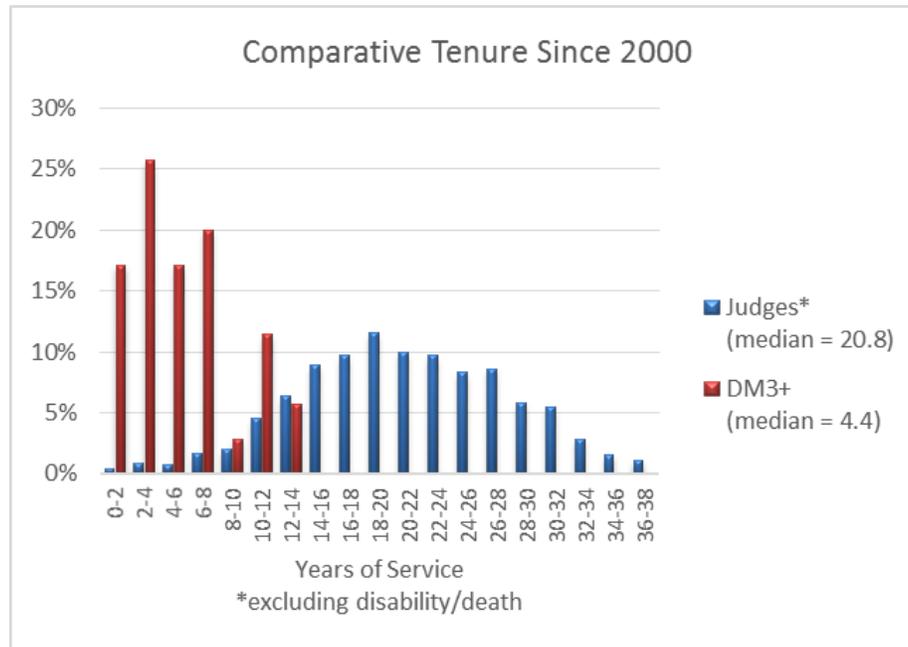
¹³⁷ At the time of the last Quadrennial Commission process in 2011, there were 13 DM-3s, Levitt Commission Report, *supra*, footnote 26, p 9, **Joint Book of Documents, Tab 31**. In 2003 there were 9 DM-3s, McLennan Commission Report, *supra*, p 24, **Joint Book of Documents, Tab 29**. In 1999 there were 10 DM-3s and in 2000 13 DM-3s, Drouin Commission Report, *supra*, p 23, **Joint Book of Documents, Tab 28**

¹³⁸ McLennan Commission Report, *supra*, p 28, **Joint Book of Documents, Tab 29**

¹³⁹ Data derived from Privy Council Office, "DM3-4 Appointment History Export (names and departments removed)", August 15, 2015, **Joint Book of Documents, Tab 17**

¹⁴⁰ Data derived from the Judicial Personnel System database of the Office of the Commissioner for Federal Judicial Affairs, *supra*, current as of September 23, 2015

122. The chart below illustrates the significant differences in tenure between the DM-3 group and the judiciary.



(iii) Significant Differences in Compensation Measures

123. Differences in compensation measures further militate against formulaic benchmarking for two reasons.

124. First, an individual who occupies a DM position is paid at a certain level based on a combination of the individual's skills and experience and the duties to be performed. The DM salary plan is more akin to appointment to level, rather than position. Because DM compensation is so highly individualized, a newly appointed deputy minister could be paid less or more than the individual who occupied the position immediately before, depending on his/her seniority and skills, and the complexity of the Government's agenda. This system of determining compensation individually and based on personal achievements is not appropriate in the context of judicial compensation.

125. Second, since 1998, deputy ministers have been eligible to receive "performance pay" measured against agreed targets and the achievement of business plans.

126. The McLennan Commission recognized that performance pay and “the achievement of defined goals, are concepts that have no relationship whatsoever to the judicial function”.¹⁴¹ Further, the Commission questioned the continued usefulness of the DM-3 group as a comparator based on the “unfortunate disconnect” due to the “structure to compensate DM-3s”.¹⁴²

127. Performance pay has two elements – a potential variable amount (at-risk pay) which is re-assessed each year and a potential bonus for performance that surpasses expectations.¹⁴³ At-risk pay is measured against individual commitments which are composed of policy and program results in support of the Government’s agenda, management results, leadership results and corporate results in support of a priority identified by the Clerk of the Privy Council.¹⁴⁴

128. Based on the applicable rating distribution, the majority of DM-3s receive performance ratings of “succeeded” or “succeeded+”. The rating of “surpassed expectations”, which includes a bonus, is reserved for not more than 20% of the group.¹⁴⁵ In the 2014-15 fiscal year, of the ten DM-3s, only two were rated at the “surpassed expectations” level, one received no performance pay at all and the other seven received at-risk pay based on either a “succeeded” or “succeeded+” rating.¹⁴⁶

129. It is critical to understand that at-risk pay is determined according to the performance assessment of the individuals in those positions in a given year. From year to year, the same person’s cash compensation will fluctuate.

130. The fact that a significant portion of a DM-3s potential overall cash compensation (up to 33% for 2014-15)¹⁴⁷ is predicated on the achievement of individual and corporate

¹⁴¹ McLennan Commission Report, *supra*, p 24, **Joint Book of Documents, Tab 29**. See also: McLennan Commission Report, *ibid*, pp 26, 27

¹⁴² *Ibid*, p 91

¹⁴³ Privy Council Office, “Performance Management Program Guidelines for Deputy Ministers, Associate Deputy Ministers and Individuals Paid in the GX Salary Range”, updated July 2015, p 1, **Joint Book of Documents, Tab 13**

¹⁴⁴ *Ibid*, pp 3-4

¹⁴⁵ *Ibid*, p 7

¹⁴⁶ Privy Council Office, “Remuneration of DM 1-3s – Fiscal 2011-2014”, Distribution of at-risk-pay for DM-3s, 2014-15, **Joint Book of Documents, Tab 11**

¹⁴⁷ *Ibid*

objectives has been overlooked and underestimated by prior Commissions in assessing the comparability of DM-3 and judicial salaries. With the introduction of the new compensation plan for deputy ministers in 1998, the validity of any continued benchmarking became even more questionable.

131. Despite the very different considerations at play in deciding to change the DM group's compensation structure, past Commissions have considered performance pay on the basis that all compensation elements must be considered. In doing so, they have not recognized the variability, as well as the very personal nature of those "bonuses" that are contingent on individual performance.

132. The reality is that these "bonuses" are not transferrable to the judicial compensation context. The Levitt Commission recognized the difficulty in factoring the quantum of bonus or other forms of variable pay into the analysis. The Commission's answer was to translate "it into the judicial context through the use of judgment".¹⁴⁸

133. Based on the small size of the DM-3 group, the rate of turnover and fluctuations in performance pay year to year, this proved to be a difficult task. Simply using the average would not yield a "static" reference point. As a consequence, the Block and Levitt Commissions determined that the best approach to ensure salary relativity was to use the mid-point of the DM-3 salary range and one-half of the maximum performance pay for which a DM-3 is eligible.¹⁴⁹

134. With respect, that approach is arbitrary and further underscores the inappropriateness of trying to directly benchmark judicial salaries to the DM-3 group. The same factors – small size, short tenures and different compensation plans – which made the choice of a benchmarking point difficult - are also the factors which discredit comparability in the first place.

¹⁴⁸ Levitt Commission Report, *supra*, para 29, p 10, **Joint Book of Documents, Tab 31**

¹⁴⁹ Block Commission Report, *supra*, para 106, p 33, **Joint Book of Documents, Tab 30**; Levitt Commission Report, *ibid*, para 29, p 10

(c) Reliable Evidence Relating to Pre-appointment Salaries

135. The growing availability of reliable evidence regarding the remuneration levels of members of the senior bar from both private and public sectors also militates against relying on the DM-3 group as a comparator. In past processes, the lack of this type of evidence has frustrated the inquiry and resulted in undue weight and relevance being placed on the DM-3 salary.

136. While cognizant that lawyers' incomes are critical to the inquiry based on the binding statutory criteria, past Quadrennial Commissions expressed concern and frustration with "the lack of available and reliable data on comparators other than the remuneration of public servants at the deputy minister level".¹⁵⁰

137. This lack of reliable evidence has been remedied to a degree through the collaboration of the principal parties and the CRA in presenting data on self-employed lawyers' incomes in the last process and the current one.

138. Another positive step in this direction, as already advocated by the Government, would be a pre-appointment income study which would provide reliable and accurate evidence about the actual incomes of lawyers prior to judicial appointment. In addition to validating the reasonableness of the assumptions made about the level required to attract outstanding candidates from the private sector, it would also provide information about the income levels of public sector lawyers and other judicial candidates.

(d) Consideration of General Trends More Appropriate and Relevant

139. Rather than seeking to establish a formulaic linkage with the mid-point of the DM-3 group, a more objective and justified approach would be to consider senior public servants' salaries generally. Looking at trends would be useful in demonstrating that judicial salaries retain a "relationship" to compensation levels in senior level government

¹⁵⁰ McLennan Commission Report, *supra*, p 41, **Joint Book of Documents, Tab 29**. See also: Drouin Commission Report, *supra*, p 37, **Joint Book of Documents, Tab 28**; Block Commission Report, *supra*, para 112, p 35, **Joint Book of Documents, Tab 30**

positions. This approach would be responsive to the criterion of “other objective criteria that the Commission considers relevant”.

140. This approach was used by the McLennan Commission. The Commission questioned “the wisdom of confining the examination to the DM-3 level”¹⁵¹ and felt it was incumbent on them to “look at a broader range of the most senior public servants whose qualities, character and abilities might be said to be similar to those of judges”.¹⁵² Consequently, the Commission considered the entire group of deputy ministers and other classes of Governor-in-Council (GIC) appointees.¹⁵³

141. The Drouin Commission also noted that “remuneration levels within the senior ranks of the Government” are relevant because judicial salaries should not be permitted “to lag materially behind”.¹⁵⁴

142. An examination of the salary levels of the broader DM community and other GIC appointees demonstrates that the current judicial salary of \$308,600 is higher than the salary mid-point (without at-risk pay) for all current positions within the DM group, the GC group and the GCQ group.

143. As of April 2015, the salary midpoints for the DM group are: DM-1 - \$209,550; DM-2 - \$240,800; DM-3- \$269,750 and DM-4-\$302,050.¹⁵⁵ The chart below illustrates the trends in DM salaries compared to the judicial salary over the last 10 years.¹⁵⁶ The judicial salary has been consistently well above the mid-point salaries of the DM-1-3 groups and in the past two years outpaced the DM-4 salary.

¹⁵¹ McLennan Commission Report, *ibid*, p 28

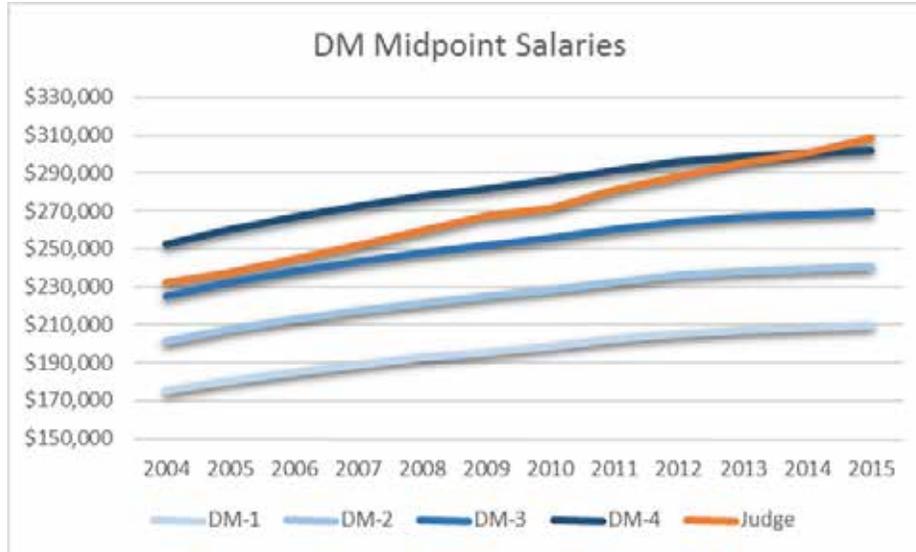
¹⁵² *Ibid*, p 30

¹⁵³ *Ibid*, pp 28-31

¹⁵⁴ Drouin Commission Report, *supra*, p 32, **Joint Book of Documents, Tab 28**

¹⁵⁵ Privy Council Office, “Income Information Regarding Deputy Ministers -- Salary Ranges, Salary Mid-Point and Average Salary, 2004-2015”, **Joint Book of Documents, Tab 12**

¹⁵⁶ *Ibid*



144. The GC and GCQ groups are smaller in number than the DM group. At present there are three GC-9 positions.¹⁵⁷ The present midpoint salary of a GC-9 is \$246,050.¹⁵⁸ There are presently only two GC-10s.¹⁵⁹ The midpoint salary is currently \$282,800.¹⁶⁰

145. There are four GCQ-9s at present.¹⁶¹ The current midpoint salary is \$288,700.¹⁶² There have been no appointments to the GCQ-10 level since the creation of the current classification system in 2002.

146. As illustrated by the chart below, the judicial salary has been consistently higher than that of the GC-9 group for over ten years, kept pace with that of the GC-10s and GCQ-9s and then, in the last four years, has outpaced those salaries.

¹⁵⁷ (1) Chief Public Health Officer, Public Health Agency of Canada; (2) President, Natural Sciences and Engineering Research Council; and (3) President, Social Sciences and Humanities Research Council: see: Privy Council Office, "GC and GCQ Income Information Regarding as of April 1, 2015", p 1, **Joint Book of Documents, Tab 15**

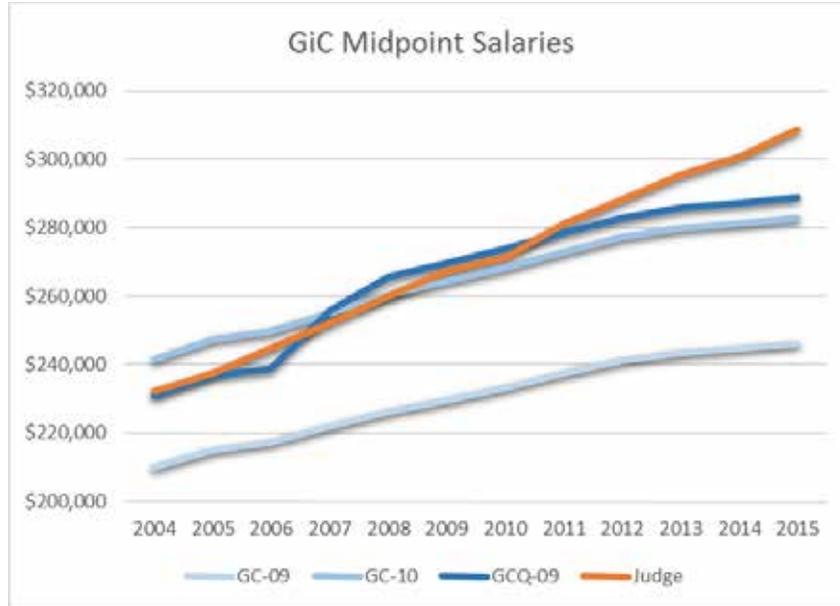
¹⁵⁸ *Ibid*, p 2

¹⁵⁹ The Presidents of the Canadian Institutes of Health Research and the National Research Council of Canada, *ibid*, p 1

¹⁶⁰ *Ibid*, p 2

¹⁶¹ (1) Chairperson and Member, Canadian Radio-television and Telecommunications Commission; (2) Chairman and Member, National Energy Board; (3) Commissioner of Competition; and (4) Superintendent, Office of the Superintendent of Financial Institutions, *ibid*, p 1

¹⁶² *Ibid*, p 3



147. As previously stated, the Government’s position is that it is inappropriate to factor in performance pay due to the fact that it must be earned each year, a percentage of appointees will not receive it and the individuals do not have security of tenure like judges. While individuals in the GC group are eligible to receive performance pay, those in the GCQ group are not.¹⁶³

148. Even if at-risk pay is factored in based on the practice used by past Commissions (midpoint salary and one-half of maximum performance pay), the judicial salary compares very favourably. Indeed, at the present time, it is higher than that of DM-1s and DM-2s and is only \$5,659 or less than 2% lower than the current DM-3 level.

149. In terms of the DM-4 group it is less than 15% lower, which is not unreasonable given that the Block Commission recognized that this level is “reserved for exceptional circumstances and positions of particularly large scope”.¹⁶⁴ At present, there are four individuals appointed to the DM-4 level, including the Clerk of the Privy Council and the Secretary of the Treasury Board.

¹⁶³ *Ibid*, p 4

¹⁶⁴ Block Commission Report, *supra*, para 105, p 33, **Joint Book of Documents, Tab 30**. Also see: Chart prepared by the Department of Justice, “Midpoint + Maximum Performance Pay/2 of DMs, GCs and Judges”, **Government’s Book of Documents, Tab 37**

150. The judicial salary is also significantly higher than the GC-9 salary midpoint with one-half maximum performance pay and is only approximately 4% lower than that of the GC-10 salary midpoint with one-half maximum performance pay.¹⁶⁵

5. Conclusion

151. Consideration of the prescribed statutory criteria demonstrates that the current level of judicial compensation is entirely adequate to maintain judicial independence. The salaries of judges need only be increased annually to allow for a cost of living adjustment until the next review process.

B. CPI – More Appropriate Statutory Indexation Measure

152. The Government proposes that judicial salaries be adjusted annually based on changes to CPI, rather than the Industrial Aggregate Index (IAI). CPI is a more modern and relevant measure of changes to the cost of living that will continue to ensure that judicial salaries are protected from erosion through inflation.

153. When statutory indexation of judicial salaries was first introduced in 1981 it was intended to minimize the erosion of judicial salaries through Parliamentary inaction. The rationale for introducing indexation was to “enhance the independence of the judiciary by removing judicial compensation from the give-and-take of the political process to the extent consistent with the principles of parliamentary democracy and ministerial responsibility for the expenditure of public funds”.¹⁶⁶

154. IAI was chosen as the indexation factor because at the time, IAI applied to Members of Parliament and it was thought that applying it to judges would avoid further controversy.

¹⁶⁵ See chart prepared by the Department of Justice, “Midpoint + Maximum Performance Pay/2 of DMs, GCs and Judges”, *ibid*

¹⁶⁶ *Debates of the Senate*, 32nd Parl, 1st Sess, Vol II (March 11, 1981) at 1993, **Government’s Book of Documents, Tab 38**

In answer to a question in the House of Commons about “the possibility of taking a look at a more accurate index”, the Minister of Justice responded as follows:

That one we felt would be less controversial – the same one that existed for members of Parliament. I do not want this act to be subject to much controversy. I would rather go with a clause of indexation that is in existence so that we will not raise any new problems.¹⁶⁷

155. The original purpose of statutory indexation was meant to “maintain the judges’ buying power”.¹⁶⁸ CPI is, however, better tailored to achieve this. It is more widely known and understood than IAI, and is a more direct means of ensuring that purchasing power remains stable. Indeed, IAI does not correlate directly to either buying power or inflation.¹⁶⁹

156. IAI is based on average weekly wages and salaries of typical “wage-earners” with whom judges share few if any characteristics. The types of salaries included in the index are forestry, logging and support; utilities; construction; information and cultural industries; finance and insurance and educational services.¹⁷⁰

157. In contrast, Statistics Canada defines CPI in the following terms:¹⁷¹

1.1 The Canadian Consumer Price Index (CPI) is an indicator of the change in consumer prices. It measures price change by comparing through time the cost of a fixed-basket of consumer goods and services. Since the basket contains products of unchanging or equivalent quantity and quality, the index reflects only “pure” price change.

1.3 The index is used for an assortment of different purposes by various users. One of its most important uses is by governments, businesses and individuals to adjust selected contractual or legislated payments in line with inflation. By linking

¹⁶⁷ *Proceedings of the House of Commons Standing Committee on Justice and Legal Affairs*, Issue No 13, 1st Sess, 32nd Parl, February 17, 1981, pp 13:27, **Government’s Book of Documents, Tab 39**

¹⁶⁸ *Proceedings of the House of Commons Standing Committee on Justice and Legal Affairs*, Issue No 14, 1st Sess, 32nd Parl, February 19, 1981, pp 14:29, **Government’s Book of Documents, Tab 40**

¹⁶⁹ The Industrial Aggregate Index is the annual rate of change in aggregate Average Weekly Earnings (AWE) established by Statistics Canada: Statistics Canada, “Earnings, average weekly, by industry, monthly (Canada)”, online: <http://www.statcan.gc.ca/tables-tableaux/sum-som/101/cst01/labor93a-eng.htm>, **Government’s Book of Documents, Tab 41**

¹⁷⁰ *Ibid*

¹⁷¹ Statistics Canada, “The Canadian Consumer Price Index Reference Paper”, 62-553-X, December 19, 2014, online: <http://www.statcan.gc.ca/pub/62-553-x/62-553-x2014001-eng.pdf>, Chapter 1, **Government’s Book of Documents, Tab 42**

a stream of future payments to the CPI, it is possible to ensure the purchasing power represented by those payments is unaffected by the average change in consumer prices that may occur.

158. There is no constitutional requirement for statutory indexation to ensure judicial independence. Providing for automatic adjustment to judicial salaries based on the widely-accepted CPI, the same basis upon which judicial annuities are adjusted annually, will continue to ensure that judicial salaries are protected from falling below the “adequate minimum” which concerned the Supreme Court in *PEI Reference*.

159. Based on forecasts of CPI for the quadrennial period, and taking into account the statutory objective as outlined above, the net result would be a judicial salary that is adequate.¹⁷²

160. Finally, it is important to note that while there has been a historic relationship between the CPI and the IAI, at any given time one may be higher than the other. However, as a matter of principle, if the primary purpose of indexation is to guard against inflation, CPI is more suited to this purpose. It is the Government’s position therefore that the *Judges Act* should be amended to replace the reference to the IAI with CPI.

C. Prothonotaries’ Compensation and Representational Funding

1. Total Compensation is Adequate

161. The prothonotaries’ current compensation arrangements are fully adequate. Their current salary is \$234,500 – 76% of a Federal Court judge’s salary. Furthermore, they are now entitled to an annuity calculated in the same manner as the judicial annuity – that is two-thirds of their salary. The judicial annuity which is valued at 36.5% increases their

¹⁷² The forecasted CPI rates for the next four years are as follows: 1.1%, 1.6%, 2.0% and 2.0%. Letter from the Assistant Deputy Minister of Finance dated February 24, 2016, Department of Finance Canada, *supra*, p 3, **Joint Book of Documents, Tab 9**. Using CPI as the statutory indexation rate there would be a net increase of 6.8% over the next 4 years. IAI forecasts over the next four years are: 1.8%, 2.2%, 2.4% and 2.6%: Letter from the Office of the Chief Actuary dated February 25, 2016, Office of the Superintendent of Financial Institutions, **Joint Book of Documents, Tab 7**. Applying IAI would result in a net increase of 9.3% over the next 4 years.

current net income to approximately \$320,093.¹⁷³ Given the recency of these significant changes to the prothonotaries' total compensation, the Government submits that there is no basis for further enhancements.

162. The Special Advisor on Federal Court Prothonotaries undertook a comprehensive review of prothonotaries' compensation in 2013.¹⁷⁴ The Government considered the Special Advisor's Report and issued a response in 2014.¹⁷⁵ Parliament then amended the *Judges Act*, significantly increasing the prothonotaries' compensation. Their salary was increased by 10% from \$198,700 to \$218,900 retroactive to April 1, 2012 and the prothonotaries became entitled to an annuity under the *Judges Act* effective January 1, 2015.¹⁷⁶

163. The prothonotaries have given notice of their intention to raise the issues of salary, incidental allowance and supernumerary status during this review process. The onus is on the prothonotaries to establish that their current compensation is inadequate with reference to the statutorily prescribed criteria in the *Judges Act*.

164. Based on the significant change to their salary effective April 1, 2012 and an entitlement to a generous annuity under the *Judges Act* effective January 1, 2015, the Government submits that nothing more than indexation is required during this Commission process.

2. Full Funding of Costs Not Justified

165. The Commission declined to make a preliminary ruling with respect to the prothonotaries' request for full funding, but rather determined that the issue must be considered as part of its full inquiry into the adequacy of amounts payable under the *Judges Act*. The Government will provide a more complete response to this issue in reply to the prothonotaries' written submissions, but makes the following observations at this time.

¹⁷³ *Supra* footnote 18

¹⁷⁴ Report by the Special Advisor on Federal Court Prothonotaries' Compensation, July 31, 2013 [Cunningham Report], **Joint Book of Documents, Tab 33**

¹⁷⁵ Response of the Minister of Justice to the Report of the Special Advisor on Federal Court Prothonotaries' Compensation, February 27, 2014, **Joint Book of Documents, Tab 33(a)**

¹⁷⁶ *Judges Act, supra*, ss 2.1, 10.1, 42, **Joint Book of Documents, Tab 24**

166. First, it is incumbent on the prothonotaries to articulate how the current formula under the *Judges Act* – the reimbursement of two-thirds of their costs – fails to meet the prescribed statutory criteria for the determination of the adequacy of the amounts payable under the Act.

167. Second, the amounts payable to Military Judges as representational costs in past compensation processes are irrelevant to the Commission’s task. Distinct from s. 26.3 of the *Judges Act*, the regulatory provisions governing the Military Judges Compensation Committee were silent as to representational funding.¹⁷⁷

168. Finally, the public policy rationale for not providing full funding to the judges is equally applicable to the prothonotaries.¹⁷⁸ Allowing full funding would afford the prothonotaries’ representatives a largely unchecked discretion in deciding what costs would be incurred for legal counsel, expert witnesses and disbursements. It is in the public interest that prothonotaries be responsible for the payment of one-third of their costs. Responsibility for some costs is a financial incentive to ensure that costs are incurred reasonably and prudently.

D. Step-Down Amendments

169. The Government further proposes that s. 43(2) of the *Judges Act* be amended to entitle the Honourable J.E. (Ted) Richard to an annuity based on his former position as Senior Judge of the Supreme Court of the Northwest Territories.

170. Chief justices who have served for at least five years are entitled to “step down” from their functions as chief justices and serve as *puisne* judges. If they elect to do so, they

¹⁷⁷ Past Military Judges Compensation Committees were established in accordance with s 165.22 of the *National Defence Act*, RSC 1985 c N-5, **Government’s Book of Documents, Tab 43** and ss 204.23-204.24 of the *Queen’s Regulations and Orders* (Chapter 204, PC 2000-1419), **Government’s Book of Documents, Tab 44**. The *National Defence Act* has since been amended and the process governing the Military Judges Compensation Committees is now provided for in ss 165.33-165.37, **Government’s Book of Documents, Tab 45**

¹⁷⁸ Response to the Report of the Judicial Compensation and Benefits Commission dated May 31, 2004 by the Minister of Justice, November 30, 2004, p 10, **Government’s Book of Documents, Tab 46**

receive a *puisne* judge's salary, but are entitled to an annuity on their retirement based on the salary of a chief justice.¹⁷⁹

171. Following the 2011 Quadrennial Commission process, s. 43(2) was amended to extend this benefit to senior judges in the territories. Based on the coming into force date, however, Mr. Richard did not benefit from the legislative change. A minor statutory amendment would also address the situation of a chief justice or senior judge who "steps down" to a different court as a *puisne* judge and allow him/her to receive an annuity based on the salary of a chief justice.¹⁸⁰

172. In the Government's view these proposed amendments are fair, appropriate and in the public interest.

E. Future Studies

173. The Government proposes that the Commission undertake two studies within its four-year mandate for use during the next Quadrennial Commission process: (1) a pre-appointment income study; and (2) a quality of life study. This would ensure that the next Commission and the principal parties have this relevant evidence available to them from the outset of the process.

1. Pre-appointment Income Study

174. As fully explained in its preliminary submissions requesting this Commission to undertake a pre-appointment income study, the Government's view is that the evidence gathered from such a study would be relevant and probative to the Commission's broad inquiry into the adequacy of judicial compensation. In that respect, the Government repeats and relies on those submissions.¹⁸¹

175. In addition to undertaking a pre-appointment income study to inform its inquiry during this process, the Government proposes that during its tenure, the Commission also

¹⁷⁹ *Judges Act, supra*, s 43(2), **Joint Book of Documents, Tab 24**

¹⁸⁰ At this time the Government is aware of two active judges who would benefit from this amendment.

¹⁸¹ Submissions of the Government of Canada on the Proposal for a Pre-appointment Income Study, January 19, 2016, *supra*, **Government's Book of Documents, Tab 28**

undertake a study to be used for the next process. It is proposed that the study would cover the ten-year period 2007-2017 for use by the 2019 Quadrennial Commission.

176. This approach would address the concerns raised by this Commission about “the delays attendant upon such a process” and asking for an extension of time. Such a prospective approach was proposed by the McLennan Commission in its recommendations for improvements to the commission process.¹⁸²

2. Quality of Life Study

177. The second proposed study is one that would examine the intangible aspects of judicial life that factor into applying for judicial appointment – a quality of life study. Successive Commissions have recognized that compensation is only one aspect that factors into making a decision to apply to the bench. Other considerations, such as the satisfaction from public service, the development of the law, a career change, a lifestyle change and collegial colleagues are a few examples of positive attributes.¹⁸³ Commissions have also considered the weighty judicial responsibilities and challenges faced by those accepting judicial appointments, such as the growth in litigation and intensified public scrutiny of judicial decisions.¹⁸⁴

178. The judiciary’s views on what these non-monetary considerations are and what role they may play in informing a decision to apply are essential. Without them, Commissions are left to speculate. With a view to gaining a more complete picture of judicial life, this Commission could oversee a study to identify, describe and perhaps even quantify the intangible advantages and disadvantages associated with judicial office. The findings would be available for consideration by the Commission and the principal parties during the next Commission process.

¹⁸² McLennan Commission Report, *supra*, pp 92-93, **Joint Book of Documents, Tab 29**

¹⁸³ Levitt Commission Report, *supra*, para 42, **Joint Book of Documents, Tab 31**. McLennan Commission Report, *ibid*, p 49

¹⁸⁴ Drouin Commission Report, *supra*, pp 10, 17, **Joint Book of Documents, Tab 28**; McLennan Commission Report, *ibid*, p 5

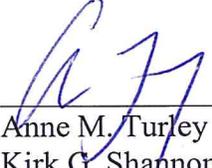
179. A similar type of study was commissioned in the United Kingdom in 2005 and 2010. The study examined the motivating factors for accepting judicial appointment, looking at why judges accepted judicial appointment, as well as why lawyers would accept an appointment.¹⁸⁵

IV. CONCLUSION

180. Given the current salary levels and the significant value of the judicial annuity, the Government's position is that no changes to either judicial or prothonotary compensation are justified during the next four years. Annual indexation in accordance with the CPI will provide the required protection against erosion of judicial salaries due to the effect of inflation. Applying the forecasted CPI amounts to a 6.8% net increase over four years. On that basis, by 2019-20 the judicial salary would increase to \$329,500 and the prothonotaries' salaries would increase to \$250,400.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa, Ontario, this ^{29th} day of February, 2016



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¹⁸⁵ Block Commission Report, *supra*, para 69, **Joint Book of Documents, Tab 30**. Office of Manpower Economics, "Report on Surveys of Pre-appointment Earnings of Recently Appointed Judges and Earnings of Experienced Barristers", July, 2010, **Government's Book of Documents, Tab 47**; Office of Manpower Economics, "Survey of Pre-appointment Earnings of Recently Appointed Judges and Earnings of Experienced Barristers", June, 2005, **Government's Book of Documents, Tab 48**