

IN THE MATTER OF THE *JUDGES ACT*, R.S.C. 1985, c. J-1, as amended

**2011 JUDICIAL COMPENSATION
AND BENEFITS COMMISSION**

SUBMISSION OF THE GOVERNMENT OF CANADA

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PART I - INTRODUCTION AND OVERVIEW

A. Overview of the Government’s Salary Proposal

1. The constitutional role of this Quadrennial Judicial Compensation and Benefits Commission is to ensure that Canada’s federally-appointed judiciary are, and are reasonably perceived by the public to be, independent.¹ The purpose of its recommendations is to ensure “public confidence in the justice system.”²

2. The statutory role of this Commission is to make recommendations regarding the “adequacy of the salaries” and benefits of judges, when considered in light of the following statutory criteria:³

(a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;

(b) the role of financial security of the judiciary in ensuring judicial independence;

(c) the need to attract outstanding candidates to the judiciary; and

(d) any other objective criteria that the Commission considers relevant.

3. The genesis of this Commission was the 1997 decision of the Supreme Court of Canada in the *PEI Judges Reference*.⁴ That case arose in the context of several provincial governments reducing salaries of provincially-appointed judges due to fiscal restraints that resulted in public sector wage freezes and reductions. The Supreme Court held that “as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are

¹ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (the “*PEI Judges Reference*”), at para. 112. The *PEI Judges Reference* was included in the index of background documents previously provided to the Commission.

In light of the Block Commission’s recommendation that the documentation provided to the Commission be less voluminous, the parties also intend to file a Joint Book of Documents shortly after their opening submissions are filed, to avoid duplication. However, the Government would be pleased to provide any data or documents cited herein that would be of assistance to counsel for the judiciary or the Commission prior to filing of the Joint Book of Documents.

² *Ibid.*

³ *Judges Act*, R.S.C. 1985, c. J-1, s. 26.

⁴ *Supra.*

remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class.”⁵ However, a freeze or change to judicial remuneration requires “prior recourse to a special process, which is independent, effective, and objective, for determining judicial remuneration, to avoid the possibility of, or the appearance of, political interference through economic manipulation,” which is the role of this Commission.⁶

4. An appearance of political interference through economic manipulation may be created either by judges being treated less well than others paid from the public purse, or by judges appearing to receive preferential treatment as compared to others paid from the public purse. Given that the *PEI Judges Reference* arose at a time of general expenditure restraints due to difficult fiscal circumstances, the Supreme Court specifically addressed the potential risks to public perception of judicial independence in such circumstances. The Court held:⁷

In my opinion, the risk of political interference through economic manipulation is clearly greater when judges are treated differently from other persons paid from the public purse. This is why we focussed on discriminatory measures in Beauregard. As Professor Renke, *supra*, has stated in the context of current appeals (at p. 19):

. . . if judges were spared compensation decreases affecting other public sector groups, a reasonable person might well conclude that the judges had engaged in some behind-the-scenes lobbying. The judges’ exemption could be thought to be the result of secret deals, or secret commitments to favour the government. An exemption of judges from across-the-board pay cuts is as likely to generate suspicions concerning judicial independence as the reduction of judicial compensation in the context of general public sector reductions. [emphasis added]

5. Measures that are “designed to effectuate the government’s overall fiscal priorities” and thus “aimed at furthering some sort of larger public interest” can be applied to the judiciary.⁸ Indeed, the Supreme Court has held that exemption from such measures risks undermining public confidence in the independence of the judiciary. Chief Justice Lamer warned: “Nothing would be more damaging to the reputation of the judiciary and the administration of justice than

⁵ *Ibid.* at para. 133; see also para. 147.

⁶ *Ibid.*

⁷ *Ibid.* at para. 158.

⁸ *Ibid.* at para. 184.

a perception that judges were not shouldering their share of the burden in difficult economic times.”⁹

6. The global economy has recently experienced the deepest and most synchronized recession since the Great Depression. That recession has had a seriously detrimental effect on Canada’s finances. Global recovery from the recession has been slow. Recently, the global economic situation has deteriorated, particularly as a result of the sovereign debt and banking crisis in Europe and concerns over the sustainability of the U.S. fiscal situation.

7. In 2009, the Government exempted judges from wage restraint measures that were applied generally to the public sector due to the recession. However, the effects of the recession have been deeper and more protracted than expected at that time. The Government is of the view that continued exemption of the judiciary from the fiscal measures applying to others who are paid from the public purse is not sustainable or fair, and would be inconsistent with the guidance provided in the *PEI Judges Reference*.

8. Accordingly, to maintain public confidence in the judiciary and ensure that increases in judicial salaries reflect the constraint on public sector spending, the Government proposes that salary increases as a result of statutory indexation in s. 25 of the *Judges Act* be capped at a maximum of 1.5% annually for the quadrennial period.¹⁰ The Government notes that the adequacy of the resulting salary will be reviewed again by the 2015 Quadrennial Commission.

⁹ *Ibid.* at para. 196.

¹⁰ Indexation under the *Judges Act* is based on the “Industrial Aggregate” index (“IAI”) published by Statistics Canada: *Judges Act*, s. 25. The IAI is the percentage change in average weekly earnings (“AWE”) across all industries, including overtime, as calculated by Statistics Canada on the basis of monthly labour income surveys of employers. IAI is applied to judicial salaries on a fiscal-year basis, so it is the change in AWE over the most recently available 12-month period, which is the previous calendar year. That is, the IAI increase applied on April 1, 2012 will be the increase in the AWE over the course of 2011.

The IAI projections of Canada’s Chief Actuary that would be applied to judicial salaries for 2012-16 are 2.2%; 2.6%; 2.8% and 2.9% respectively: Letter from M. Mercier, Office of the Chief Actuary, Office of the Superintendent of Financial Institutions, dated December 8, 2011 (to be included in the Joint Book of Documents to be submitted by the parties).

The most recent projections of IAI by the Department of Finance are 2.4% for 2011 (applied to judges in 2012) and 1.3% for 2012 (applied to judges in 2013): Letter from B. Robidoux, Assistant Deputy Minister, Economic and Fiscal Policy Branch, Department of Finance, dated December 16, 2011 (“Department of Finance Letter”), Annex D to this submission.

9. The Government submits that this annual increase of up to 1.5% (a net increase of up to 6.1%) is adequate to meet the requirements of s. 26 of the *Judges Act*. With respect to the mandatory criteria:

10. *The prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government* (s. 26(1.1)(a)): The global economy has slowed recently and uncertainty over the outlook has risen considerably. The key near-term risks are the sovereign debt and banking crisis in Europe, as well as the possibility of a further slowdown in the U.S. economy. The Canadian economy has performed relatively better but is not immune from these developments, and like other countries has been impacted through stock market declines and reduced business and consumer confidence. Private sector economists have revised down their outlook for Canadian economic growth since the 2011 budget, particularly for 2011 and 2012. The deterioration of the global economic situation has also begun to be felt in Canadian employment, which by November 2011 had dipped to its lowest level since May 2011. Weakness in our trading partners has also meant that Canada's exports remain below pre-recession levels. Budgetary deficits are projected throughout the quadrennial period. The Government has undertaken a comprehensive review of government spending to identify spending reductions of at least \$4 billion by 2014-15, the results of which will be announced in Budget 2012. Constraints on the Government's ability to spend necessarily inform its approach to public sector wage increases. The Government submits that it would be inconsistent with the guidance provided by the Supreme Court of Canada in the *PEI Judges Reference* for judges to be exempt from any constraint on wage increases as compared to others paid with public funds.¹¹

11. *The role of financial security of the judiciary in ensuring judicial independence* (s. 26(1.1)(b)): Judicial salaries are already well above the level at which the public could reasonably be concerned that judges are vulnerable to economic pressure due to lack of financial security.

Under the Government's proposal, if IAI turns out to be 1.5% or less in a particular year (as the Department of Finance predicts for 2013), that IAI amount would apply under s. 25 of the *Judges Act*, as usual. If IAI is more than 1.5%, the salary increase would be capped at 1.5%.

¹¹ *PEI Judges Reference, supra* at para. 156.

12. *The need to attract outstanding candidates to the judiciary* (s. 26(1.1)(c)): There is no difficulty attracting outstanding candidates to the judiciary at current salary levels.

13. The Government submits that where:

- (a) the country faces difficult economic and fiscal conditions;
- (b) wage increases of up to 1.5% annually were applied to individuals paid from the public purse other than judges in 2008-11, pursuant to the *Expenditure Restraint Act*,¹²
- (c) economic increases of 1.5% annually are being provided to executives and deputy ministers for 2011-13;¹³
- (d) economic increases of 1.5% annually have been negotiated with the largest public sector unions for 2011-14;¹⁴ and
- (e) judicial salaries are already at a level that preserves financial security and successful recruitment;

the current judicial salary plus an annual increase of up to 1.5% for the next four years, until the commencement of the next Quadrennial Commission, is adequate.

14. If this Commission recommends a 1.5% cap on indexation in such circumstances, a reasonable and informed person would not conclude that the Government is exerting political pressure through economic manipulation of the judiciary.¹⁵ Rather, a reasonable and informed

¹² *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393 (“ERA”), online: <http://laws.justice.gc.ca/eng/acts/E-15.5/page-14.html#h-9>.

¹³ Treasury Board of Canada Secretariat, “Information Notice: Changes to Executive Level Total Compensation” online: <http://www.tbs-sct.gc.ca/hrh/110729in-bi-eng.asp>; an additional .25% was provided for 2011-12 as a result of savings resulting from elimination of accumulation of severance pay for resignation or retirement.

¹⁴ As a result of elimination of accumulation of severance pay for resignation or retirement, a top-up of .25% in 2011-12 and .5% in 2013-14 was also included in the overall wage increases in these settlements (that is, the total wage increases are 1.75% for 2011-12; 1.5% for 2012-13 and 2.0% for 2013-14, of which 1.5% annually is the economic increase): *Ibid.*; Public Service Alliance of Canada, “Treasury Board bargaining” (6 April 2011), online: <http://www.psc-afpc.com/news/2011/bargaining/20110406-e.shtml>; Professional Institute of the Public Service of Canada, “Understanding Severance Pay” <http://www.pipsc.ca/portal/page/portal/website/news/magazine/spring2011/4>.

¹⁵ Compare *PEI Judges Reference*, *supra* at para. 170.

person¹⁶ would conclude that judicial salaries are subject to the same constraints on spending that apply throughout the public sector, and that the temporary measures being proposed by the Government do not threaten judicial independence.¹⁷

B. The Commission's December 8, 2011 Notice

15. The Government acknowledges the Commission's Notice of December 8, 2011, which is attached hereto as Annex A. In that Notice, the Commission has declared its intention to adopt the mid-point of the DM-3 salary range, plus one-half of maximum performance pay "as a comparator that meets the section 26(1.1) criteria," unless "there has been a change in facts or circumstance which justify a rehearing of the question." Second, the Commission has indicated that it also intends to adopt recommendations 2, 3, 5, 6, 7, 10 and 11 of the 2007 Judicial Compensation and Benefits Commission (the "Block Commission") and the portion of recommendation 4 which relates to salary differentials, in the absence of a change of facts or circumstance.¹⁸ Third, in relation to former recommendations 1, 4 and 9, the Commission requests submissions "as to what those amounts should be currently based on the reasoning enunciated in those Recommendations." Finally, the Commission asks for submissions on whether it is "necessary or advisable" for it to "turn its mind to the timeliness and substance" of the Government's 2009 response to the Block Commission Report.

16. By letter dated December 13, 2011, the Government responded to the Notice. A copy of that letter is attached hereto as Annex B. For the reasons set out in its letter, the Government respectfully submits that the approach set out in the Notice is not open to the Commission. Rather, the Commission is constitutionally and statutorily required to conduct an inquiry in which submissions on all the criteria set out in s. 26 of the *Judges Act* are made and heard publicly and are considered independently and objectively by this Commission. This Commission must make its own assessment of the evidence and submissions received during its inquiry, and cannot simply follow the recommendations of a prior Commission without making

¹⁶ For the reasonable and informed person test, see *ibid.*, at para. 113.

¹⁷ Compare *ibid.*, at para. 156.

¹⁸ Report of the Third Quadrennial Judicial Compensation and Benefits Commission, dated May 30, 2008 ("Block Commission Report").

that assessment.¹⁹ In light of this duty, these representations set out evidence and submissions regarding all the issues raised by s. 26 of the *Judges Act*, rather than being limited to submissions on changes of fact or circumstance since the Block Commission.

PART II - BACKGROUND

A. Current Compensation

17. At the request of the Commission, the Government and the judiciary have jointly prepared a background note on the current compensation of judges and the evolution of their salaries since the commencement of the first Quadrennial Commission. A copy of that note is attached hereto as Annex C.

B. The Mandate of the Commission

18. This Commission has both a constitutional and a statutory mandate.

19. The constitutional purpose of this Commission is to preserve the independence of the federally-appointed judiciary. Judicial independence is a fundamental tenet of the Constitution of Canada and was described by Chief Justice Dickson as the “lifeblood of constitutionalism in democratic societies.”²⁰ Its protection is important not only to preserve impartiality in deciding individual cases but also to maintain the integrity of the judiciary in its role as guardian of the Constitution and to uphold public confidence in the administration of justice.

20. There are three essential conditions of judicial independence: security of tenure, administrative independence and financial security. The achievement of judicial independence is assessed by considering whether a “reasonable and informed person” would perceive that the court enjoys these three objective conditions of independence.²¹

¹⁹ Indeed, both the Block and McLennan Commissions specifically found that they were not bound by the conclusions of previous Commissions: Block Commission Report, at para. 21; Report of the Second Quadrennial Judicial Compensation and Benefits Commission, dated May 31, 2004 (“McLennan Commission Report”), at p. 8.

²⁰ *Beauregard v. Canada*, [1986] 2 S.C.R. 56 at 70, online: <http://scc.lexum.org/en/1986/1986scr2-56/1986scr2-56.html>; see also: *Ell v. Alberta*, [2003] 1 S.C.R. 857 at para. 21, online: <http://scc.lexum.org/en/2003/2003scc35/2003scc35.html>; *PEI Judges Reference*, *supra* at paras. 112 & 138; Block Commission Report, at paras. 2-5.

²¹ *PEI Judges Reference*, *supra* at paras. 112-115; see also Block Commission Report, at paras. 6-9.

21. Financial security prevents “political interference through economic manipulation” of the judiciary.²² In the *PEI Judges Reference*, the Supreme Court held that financial security has three components:²³

(a) First, governments can increase, freeze or reduce judicial salaries and/or benefits, “either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure directed at [judges] as a class.” However, such changes or freezes to judicial remuneration require prior recourse to an independent, objective, effective judicial remuneration commission.

(b) Second, negotiations between members of the judiciary or their representative organizations and members of the executive or legislature regarding remuneration are prohibited.

(c) Third, the salaries paid to members of the judiciary must not be so low that judges could reasonably be perceived to be susceptible to political pressure through economic manipulation.

22. The Supreme Court described the “constitutional function performed by” this Commission and its provincial counterparts as being to “serve as an institutional sieve, to prevent the setting or freezing of judicial remuneration from being used as a means to exert political pressure through the economic manipulation of the judiciary.”²⁴ This Commission will have achieved its constitutional mandate if a reasonable and informed person would perceive that the setting of judicial compensation has been depoliticized.²⁵ The Supreme Court has held that a

²² *PEI Judges Reference*, *supra*. at para. 131.

²³ *Ibid.* at paras. 131-37; see also *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, [2002] 1 S.C.R. 405 at paras. 54-60 (*Mackin* was included in the index of background documents previously provided to the Commission) and *Valente v. The Queen*, [1985] 2 S.C.R. 673 at 704, online: <http://scc.lexum.org/en/1985/1985scr2-673/1985scr2-673.html>; Block Commission Report, at para. 10.

²⁴ *PEI Judges Reference*, *supra*. at para. 170; see also Block Commission Report, at para. 12.

²⁵ See e.g. *Mackin*, *supra* at para. 69: “In short, I consider that the opinion stated by this Court in the *Provincial Court Judges Reference*, *supra*, requires that any change made to the remuneration conditions of judges at any given time must necessarily pass through the institutional filter of an independent, effective and objective body so that the relationship between the judiciary, on the one hand, and the executive and legislative branches, on the other, remain depoliticized as far as possible. That is a structural requirement of the Canadian Constitution resulting from the separation of powers and the rule of law” [emphasis added].

See also *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*; *Ontario Judges' Assn. v. Ontario (Management Board)*; *Bodner v. Alberta*; *Conférence des juges du Québec v. Québec (Attorney General)*; *Minc v. Québec (Attorney General)*, 2005 SCC 44, [2005] 2 S.C.R. 286 (“*Bodner*”) at para. 67:

judicial compensation commission will have had a “meaningful effect” as required by the Constitution if it is a “public and open process of recommendation and response.”²⁶

23. This Commission’s recommendations are not binding. However, the Government can only vary or decline to follow them for legitimate reasons that are supported by a reasonable factual foundation, and in a manner that shows respect for this Commission’s process and achieves its purposes of “preserving judicial independence and depoliticizing the setting of judicial remuneration.”²⁷

24. Accordingly, this Commission plays a crucial constitutional role in safeguarding the independence of Canada’s federally-appointed judges.

25. The Supreme Court provided the following guidelines for compensation commissions in its 2005 decision in *Bodner*:²⁸

The *Reference* laid the groundwork to ensure that provincial court judges are independent from governments by precluding salary negotiations between them and avoiding any arbitrary interference with judges’ remuneration. The commission process is an “institutional sieve” (*Reference*, at paras. 170, 185 and 189) — a structural separation between the government and the judiciary. The process is neither adjudicative interest arbitration nor judicial decision making. Its focus is on identifying the appropriate level of remuneration for the judicial office in question. All relevant issues may be addressed. The process is flexible and its purpose is not simply to “update” the previous commission’s report. However, in the absence of reasons to the contrary, the starting point should be the date of the previous commission’s report.

Each commission must make its assessment in its own context. However, this rule does not mean that each new compensation commission operates in a void, disregarding the work and recommendations of its predecessors. The reports of previous commissions and their outcomes form part of the background and context that a new compensation committee should consider. A new commission may very well decide that, in the circumstances, its predecessors conducted a

“the Commission’s purpose is to depoliticize the remuneration process and to avoid direct confrontation between the Government and the judiciary.” *Bodner* was included in the index of background documents previously provided to the Commission.

²⁶ *Bodner*, *ibid.* at para. 19; see also para. 63 (“The objective of an open and transparent public process”).

²⁷ *Ibid.* at para. 31.

²⁸ *Ibid.* at paras. 14-15, 17; see also Block Commission Report, at paras. 14 and 21; McLennan Commission Report, at p. 3 (Commission to be guided by its perception of the public interest).

thorough review of judicial compensation and that, in the absence of demonstrated change, only minor adjustments are necessary. If on the other hand, it considers that previous reports failed to set compensation and benefits at the appropriate level due to particular circumstances, the new commission may legitimately go beyond the findings of the previous commission, and after a careful review, make its own recommendations on that basis.

...

The commission must objectively consider the submissions of all parties and any relevant factors identified in the enabling statute and regulations. Its recommendations must result from a fair and objective hearing. Its report must explain and justify its position.

26. To satisfy the requirements of the *PEI Judges Reference* with respect to an independent, objective and effective Commission, the Government enacted s. 26 of the *Judges Act* to establish the Quadrennial Commission. The *Judges Act* requires this Commission “to inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges’ benefits generally,” which are to be assessed pursuant to the considerations set out in s. 26(1.1) of the Act.²⁹ As the McLennan Commission observed, “Section 26 calls on us to make recommendations as to what compensation would be ‘adequate’ to fulfill the goals established by the legislation.”³⁰ Accordingly, this Commission will have satisfied both its constitutional and statutory mandates if it recommends salaries that are adequate in light of the s. 26(1.1) criteria, through an independent, objective and effective process.³¹

27. The Government further relies upon its December 13, 2011 letter (Annex B) with respect to the mandate of this Commission.

²⁹ Block Commission Report, at paras. 17-20.

³⁰ McLennan Commission Report, at p. 9.

³¹ Block Commission Report, at para. 15.

PART III - JUDGES ACT MANDATORY CRITERIA

A. The prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government

1. Background: The Global Recession and Recent Judicial Compensation

28. For the reasons set out in the Government's December 13, 2011 letter, this Commission has no jurisdiction to review the Government's response to the Block Commission Report. However, that report and response do form part of the background for this Commission. As set out below, there was a dramatic change in economic facts and circumstances after the Block Commission Report was delivered.

29. The parties' submissions to the Block Commission with respect to economic conditions were based upon the Economic Statement tabled by the Minister of Finance on October 30, 2007.³² At that time, the Canadian economy appeared to be robust. On May 30, 2008, the Block Commission recommended a salary increase of 4.9% for *puisne* judges for 2008-2009 (inclusive of annual indexing), and an additional 2% plus statutory indexing for each of the following three years of its mandate.

30. The global economy and Canada's financial position deteriorated rapidly after the Block Commission Report was received. In Canada, growth declined in the latter half of 2008, resulting in an overall growth rate of 0.5 per cent for the year, the weakest annual growth rate in 17 years.³³

31. On November 27, 2008, (three days before the Minister of Justice's response to the Block Commission Report was due) the Minister of Finance announced that the Government intended to take steps to protect Canada's fiscal position by introducing legislation to limit public sector wage increases.

32. Given the announcement of the public sector wage legislation, the Minister of Justice determined that he would not be able to meet the deadline of December 1, 2008 to respond to the

³² *Ibid.* at paras. 51 and 54.

³³ Affidavit of Benoit Robidoux sworn May 13, 2009, filed in the *Aalto* case ("Robidoux Affidavit"), at para. 26 (to be included in the Joint Book of Documents).

Block Commission Report. He decided that it would be appropriate to delay his response, to consider the Block Commission Report in light of the significant changes that had occurred in the prevailing economic conditions and the financial position of the federal government.³⁴

33. The 2009 Budget, which was tabled on January 27, 2009, announced \$40 billion in federal tax and spending measures to stimulate the economy.³⁵ These significant fiscal stimulus measures, combined with weaker government revenues, had a large negative impact on the federal government's financial position. The 2009 Budget projected significant deficits for the first time since 1996-1997, including \$1.1 billion in 2008-9, \$33.7 billion in 2009-10, \$29.8 billion in 2010-11, \$13.0 billion in 2011-12, and \$7.3 billion in 2012-13.³⁶

34. On February 6, 2009, the Government introduced the legislation implementing the public sector wage controls, the *Expenditure Restraint Act* (the "ERA").³⁷ The ERA did not apply to judges.³⁸

35. Five days later, the Minister of Justice delivered the Response to the Block Commission Report (the "2009 Response"). In light of the changed economic circumstances, the Government declined to implement the Commission's recommendations. With reference to the ERA, the Government stated:

In the Government's view, the public would reasonably expect that judges should be subject to similar restraint measures. The Supreme Court of Canada has established that it is to ensure continued public confidence in the judiciary that judicial remuneration should be subject to measures affecting the salaries of all others paid from the public purse. In *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, Chief Justice Lamer observed that equality of treatment "helps to sustain the perception of judicial independence precisely because judges are not being singled out for preferential treatment".³⁹ He explained:⁴⁰

³⁴ Response of the Government of Canada to the Report of the 2007 Judicial Compensation and Benefits Commission, February 11, 2009, at p. 1, online: <http://www.quadcom.gc.ca/archives/2007/Media/Pdf/2009/GovernmentResponseFull.pdf>. The Response was included in the index of background documents previously provided to the Commission.

³⁵ Block Commission Report, at para. 32.

³⁶ Robidoux Affidavit., at para. 33.

³⁷ *Supra*.

³⁸ *Ibid.*, s. 13(4).

³⁹ *PEI Judges Reference, supra* at para. 156 [footnote in original].

In my opinion, the risk of political interference through economic manipulation is clearly greater when judges are treated differently from other persons paid from the public purse. This is why we focussed on discriminatory measures in Beauregard. As Professor Renke, supra, has stated in the context of current appeals (at p. 19):

. . . if judges were spared compensation decreases affecting other public sector groups, a reasonable person might well conclude that the judges had engaged in some behind-the-scenes lobbying. The judges' exemption could be thought to be the result of secret deals, or secret commitments to favour the government. An exemption of judges from across-the-board pay cuts is as likely to generate suspicions concerning judicial independence as the reduction of judicial compensation in the context of general public sector reductions.

36. A similar response was given by the Government to the recommendations of the Special Advisor on Federal Court Prothonotaries' Compensation.⁴¹ The Report of the Special Advisor had been released the same day as the Block Commission Report (May 30, 2008). The Government responded to both reports on the same day (February 11, 2009). In litigation brought by the Federal Court Prothonotaries challenging the Government's response to the Special Advisor's Report, the Federal Court found that there were "significant changes in economic conditions generally and in the adverse effects on public finances of the Government of Canada which became apparent after the Report of the Special Advisor was submitted to the Minister on May 30, 2008."⁴² The Government's response was ultimately upheld by the Federal Court of Appeal as being constitutional in light of "the deteriorating state of the global economic situation and its impact on the finances of the Government of Canada."⁴³ Leave to appeal that decision to the Supreme Court of Canada was denied.

⁴⁰ *Ibid.*, at para. 158 [footnote in original].

⁴¹ "Response of the Minister of Justice to the Report of the Special Advisor on Federal Court Prothonotaries' Compensation," February 11, 2009, online: <http://www.justice.gc.ca/eng/dept-min/pub/res-rep/>

⁴² *Aalto v. Canada (Attorney General)*, 2009 FC 861, [2010] 3 FCR 312 at para. 2 (online: <http://decisions.fct-cf.gc.ca/en/2009/2009fc861/2009fc861.html>), aff'd 2010 FCA 195 (online: <http://decisions.fca-caf.gc.ca/en/2010/2010fca195/2010fca195.html>); leave to appeal to S.C.C. denied March 17, 2011 (online: <http://www.scc-csc.gc.ca/case-dossier/cms-sgd/dock-regi-eng.aspx?cas=33868>).

⁴³ *Ibid.* (F.C.A.), at paras. 11-12.

37. The effect of the Government's 2009 Response maintaining judges' IAI increases was that judges' annual salary increases exceeded the public sector wage increases in the ERA. From 2006 to 2011, judges' salaries increased by 50% more than others paid from the public purse (a net increase of 14.5% as compared to 9.6%):⁴⁴

Year	Public Servants	Judges	<i>Puisne</i> Judges' Salaries
2006-07	2.5%	3.1%	\$244,700
2007-08	2.3%	3.0%	\$252,000
2008-09	1.5%	3.2%	\$260,000
2009-10	1.5%	2.8%	\$267,200
2010-11	1.5%	1.6%	\$271,400

38. In the first year following the ERA (2011-12), public sector wage increases of 1.75% applied as a result of agreements reached with some of the largest public sector unions⁴⁵ (.25% of which is with respect to elimination of severance pay accumulation for resignation or retirement).⁴⁶ The same 1.75% increase was also applied to public sector executives and deputy ministers (whose salaries are not negotiated, and for whom severance pay accumulation was also eliminated).⁴⁷ In contrast, the IAI applied to judicial salaries was 3.6%, resulting in the current *puisne* judge salary of \$281,100.⁴⁸

39. During this period of restraint, the global economy experienced the deepest and most synchronized recession since the Great Depression.⁴⁹ It was even more severe and protracted than the Government expected at the time of its 2009 Response. As demonstrated in the

⁴⁴ Compare ERA, s. 16 to the description of judges' compensation and benefits at Annex C.

⁴⁵ Data provided by Treasury Board, to be included in Joint Book of Documents.

⁴⁶ Treasury Board of Canada Secretariat, "Information Notice: Changes to Executive Level Total Compensation" online: <http://www.tbs-sct.gc.ca/hrh/110729in-bi-eng.asp>; Public Service Alliance of Canada, "Treasury Board bargaining" (6 April 2011), online: <http://www.psac-afpc.com/news/2011/bargaining/20110406-e.shtml>; Professional Institute of the Public Service of Canada, "Understanding Severance Pay" <http://www.pipsc.ca/portal/page/portal/website/news/magazine/spring2011/4>.

⁴⁷ Treasury Board of Canada Secretariat, "Information Notice: Changes to Executive Level Total Compensation" online: <http://www.tbs-sct.gc.ca/hrh/110729in-bi-eng.asp>.

⁴⁸ See the description of judges' compensation and benefits at Annex C.

⁴⁹ Robidoux Affidavit, at para. 7.

following chart, deficits in 2010-13 were or are expected to be a cumulative \$41.7 billion more than was anticipated at the time of the 2009 Response:⁵⁰

Year	Deficit Projected in 2009	Actual or Currently Projected Deficit	Difference
2010-11	\$29.8 billion	\$33.4 billion	\$3.6 billion
2011-12	\$13 billion	\$31 billion	\$18 billion
2012-13	\$7.3 billion	\$27.4 billion	\$20.1 billion
Total			\$41.7 billion

2. Current Economic and Fiscal Conditions

40. The Canadian economy remains very fragile. As a trading nation, Canada is inevitably detrimentally affected by the current global economic turmoil, particularly the challenges faced by the U.S. and Europe. The global economic situation and outlook have deteriorated recently, and uncertainty over the outlook has risen, largely reflecting the negative impacts of the sovereign debt and banking crisis in Europe, and concerns over the health of the U.S. recovery and the country's fiscal sustainability.⁵¹

41. In its September 2011 *World Economic Outlook*, the International Monetary Fund ("IMF") found: "The global economy is in a dangerous new phase. Global activity has weakened and become more uneven, confidence has fallen sharply recently, and downside risks are growing."⁵² Assuming that "European policymakers contain the crisis in the euro area periphery, that U.S. policymakers strike a judicious balance between support for the economy and medium-term fiscal consolidation, and that volatility in global financial markets does not escalate," the IMF would still project "anemic" growth of real GDP in advanced economies of

⁵⁰ Compare Robidoux Affidavit., at para. 33, with the Department of Finance Letter (Annex D).

⁵¹ Department of Finance Letter (Annex D).

⁵² International Monetary Fund, *World Economic Outlook, September 2011: Slowing Growth, Rising Risks* at p. xv online: <http://www.imf.org/external/pubs/ft/weo/2011/02/pdf/text.pdf>.

about 1.5% for 2011 and 2% for 2012. Its projections for Canada are 2.1% for 2011 and 1.9% for 2012.⁵³

42. Uncertainty regarding the global economy has shaken consumer and business confidence and resulted in sharp declines in equity values worldwide. As a result of ongoing weak external demand and a relatively high Canadian dollar, Canadian exports remain well below pre-recession levels.⁵⁴ The deterioration of the global economic situation has also begun to be felt in Canadian employment, which by November 2011 had dipped to its lowest level since May 2011.⁵⁵

43. On November 8, 2011, the Minister of Finance released an Update of Economic and Fiscal Projections (“Fall Update”).⁵⁶ Due to slowing of the global economy and increasing uncertainty about the short-term outlook, reflecting the negative impacts of the European debt crisis and concerns over the United States’ fiscal situation, private sector economists have revised their outlook for Canadian economic growth significantly downward. Real gross domestic product growth is now expected to be a modest 2.2% in 2011 and 2.1% in 2012, compared to projections of 2.9% for 2011 and 2.8% for 2012 made 6 months earlier for purposes of the 2011 Budget.⁵⁷ The global economic situation continues to evolve, creating a period of great uncertainty for the Canadian economy.

44. The Fall Update projected budgetary deficits of \$33.4 billion for 2010-11, \$31 billion for 2011-12, \$27.4 billion for 2012-13, \$17 billion in 2013-14, \$7.5 billion in 2014-15, and \$3.4 billion in 2015-16.⁵⁸ To restrain public sector spending, the Government has frozen the operating budgets of departments at their 2010-11 levels for two additional years.⁵⁹ The Government has further targeted reductions in expenses through a strategic and operating review of direct program spending of at least \$1 billion in 2012-13, \$2 billion in 2013-14 and \$4 billion

⁵³ *Ibid.* at pp. xv and 75.

⁵⁴ Department of Finance Letter (Annex D).

⁵⁵ Statistics Canada, CANSIM, V2062811: “Employment in Canada (seasonally adjusted)” (2 December 2011).

⁵⁶ Department of Finance Canada, Update of Economic and Fiscal Projections (November 8, 2011) online: <http://www.fin.gc.ca/efp-pef/2011/index-eng.asp> (“Fall Economic Update”).

⁵⁷ *Ibid.* and Department of Finance Letter (Annex D).

⁵⁸ *Ibid.*

⁵⁹ Budget 2011, tabled in the House of Commons by the Honourable James M. Flaherty, P.C., M.P. Minister of Finance on June 6, 2011, at p. 179, online: <http://www.budget.gc.ca/2011/home-accueil-eng.html>.

annually starting in 2014-16.⁶⁰ If these savings targets are met, the projections become deficits of \$26.4 billion in 2012-13, \$15 billion in 2013-14, \$3.5 billion in 2014-15 and a surplus of \$0.6 billion in 2015-16.

45. Wage increases negotiated with some of the largest public sector unions have seen annual economic increases of 1.5% from 2011-12 to 2013-14, and an additional 0.25% in 2011-12 and 0.50% in 2013-14 in respect of the elimination of the accrual of severance benefits for resignation and retirement (that is, a total wage increase of 1.75% for 2011-12; 1.5% for 2012-13 and 2.0% for 2013-14).⁶¹ The same 1.75% and 1.5% increases for 2011-12 and 2012-13 have also been provided to public sector executives and deputy ministers, whose wages are not negotiated by the unions and who were also subject to elimination of severance pay accumulation. Because departmental operating budgets are frozen, these increases to base pay must be absorbed within current budgets for 2011-12 and 2012-13.⁶²

46. The salaries and allowances of the Prime Minister, Ministers, Members of Parliament and Senators have been frozen for 2010-11, 2011-12 and 2012-13.⁶³

47. The Supreme Court of Canada has held, in the foundational *PEI Judges Reference* decision that established this Commission: “Nothing could 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.”⁶⁴ Accordingly, adequacy of salaries pursuant to s. 26 of the *Judges Act* must be assessed in light of the fact that others paid from the public purse have faced wage restraints not imposed on judges for the last five years, and continue to expect similar annual wage increases during this period of economic and fiscal vulnerability.

⁶⁰ Fall Economic Update, *supra* and Department of Finance Letter (Annex D).

⁶¹ Data provided by Treasury Board of Canada Secretariat (to be included in Joint Book of Documents); see also Treasury Board of Canada Secretariat, “Information Notice: Changes to Executive Level Total Compensation” online: <http://www.tbs-sct.gc.ca/hrh/110729in-bi-eng.asp>; Public Service Alliance of Canada, “Treasury Board bargaining” (6 April 2011), online: <http://www.psac-afpc.com/news/2011/bargaining/20110406-e.shtml>; Professional Institute of the Public Service of Canada, “Understanding Severance Pay” <http://www.pipsc.ca/portal/page/portal/website/news/magazine/spring2011/4>.

⁶² *Ibid.*

⁶³ *ERA*, s. 55(2).

⁶⁴ *PEI Judges Reference*, *supra* at para. 196; see also *Aalto*, *supra* at paras. 11-13.

48. For the reasons set out in Annex B to this submission, this Commission cannot limit its inquiry to whether there has been a change in facts or circumstances since the Block Commission Report. In any event, there clearly was a significant deterioration in the Canadian economy after the release of that report, and the current uncertain economic outlook, the deficit situation of the Government, and the resulting tight constraints on expenditures from the public purse constitute markedly changed circumstances for this Commission's inquiry as compared to the circumstances prevailing at the time of the Block Commission. This Commission is constitutionally and statutorily bound to consider the adequacy of judicial remuneration in light of current economic and fiscal conditions.⁶⁵

B. The role of financial security of the judiciary in ensuring judicial independence

49. As discussed above, financial security is a core characteristic of judicial independence.⁶⁶ It has two dimensions: individual and collective.⁶⁷ Financial security of individual judges is guaranteed by the constitutional requirement that their salaries be established by law.⁶⁸ The Supreme Court has held that the collective or institutional financial security of the judiciary has three components:

(a) As a general constitutional principle, judicial salaries can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at judges as a class. However, any changes to or freezes in judicial remuneration require prior recourse to this Commission, which must be independent, effective, and objective, to avoid the possibility of, or the appearance of, political interference through economic manipulation.⁶⁹

⁶⁵ See McLennan Commission Report, at p. 9: "The consideration to be applied is whether economic conditions dictate restraint from expenditures out of the public purse." See also *Bodner, supra* at paras. 96 and 98 (fiscal restraint and reductions in other expenditures are reasonable considerations in setting judicial compensation).

⁶⁶ *PEI Judges Reference, supra* at para. 115.

⁶⁷ *Ibid.* at para. 121.

⁶⁸ *Ibid.* at para. 116; *Valente, supra* at p. 706; *Constitution Act, 1867*, s. 100, online: http://laws-lois.justice.gc.ca/eng/Const/PRINT_E.PDF.

⁶⁹ *PEI Judges Reference, supra* at para. 133.

(b) Negotiations between the judiciary and executive or representatives of Parliament about compensation are prohibited.⁷⁰

(c) Judges cannot be paid so little as to cause a reasonable and informed person to perceive that Canada's judiciary is not independent. The Supreme Court provided the following guidance on this component of financial security in the *PEI Judges Reference*:⁷¹

any reductions to judicial remuneration, including *de facto* reductions through the erosion of judicial salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge. Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation, as is witnessed in many countries. [emphasis added]

50. All of these components of collective financial security are currently satisfied, and the Government's compensation proposal is consistent with them.

51. First, this Commission has been appointed to consider and provide independent and objective recommendations regarding the Government's proposal to increase judges' salaries by up to 6.1% over the next four years. The parties have respected the Commission's independence and have endeavoured to provide relevant data, working jointly where possible.

52. Second, the Government and judiciary have not engaged in any negotiations regarding judicial salary or benefits.

53. Third, the lowest salary of federally-appointed judges is currently \$281,100. Given that the average salary of an employed Canadian is less than \$46,000,⁷² judges are clearly not being paid "at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation."⁷³ In light of the fact that the judicial salary is currently well above the level at which the public would reasonably fear that the judiciary is institutionally vulnerable to economic manipulation, there is no reasonable prospect of inflation taking judicial salaries

⁷⁰ *Ibid.* at para. 134.

⁷¹ *Ibid.* at para. 135.

⁷² Statistics Canada "Earnings, average weekly, by industry, monthly," AWE for August 2011, online: <http://www40.statcan.gc.ca/101/cst01/labor93a-eng.htm>.

⁷³ *PEI Judges Reference, supra* at para. 135.

“below a basic minimum level of remuneration which is required for the office of a judge.”⁷⁴ Current projections of CPI are modest.⁷⁵ They are only slightly above the 1.5% cap on indexation proposed by the Government. Indeed, it appears that IAI may be less than CPI in some years, regardless of the cap.⁷⁶

C. The need to attract outstanding candidates to the judiciary

54. Canada has an outstanding judiciary. The Government, and all Canadians, have an interest in ensuring that there is a sufficient pool of lawyers who meet the high standards set by the current Bench and who are willing to accept judicial appointment. If there were persuasive evidence of a problem recruiting exemplary judges, that would be of grave concern to the Government. For the reasons set out below, there is no evidence that Canada currently faces such difficulties.

1. The Judicial Salary is Adequate to Attract Outstanding Candidates from Multiple Sources

55. The pre-appointment background of Canada’s exemplary, federally-appointed judges includes private and public sector law practices, academia and the provincially-appointed judiciary. These sources of outstanding candidates represent a broad spectrum of salaries.

56. While it may be appropriate in many industries to assume that the brightest, most capable individuals are also the most highly-paid, such an assumption does not hold true for the legal profession. Many of the best lawyers and most outstanding potential judges choose to work in the public sector. For example, 4 of the 9 current Supreme Court of Canada judges were in the public sector (including academia) at the time of their initial appointment to the Bench.⁷⁷ There can be no doubt that former public sector lawyers and law professors who are appointed to the

⁷⁴ *Ibid.*

⁷⁵ For 2012-16, current projections of CPI are 2% annually: See “Department of Finance Letter” (Annex D). CPI measures the percentage change in the cost of a fixed basket of commodities of unchanging or equivalent quantity and quality, averaged across Canada. The eight major components of the CPI basket are: food, shelter, household operations and furnishings, clothing and footwear, transportation, health and personal care, recreation, education and reading, and alcoholic beverages and tobacco products.

⁷⁶ See “Department of Finance Letter” (Annex D) (IAI projection for 2012, applied to judges in 2013, is 1.3%).

⁷⁷ Profiles available online: <http://www.scc-csc.gc.ca/court-cour/index-eng.asp>. Statistics regarding the percentage of judges from the private and public sectors are discussed at paras. 94-97 below.

Bench are as outstanding as their private sector colleagues, and are equally capable of rising to the top of the judiciary.

57. Moreover, to ensure that the Canadian judiciary is diverse and is experienced in the areas of law that most frequently result in litigation, the Government appoints a significant number of lawyers who practice in less remunerative fields, including Crown attorneys, criminal defence lawyers and family lawyers. A highly-paid “rainmaker” who develops a great deal of business for a national law firm, but no longer has a significant substantive legal practice, may be poorly suited to the Bench, particularly when compared with a lower-salaried Crown attorney or defence lawyer who is in court on a regular basis. Accordingly, pre-appointment income does not accurately reflect whether a lawyer is an outstanding candidate for judicial appointment. As the Block Commission noted: “The issue is not how to attract the highest earners; the issue is how to attract outstanding candidates. It is important that there be a mix of appointees from private and public practice, from large and small firms and from large and small centres.”⁷⁸

58. The lowest judicial salary of \$281,100 is significantly higher than federal public sector lawyers’ salaries. The salary for Chief Legal Counsel/Assistant Deputy Attorney General, the highest Law Cadre Group rank in the public service, is a maximum of \$195,700, with maximum performance pay of 20%.⁷⁹

59. The current *puisne* judge salary also exceeds that of any professor at the Osgoode Hall Law School or the University of Toronto Law School, two of the largest law schools in Canada, in the 2011 list published pursuant to the Ontario *Public Sector Salary Disclosure Act*.⁸⁰

60. The 2010 *puisne* judge salary was also higher than the 2010 income of approximately 73% of self-employed private sector lawyers aged 35-69, even without the value of the judicial

⁷⁸ Block Commission Report, at para. 116.

⁷⁹ Please see “Senior Law Group and Law Cadre Group Salary Ranges” for additional information regarding salaries of federal lawyers (to be included in the Joint Book of Documents).

⁸⁰ Online at: <http://www.fin.gov.on.ca/en/publications/salarydisclosure/2011/univer11b.html> The salary of the Vice-President Academic & Provost of York University, who is currently a member of Osgoode Hall Law School’s faculty, is higher than the *puisne* judge salary.

annuity being taken into account.⁸¹ As discussed below, the judicial annuity is a significant component of judicial remuneration that should be considered by this Commission in any comparison with private sector salaries. The 2010 *puisne* judge salary plus the value of the judicial annuity was higher than the 2010 income of approximately 82% of self-employed private sector lawyers aged 35-69.

61. Accordingly, the judicial salary is already more than adequate to attract outstanding judicial appointees from all of the sources of candidates.

2. The Judicial Salary is Adequate to Attract Private Sector Lawyers

62. In particular, the judicial salary compares favourably to that of self-employed lawyers (equity partners or sole practitioners) in the private sector.

63. Previous Quadrennial Commissions have had difficulty assessing private sector salaries, due either to concerns about the reliability of the data filed, or disagreement among the parties regarding whether survey or income tax data should be used.⁸² For this Commission, the parties have worked jointly with the Canada Revenue Agency (“CRA”), in an open and transparent manner, to set agreed parameters for creation of a database of self-employed lawyers’ incomes in 2006-2010.⁸³ Income tax forms now require different codes for lawyers than for notaries and other legal professionals, and CRA has limited its database of self-employed lawyers to tax filers who used the code for lawyers, or whom CRA has identified as a member of a law society.⁸⁴

64. To the extent that a change of facts or circumstance is relevant, the Government submits that the availability of jointly-prepared, reliable private sector lawyers’ income data is such a

⁸¹ 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, dated December 13, 2011 (“Pannu Report”), at p. 15 (Annex E).

⁸² See e.g. Block Commission Report, at para. 112; McLennan Commission Report, at pp. 32-33.

⁸³ The reports prepared by the CRA for the parties will be included in the Joint Book of Documents.

⁸⁴ Canada Revenue Agency, Individual Statistics and Modelling Sector, “2011 Quadrennial Judicial Compensation and Benefits Commission Self-Employed Lawyers Master File Methodology,” September 2011; “2011 Quadrennial Judicial Compensation and Benefits Commission Self-Employed Lawyers Master File Methodology, 2010 Update” (November 2011); and Responses to Questions on the CRA Master File Methodology, December 12, 2011 (collectively, “CRA Methodology”) (to be included in the Joint Book of Documents).

change. The Block Commission did not engage in a thorough review of potential private sector comparators, as the parties disagreed on the data relevant to such an inquiry.

65. Now that there is a jointly-produced set of raw data, this Commission must consider which of the data points are relevant to its inquiry. In particular, three variables significantly affect potential private sector comparators: the percentile examined, age range, and residence. Further, given that self-employed lawyers must provide for their retirements with after-tax income, whereas the judicial annuity is primarily government-funded, a fair comparison of salaries must take the government-funded portion of the annuity into account.

a) Relevant Percentile of Private Sector Lawyers' Incomes, Age-Weighting and Location

66. Compensation benchmarking is commonly done based on median incomes (the 50th percentile). However, depending on supply/demand factors, economic conditions and an employer's ability to attract candidates, the 65th percentile is used to attract exceptional individuals. Depending on the same factors, the 75th percentile may be used to attract truly exceptional individuals to a position.⁸⁵

67. The committee that recommends salaries for public sector executives benchmarks the lowest executive level (EX-1) at the median of what an executive with equivalent responsibilities would be earning in the Canadian labour market (the private and broader public sector). Salary ranges for all higher levels, including all deputy ministers, are set according to internal differentials, not comparisons to the market.⁸⁶ For example, as of December 2010, a DM-2 earned less than half of the median of what his or her counterparts in an equivalent job would make in the Canadian labour market.⁸⁷

68. The Government submits that the 65th percentile of self-employed lawyers' incomes is the appropriate private sector comparator for judges, particularly in light of current economic conditions, the fact that there is an ample supply of outstanding lawyers who apply for judicial

⁸⁵ Pannu Report, at pp. 3, 5 (Annex E).

⁸⁶ See e.g. Seventh Report of the Advisory Committee on Senior Level Retention and Compensation (December 2004), at p. 4, online: <http://www.tbs-sct.gc.ca/hrh/adcm-eng.asp>.

⁸⁷ Fourteenth Report of the Advisory Committee on Senior Level Retention and Compensation (December 2004), at p. 4, online: <http://www.tbs-sct.gc.ca/hrh/adcm-eng.asp>.

appointment, and the fact that self-employed lawyers are already the highest-earning subset of outstanding candidates for judicial appointment.

69. The Government notes that while the McLennan Commission looked at the 75th percentile of private sector income, it appears to have done so in part because it considered the income data before it to be “probably conservative,” as it included the net income of notaries and paralegals, thereby reducing the averages (which is no longer the case), excluded lawyers who had established personal corporations and were thus reporting business rather than professional income (which is no longer the case), and included only net professional income from the practice of law (which is no longer the case).⁸⁸ Now that the data has been refined to report total net incomes of lawyers, the Government submits that the standard compensation benchmark for outstanding candidates — the 65th percentile — is the appropriate comparator.

70. The 65th percentile self-employed lawyer’s income in 2010 was \$204,159; whereas the judicial salary in that year was \$271,400.⁸⁹

71. However, the Government acknowledges that in the private sector incomes vary with the lawyer’s age. Accordingly, its expert has age-weighted private sector incomes according to judges’ ages of appointment from January 1, 1997 to March 31, 2011. This gives a single point of income comparison for a private sector lawyer who is hypothetically considering accepting a judicial appointment. Age-weighting raises the 65th percentile income to \$218,500, still well below the judicial salary.⁹⁰

72. Indeed, another important change of facts or circumstance in analyzing the private sector comparator is that ages of appointment have changed. In the past, the judiciary’s submissions focused on the incomes of private sector lawyers aged 44-56; however, that age bracket has become much less significant, as shown in the following chart of ages of appointment:⁹¹

⁸⁸ McLennan Commission Report, at pp. 42-43.

⁸⁹ Pannu Report, at p. 5 (Annex E).

⁹⁰ *Ibid.*, at p. 6.

⁹¹ Data provided by the Commissioner for Federal Judicial Affairs (“CFJA”) (to be included in the Joint Book of Documents).

	<44	44-56	>56
1Jan97-31Mar04	5%	83%	11%
1Apr04-31Mar07	7%	67%	26%
1Apr07-31Mar11	4%	65%	31%

73. Accordingly, the incomes of all private sector lawyers who are eligible for appointment should be considered, with appropriate weighting, rather than completely excluding the incomes of 35% of recent appointees by looking only at the 44-56 cadre.

74. Finally, there is no objective basis for excluding all lawyers with incomes of less than \$60,000 from the data analyzed. This is not an accepted approach in compensation benchmarking, and it distorts the compensation analysis.⁹² The whole purpose of choosing a percentile above the median is to give less weight to lower-earning individuals within the data source. Applying a \$60,000 income exclusion and benchmarking to the 65th percentile of self-employed lawyers' incomes is really applying approximately the 73rd to 74th percentile.⁹³ Applying a \$60,000 income exclusion and benchmarking to the 75th percentile of self-employed lawyers' incomes is really applying approximately the 81st percentile.⁹⁴ The 81st percentile is higher than the benchmark used for even truly exceptional recruitment situations.⁹⁵ The Government encourages the Commission to consult with its expert on these matters.

75. The Government has also considered the fact that lawyers' salaries tend to be higher in certain urban centres than in other parts of Canada. However, as the Drouin Commission noted, it would not be "responsible to suggest that the salary level of the Judiciary should be set so as to match the income of the highest income earning lawyers in the largest urban centres in Canada."⁹⁶ In 2010, the judicial salary exceeded the total net income of 73% of self-employed lawyers across Canada. It also exceeded at least the 70th percentile salary in all major urban centers in Canada except Calgary and Toronto.⁹⁷

⁹² Pannu Report, at p. 7 (Annex E).

⁹³ *Ibid.*, at p. 7.

⁹⁴ *Ibid.*, at p. 8.

⁹⁵ *Ibid.*, at pp. 3, 5.

⁹⁶ First Report of the Judicial Compensation and Benefits Commission, May 31, 2000 ("Drouin Commission Report"), at p. 46; see also p. 9. The Drouin Commission was included in the index of background documents previously provided to the Commission.

⁹⁷ Pannu Report, at p. 15 (Annex E).

b) Annuity

76. In addition to a salary that competes with or exceeds the vast majority of private sector lawyers' salaries, a major compensation-related incentive for judicial appointment is the judicial annuity. A retired judge receives two-thirds of salary, based on his or her last year serving as a judge, for life (currently \$187,400 for a *puisne* judge).⁹⁸ Judges can retire with a full annuity when, with a minimum of 15 years in judicial office, the judge's age and years of service total at least 80. For example, a judge appointed at the average appointment age of 52 can retire with a full annuity at 67.⁹⁹

77. The annuity includes a generous long-term disability benefit. A judge who becomes disabled is entitled to the full annuity for life, with no minimum service requirement (that is, the benefit is payable even if a judge becomes disabled on his or her first day on the Bench).

78. Moreover, the surviving spouse of a judge who passes away receives half of the annuity, for life, also with no minimum service requirement.

79. Most of the judicial annuity is paid for by the Government. Judges contribute 7% of their salary until they are eligible for retirement, and 1% thereafter.¹⁰⁰ In contrast, private sector lawyers must provide for their retirements and disability insurance with after-tax income.

80. The Government's expert has estimated the value of the government-paid portion of the retirement benefit of the judicial annuity to judges, by determining what a private sector firm would need to spend to fund an equivalent benefit. This is the same method that he used to value the judicial annuity for both the Block and McLennan Commissions, both of which were accepted.¹⁰¹

⁹⁸ The last year's salary upon which the annuity is based can be the full salary a judge receives while working fewer hours as a supernumerary judge, as discussed in paras. 86-90, *infra*.

⁹⁹ The average age of appointment is derived from data provided by the CFJA.

¹⁰⁰ *Judges Act*, s. 50. See the description of "Judges Contributions" in Annex C for further detail.

¹⁰¹ McLennan Commission Report, at pp. 57-58 (the McLennan Commission's expert found Mr. Pannu's methods and assumptions to be "appropriate for compensation benchmarking purposes," but used a somewhat different range of appointment ages in its own evaluation, resulting in a slightly lower value.

81. Pension value varies considerably based on age of appointment; for example, it is worth 19.6% of salary to a judge appointed under the age of 44, but worth 41.3% to a judge appointed between the ages of 60 and 64. The weighted average based on age of appointment is 27.2%.¹⁰²

82. As noted above, the judicial annuity is also a valuable disability benefit. The Government's expert valued the Government-paid portion of this benefit, using the same method applied to the retirement benefit. The disability value of the judicial annuity, based on a weighted average of ages of appointments, is 9.7% of a judges' salary.¹⁰³ This is important evidence that was not before the Block Commission.

83. The total value of the judicial annuity is thus 36.9%.¹⁰⁴ When the Government-paid portion of the judicial annuity is taken into account, the 2010 *puisne* judge salary was effectively \$371,547.¹⁰⁵ The 2010 judicial salary plus the value of the Government-paid portion of the judicial annuity in that year was more than the 2010 income of 82% of self-employed lawyers, who would need to save for retirement and pay for disability insurance out of that income.¹⁰⁶

84. In addition, a self-employed lawyer who accepts a judicial appointment also gains an extensive group benefits plan, including life insurance, accidental death and dismemberment insurance, health care and dental service, with 100% of the premium paid by the Government.¹⁰⁷ That individual is likely to have been paying personally for such insurance or services while in private practice.¹⁰⁸

¹⁰² Pannu Report, at p. 13 (Annex E).

¹⁰³ *Ibid.*, at p. 14.

¹⁰⁴ The Office of the Chief Actuary of the Office of the Superintendent of Financial Institutions estimates the cost to Government of the judicial annuity (retirement and disability benefit) to be 1/3 of annual salary costs. That is, if pension costs were funded through the judges' years on the bench, the Government would be paying approximately \$33 for each \$100 of salary paid. This cost is projected to increase to 35% of payroll by 2015: Actuarial Plan Pension Plan for Federally Appointed Judges as at March 31, 2010, dated October 29, 2010, at p. 10, online: http://www.osfi-bsif.gc.ca/app/DocRepository/1/eng/reports/oca/judges2010_e.pdf.

¹⁰⁵ Pannu Report, at p. 15 (Annex E).

¹⁰⁶ *Ibid.*

¹⁰⁷ See the description of judges' compensation and benefits at Annex C.

¹⁰⁸ Pannu Report, at p. 16 (Annex E).

85. Given all of these benefits, judicial compensation is already more than adequate to ensure that a reasonable, informed, outstanding private sector lawyer who wants to provide the valuable public service of serving as a judge would not be discouraged from doing so.¹⁰⁹

c) Supernumerary Status

86. It is also significant when considering attraction of lawyers to the Bench that large private sector law firms frequently require retirement as equity partners at age 65 (although lawyers may continue as counsel or partners *emeritus*, generally for lower salaries, after reaching 65).¹¹⁰ In contrast, the mandatory retirement age for a judge is 75, and 47% of judges have retired at that age.¹¹¹ The average age of retirement is 72.¹¹² Moreover, a judge can elect to become a supernumerary judge if: a) he or she is eligible to retire with a full annuity (when he or she has served for at least 15 years and his or her age plus years of service equal at least 80); or b) has served 10 years and attained the age of 70.¹¹³ Supernumerary judges receive full salary, but are not expected to work full hours (typically, the expectation is 50% of a normal workload).

87. The supernumerary complement provides greater flexibility to the courts in assigning cases. The availability of the supernumerary election is also advantageous for the public purse, as supernumerary judges work approximately half-time for only 33% more than they would be paid if they retired.

88. However, in addition to these public benefits, the existence of supernumerary status is also an important benefit for individual judges. Unlike most private sector law firm partners, judges can work at full salary to age 75 and can “semi-retire” at full salary upon supernumerary eligibility. The Supreme Court of Canada has described the system of supernumerary judges as an “undeniable economic benefit” to the judiciary and to “eventual candidates for the position of judge in the court. In other words, this type of benefit was certainly taken into consideration

¹⁰⁹ Compare McLennan Commission Report, at p. 13.

¹¹⁰ See, e.g. Kevin Marron, “Just saying ‘no’ to retirement” (April 2011) *Canadian Lawyer*, online: <http://www.canadianlawyermag.com/just-saying-no-to-retirement.html>; Sandra Rubin, “Faskens Case Prompts Boomer Turf Wars”, *Lexpert*, online: <http://www.lexpert.ca/globe/article.php?id=2016>.

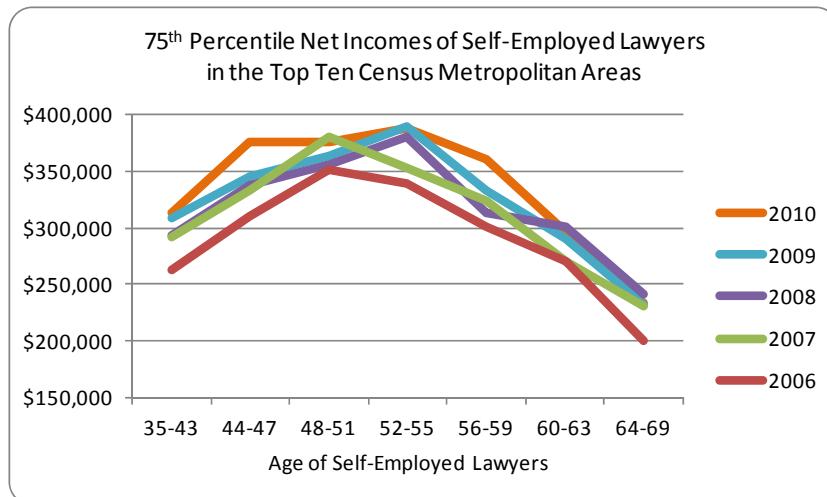
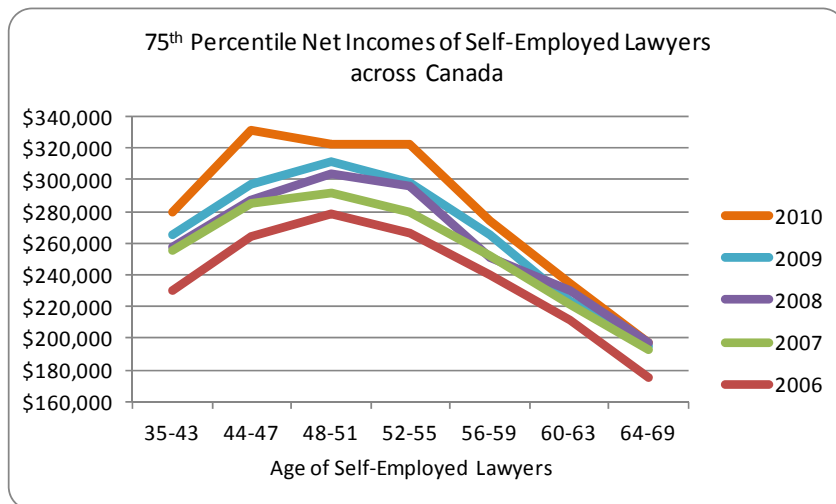
¹¹¹ Retirements since 1997. Retirement data provided by the CFJA.

¹¹² Retirement data provided by the CFJA. The average retirement age since 1997 is 71.9, excluding deaths and retirements due to disability.

¹¹³ See the description of judges’ compensation and benefits at Annex C.

both by sitting judges and by candidates for the office of judge in planning their economic and financial affairs.”¹¹⁴

89. The availability of a high salary to age 75 is a significant inducement for outstanding candidates for appointment, particularly in light of the fact that private sector salaries, on average, decrease precipitously in a lawyer’s early to mid-50s, as demonstrated in the following charts derived from the CRA self-employed lawyer data; whereas a judge’s salary increases every year:¹¹⁵



¹¹⁴ Mackin, *supra* at para. 67, online: <http://scc.lexum.org/en/2002/2002scc13/2002scc13.html>.

¹¹⁵ The 75th percentile is used in these charts as it is the closest percentile to judges’ salaries; that is, as noted above, the judicial salary in 2010 (without the judicial annuity) was equivalent to approximately the 73rd percentile of private sector lawyers’ incomes.

90. These graphs actually understate the decrease in income at older ages in the private sector, as CRA has excluded all lawyers who receive more in CPP/QPP benefits than in income from the data provided for this Commission.¹¹⁶ As a result, only higher-earning, older lawyers were included in the data and in the charts above.

d) Private Sector Compensation Trends

91. The Block Commission warned: “there is no certainty that if the income spread between lawyers in private practice and judges were to increase markedly that the Government would continue to be successful in attracting outstanding candidates to the Bench from amongst the senior members of the Bar in Canada.”¹¹⁷

92. Such a divergence in lawyers’ and judges’ income trends has not occurred. The current judicial salary compares favourably to judicial salaries found adequate to attract outstanding candidates by past Commissions. The following chart compares CRA private sector data from 2002 to 2010 with the judicial salary. The 2002 and 2003 judicial salaries were recommended by the Drouin Commission and implemented without variation by the Government. There can be no question as to their adequacy.¹¹⁸

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Judge Salary + Annuity	\$287,764	\$296,525	\$318,019	\$325,001	\$334,994	\$344,988	\$355,940	\$365,797	\$371,547	\$384,826
Judge Salary	\$210,200	\$216,600	\$232,300	\$237,400	\$244,700	\$252,000	\$260,000	\$267,200	\$271,400	\$281,100
Canada, All Ages, 75th Percentile	\$198,950	\$207,429	\$229,797	\$233,932	\$242,006	\$257,762	\$264,550	\$266,210	\$278,526	

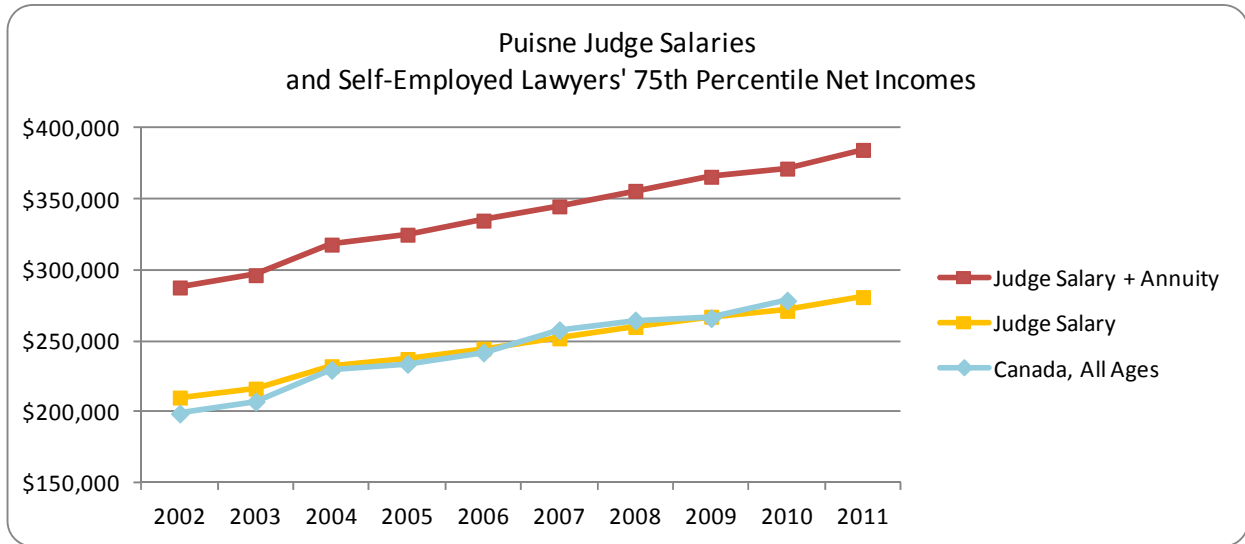
93. As the following chart demonstrates, judicial salaries have kept pace with those of potential private sector appointees over the past decade:¹¹⁹

¹¹⁶ CRA Methodology, *supra*.

¹¹⁷ Block Commission Report, at p. 37.

¹¹⁸ The annuity value in the first row of this chart is calculated as 36.9%: Pannu Report, at pp. 13-14 (Annex E). The CRA data in the bottom row of this chart is from the CRA reports relating to lawyers aged 35-69. The 75th percentile is used as it is currently the closest percentile to judges’ salaries; however, as discussed above, the 65th percentile would be the appropriate comparator for a benchmarking analysis.

¹¹⁹ Annuity value calculated as 36.9%: Pannu Report, at pp. 13-14 (Annex E).



e) Demographic Data

94. Recent demographic data regarding judicial appointees confirms that private sector lawyers continue to be attracted to judicial positions.¹²⁰ The percentage of judges appointed from the private sector in 2007-11 was 71%, which is consistent with past appointment data (73% from January 1, 1997 to March 31, 2007).

95. It is noteworthy that former provincial and territorial court judges and masters are classified as “public” even if they were in private practice prior to their provincial appointments. Of the 69 “public sector” appointees in 2007-11, 28 were provincial or territorial judges or masters. Accordingly, the number of appointees whose law practice prior to any judicial appointment was in the private sector is likely to be higher than 71% (that is, it is very unlikely that all of the provincial and territorial judges had previously been public sector lawyers).

96. It is significant that the provinces with higher private sector salaries also have a high proportion of private sector appointments. For example, 77% of Ontario appointees were in the private sector, as were 83% of Quebec appointees. There is no evidence of difficulty attracting outstanding private sector candidates in provinces with higher law firm salaries.

¹²⁰ This demographic data was provided by the CFJA to both the Government and the associations representing the judiciary (tables to be included in the Joint Book of Documents).

97. Indeed, the overall rate of lawyers' applications for judicial positions by jurisdiction is consistent with the percentage of the national judicial complement in each jurisdiction, and is generally consistent with the percentage of self-employed lawyers in each province or territory, as reported by CRA, as is illustrated by the following chart:

	Lawyer Applicants for Appointment ¹²¹		Current Judicial Complement ¹²²		2010 CRA Income Data (All ages, no threshold)		
	N	%	N	%	N	%	P ₇₅ Income
Alberta	169	9%	78	10%	1,360	6%	\$301,632
British Columbia	214	11%	103	13%	2,120	10%	\$237,711
Manitoba	68	4%	43	5%	560	3%	\$186,403
New Brunswick	78	4%	31	4%	320	2%	\$151,208
Newfoundland & Labrador	34	2%	27	3%	200	1%	\$216,436
Nova Scotia	95	5%	43	5%	410	2%	\$170,761
Ontario	761	39%	264	33%	10,760	51%	\$348,692
Prince Edward Island	12	1%	8	1%	40	0.2%	\$191,166
Québec	433	22%	165	20%	4,920	23%	\$223,120
Saskatchewan	69	4%	40	5%	300	1%	\$188,990
Territories	60	3%	10	1%	40	0.2%	\$166,595
Canada	1,993		812		21,120		\$278,526

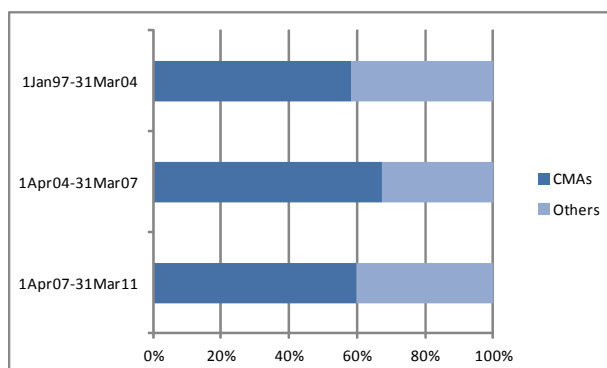
98. Of the appointees from the private sector for whom law firm size information was available, 38% practiced in firms that had more than 60 lawyers nationally, and 30% were from firms with more than 100 lawyers.¹²³

99. The proportion of appointees from Canada's major cities (the "Census Metropolitan Areas") has also remained relatively consistent over time:

¹²¹These numbers exclude applicants who were or are provincial, territorial or Tax Court of Canada judges.

¹²² These numbers exclude the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada. They include vacancies but exclude supernumerary judges.

¹²³ Data provided by CFJA, "Table 3: Size of Firm for Appointees at the Date of Appointment April 1, 2007 to March 31, 2011" (to be included in Joint Book of Documents). For past Quadrennial Commissions, the CFJA did not identify the national firm size of appointees, so that column was not included in past tables.



100. In light of the foregoing demographic information, there is no evidence of a problem recruiting judges from any segment of the legal community, including from the private sector in the provinces with higher private sector lawyers' salaries, from CMAAs or from large firms.

101. In the absence of such evidence, the Government respectfully submits that there is no objective basis for recommending increases to judicial salaries above the Government's proposal in order to recruit outstanding candidates to the judiciary.

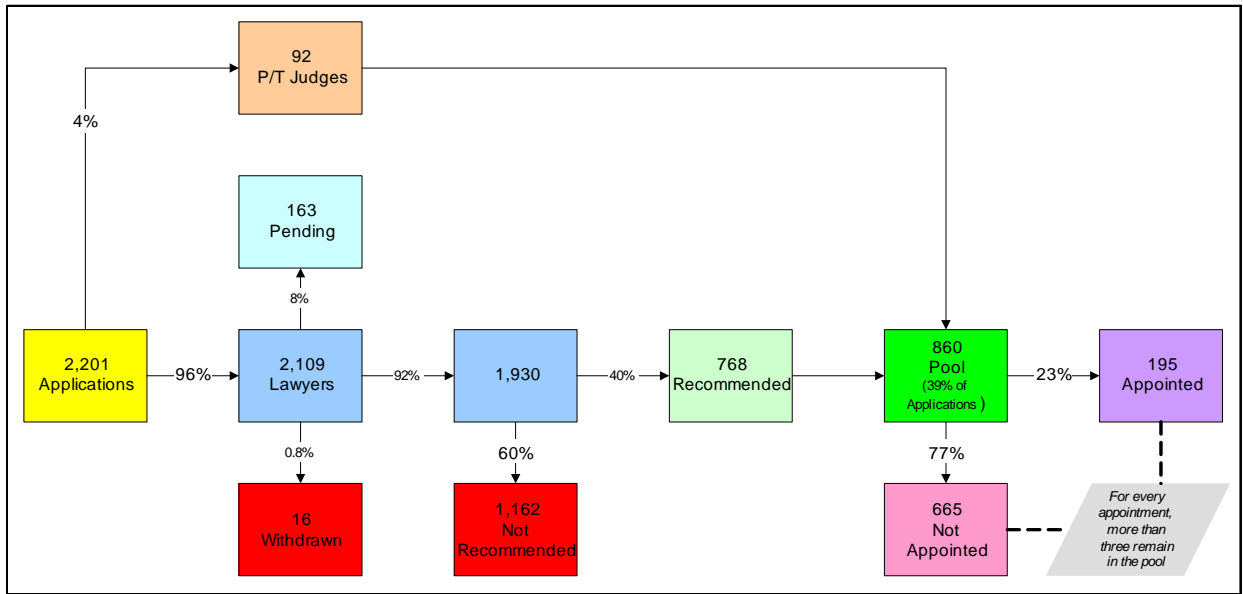
f) Application and Resignation Statistics

102. Statistics relating to applications for judicial appointment and resignations from judicial office further confirm that the judicial salary is adequate for recruitment.

103. As the following table demonstrates, there is an ample pool of qualified applicants for the Bench. For every judge appointed, there are 3.3 recommended applicants remaining in the pool:¹²⁴

¹²⁴ As set out in the chart, 2109 lawyers applied for consideration for appointment. Their applications are assessed by a Judicial Appointment Committee. There were also 92 provincial and territorial judges who applied for federal appointments. Existing judges' applications are not reviewed by the Judicial Appointment Committee; their applications are effectively automatically recommended.

During its preparations for this Commission, the Government realized that the number of provincial and territorial judge applications reported in its 2007 submissions was incorrect; the statistics provided by the CFJA at that time did not identify provincial/territorial judge or "pending" applications, and the Government incorrectly inferred that all applicants who were neither recommended nor "not recommended" must be provincial/territorial judges who were not assessed by the committee. The CFJA provided more detailed statistics to the Government and judiciary for this Commission. Accordingly, the current statistics cannot be compared directly to paragraphs 36 and 37 and the accompanying footnotes of the Government's 2007 opening submission.



104. Similarly, statistics relating to retirement from judicial office demonstrate that there is no compensation-related retention problem. There have only been 4 judges who have elected to resign from the bench (for any reason other than disability), prior to eligibility for early retirement, since 2007.¹²⁵

g) Conclusion

105. In light of the foregoing, there is ample evidence that the current judicial salary, with the proposed increase of up to 6.1% over the current quadrennial period, is adequate to attract outstanding candidates, including private sector lawyers. One of the constitutional requirements for this Commission is that it be objective.¹²⁶ The Government respectfully submits that the objective evidence demonstrates that its salary proposal meets the test of “adequacy” to be applied by this Commission.

¹²⁵ Retirements from 1 Jan 97 though 13 Apr 11 (to be included in the Joint Book of Documents). Judges who resign prior to eligibility for early retirement receive a return of their pension contributions.

¹²⁶ *PEI Judges Reference*, *supra* at para. 133.

D. Other objective criteria that the Commission considers relevant

1. There is no consensus of past Commissions regarding a formulaic DM-3 comparator

106. Recommendation 14 of the Block Commission states that where “consensus has emerged” with respect to a particular issue, in the absence of demonstrated change “such Consensus should be taken into account by the Commission.”¹²⁷ This Commission has interpreted that recommendation as mandating it to apply the mid-point of the DM-3 salary range, plus one-half of maximum performance pay as a comparator, unless a change of fact or circumstance is established.

107. With respect, there is no consensus that the mid-point of the DM-3 salary range plus one-half of maximum performance pay is an appropriate comparator.¹²⁸ Indeed, the 2004 McLennan Commission specifically rejected a focus on DM-3s alone, and concluded that performance pay is based on considerations not relevant to the judicial context.¹²⁹ The last two Commissions specifically disagreed regarding the comparator being proposed in the Notice. There is no consensus.

108. Past Quadrennial and Triennial Commissions have considered “rough equivalence” to the salaries earned by DM-3s, but Commissions have differed significantly in the weight, if any, placed on the “DM-3 comparator.” For example, the McLennan Commission noted: “During the period 1975 to 1992, it appears that judges’ salaries, with the exception of 1975 and 1986, were below the DM-3 midpoint and generally below the minimum of the DM-3 salary scale.” The McLennan Commission further pointed out that the Scott Commission had concluded: “A strong case can be made that the comparison between DM-3’s and judges’ compensation is both imprecise and inappropriate.”¹³⁰

109. There is also no consensus that a single benchmark should be used. As the McLennan Commission noted: “it would be counter-productive to fix judicial salaries as having a pre-

¹²⁷ Block Commission Report, at p. 78.

¹²⁸ See also the Government’s submissions in Annex B.

¹²⁹ McLennan Commission Report, at pp. 27-28.

¹³⁰ *Ibid.*, at p. 25.

determined relationship to other salaries, whether those of senior civil servants or senior legal practitioners. ... Were it otherwise, there would be no need to address this subject every four years, as contemplated by the *Judges Act*.”¹³¹ Similarly, the Drouin Commission concluded: “the unique position of the Judiciary in Canada strongly militates against a formulaic approach to the determination of an adequate salary.”¹³² With respect, the Government submits that to treat the mid-point of the DM-3 salary range plus one-half of maximum performance pay as a formulaic benchmark is wrong in law and in principle.

2. If this Commission considers DM-3 salaries, it should consider all deputy minister salaries

110. All Commissions have acknowledged that no direct comparison can be made between judges and senior public servants.¹³³ The work done by judges and DM-3s is not similar.¹³⁴ Deputy Ministers are not generally potential candidates for judicial appointment. Deputy Ministers are not constitutionally required to be independent. Rather, the only rationale given for considering DM-3 salaries has been as a reflection of “what the marketplace expects to pay individuals of outstanding character and ability, which are qualities shared by deputy ministers and judges.”¹³⁵ As the McLennan Commission pointed out, this phrase, used by the Courtois, Scott and Drouin Commissions refers to “deputy ministers,” not DM-3s and is clearly true of all levels of deputy ministers.¹³⁶ Indeed, other senior public servants who do not have the deputy minister title are also “individuals of outstanding character and ability.” The Government submits that if this Commission decides to consider senior public servants’ salaries, it should follow the McLennan Commission’s approach of considering all deputy ministers, rather than focusing solely on the salaries of the 13 DM-3s.

¹³¹ McLennan Commission Report, at p. 8.

¹³² Drouin Commission Report, at pp. 9-10.

¹³³ See e.g. McLennan Commission Report, at pp. 25-26.

¹³⁴ *Ibid.* at p. 25.

¹³⁵ *Ibid.*; Block Commission Report, at para. 103; Drouin Commission Report, at p. 31; Report and Recommendations of the 1995 Commission Judges' Salaries and Benefits, September 30, 1996 (“Scott Commission Report”), at p. 13; Report and Recommendations of the 1989 Commission on Judges' Salaries and Benefits, March 5, 1990 (“Courtois Commission Report”), at p. 10. The reports of the Courtois, Scott and other “Triennial Commissions” were provided to the Commission on CD-ROM on November 22, 2011.

¹³⁶ McLennan Commission Report, at p. 28.

111. The McLennan Commission observed that the large majority of senior public servants who reach the DM-3 level have come up from the DM-1 and DM-2 levels.¹³⁷ That remains the case; of the 30 DM-3s currently serving or that have served in that position since 2000, 27 (90%) had been DM-2s.¹³⁸ The McLennan Commission also relied upon the fact that the significant majority of DM-1s and DM-2s are similar in age to judges on their appointment.¹³⁹ That also remains the case. The average age of judges on appointment is 52. The average age of an associate deputy minister (DM-1) is 54.4, and that of deputy ministers is 53.9.¹⁴⁰

112. The McLennan Commission placed particular emphasis on the fact that all deputy ministers have levels of experience comparable to judges. As of October 21, 2011, the average level of experience of DM-1s was 27.1 years, the average level of experience of DM-2s was 27.4 years and the average for DM-3s was 29 years.¹⁴¹ Overall, 86% of all deputy ministers had more than 20 years' experience.¹⁴² All deputy ministers "are public servants of long experience and demonstrable ability."¹⁴³

113. The McLennan Commission found:¹⁴⁴

Since many, if not most, of those who reach the DM-1 and DM-2 levels have the qualities of character and ability that qualify them for promotion to DM-3, were openings available, there seems to us to be no good reason to exclude them from consideration. This is especially so given the importance that is accorded to the DM-3 comparison and the fact that, at present, there are only nine people who hold that rank, a very small sample upon which to base the remuneration of more than 1,100 federally appointed judges. Another consideration that influences our thinking was the difference in the pension available to those at the DM levels compared with the judicial annuity, which we will discuss in the next chapter. We are also cognizant of the fact that deputy ministers do not have the security of tenure accorded *puisne* judges.

¹³⁷ *Ibid.*

¹³⁸ Data supplied by the Senior Personnel and Public Service Renewal section of the Privy Council Office as of June 22, 2011.

¹³⁹ McLennan Commission Report, at p. 29.

¹⁴⁰ Clerk of the Privy Council and Secretary to the Cabinet, *Eighteenth Annual Report to the Prime Minister on the Public Service of Canada for the year ending March 31, 2011*, online: <http://www.clerk.gc.ca/eng/feature.asp?pageId=275>.

¹⁴¹ Data provided by Privy Council Office as of October 21, 2011.

¹⁴² *Ibid.*

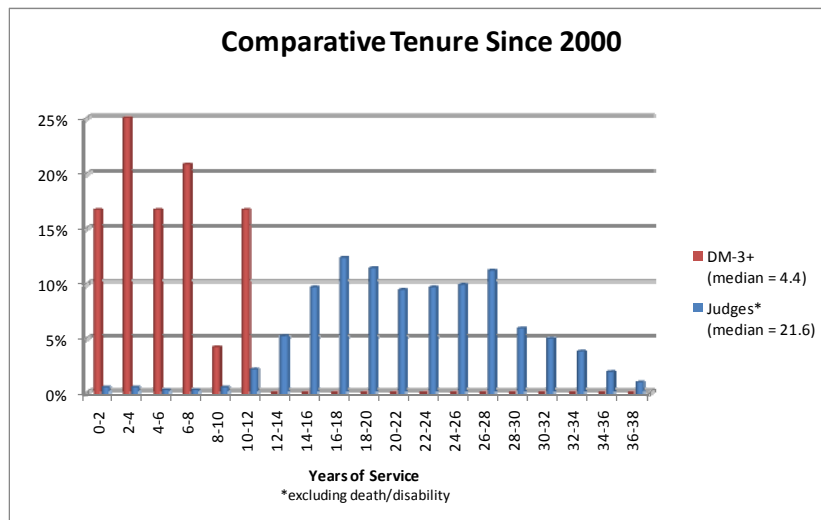
¹⁴³ McLennan Commission Report, at p. 28.

¹⁴⁴ *Ibid.* at p. 29.

114. With respect to security of tenure, deputy ministers serve at the pleasure of the Governor in Council; whereas 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, to preserve their independence. Among the 24 individuals who have served as a DM-3 and whose tenure as a DM-3 or higher ended between 2000 and 2011, the median tenure at the rank of DM-3 or higher was 4.4 years.¹⁴⁵ Even the maximum tenure was less than 12 years.

115. In contrast, the 424 judges who retired between 2000 and 2011 had spent a median of 21.6 years as a judge, with the maximum tenure close to 38 years.¹⁴⁶ Indeed, only 4% retired with less than 12 years of service, which was the maximum DM-3 tenure.¹⁴⁷

116. Graphically, judicial and DM-3 tenure compare as follows:¹⁴⁸



¹⁴⁵ This calculation includes time as a DM-4 and time in “step down” positions where a DM-3 is given an assignment as an advisor, head of a board or international posting, usually just prior to retirement, at his or her previous DM-3 salary (but not the same level of benefits and not necessarily with the same level, if any, performance pay). Data supplied by the Senior Personnel and Public Service Renewal section of the Privy Council Office as of June 22, 2011.

¹⁴⁶ Judges who passed away while in office, or retired by reason of a disability, have been excluded from this calculation. The calculation of years of service includes those as a supernumerary judge. Data derived from the Judicial Personnel System database of the Office of the Commissioner for Federal Judicial Affairs as of April 13, 2011.

¹⁴⁷ It is noteworthy that deputy ministers’ pensions are based on their best 5 consecutive years of service, so most DM-3s will not receive a pension based solely on compensation while at DM-3 or higher levels. Deputy Minister (DM-3) Summary of Benefits, prepared by Department of Justice based on data supplied by the Senior Personnel and Public Service Renewal section of the Privy Council Office as of June 22, 2011 (to be included in the Joint Book of Documents).

¹⁴⁸ Additional comparison charts will be included in the Joint Book of Documents.

117. This comparison of tenure is evidence that was not before the Block Commission.

118. The Advisory Committee on Senior Level Retention and Compensation (the “Stephenson Committee”) can recommend economic increases for deputy ministers.¹⁴⁹ Even though such increases reflect a percentage increase in base salary, a deputy minister who fails to meet expectations is not normally given the economic increase.¹⁵⁰

119. While the IAI adjustment increased judicial salaries by 3.6% in 2011-12, deputy ministers’ base pay for 2011-12 increased 1.75% compared to 2010-11, which includes .25% relating to elimination of severance pay accumulation.¹⁵¹ Deputy ministers’ base pay for 2011-12 will be as follows:¹⁵²

¹⁴⁹ The Advisory Committee on Senior Level Retention and Compensation, composed of senior executives from the private and other public sectors, was established in 1997 to provide advice to the Government on compensation for public service executives and Governor in Council appointees. Its recommendations are not binding on the Government.

¹⁵⁰ Senior Personnel Secretariat, Privy Council Office, “Performance Management Program Guidelines for Deputy Ministers, Associate Deputy Ministers and Individuals Paid in the GX Salary Range” last updated October 2011 (“PMP Guidelines”), online: <http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=secretariats&sub=spsp-psps&doc=pmp-pgr/dm-sm/dm-sm-eng.htm>.

¹⁵¹ Treasury Board of Canada Secretariat, “Information Notice: Changes to Executive Level Total Compensation” online: <http://www.tbs-sct.gc.ca/hrh/110729in-bi-eng.asp>.

¹⁵² Data provided by Privy Council Office, “Landscape_DM_Income_Info_.doc (19Oct11)” (to be provided in Joint Book of Documents).

	Minimum	Maximum	Midpoint	Population
DM-1	\$185,800	\$218,500	\$202,150	30
DM-2	\$213,700	\$251,300	\$232,500	38
DM-3	\$239,200	\$281,400	\$260,300	13
DM-4	\$267,900	\$315,100	\$291,500	3
Weighted Midpoint: DM-1 to DM-4			\$228,070	
Weighted Midpoint: DM-2 to DM-4			\$242,470	

120. These salaries will increase by 1.5% in 2012-13,¹⁵³ the same increase being proposed for judges.

121. The Government submits that in light of the small number of DM-3s (13 compared to 1,117 judges), their short tenure (4.4 compared to 21.6 years), and the fact that the entire deputy minister population has a level of experience comparable to judges, if this Commission considers a public sector comparator, it should consider all deputy ministers and not only DM-3s. The judicial salary is consistent with both judges and deputy ministers being paid as “individuals of outstanding character and ability.”

3. Deputy Minister Performance Pay is Provided for Reasons Not Relevant to the Judicial Context

122. Since 1998, deputy ministers, associate deputy ministers and certain other Governor in Council appointees have been eligible to potentially receive “performance pay” measured against agreed targets and the achievement of business plans. As the McLennan Commission noted, it is apparent from a review of the reports of the predecessors to the Stephenson Committee: “that this is so in part because of the executive market pressures that exist to attract and retain talented people in the public service, as compared to the income levels available to such people in the private sector, and in part as an incentive to reward the attaining of preset and measurable annual goals of achievement. Those considerations are not relevant to the judicial context.”¹⁵⁴

123. 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. As of

¹⁵³ Treasury Board of Canada Secretariat, “Information Notice: Changes to Executive Level Total Compensation” online: <http://www.tbs-sct.gc.ca/hrh/110729in-bi-eng.asp>.

¹⁵⁴ McLennan Commission Report, at p. 27.

2011, 60% of at-risk pay is based on results against individual commitments, and the remaining 40% is based on achievement of corporate commitments linked to the all-of-government spending review under which at least \$4 billion in annual savings is targeted, as discussed in paragraph 44 above.¹⁵⁵ The dependence of 40% of performance pay on achievement of the Government's deficit-reduction goals is yet another change in facts since the Block Commission.¹⁵⁶

124. Deputy minister performance awards for 2011-12 will be assessed as follows:¹⁵⁷

	Corporate Commitment	Individual Commitment	Economic Increase	In-Range Increase
AT-RISK PAY	Did not meet X	Did not meet X	X	X
	Unable to assess X	Unable to assess X	√	X
	Partially Achieved √DM-1/GX: up to 4% √DM-2/3: up to 5% √DM-4: up to 6%	Succeeded – √DM-1/GX: up to 6% √DM-2/3: up to 10% √DM-4: up to 14%	√	√
	Achieved √DM-1/GX: up to 6% √DM-2/3: up to 7.5% √DM-4: up to 9%	Succeeded √DM-1GX: up to 9% √DM-2/3: up to 12.5% √DM-4: up to 16%	√	√
	Fully Achieved √DM-1/GX: up to 8% √DM-2/3: up to 10% √DM-4: up to 12%	Succeeded + √DM-1/GX: up to 12% √DM-2/3: up to 15% √DM-4: up to 18%	√	√
BONUS	Surpassed √DM-1/GX: 20% + up to 6% bonus √DM-2/3: 25% + up to 8% bonus √DM-4: 30% + up to 9% bonus		√	√

¹⁵⁵ PMP Guidelines, *supra*; Treasury Board of Canada Secretariat, “Information Notice: Changes to Executive Level Total Compensation,” *supra*.

¹⁵⁶ 2007-2008 Performance Management Program Guidelines – Deputy Ministers, Associate Deputy Ministers and Individuals Paid in the GX Salary Range, November 2007, at p. 3 (emphasis in original) (to be included in the Joint Book of Documents. The same document was Appendix 15 of the Submission of the Government of Canada to the Block Commission).

¹⁵⁷ Privy Council Office, “Performance Awards for Deputy Ministers, Associate Deputy Ministers and People Paid in the GX Salary Range for 2011-12”, online: <http://www.pco.gc.ca/index.asp?lang=eng&page=secretariats&sub=spsp-psps&doc=pmp-pgr/dm-sm/performance-rendement-eng.htm>.

125. As noted above, in 2004 the McLennan Commission concluded that the purposes of at-risk pay are not relevant in the judicial context.¹⁵⁸ That is even more true now that at-risk pay is tied to achievement of deficit-reduction targets. An incentive paid to the few deputy ministers who lead the public service to find means of reducing government expenses and balancing the federal budget is not an appropriate amount to include in a benchmark to potentially increase the salaries of 1,117 judges.

126. Moreover, the concept of a “bonus” has no place in judicial remuneration. The very notion of a discretionary bonus offends the constitutional principle that the judiciary not be beholden to the Executive nor swayed by favour.

127. For the reasons set out above, the Government submits that it is not necessary for this Commission to consider deputy minister compensation at all, much less deputy minister performance pay. Nevertheless, even if the Commission considers the midpoint of the at-risk pay available to a deputy minister who “succeeds” in his or her individual commitments (that is, the mid-point between maximum at-risk pay for “succeeded-” (10% for DM-3s, as shown in the chart at para. 124 above) and the maximum for “succeeded” (12.5% for DM-3s)), judicial salaries compare well to those amounts:¹⁵⁹

DM-1 Midpoint + 7.5%	\$217,311
DM-2 Midpoint + 11.25%	\$258,656
DM-3 Midpoint + 11.25%	\$289,584
DM4 Midpoint + 15%	\$335,225
Weighted DM-1 to DM4	\$251,411
Weighted DM-2 to DM4	\$270,356

¹⁵⁸ McLennan Commission Report, at p. 27.

¹⁵⁹ These figures are for 2011-12. See para. 119, *supra*.

128. For the information of the Commission, the Government has also set out below the maximum available to a deputy minister who has “succeeded” in his or her individual commitments:¹⁶⁰

DM-1 Midpoint + 9%	\$220,344
DM-2 Midpoint + 12.5%	\$261,563
DM-3 Midpoint + 12.5%	\$292,838
DM4 Midpoint + 16%	\$338,140
Weighted DM-1 to DM4	\$254,417
Weighted DM-2 to DM4	\$273,346

129. Accordingly, even if performance pay is taken into account, the salary of a *puisne* judge is currently between that of a DM-2 and a DM-3 and the salary of a chief justice or associate chief justice exceeds that of a DM-3. The salary of a Supreme Court *puisne* judge is comparable to that of a DM-4, the apex of the judiciary and the public service respectively.

PART IV - ADDITIONAL INFORMATION REQUESTED IN NOTICE

130. With respect to the Commission’s request for submissions regarding whether there has been a change in facts or circumstances regarding Recommendations 5, 6, 7, 8, 9 and 10 of the Block Commission, as noted in Annex B, the Government understands, based on the meeting held with the Commission on November 15, 2011, that the judges’ associations are not seeking increased benefits during this Commission’s inquiry. The Government respectfully submits that the Commission has no objective basis upon which to recommend such increases. If the judges’ associations now seek increases to benefits as well as salaries, the Government will respond in its reply submissions.

131. Similarly, with respect to Recommendation 3, as noted in Annex B, the Government is not aware that an appellate differential is being requested during this Commission’s inquiry. If submissions are made seeking a differential, the Government will respond in its reply submissions.

¹⁶⁰ These figures are for 2011-12.

132. With respect to Recommendations 1 and 4, the Commission requested “that submissions be made as to what those amounts should be currently based on the reasoning enunciated in those Recommendations.” For the reasons set out above and in Annex B, the Government submits that Recommendations 1 and 4 should not be adopted by this Commission. However, if this Commission, like the Block Commission, were to recommend an increase of 4.9% (inclusive of the IAI increase) for the first year of its mandate, and a 2% increase in addition to IAI in the remaining 3 years, the resulting salaries would be:

Year Starting	Increase from Prior Year	Puisne Judge (1071 Judges)	Chief Justice/ACJ (37)	Supreme Court Puisne (8)	Chief Justice of Canada (1)
April 1, 2011		\$281,100	\$308,200	\$334,500	\$361,300
April 1, 2012	4.9%	\$294,800	\$323,300	\$350,800	\$379,000
April 1, 2013	4.6%	\$308,300	\$338,100	\$366,900	\$396,400
April 1, 2014	4.8%	\$323,000	\$354,300	\$384,500	\$415,400
April 1, 2015	4.9%	\$338,800	\$371,600	\$403,300	\$435,700

PART V - CONCLUSION

133. In conclusion, the Government submits that when the Commission considers the three mandatory *Judges Act* criteria (the economy, financial security and recruitment), the current judicial salary, increased by up to 1.5% annually for each of the next four years, is adequate. Even if this Commission determines that it should also review salaries of senior public servants, as a further objective criterion that the Commission finds relevant,¹⁶¹ the judicial salary remains adequate.

134. The paramount consideration for this Commission, and for the Government, must be the public interest. Preservation of judicial independence is essential to the public interest. The Government submits that in current circumstances, public perception of independence is best preserved not through automatic increases but through temporary measures that a reasonable and informed member of the public would consider to be fair in light of overall economic measures that are being implemented in the public interest. The Government’s proposal of increases of up to 1.5% annually for the next four years is consistent with the Supreme Court’s admonition that:

¹⁶¹ See *Judges Act*, s. 36(1.1)(d).

“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.”¹⁶² Accordingly, the Government respectfully submits that the Commission should recommend that the Government’s proposal be implemented.

ALL OF WHICH is respectfully submitted.

DATED at Toronto, this 23rd day of December, 2011.

Catherine Beagan Flood

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¹⁶² *PEI Judges Reference, supra* at para. 196.

